

## **KNOCKING AT THE DOOR OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS: HOW CAN THIS QUASI-JUDICIAL BODY BE BENEFICIAL TO MAURITIUS?**

### ***BATENDO NA PORTA DA COMISSÃO AFRICANA DOS DIREITOS DO HOMEM E DOS POVOS: COMO É QUE ESTE CORPO QUASI-JUDICIAL É BENÉFICO PARA A MAURÍCIA?***

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**Abstract:** The Republic of Mauritius signed and ratified the African Charter on Human and Peoples' Rights (hereafter the African Charter) in 1992. With this ratification, Mauritius committed itself to protect, respect and promote the three categories of rights provided by the African Charter. One key way of achieving a desirable and acceptable standard of human rights is by way of submitting communications relating to human rights abuses to the African Commission on Human and Peoples' Rights (hereafter the African Commission) against a signatory state by individuals or Non-Governmental Organisations (NGOs). The paper illustrates that this quasi-judicial avenue has not been effectively explored by Mauritians to enhance their human rights standards and to ensure that their legitimate expectations from the government are fulfilled. The word 'enhance' has been deliberately chosen as one could argue that Mauritians do enjoy a relatively higher standard of human rights compared to citizens of a majority of African states and it explains the fact that little attention and importance are given to the African Commission. It is argued that there is always the possibility of enhancing human rights of people and Mauritian's individual as well as collective rights can be further enhanced.

**Keywords:** Human Rights; Mauritius; African Commission on Human and Peoples' Rights; Chagos.

**Resumo:** *A República da Maurícia assinou e ratificou a Carta Africana dos Direitos Humanos e dos Povos (doravante a Carta Africana) em 1992. Com esta ratificação, a Maurícia comprometeu-se a proteger, respeitar e promover as três categorias de direitos fornecidas pela Carta Africana. Uma maneira fundamental de alcançar um padrão desejável e aceitável de direitos humanos é através da submissão de comunicações relativas a abusos de direitos humanos à Comissão Africana dos Direitos Humanos e dos Povos (doravante a Comissão Africana) contra um Estado signatário por indivíduos ou Organizações Não-Governamentais (ONGs). Este artigo ilustra que esta via quase judicial não foi efetivamente explorada pelos mauricianos para melhorar seus padrões de direitos humanos e assegurar que suas expectativas legítimas do governo sejam cumpridas. A palavra “melhorar” foi deliberadamente escolhida, pois se pode argumentar que os mauricianos desfrutam de um padrão relativamente mais elevado de direitos humanos em comparação com os cidadãos da maioria dos estados africanos e explica o fato de que pouca atenção e importância são dadas à Comissão Africana. Argumenta-se que há sempre a possibilidade de aumentar os direitos humanos das pessoas, e os direitos individuais e coletivos das Maurícias, assim como os direitos coletivos, podem ser melhorados.*

**Palavras-chave:** *Direitos Humanos; Maurícia; Comissão Africana dos Direitos Humanos e dos Povos; Chagos.*

**SUMMARY:** 1. Introduction. 2. The situation of Human Rights in the state of Mauritius. 3. Mauritius and the African Human Rights architecture. 4. The jurisprudence of the Commission. 5. The state of Mauritius and the Commission. 5.1 Cases that the Commission could or should have considered! 5.1.1 Madhewoo case-right to privacy on the biometric card. 5.1.2 Chagos case – peoples’ rights. Conclusion. References.

## 1 INTRODUCTION

The establishment of the African Commission on Human and Peoples’ Rights was a strong statement in the steps of decolonization of the African continent. It was symbolical of the independence and self-sufficient values that was espoused by the Organisation of the African Unity in view of changing the African continent for the better. The OAU wanted the Member States to fully believe in the functioning of the African institutions while applying the principles of and remaining within the realm of international law. Approaching the African Commission on Human and Peoples’ rights for judicial and quasi-judicial matters therefore demonstrates a belief and a respect for the African Human Rights architecture. However it can be observed that many Member States of the African Union do not approach the African Commission, for reasons albeit different to them. Is a question of lack of awareness of the regional human rights system, is it a lack of willingness or a complete disbelief in the capacity and efficiency of the African Human Rights Architecture. This article attempts to answer some of these questions in this light by highlighting the case of Mauritius. The first section highlights the trajectory of the African Charter on Human and Peoples’ Rights and how does the Charter itself goes in complementarity with the national

constitution and the laws of the nation, while the next section will briefly deal with the situation of human rights in Mauritius. This is essential as it illustrates how despite enjoying a relatively decent level of human rights, a country such as Mauritius can still benefit from the Charter and the Commission - this indeed showcases the efficiency and utmost relevance of both the Charter and the Commission applicable in the context of the country. A subsequent section of the article will focus on the relationship that Mauritius has developed over the years with the existing African human rights architecture in terms of its ratification of treaties, political participation at the African Union level and its commitment to the various judicial, quasi-judicial and legislative institutions of the continent. The aim for illustrating this relationship is to explore the argument of Mauritius being politically present on the Africa scene and yet seemingly not trusting the effectiveness of the Charter and the Commission. The ensuing section of the article will analyse the presence of Mauritius at the Commission - ranging from state party submitting its biennial reports up to one of the Commissioners of the Commission hailing from the Island Nation! Finally, three cases pertaining to the right to privacy, rights of peoples and socio economic rights are discussed in an attempt to demonstrate that the Charter and Commission could have been more efficient if seized as a mechanism for redress.

The African Charter on Human and Peoples' Rights (the Charter) was adopted in 1981 by the Organisation of African Unity (OAU) Assembly of Heads of State and Government in Nairobi, Kenya. It obtained the required number of ratifications in 1986 to come into force (HEYNS, 2001). It is one of the most contested as well as celebrated regional human rights instruments that has graced the African human rights architecture. The Charter remains the Pillar in the promotion and protection of Human Rights on the African continent. The Charter came to challenge the existing bipolar structural design embraced by the international human rights system since the early 1970s which was based on dichotomies - the individual against the community, rights against duties, first against second and third generations of rights and enforceability against non-enforceability (VILJOEN, 2001). The Charter made its greatest contribution to the African human rights system by including the concept of 'peoples', listing down individual duties, emphasising on morality, adopting a strong anti-colonial stance and position all three generations of rights on the same level (UMOZURIKE, 1997).

The Charter sees each human being as an individual bearer of rights as well as a member of the collective, a collectivity which is guaranteed protection as

peoples or a the family unit.<sup>1</sup> Second and third generations of rights which includes socio-economic rights and the right to development, peace and environment are enshrined by the Charter and are as justiciable and enforceable as civil and political rights - a mammoth task that even the Universal Declaration of Human Rights could not achieve resulting in the creation of two separate covenants which are the International Covenant on Civil and Political Rights and the International Covenant on Social, Cultural and Economic rights. The Preamble of the Charter refers to duties of individuals by stating that 'the enjoyment of rights and freedoms also implies the performance of duties'.<sup>2</sup> A list of duties, implicitly imbuing the values of African civilization is provided in its article 29.<sup>3</sup> In these ways, the Charter differs from other regional human rights instruments with its unique characteristics and features mentioned above.

To give effect to the values enshrined in the Charter, the primary responsibility lies with Member States. However as an oversight and redress mechanism, the Charter establishes the African Commission on Human and Peoples' Rights. Another important feature of the Charter is the African Commission on Human and Peoples' Rights (The Commission) which is established under article 45 of the Charter.<sup>4</sup> At the time of the drafting of the Charter, there was a political consensus to create a commission without the power to issue legally binding decisions, which illustrates the non-democratic nature of many African states at that time (NDULO, 2008). In spite of opting for a commission rather than a court, the Charter did confer important and crucial roles and mandates to the Commission (The Charter, Art 45).<sup>5</sup> The Commission is mandated to receive complaints both from state parties and individuals in relations to violations of any article of the Charter (The Charter, Art 47 and 55).<sup>6</sup> It reviews biennial reports which state parties are required to submit to report on the implementation of the various provisions of the Charter at the domestic level (The Charter, Art 62), thus ensuring its monitoring mandate. The Commission also has the mandate to appoint special rapporteurs on issues related to prisons, human rights activists and extra-judicial killings to name a few.

Indeed, the Charter as well as the Commission can both be considered as critical components of the African human rights system that are at the disposal of

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<sup>1</sup> Article 24 of the African Charter on Human and Peoples' Rights

<sup>2</sup> Preamble of the African Charter on Human and Peoples' Rights

<sup>3</sup> Article 29 of the African Charter on Human and Peoples' Rights

<sup>4</sup> Article 45 of the African Charter on Human and Peoples' Rights

<sup>5</sup> Article 45 of the African Charter on Human and Peoples' Rights

<sup>6</sup> Articles 47 and 55 of the African Charter

African states to make good use of to ensure rights of their citizens are respected, protected and promoted as well as sacrosanct principles such as democracy, rule of law and constitutionalism prevail domestically. At least by the numbers, all African states (except Morocco)<sup>7</sup> are state parties to the Charter and therefore have automatically accepted the competence of the Commission. However, the following primary question remains - to what extent have African states and African citizens maximised and profited from the existence of the Charter and the Commission? To what extent have they been able to derive benefits and effective protection from the unique features of the Charter? This article uses Mauritius as an African state, as a Member State of the African Union and various human rights cases originating from the Island in attempting to answer the question. The initial feeling of the authors is that Mauritius has not yet made the most of the Charter and its Commission to deal with human rights issues pertinent to it. It is firmly believed that some cases on human rights issues, if dealt with at the African level, instead of international level, could have met with an altogether different, arguably positive, outcome. Such cases would be used to argue that it is perhaps time for Mauritius and Mauritians to start knocking at the door of the Commission.

## 2 THE SITUATION OF HUMAN RIGHTS IN THE STATE OF MAURITIUS

It is important to give an idea of the situation of human rights in Mauritius to try to explain why the African Commission has not been approached maximally. Mauritius seems to be a 'human rights paradise'<sup>8</sup> at a first glance, with the peaceful cohabitation of people from different religions and ethnicities. Mauritians, as well as foreigners, take Mauritius to be a safe haven without any fear of riots hovering or being attacked by terrorists. This image of the island is projected this image very beautifully as it is an asset for the tourism industry, which is one of the pillars of the economy and also to attract foreign investors to the country on whom the economy is heavily dependent. It also helps in enhancing the bilateral and diplomatic ties with many countries as the latter protects their own respective diaspora, and thus bringing in foreign aid. However, the other side of Mauritius is almost never shown to the world. The inter- religious and the inter- racial discrimination which is highly prevalent, the plight of the Chagos

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<sup>7</sup> Morocco was accepted in the African Union at the January 2017 Summit after 33 years of abstention or association with the AU. While it adheres to the Constitutive Act of the African Union, it needs to formally ratify the African Union Instruments for them to be legally binding on the country.

<sup>8</sup> See "Mauritius-Mauritius: Honeymoon Destination and Human Rights Paradise?" at <http://business.mega.mu/2013/10/27/mauritius-honeymoon-destination-and-human-rights-paradise/> (accessed on 3 July 2017)

islanders/refugees and the cases of police brutality due to political interference is a slur on the example that Mauritius represents for the African continent. It is to be noted that though there is no tribalism per say in Mauritius, it remains an African Island state which has been for long considered to have no indigenous population, and therefore the absence of a definition of Peoples' Rights in the constitution of the Republic of Mauritius. Individuals have been brought to the island by those who discovered the country and the colonizers who wanted to exploit the opportunities that the strategic location of Mauritius being situated right in the middle of the Indian Ocean provided. Mauritius was the bridge between Asia and Africa for Europeans.

There have been several notable positive developments in the field of human rights in Mauritius. A couple of years back, the then Mauritian Prime Minister was congratulated and appreciated by the world human rights organizations for his refusal to attend the Commonwealth Summit held in Sri Lanka in November 2013 due to the several major human rights violations taking place against the minority population of people of Tamil origin there.<sup>9</sup> However, it still remains unclear whether the Prime Minister's decision of expressing his dissatisfaction with the current human rights situation in Sri Lanka through his absence, was a political decision to prevent protests from the people of the Tamil community in Mauritius, in order to maintain his vote bank, or a genuine concern for respect for human rights.<sup>10</sup> The interplay between the politicizing of human rights decisions and a genuine concern for the respect, promotion and protection of human rights often borders the ethnic lines of division that characterizes the Mauritian society. Many politicians think primarily of the benefits to the ethnic communities first instead of the larger good and welfare of the society.

In so far as the socio-economic rights are concerned, Mauritius is a welfare state, and ranked 1<sup>st</sup> in Africa as per the Mo Ibrahim Index (2016) with regards to economic performance and also at the same time lauded for its system for good governance and leadership.<sup>11</sup> The essence of democracy is maintained and one vivid example is represented in the Best Loser System to ensure that there is equal representation of all parties related to the ethnic origins so that no one feels under-represented or marginalized. The process of free and fair elections taking place after every 5 years gives the population the opportunity to express their dissatisfaction with the ruling

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<sup>9</sup> See <http://tribune.com.pk/story/630930/mauritius-pm-to-boycott-sri-lanka-commonwealth-meet/> (accessed on 16 July 2017).

<sup>10</sup> See <http://www.lemauricien.com/article/kudos-canadian-prime-minister-stephen-harper-appeal-navin-ramgoolam-boycott-commonwealth-con> (accessed on 16 July 2017).

<sup>11</sup> See 2016 Ibrahim Index of African Governance Summary, at <http://www.moibrahimfoundation.org/downloads/2016/2016-IIAG-summary-report.pdf> (accessed 16 July 2017).

party without any fear of being arrested or convicted. It follows closely the Principles of the African Charter on Democracy, Elections and Governance (ACDEG).<sup>12</sup> It needs to be noted that though Mauritius follows the Principles enshrined in the ACDEG, it has only signed the said instrument and not ratified it.

Mauritius can also take pride on the other issues which have been a gift to the island as compared to the African counterparts such as a good functioning of different core systems such as free health care, free education and free transport to the students and old age persons despite having a major hurdle of no natural resources in the country. Human rights are protected and respected by providing adequate support and economic benefits for old age persons. Good homes are built and looked after by the government for those who are neglected by their family members. Therefore, it can be seen that on a broader picture, Mauritius is faring quite well in the respect, protection and fulfillment of human rights.<sup>13</sup> However, even though it is a welfare state, by providing free health care and education, subsidized rates for water and staple foods, socio economic rights are not justiciable. They are not mentioned in the Constitution and therefore there is no avenue for a judicial remedy in case the citizens think that the Government is not delivering in its duty.

With regards to the women human rights issues, the amendment in the Constitution, Act 35 (2011), which enables the political participation of at least 30% of women is a commendable initiative by the government. It is symbolical of promoting a more gender equal society and recognizant of the right to political participation and decision making of women. Due to this new amendment, it is now compulsory for all political parties to have one third of their candidates as women in all the constituencies. The director of Gender Links, Mrs Loga Virasawmy, holds the view that this is a major milestone in achieving one of the goals that the Southern African Development Commission established.<sup>14</sup> It is noteworthy that Mauritius has still not ratified the Protocol on the Rights of Women or more popularly, the Maputo Protocol.

However, the other side of the coin is that the picture is not as rosy or ideal as it seems to be to the outside world. Mauritians know exactly what is wrong

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<sup>12</sup> Concluding Observations and Recommendations on the 2nd, 3rd, 4th and 5th Periodic Reports of the Republic of Mauritius, [http://www.achpr.org/files/sessions/45th/conc-obs/2nd-5th-2008/achpr45\\_conc\\_staterep2\\_mauritius\\_eng.pdf](http://www.achpr.org/files/sessions/45th/conc-obs/2nd-5th-2008/achpr45_conc_staterep2_mauritius_eng.pdf) (accessed 15 July 2017).

<sup>13</sup> National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21\*, Working Group on the Universal Periodic Review Seventeenth session Geneva, 21 October–1 November 2013.

<sup>14</sup> See <http://www.genderlinks.org.za/article/a-giant-step-towards-gender-equality-local-government-act-provides-for-legislated-quota-2012-05-29> (accessed 14 July 2017).

but many are afraid to voice it out, as freedom of expression and the press is limited. The Mauritius Broadcasting Corporation (MBC) remains essentially and basically the niche of the Prime Minister whereby he uses the media as a system of propaganda of his own achievements. The news which is shown daily is repetitive, starting and ending with the Prime Minister. The MBC remains the most accessible source of information to the majority of Mauritians who fall within the category of middle class income families. The news unfortunately is not what the mass needs to know, it is more what the Prime Minister wants the Mauritians to know.<sup>15</sup> It is to be noted that the freedom of expression is guaranteed in the Constitution. The arrest of Nitin Chinien, a famous and well appreciated artist, is an example of the treatment meted out to someone who speaks against the Prime Minister or his proteges. It is in direct violation of the section 12 of the Chapter 2 of the Constitution which deals with the protection of freedom of expression.<sup>16</sup> Unfortunately, Mauritius seems to be drifting from the heaven of democracy where people were free to voice out their opinions, to an authoritarian and dictatorial atmosphere where the fear of arrest looms over one's head if something against the government and the malpractices is denounced.

As enunciated above, Mauritius is claimed to have no indigenous population or people. Yet the concept of community and ethnic belongingness is so strongly felt in the Mauritian society. Going by the definition of the Peoples as defined in the African Charter, having lived through five (5) generations since having been brought to the island, the different ethnic groups may be categorized as Peoples-sticking to the values, traditions and way of life since aeons of years. Their different ways of life are symbolical of their notion of identity and association. Unfortunately there is marked segregation in the Mauritian society. Even though Mauritius seems to be the perfect destination for the cohabitation of multi-ethnic and multi-religious groups, there is still a strong sense of racial discrimination that exists. Mauritius has not yet submitted its report to the International Convention on Racial Discrimination. Though it is not explicitly and overtly discussed with the fear of hurting the sensibilities of many different religious groups, and thus facing the consequences politically, it is undeniable that the rights of the people of African descent, mostly known as general population, or Creoles, are denied to them. It is unfortunate that people still cling to their origins and discriminate towards

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<sup>15</sup> Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Working Group on the Universal Periodic Review Seventeenth session Geneva, 21 October–1 November 2013.

<sup>16</sup> See <http://www.lexpress.mu/article/le-chanteur-nitin-chinien-en-cellule-pour-au-moins-une-semaine> (translated from French, accessed on 15 July 2017).



people of other origins even though Mauritius has no indigenous population. (The Asian population namely the Hindus (Indians), Muslims (Indians) and Buddhists (Chinese) were brought to Mauritius as indentured labourers under the British Rule; the African population- the Creoles, were brought as slaves under the French Rule). The prevailing racial discrimination that exists is becoming a whirlwind of drug addiction, poverty, prostitution and crime. It is forcing them to adopt a fatalistic attitude towards life. It has been noted by field and social workers that Creoles do not even apply for jobs because they know before-hand that they will not be selected due to their background, even if they are qualified for the post.<sup>17</sup> This also brings to the forefront that many of our political figures belong mostly to the Hindus and Muslims community. Majority of those who occupy posts in the state institutions also belong to the Hindus and Muslims community. Since the sense of community belongingness is so entrenched in the Mauritian psyche, it is clear how distant most of the Mauritians being from the Hindus and Muslims background, especially their roots emanating from the Indian sub-continent do not identify themselves as Africans. The continuing shameful discrimination that goes on towards the people of African descent in Mauritius is reminiscent of this fact and even though Mauritius is an Island State of the African continent, one can say that this adhesion remains merely a political move on the international front instead of truly adhering to the values of Pan Africanism.

The complexities of belongingness go beyond the seemingly stark differences between the communities and their different ways of life. The racial discrimination does not exist only among people inter- religiously. It also exists intra-religiously. The majority of the Mauritian population is the Hindu population, who came from different parts of India. Unfortunately, even after so many years of having left India, people still believe in the derogatory notion of the caste system. The caste system, if it was followed of how it was originally created to be, there would have been no human rights violations. The caste system was created to help everybody get a job in the society and that everybody has a place in the hierarchical social ladder. However, the subtle discrimination based on the caste system is being felt in the world of employment and career advancement. It is being noted that many well qualified graduates are jobless, with an unemployment rate reaching 15% which is still a big number, for a small country like Mauritius. It is not acknowledged openly but most of the Hindus know the reason behind their non-selection, is the caste system in many cases. It is also unfortunate and ironical that people belonging to the higher caste, or the Brahmins, will not be allowed to reach the pinnacle of the government or

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<sup>17</sup> Telephone communication with Mr Ashok Kisto, Family Social worker, National Empowerment Fund, on 30 June 2017.

be ministers only because of their ethnic belonging as they form part of the Hindu elite but nonetheless, a minority group.<sup>18</sup> It was important to explain the nitty-gritties of the political undertones of Mauritius to explain why many of the instruments of the African Union and many others of the United Nations have not been ratified. Mauritius, even though only a dot on the world map, and taking pride in its seeming unity, remains a deeply divided society on many levels, politically and socio- economically.

Again in relation to the socio economic rights in Mauritius, the poverty pockets in Mauritius, despite being a welfare state, are rampant with people of the Creole population, living in deplorable and pitiable conditions. The houses are built by the National Empowerment Fund (NEF) to help alleviate the suffering of those staying at the lowest rung of the social ladder, however, even those are allocated to people on the basis of religion, mostly depending on what the Minister of National Solidarity decides. Those houses do not necessarily go towards those who are most in need.<sup>19</sup>

In this context, it is important to highlight the fact the Mauritian Constitution does not make any provision for Right to Information. Whenever people feel that there has been any injustice to them, especially related to questions of selection and recruitment, there is no mechanism of accountability.<sup>20</sup> The Public Service Commission which is the organization for the recruitment in the government does not consider itself accountable to give any explanation or justification on the recruitment drive. It also needs to be noted that at the end of many interviews, interviewees are asked if they have any kind of political connections or backing. This non respect of human dignity and insult to years of hard work and diligence is a core violation of the section 16 of the Chapter 2 of the Constitution which deals with the protection from discrimination of the individual.<sup>21</sup>

In addition to it, the other dimension of the racial discrimination which exists, is the continuation of the legacy of colonialism. 'The whites are superior', or so it has always been believed, and we do not know for how long it will continue. On the legal aspect, Mauritius follows a hybrid legal system having been colonized both by the British and the French. As the highest Court of Appeal beyond the Supreme Court, Mauritians approach the Privy Council for redress. On the socio economic aspect, by privatizing the system, the Mauritian government is giving the former colonizers all the resources and all the power, without caring for the majority of

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<sup>18</sup> Telephone conversation with Prof Sheila Bunwaree, on 15 May 2017.

<sup>19</sup> ( n 11 above)

<sup>20</sup> (n 7 previous) para 24

<sup>21</sup> Chapter 2, The Constitution of the Republic of Mauritius, 3-19

the population, and thus maintaining the high class and middle class division. It is noteworthy to remind that the Constitution of the Republic of Mauritius makes no mention of socio-economic rights. The long term results are a concentration of the wealth in the hands of few and handicapping the rest. All the profitable ventures, be it real estate, hotels, oil, offshore trade, banks, everything is still controlled by the white population. They are a tiny part of the population where even the assets of only one person exceed the financial budget of the country. Even though the government claims that they are generating employment in the country by doing so, it is not paying attention to the fact that these companies do not respect minimum wage requirement and this is just increasing the gap between the rich and the poor. Opportunities are not being created for the middle class. Women who work as maids in the bungalows of the whites are heavily underpaid and they have no institutions like trade unions to help them out of the situation. It has become a situation of learned helplessness. Even the government fails to confront the inequalities because the independence of Mauritius only permitted the voting, the political power to the Mauritian population, not the economic freedom. The removal of taxation barriers, free trade, and the arrival of cheap labour from China or Bangladesh has been a hard blow to many Mauritians who find themselves jobless because of this situation. Textile industry, road development contractual works are mostly given to foreign companies who do not come to Mauritius to provide employment to Mauritians but to make a profitable venture using their own labour and enjoy the maximum of the 5 years tax free benefits. It is worth highlighting that the issues of labour rights as described here are well protected for in the African Human Rights Charter.

With respect to the rights of bodily integrity and the respect of the dignity of the individual, the issue of police brutality and the laissez faire attitude can be brought to the limelight here. Furthermore, the dictatorial attitude adopted by politicians who are riding high on their powers as they are in the ruling party after a sweeping victory in the December 2014 elections can be seen in the way they use the police force to serve their ends. Many cases of deaths in custody and police brutality have underneath a connection with politicians. Newspapers, radio, media do not cover these issues because it concerns the reputation of the politician(s) in question. Nor does the police divulge this information even informally. It is only NGOs working in the field of human rights, such as Speak Human Rights and Dis Moi, which have investigative bodies and look into the matter by liaising with the family members of the victims. The most recent case of death in custody was a case related to the Prime Minister, where the victim was said to have hanged himself inside the custody within 30 minutes of him being brought to jail.<sup>22</sup> Another case

<sup>22</sup> See <http://www.defimedia.info/news-sunday/nos-parliament/item/12225-roches-noires->

of death in custody was of Rajesh Ramlogun, on whose body 30 marks of police beatings were noticed during the post mortem. Furthermore, in a recent case, the murder of Michela Harte, which was on the international platform for long, the victim asserted that he was forced into accepting a crime which he did not commit.<sup>23</sup> After all, the reputation of the hotel was more important than the lives of the people working in the hotel even if evidences indicate that the husband might have been involved in the premeditated murder. The police force has been misusing force to fulfill the wishes of politicians and to find an answer to give to the population. The major human rights organizations are the National Human Rights Commission (NHRC) and the recently launched Equal Opportunities Commission (EOC). Both these government organizations are responsible for the registration of the complaints and recommend the further line of action for the individuals in question. However, the veracity of these institutions remains questionable as they are part of the government and their members are politically anointed. The NHRC does not even have the required mandate to take decisions independently without consulting the government.<sup>24</sup> It also relates to political appointment of the leadership of these organizations – whether it is a show of political loyalty system or meritocracy.

### 3 MAURITIUS AND THE AFRICAN HUMAN RIGHTS ARCHITECTURE

Starting with the OAU Declaration 1995, also known as the Grand Bay Declaration (1995), Mauritius has had a long standing working relationship with the Organization of African Unity and now the African Union. It can be explained that post-independence, Mauritius's decision to adhere to the African Continental Organization was a well thought political move even though the majority of the population was of Indian Origin. It could also be attributed to the fact that the Association of Southeast Asian Nations (ASEAN) Community and the Oceania was not as developed as it is today.

However it has been observed that Mauritius does not ratify many of the African Union Conventions and treaties. With regards to the human rights instruments belonging to the African Union, with the exception of the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child, Mauritius has not ratified the other most prominent ones

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[%E2%80%93truth-still-not-unveiled.html?tmpl=component&print=1](#) (accessed on 2 July 2017).

<sup>23</sup> See <http://www.islandcrisis.net/police-brutality-mauritius-reality/> and <http://leverlepep.blogspot.com/2012/09/police-brutality-in-mauritius.html> (accessed on 3 July 2017).

<sup>24</sup> Mauritius. Human Rights Report, Country Reports on Human Rights Practices for 2012, United States Department of State, Bureau of Democracy, Human Rights and Labor.

which include the Maputo Protocol, the Kampala Convention and the ACDEG. It cannot be established for sure whether it is a selective selection of ratification of treaties in terms of international law hierarchy as Mauritius does sign and ratify many of the United Nations Charters and Treaties.

Of critical importance in this section, linked to the relationship between Mauritius and the African Union Human Rights Architecture is the issue of the Chagos Islands which reeks of the ongoing colonization of the continent. Article 20(2) of the African Charter on Human and Peoples' Rights (the African Charter), states that "colonised or oppressed peoples shall have the right to free themselves from the bonds of oppression by resorting to any means recognised by the international community" (GAWANAS, 2011) and the African Union agenda 2063 adopted by the Assembly of Heads of States and Government in 2013 as the Vision for the continent over the next 50 years states that African needs to achieve complete decolonization by 2020.<sup>25</sup>

#### **4 THE JURISPRUDENCE OF THE COMMISSION**

While the Commission has important tasks such as reviewing of state reports and appointing special rapporteurs on human rights issues, its most popular remains the communication procedure. Under this particular mandate, the Commission has been entrusted with the task of interpreting the various provisions of the Charter, many of which have been criticized by scholars especially with regard to the clawback provisions in rights that it grants (MAUGENEST; BOUKONGOU, 2001). The Commission has successfully mitigated the negative potential of the clawback clauses through the dynamic fashion in which it has interpreted the Charter in various cases (VILJOEN, 2001). In addition to the communication procedure, it has adopted various mechanisms including missions of a promotional nature to African states and investigations in suspected situations of serious rights violations. Since the particular focus of this article is on the communication mandate and how Mauritius could benefit from it, it is relevant at this point to briefly look at the jurisprudence of the Commission. It is argued that the rich jurisprudence of the Commission would be the foundation upon which the potential of success of the Mauritian cases (to be discussed below) would be assessed.

In the wake of harmonizing the interpretation of human rights in Africa with international standards, the Commission held that African practices had to be consistent with international norms and that inspiration must be drawn from

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<sup>25</sup> Paragraph 22 of the African Union Agenda 2063.

standard-setting instruments of the OAU and the UN in the case of *Legal Resources Foundation v Zambia*<sup>26</sup> in 2001. On the question of exhaustion of local remedies, the Commission has taken a practical stand especially in its interpretation. Indeed, in *Alhassan Abubakar v Ghana*,<sup>27</sup> the Commission was of the view that external residence and the fear of being detained meant that local remedies were not available to the complainant. Abubakar had escaped detention without trial for five years and fled from Ghana. The effectiveness of local remedies was reiterated in the case of *Rights International v Nigeria*<sup>28</sup> in 1999 whereby the Commission held that effective remedies for human rights violations were lacking under the military regime in Nigeria. Another important issue pertaining to the inheritance by a new government of the international commitments as well as culpability for human rights violations of the previous regime was considered in the case of *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*<sup>29</sup> in 1995. The Commission held that the new regime in Malawi had the responsibility of paying reparations for violations by the former dictatorial regime and the claims of the complainants were not extinguished by a mere change in regime.

The Commission has also drawn inspiration from jurisprudence of other regional systems in its interpretation of article 1 of the Charter which provides that member states shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them. Drawing support from cases such as *Velasquez Rodriguez v Honduras*<sup>30</sup> from the Inter-American Court and *X and Y v Netherlands*<sup>31</sup> from the European Court, the Commission held that the positive obligations enshrined in article 1 also extended to the obligation of member states to protect their nationals from the wrongful acts perpetrated by private individuals. In the case of *Organisation Mondiale Contre la Torture and others v Rwanda*,<sup>32</sup> it was held that the expulsion by Rwanda of Burundians violated article 2 of the Charter which provides for equality in the way foreigners are to be treated. The Commission accentuated on the fact that the ratification of the Charter implies that states have to secure the rights of all individuals on their territory, nationals and

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<sup>26</sup> Legal Resources Foundation vs. Zambia

<sup>27</sup> Abubakar vs. Ghana

<sup>28</sup> Rights International vs. Nigeria

<sup>29</sup> Achutan vs. Malawi

<sup>30</sup> Velasquez Rodriguez vs. Honduras, Inter American Court

<sup>31</sup> X and Y vs. Netherlands, European Court on Human Rights

<sup>32</sup> Organisation Mondiale contre la Torture and others vs. Rwanda

non-nationals alike. In *Forum of Conscience v Sierra Leone*,<sup>33</sup> it ruled that the physical integrity of a person had been violated by the fact that an individual was detained in a filthy cell with inhumane and degrading conditions. The question of detention amounting to inhumane and degrading treatment was also considered in *Media Rights v Nigeria*<sup>34</sup> in 2000 and *Ouko v Kenya*<sup>35</sup> in 2000. Regarding the nature of a fair trial, the Commission was of the view that the right to a fair trial consists of the right to petition competent courts and the right to be heard by an imperial and independent court as elaborated in *Achunthan and another (on behalf of Banda and others) v Malawi*<sup>36</sup> in 1995.

The Commission has also provided for some progressive interpretation of socio-economic rights and the right to environment. In *Social and Economic Rights Action Centre and Another v Nigeria*, arguably its most famous communication, the impact on socio-economic rights and the right to environment of people of Ogoniland (in the Niger Delta of Nigeria) as a result of the activities of Shell Corporation in collusion with the Nigerian government. The Commission upheld the right to free disposal of natural resources and the right to a satisfactory environment. In addition, it applied the implied rights theory by confirming that the right to food was implicitly protected by the right to life, the right to health and the right to economic, social and cultural development. It has also produced another ground breaking decision in the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*<sup>37</sup> in 2009. The denial of access to the traditional lands to the Endorois community was held as being a violation of the right of ownership of the community on their ancestral lands. The limelight of this decision remains the elaboration by the Commission on the meaning of the right to development provided by article 22 of the Charter, the only international human right treaty recognizing this right.<sup>38</sup>

The array of decisions on extremely important principles and concepts of human rights, and not merely on the substantive aspect of the rights provided by the Charter, is rather impressive especially when one takes into account the various challenges the Commission has encountered in delivering its mandate. The three major challenges have been a critical lack of resources, non-compliance by

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<sup>33</sup> Forum of conscience vs. Sierra Leone

<sup>34</sup> Media Rights vs. Nigeria

<sup>35</sup> Ouko vs. Kenya

<sup>36</sup> Achunthan vs. Malawi

<sup>37</sup> Centre for Minority Rights vs. Kenya

<sup>38</sup> Article 22 of the African Charter on Human and Peoples' Rights

the states with regards to its recommendations which follows a communication and the duty to submit biennial state reports and the failure or inability to enforce its own recommendations/decisions. In addition, the scope of the activities of the Commission is determined by African heads of state who are often the subjects of human rights claims by their citizens (NDULO, 2011). The Commission findings reported to the Assembly of Heads of State have to be endorsed by the African heads of state for them to have any meaningful effect. There is an undeniable probability that deliberations which reveals gross human rights violations and high political implications can be easily brushed under the carpet by a non-acceptance from the Assembly. In the midst of all these issues, the Commission has been instrumental in interpreting and putting into action the Charter.

With such a rich jurisprudence as a background, the question now arises as to why the State of Mauritius has been quite reluctant or unwilling to approach the Commission for human rights cases prevailing domestically. There is another sub question pertinent to this main one - what has been the role of the State of Mauritius at the Commission? The following part attempts at answering the latter before illustrating some human rights cases which could have been heard by the Commission for a stronger closer to reality decision.

## **5 THE STATE OF MAURITIUS AND THE COMMISSION**

Mauritius became a state party to the Charter on the 19th of June 1992. It has been quite active and participative when it comes to becoming party to the various legal instruments under the African Union. As at date, it has signed the AU Convention Governing Specific Aspects of Refugee Problems in Africa, the African Charter on Democracy, Elections and Governance and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa without ratification. It has ratified or acceded to the African Charter on the Rights and Welfare of the Child, the African Youth Charter and the Convention on the Prevention and Combatting of Terrorism. Mauritius submitted its first Periodic Report covering the year 1992 to 1994 to the African Commission in November 1994. The report was primarily a description of case law, legislations and practices for the promotion and protection of human rights in accordance with the articles of the Charter.

In March 2016, the sixth to eighth combined periodic report on the implementation of the Charter was submitted to the Commission covering a period ranging from May 2009 to December 2015. At the outset, it must be highlighted that Mauritius has experienced considerable delays in submitting its state reports to the Commission. When one looks at the periodicity with which



similar reports are submitted to the United Nations organs, one is forced to think whether enough seriousness and commitment are shown towards the African human rights architecture by the country. For instance, the report that Mauritius submitted to the African Committee of Experts of the Rights and Welfare of the Child was one which was a replica of the one submitted to the UN Committee on the Rights of the Child. It was sent back to Mauritius since it was not in line with the reporting guidelines and did not take into account the context which is different at the African level compared to the global one.<sup>39</sup>

## **5.1 CASES THAT THE COMMISSION COULD OR SHOULD HAVE CONSIDERED!**

The cases which will be discussed here pertain to three different scenarios and the authors believe that had the African Commission be approached to provide an advisory opinion or even referred it to the Court for a legally binding judgment under article 55 of the Protocol establishing the African Court on Human and Peoples' Rights to be a complement and give judicial grounding to the protection of human rights on the African continent.

### **5.1.1 MADHEWOO CASE- RIGHT TO PRIVACY ON THE BIOMETRIC CARD**

This case currently deals with the issue of the right to privacy. As exemplified by Mahadew, in his summary of the case:

Mr Maharajah Madhewoo, a citizen of Mauritius, challenged the constitutionality of the 2013 Act that acted as the legislative vehicle for the new smart ID project. He sought redress under section 17 of the Constitution of Mauritius (The Constitution) which allows citizens to apply to the Supreme Court in cases of violations of provisions of the Bill of Rights (section 3 to 16). He based himself on the legal obligation imposed on all citizens of Mauritius to carry identity cards bearing their name, picture and signature pursuant to the National Identity Card Act 1985 (The 1985 Act). In 2013, the former government (changed after the 2014 general elections) proposed the introduction of a new smart identity card, incorporating an individual's fingerprints and other biometric information related to external traits and characteristics. The amendment of the 1985 Act was required for the materialisation of the project. The National Identity Card (Miscellaneous Provisions) Act 2013 (The 2013 Act) was enacted. Such a project met with significant

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<sup>39</sup>Statement made by Ayalew Getachew, Legal Officer at the African Children's Committee in August 2016 at the African Youth Forum held in Windhoek Namibia.

opposition and criticism from various classes of the Mauritian society (MAHADEW, 2017).

He contested that individual fingerprints and other biometric information were a violation of the right to privacy of the individual. The judgement given by the Supreme Court of Mauritius was that there is no right to privacy in the Constitution of the Republic of Mauritius. What was argued by Mahadew in this regard was that even though the Court brilliantly applied the concept of limitation of rights in the present case, there was no demonstration of judicial activism. He further adds, "While the substance of the decision is correct and well founded, the general approach which is one based on judicial restraint and diametrically opposed to the principle of implied rights theory is a real concern" (MAHADEW, 2017). Considering that Mauritius is a State party to the African Human Rights Charter, the Judiciary could have extended the interpretation of the right privacy as being dutifully accorded to the Mauritian citizen.

Furthermore, Mahadewoo could have made an appeal to the Commission in this regard as an aggrieved citizen whose limited rights in the Constitution denied him of the privacy he would like to maintain. Considering the jurisprudence of the Commission and the brilliant way it has applied and analyzed the implied rights theory in several communications brought to the Commission, it could have set a different precedence for Mauritian Judges to follow. The Black Law Dictionary defines judicial activism as a judicial philosophy which motivates judges to depart from their traditional precedents in favor of progress and social policies.<sup>40</sup> This practice has been observed as a tradition in the jurisprudence of the Commission and would have set the bar high for Mauritian judges.

### 5.1.2 CHAGOS CASE – PEOPLES' RIGHTS

Diego Garcia island is part of the Chagos Archipelagos (GIFFORD, 2004) and it is currently one of the biggest secretive U.S military bases in the Indian Ocean (VINE, 2005). This topic often remains absent from mainstream discussion related to militarization, world peace and security (KENNEDY, 2014). It seems almost to have been forgotten among discussions of nuclear disarmament in Africa (PILGER), even if Mauritius and Diego Garcia very well form part of the continent (LUNN, 2012). This case has been running since a long time in the European Court of Human Rights. However it has never been brought to the Commission. The Chagossians are being denied their rights to go back to their land because of the compensation already given to them by the British government during

<sup>40</sup> Law Dictionary. Available at [http://law.academic.ru/12129/judicial\\_activism](http://law.academic.ru/12129/judicial_activism) (accessed 06 July 2017).

the granting of independence and territorial dismemberment of the Mauritian territory. The Committee on the Elimination of Racial Discrimination urged Mauritius to seek different ways to look into the matter.

When the UK excised the Chagos Islands from Mauritius to establish the BIOT on 8 November 1965 (GEOFFREY, 2012), it deliberately misled the UN and the international community by claiming that there was no permanent population on the islands (PILGER). The UK declared that there were only a few 'man Fridays' who lived on the islands when the reality was that people lived on Diego Garcia for generations (PILGER). Chagossians, who are descendents of slaves brought from the mainland Africa can trace their roots on the islands back for two centuries, and the graves of parents and grandparents remain on the larger islands, Peros Banhos and Diego Garcia. The people who were sent to Mauritius were born and brought up on Diego Garcia and this was the only homeland they had known throughout their lives. From the definition as 'peoples' in the preamble of the Charter, the Chagossians can be said to be peoples for they have a distinct way of life, identity and sense of belongingness.

Furthermore, the Chagossians case also bears a similarity to the Israel-Palestine conflict. The human rights violations occurring due to the denial of the right to one's homeland in Palestine in the context of the Israel-Palestine conflict can be used as an example to illustrate the Chagossians' case. Stephen Hallbrook, argues quoting the late Egyptian President, Anwar Sadat 'that there is no use not recognizing the Palestinian people and their own right in establishing the homeland and their right to return' (ZAYAS, 1995). Thus, establishing a parallel to the Chagossians case, it can be seen that the Chagossian people are not being recognized through a denial of their right in establishing the homeland and their right to return (HALLBROOK, 1981).

In this regard considering the prominent and advanced advisory opinions given by the Commission, it could be gleaned that should the state of Mauritius have approached the Commission or the Chagossians themselves could have done so in order to get stronger support from the African Union and the International Community to support their cause.

## CONCLUSION

In a nutshell, it can be seen that though the overall picture of Mauritius does not sound of despair in the human rights field, issues like freedom of expression, access to information and provisions for the inclusion of socio economic rights still need to be addressed. The Bill of Rights in the Mauritian Constitution is

largely limited. Being a state party to the African Human Rights Charter provides an opportunity to the Mauritian State to broaden its horizons in terms of the protection and promotion of human rights, be it in the interpretation of rights of second and third generations as well protection of the different minority peoples group that make up the diversity of the nation. The State of Mauritius should therefore ratify the existing AU Charters on Human Rights and domesticate them in national laws. It should also encourage the culture of approaching the African Commission for in depth interpretation of rights not included in the Constitution. This can be achieved by raising awareness on the mandate and jurisdiction of the African Commission.

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