

Conclusion

The provision of special needs housing falls primarily to the NGO sector, which presents two problems. First, there is no standardisation of norms for NGOs that will provide special needs housing. Secondly, no specific government department has taken ownership of the policy, and therefore the chain of accountability remains broken, which makes matters especially difficult for the implementing government departments.

Although the concerns that have been raised about the SHNP are valid, the unfortunate result of the delay in finalising and implementing the policy is that scores of people with special needs are unable to access housing. The government department primarily responsible for the delivery of special needs housing, the DHS, needs to take ownership of implementing this policy and outline a clear set of norms, informed by a human rights-based approach, for providers of special needs housing.

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Economic and Social Rights as Constitutional Guarantees, Compared to Privileges under the Welfare State System: An Assessment of the Case of Mauritius

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Introduction

Mauritius celebrated 50 years of independence on 12 March 2018, a date which coincided with the fiftieth anniversary of its Constitution. At the time of this writing, a number of celebratory events were under way to commemorate these milestones, but there has been debate, too, about the status of economic and social rights (hereafter, socio-economic rights) in the country. Their complete absence in the Mauritian Constitution has raised several critical questions from different quarters about the effectiveness of their protection.

These questions become all the more pertinent when one considers that Mauritius is one of the strongest welfare states in Africa and provides citizens with a plethora of social and economic benefits without there being constitutional guarantees of socio-economic rights. Is there hence any real need to enshrine the rights in the Constitution when the country is faring relatively well as it is? Would constitutional protection of socio-economic rights genuinely improve the social and economic conditions of Mauritians?

This article addresses these questions in the light of the wide-ranging discussion currently taking place in Mauritius on the possible review and amendment of the Constitution. After providing an overview of the history of the Constitution, the article assesses the Bill of Rights contained in it and demonstrates the absence of socio-economic rights in the Constitution; it is the case instead that Mauritius has relied on the concept of the welfare state to ensure and enhance its citizens' social and economic conditions.

It is argued, however, that while welfare statism has both necessary and successful in Mauritius, the picture remains incomplete without the constitutional entrenchment of socio-economic rights. Socio-economic privileges conferred by the welfare state remain volatile and subject to the risk of being taken away from the citizens.

An overview of the Mauritian Constitution

The Constitution was granted by the representatives.

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United Kingdom and did not emanate from the people of Mauritius or their elected Meetarbhan argues as such that it does not necessarily reflect the will of the people, albeit that the British government held consultations with political parties from Mauritius during the constitutional talks at Lancaster House in London (Meetarbhan 2017: 1). The Constitution was published as the Mauritius Independence Order 1968, Government Notice 54 of 1968.

Chapter 2 of the Constitution is referred to as the Bill of Rights. It provides for civil and political rights only, and, as noted in the case of *Lincoln v Governor General* (1973 MR 290), draws inspiration from the European Convention on Human Rights. The civil and political rights protected in the Bill of Rights are as follows: right to life (section 4); right to personal liberty (section 5); protection from slavery and forced labour (section 6); protection from inhuman treatment (section 7); protection from deprivation of property (section 8); protection of the privacy of home and other property (section 9); provisions to secure protection of the law (section 10); protection of freedom of conscience (section 11); protection of freedom of expression (section 12); protection of freedom of assembly and association (section 13); protection of freedom to establish schools (section 14); protection of freedom of movement (section 15); and protection from discrimination (section 16).

It is clear from the above that the Constitution has not entrenched any socio-economic rights in its Bill of Rights; it has not provided for them either in the form of Directive Principles of State Policy, as is the case with the Indian Constitution (De Villiers 1992: 29). The reason for this omission has not been documented, as is evident in the lack of information about this subject in general legal literature in Mauritius.

However, Dr Chan Low, former Professor at the University of Mauritius argues that there was no need to include social rights as they were already taken care of by the system of the welfare state; as for economic rights, the danger of including them in the Constitution was that it would give rise to legal contestation and demands for equal economic rights with the white population of Mauritius, who are generally considered to be in control of the Mauritian economy (from discussions with Dr Low during a UNDP-organised seminar with a Ugandan Rule of Law and Constitutional Democracy delegation in November 2017 at the UNDP Headquarters in Port Louis Mauritius). In the interests of 'stability', it was therefore decided not to include socio-economic rights in the Constitution.

The National Human Rights Commission of Mauritius also took a position on the absence of economic rights in the Constitution – arguably, a disappointing one. It stated that

Mauritius has adopted a consistent stand to the effect that there is no need to include economic, social and cultural rights in our Constitution since the perennity [meaning 'the state or quality of being perennial'] of the welfare state

is guaranteed by other legislations such as the Education Act, the Social Aid Act, the National Pensions Act, the provision of free health services, the setting up of institutions and the subsidisation of Non-Governmental Organisations catering for the welfare of the deprived members of society (National Human Rights Commission 2002: 6).

While the argument about the perennity of the welfare state remains valid to some extent, the overall conclusion that there is no need for the inclusion of socio-economic rights in the Constitution is highly questionable, as will be shown later in the article. The matter has also been highlighted as a major issue by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in its Concluding Observations on Mauritius's state report of Mauritius in 2010, where it noted that

[t]he Committee is concerned that economic, social and cultural rights are essentially not enshrined in the Constitution, although some individual rights proclaimed therein are relevant to this category of rights. The Committee is also concerned that the Covenant provisions have not been incorporated in the domestic law and cannot be directly invoked by individuals before national courts. It notes that this situation has a restrictive impact on the scope of the competencies of the institutional guarantees of human rights, including courts, the National Human Rights Commission, and the Office of the Ombudsman' (para 7).

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While presenting the state report for Mauritius, the country's then ambassador and permanent representative to the United Nations, Shree Servansing, described Mauritius as a welfare state offering free education, free health services, universal old age pensions, social security and benefits for widows, orphans and persons with disabilities, free public transport for students and old-aged persons, and other financial assistance and schemes for the needy (Second, Third and Fourth Periodic Report 2010: 2). The argument that Mauritius is welfare state seems to be the favourite justification that officials offer to explain the absence of socio-economic rights in the Constitution and the reluctance to enshrine them by amending the Constitution. The next section thus examines the country's

welfare-state system more closely.

Mauritius as a welfare state

Entrenching socio-economic rights in a country's constitution does not necessarily entail that the country complies with these rights or respects, protects and promotes them. For instance, several African states, such as Ethiopia and Madagascar, have incorporated socio-economic rights in their constitutions yet without genuinely complying with these provisions. By contrast, Mauritius has been reasonably successful as a welfare state, ensuring the relative well-being of its citizens. For instance, despite not ratifying the Maputo Protocol (until June 2017), Mauritius was catering for women's socio-economic rights through the welfare state system. Such an approach has often been based on the argument that it is better to comply with treaty provisions without ratification rather than doing the contrary which is the case for many African states (Geset & Mahadew: 2016, 169).

A welfare state is a state which provides a wide range of social services for its citizens. Several philosophers have contributed to this concept. For example, John Stuart Mill's philosophy of utilitarianism and the *laissez-faire* economy paved the way for the theory of the welfare state. Green sought to add a moral dimension to liberalism in his contribution to the concept of welfare state (Holloway 1960: 389). The concept took shape in Germany with the development of social insurance under Bismarck (Sinn 1995: 495) and gained momentum after the Second World War when several European countries changed from a system of partial social services to one affording comprehensive social coverage to the population (Gough 2008: 39).

As stated above, Mauritius provides various kinds of social assistance and benefits, such as free primary, secondary and tertiary education (UNESCO 2006), free health services in public hospitals – which includes open-heart surgery and cancer-related treatments (Ministry of Health and Quality of Life 2002), old-age pensions to those above 60 years of age, retirement pensions and free transport to all students, including university students (Social Security Administration, 2011). It also covers a range of pension schemes related to invalidity and physical disabilities.

Phaahla (2014: 4) argues that Mauritius has succeeded in maintaining a consistently progressive welfare system, an attainment evident, for instance, in the fact that according to the Human Development Index of the United Nations Development Programme, quality of life and levels of equity in Mauritius rival those of the top countries of the industrialised world.

In this vein, the eminent economist Joseph Stiglitz has praised its welfare system, remarking that although Mauritius has few national resources and is not particularly rich, it has managed to ensure a decent quality of life and living standard for its citizens (The Guardian 2011).

The success of the system is due mainly to the legislative framework and the will of political parties to maintain this system. Legislative acts cater for the social assistance mentioned above and comprise a consistent and reliable legal framework for providing welfare services to citizens. Education is catered for by the Education Act 1957, and pensions-related services, by the Social Aid Act 1983 and National Pensions Act 1976. Health services are catered for by the Public Health Act 1925 and the Private Health Institutions Act 1989, while disability-related issues are provided for by the Training and Employment of Disabled Persons Act 1996 and the National Council for the Rehabilitation of Disabled Persons Act 1986. Employment-related matters are addressed by the Employment Rights Act 2009 and Employment Relations Act 2009. The institutional support for social and economic policies to maintain the welfare system is provided by the National Economic and Social Council Act 2002. Economic policies and welfare are regulated by the Small and Medium Enterprises Development Authority Act 2010 and the Small Planters Welfare Fund Act 2002.

There has also been strong political will to maintain the welfare state system since independence. This has been demonstrated by the political manifestos and programmes of all political parties running for elections and the ruling parties in power. Social assistance and benefits have been a priority of all governments since 1968, and all governments have maintained – if not significantly increased – social and economic benefits for the citizens.

Mauritius's success and praiseworthiness as a welfare state are precisely the things that are usually cited to resist the need to entrench socio-economic rights in the Constitution. Several governments have relied on admittedly very decent statistics and track records on social and economic benefits to counter any arguments in this regard. Against this backdrop, the next section considers the reasons why it remains crucial to include socio-economic rights in the Constitution despite Mauritius's relative success as a welfare state.

The need to include socio-economic rights in the Constitution

All the acts of Parliament mentioned above ensure that socio-economic benefits are administratively provided to citizens and that proper mechanisms are in place for delivering pensions, educational facilities and health services to the people of Mauritius.

It is crucial to stress, though, that none of these acts whatsoever provides for a right per se to health, education or social benefits. Arguably, there is a difference between a law providing for a right that is constitutionally guaranteed and an act of parliament administratively providing for such benefits.

The reason is that acts of parliament can be amended easily with a simple majority and are subject to changes in the economic situation locally and internationally. However, because education, housing, health and other social benefits are of key importance for any population, they should be provided mandatorily as rights and not merely as political privileges under a welfare-state system, where they are exposed to the risk of being can be retracted in part or in their entirety without any possibility of judicial control over such alterations.

The conservative nature of the Mauritian judiciary is another reason for why socio-economic rights should be entrenched in the Constitution. The Mauritian judiciary has never attempted to use the theory of implied rights or a purposive interpretation by, for instance, interpreting the right to life to include the right to health or education (see *Olga Tellis v Bombay Municipal Corporation* 1985 3 SCC 545). The extremely restrictive approach taken by the Supreme Court of Mauritius in *Madhewoo v The State of Mauritius* (2016 UKPC 30), relating to the right to privacy, lends ammunition to the argument that the Court is not ready for judicial activism. Importantly, the right to privacy is a right already enshrined in the Constitution. One can then easily guess the outcome of any socio-economic case brought before the Supreme Court relying on judicial activism or the application of implied-rights theory (Mahadew 2015: 170). Unless socio-economic rights are enshrined in the Constitution, their protection and promotion are open to challenge under the welfare-state system.

Another justification for the inclusion of second-generation rights in the Constitution lies in the incomplete application of the ICESCR, to which Mauritius is a state party. Given that the country is a dualist state, its domestication of international law takes place through a transposition of norms in an act of Parliament (*Permal v Illois Trust Fund* 1984 SCJ 173 at 7). Mauritius has not domesticated the ICESCR and thus the latter's provisions are hardly of any help in protecting and promoting socio-economic rights.

The United Nations Human Rights Committee recommended that citizens of Mauritius be able to enforce the Covenant's rights directly before the domestic courts. However, the required legal machinery is not yet in place (Meetarbhan 2015: 33). It is essential, therefore, that, because the highest court of the country is unlikely to demonstrate judicial activism, socio-economic rights should be included in the Constitution to ensure that the Supreme Court gives priority to the 'clear terms of our [the] Constitution' (*Roman Catholic Diocese of Port Louis v Minister of Education* 1991 MR 176).

Conclusion

Socio-economic benefits under the Mauritian welfare-state system exist only as political privileges, not as constitutional rights.

Since 1968, all the country's political leaders and parties in power given priority to socio-economic benefits, but it can be plausibly argued they have been done so merely to gain the support of voters in elections – in the turbulence of the world economy, the winds of change blow regularly and could see socio-economic benefits being taken away from citizens.

An example is the Minister of Finance's invitation to people to reflect on whether basic retirement pensions and free health care should still be given to rich people (Le Defi Media: 2016). Without arguing that all socio-economic benefits must always be maintained or removed, this article has held that it is imperative to have the proper legal foundation to argue the legality and constitutionality of such matters. This is possible only by including socio-economic rights in the Constitution. Only then will the protection of human rights in Mauritius be complete and effective.

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