

## The Children's Bill of Mauritius: A critical assessment of key aspects

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**Summary:** *This article critically assesses the Children's Bill that has been presented as a law that will revolutionise the sphere of children's rights in Mauritius. It is set to replace the Child Protection Act which was way below the required international standard for children's rights. Essential aspects of the Bill are reviewed by using as barometers the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Some of the aspects explored are the principle of the best interests of the child, the protection of the child, the child as a juvenile offender and the Children's Court. The article also compares the Bill to the previous Child Protection Act to evaluate the efficacy of the changes brought about by the Bill.*

**Key words:** *children's rights; Mauritius; Children's Bill; Children's Court*

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## 1 Introduction

Children's rights have always received the necessary importance and attention in Mauritius. Since independence, various governments have legislated on the issue with the creation of acts of parliament and necessary subsequent amendments.<sup>1</sup> Mauritius has also ratified and acceded to critical international treaties and conventions on the rights and welfare of the child.<sup>2</sup> While the existing normative framework on children's rights was a rather decent one,<sup>3</sup> it could be said that with respect to certain aspects it fell short of the required standard set by international human rights law. In 2019 the Children's Bill was presented in Parliament with the primary aim of significantly ameliorating the existing legal framework on the rights and welfare of the Mauritian child.

A final draft of the Children's Bill was submitted to the Mauritian National Assembly in September 2019. The Bill would have become an Act last year had it not been delayed because of the general elections of November 2019. As the ruling party has won the general elections between 2014 and 2019 and remain in power, the Children's Act will very soon materialise and gain the force of law.<sup>4</sup> It is considered a significant upgrade to the existing Child Protection Act of 1994 (CPA), as it is in line with international standards on children's rights such as the African Charter on the Rights and Welfare of the Child (African Children's Charter) and the United Nations (UN) Convention on the Rights of the Child (CRC).

Against this background this article seeks to critically assess certain aspects of the Children's Bill, namely, (i) the best interests and protection of the child; (ii) child offenders and the juvenile justice system; and (iii) the Children's Court. This exercise is undertaken by using the African Children's Charter and CRC as barometers in view of examining the extent to which these provisions of the Children's

1 Child Protection Act; Protection from Domestic Violence Act; Education Act; Computer Misuse and Cyber Crime Act; Juvenile Offenders Act; Ombudsperson for Children Act; National Children's Council Act; Criminal Code; Cinematograph Act; Dangerous Drugs Act; Divorce and Judicial Separation Act.

2 African Charter on the Rights and Welfare of the Child; Hague Convention on Civil Aspects of Child Abduction; Convention on the Rights of the Child; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; Worst Forms of Child Labour Convention 1999; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts.

3 UN CRC 'Consideration of reports submitted by states parties under Article 44 of the Convention – Mauritius' UN Doc CRC/C/3/Add.36 2 October 1995 paras 3-7.

4 Kalpana Koonjoo-Shah 'Sur le Children's Bill *L'Express* 4 July 2020.

Bill are in line with the required international standards. The above-mentioned aspects of the Children's Bill are then analysed critically, highlighting the ways in which it may be considered a significant upgrade to the current legal position.

## 2 An overview of the normative framework on children's rights in Mauritius

Mauritius has maintained a decent record regarding children's rights. Nevertheless, there still is room for improvement.<sup>5</sup> The positive situation of children's rights in Mauritius has been highlighted by the UN Committee on the Rights of the Child (CRC Committee) in its Concluding Observations issued to Mauritius in 2015. The Committee indeed noted with appreciation the ratification of a number of international conventions and treaties on children's rights,<sup>6</sup> welcomed the adoption of a series of legislative Acts<sup>7</sup> and the establishment of a number of policies, action plans and programmes concerning the rights and welfare of the child.<sup>8</sup>

As an illustration of the above, government expenditure on education for 2019/2020 has been estimated at around US \$500 000, which is 10 per cent of its total expenditure.<sup>9</sup> For pre-primary education, the gross enrolment ratio, that is, the number of students enrolled per 100 of the population aged four and five years, is around 96 per cent, out of which 49 per cent are girls.<sup>10</sup> The same ratio concerning primary education is 95 per cent out of which

5 See Recommendations for Universal Periodic Review – Updated as at December 2015, [https://www.upr-info.org/sites/default/files/document/mauritius/session\\_17\\_-\\_october\\_2013/mauritius\\_mid-term\\_2ndcycle\\_2016.pdf](https://www.upr-info.org/sites/default/files/document/mauritius/session_17_-_october_2013/mauritius_mid-term_2ndcycle_2016.pdf) (accessed 10 March 2020).

6 UN CRC 'Concluding Observations on the combined third to fifth periodic reports of Mauritius' UN Doc CRC/C/MUS/CO/3-5 27 February 2015 para 3.

7 As above. Equal Opportunities (Amendment) Act, which established the Equal Opportunity Commission to prevent all forms of discrimination, 1 January 2012; Institute for Judicial and Legal Studies Act, 1 October 2011; Combating of Trafficking in Persons Act 2009; Amendment to the Child Protection Act which set up a child mentoring scheme, in December 2008.

8 As above. Political manifesto of the new government, which strengthens the protection of children against illicit substances, sexual exploitation and exploitation on the internet, December 2014; National Child Protection Strategy and its Action Plan which aims at preventing violence against children, October 2014; Human Rights Monitoring Committee in order to ensure the implementation of the recommendations of the National Human Rights Action Plan, December 2013; National Human Rights Action Plan 2012-2020, October 2012; Fast-track procedure by the Office of the Director of Public Prosecutions to investigate sexual offences involving child victims effectively, June 2012; Community Child Protection Programme, August 2007; National Parental Empowerment Programme, May 2007.

9 Statistics Mauritius 'Education Statistics', [http://statsmauritius.govmu.org/English/Publications/Pages/Edu\\_Stats\\_Yr19.aspx](http://statsmauritius.govmu.org/English/Publications/Pages/Edu_Stats_Yr19.aspx) (accessed 10 March 2020).

10 As above.

50 per cent are girls. Regarding secondary education, the gross enrolment ratio is 72 per cent out of which 52 per cent are girls.<sup>11</sup> Out of a population of around 110 000 secondary school students, around 50 per cent managed to successfully proceed to tertiary education.<sup>12</sup> It should also be noted that education in Mauritius from pre-primary up to tertiary education level (for a first degree) is free. Even transport is free for students during term-time.<sup>13</sup>

As far as the right to health of children in Mauritius is concerned, the situation has seen great amelioration compared to the early 1990s. For instance, still-births, early neonatal deaths, perinatal deaths, late neo-natal deaths, neonatal deaths, post-neonatal deaths and infant deaths have decreased by approximately 60 per cent in 2018 compared to 1994 levels.<sup>14</sup> The programme of immunisation for babies and children provided by the public health sector also can be said to be robust with around 134 000 babies receiving vaccinations of all kinds, including Rotavirus, pneumococcal, Bacillus Calmette-Guerin and Mumps-Measles-Rubella vaccine.<sup>15</sup> The primary school health statistics are encouraging with the screening of 70 000 children (representing almost 100 per cent of the primary school population) done for scabies, nits, lice, dental care (tooth decay), vision acuity and immunisation.<sup>16</sup> For young adolescents, the public health sector provides free medical treatment, as a matter of right, for health issues and complications similar to that of adults in Mauritius.<sup>17</sup>

The relative success of Mauritius as far as children's rights are concerned, especially comparatively speaking, may be explained by its strong normative framework. At the apex there is the Constitution of Mauritius with its Bill of Rights which protects the civil and political rights of children. The strong sense of constitutionalism, the rule of law and separation of powers that prevail in Mauritius ensure that constitutional provisions are applied to the best interests of the child, as discussed elsewhere by the author.<sup>18</sup> The absence of

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11 As above.

12 As above.

13 Tertiary Education Commission 'Free transport and education', <http://www.tec.mu/freetransport> (accessed 10 March 2020).

14 Ministry of Health and Quality of Life 'Health statistics report 2017' (2017) 35, <http://health.govmu.org/English/Documents/2018/ANNUAL%20REPORT%202017%20FOR%20PRINTING.pdf> (accessed 10 March 2020).

15 Ministry of Health and Quality of Life (n 14) 42.

16 Ministry of Health and Quality of Life (n 14) 56.

17 Republic of Mauritius 'Access to key health care services is every citizen's fundamental right, says Minister Husnoo', <http://www.govmu.org/English/News/Pages/Access-to-key-health-care-services-is-every-citizen's-fundamental-right,-says-Minister-Husnoo.aspx> (accessed 10 March 2020).

18 See in general R Mahadew 'The role of the Mauritian Supreme Court in upholding democracy and the Constitution' (2018) 5 *African Journal of Democracy and*

socio-economic rights in the Constitution is noted but, at the same time, the argument remains that the strong welfare state system of Mauritius does cater for socio-economic benefits and privileges despite providing for lesser guarantees than those of constitutional provisions.<sup>19</sup>

In terms of legislation, the main Act is the CPA which is set to be replaced by the Children's Bill. The main objective of the CPA is to give protection to child victims of abuse and neglect.<sup>20</sup> In 1998 a number of amendments were brought in through the Protection of the Child (Miscellaneous Protection) Act to no fewer than 23 pieces of legislation, including the CPA itself.<sup>21</sup> A second round of amendments came about in 2005 to cater for issues such as child trafficking, abandonment and abduction and fines and terms of imprisonment were also increased to make penalties stricter.<sup>22</sup> In summary, the CPA was a relatively short Act with 22 sections with several provisions dedicated to the child mentoring scheme and the emergence protection order and others focusing on issues such as ill-treatment, sexual offences, indecent photographs of children and mendacity. Some of these sections are discussed from a comparative perspective with the provisions of the Children's Bill in subsequent parts of the article.

The CPA was supported by other pieces of legislation to provide a protective framework for Mauritian children. For instance, the Protection from Domestic Violence Act 1997 was amended in 2004 to extend the scope of the term 'domestic violence' to include physical, sexual and moral violence on children and not only on a spouse.<sup>23</sup> In terms of compulsory education, the Education Act 1957 was amended in 2004 to ensure that education is compulsory for every child up to the age of 16 years.<sup>24</sup> In 2003 the Computer

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*Governance* 49.

- 19 R Mahadew 'Economic and social rights as constitutional guarantees, compared to privileges under the welfare state system: An assessment of the case of Mauritius' (2018) 19 *Economic and Social Rights Review* 9-12.
- 20 Ministry of Women's Rights, Child Development, Family Welfare and Consumer Protection 'Mauritius National Progress Report of the Special Session of the General Assembly on Children' (2006) 3, [https://www.unicef.org/arabic/worldfitforchildren/files/Mauritius\\_WFFC5\\_Report.pdf](https://www.unicef.org/arabic/worldfitforchildren/files/Mauritius_WFFC5_Report.pdf) (accessed 10 March 2020).
- 21 Amendments to the CPA included the definition of the word 'harm' extended so include physical, sexual, psychological, emotional or moral injury, neglect, ill-treatment, impairment of health or development as the forms of harm; 'place of safety' amended to also include 'a convent, a charitable institution, an institution for children and a hospital'. The definition of who can report cases of suspected abuse has been expanded.
- 22 Ministry of Women's Rights, Child Development, Family Welfare and Consumer Protection (n 20).
- 23 Sec 2 Protection from Domestic Violence Act 1997.
- 24 Sec 37 Education Act 1957.

Misuse and Cybercrime Act was enacted to make child pornography and indecent photography a criminal offence punishable by law.<sup>25</sup> According to the Juvenile Offenders Act 1935, juveniles who cannot be controlled by their parents or guardians may be removed and placed in an institution by court order.<sup>26</sup> Another key piece of legislation on children's rights is the Ombudsperson for Children Act, establishing an office of an Ombudsperson for Children.<sup>27</sup> The Ombudsperson for children is empowered under the Act to act as an advocate for children's rights, to advise ministers and public bodies and authorities on the promotion and protection of children's rights, and to investigate complaints related to the rights and welfare of the child.<sup>28</sup> In 2005 amendments were made to the Act to compel witnesses to attend and testify before the Ombudsperson in connection with investigations being conducted and to make acts such as giving false evidence and documents or wilfully interrupting proceedings criminal offences.<sup>29</sup>

In addition to legislation, various units have been created to provide the necessary framework within which the provisions of the various Acts of Parliament can be made effectively operational. For example, the Child Development Unit under the Ministry of Gender Equality and Family Welfare is effective in intervening in cases of child abuse and neglect.<sup>30</sup> The unit has the duty to enforce legislation pertaining to children and to implement policies and programmes relevant to the survival, development, promotion and participation of children.<sup>31</sup> The Family Welfare and Protection Unit is responsible for implementing strategies and policies to promote family welfare and to adopt relevant strategies and implement actions to address the problem of gender-based violence.<sup>32</sup> This unit operates through six regional offices known as Family Support Bureaux providing for greater proximity to victims of domestic violence, including children.<sup>33</sup> There equally is the Child Perpetrator Support Unit set pursuant to the recommendations of CRC. The main objectives of this unit are to (i) cater for the psychological needs of juvenile

25 Sec 16 Computer Misuse and Cybercrime Act 2003.

26 Sec 18 Juvenile Offenders Act 1935.

27 Sec 3 Ombudsperson for Children Act 2003.

28 Sec 6 Ombudsperson for Children Act 2003.

29 Sec 11A Ombudsperson for Children Act 2003.

30 Ministry of Gender Equality and Family Welfare 'Child Development Unit', <http://gender.govmu.org/English/Pages/Units/Child-Development-Unit.aspx> (accessed 10 March 2020). The state has the obligation to ensure a parental role wherever parents fail to do so and this role is ensured by the CDU.

31 Ministry of Women's Rights, Child Development, Family Welfare and Consumer Protection (n 20) 12.

32 Ministry of Gender Equality and Family Welfare 'Family Welfare and Protection Unit', <http://gender.govmu.org/English/Pages/Units/Family-Welfare-and-Protection-Unit.aspx> (accessed 10 March 2020).

33 As above.

offenders and provide adequate psychological support that would pave the way towards their rehabilitation and reintegration in the society; (ii) attend to requests from different stakeholders, namely, the DPP and the judiciary, with respect to the forensic psychological evaluation of juvenile offenders; (iii) come up with appropriate psychological treatment programmes designed and targeted to assist child perpetrators to develop skills to reduce reoffending; and (iv) provide pre-trial support and post-trial follow-up for juveniles involved in court proceedings.<sup>34</sup>

The normative framework discussed above supported the agenda of all governments in Mauritius to protect and promote the rights and welfare of the child since the country's independence.<sup>35</sup> It should be noted that the legislations, policies, actions plans and programmes are not limited to the ones discussed above.<sup>36</sup> In spite of the positive situational overview of children's rights in Mauritius, illustrated by access to education and healthcare services, the Committee nevertheless has highlighted certain areas of concern. These include the definition of the child; non-discrimination; the best interests of the child; violence against children; children with disabilities; and the administration of juvenile justice.<sup>37</sup> The Children's Bill consequently attempts to address these issues in line with the recommendations of the Committee. The following part of the article focuses on the Children's Bill by comparing it to the previous CPA and assessing its effectiveness using the international normative framework on children's rights as standard.

### 3 Children's Bill: A critical assessment

The explanatory memorandum that introduces the Children's Bill clearly sets out its main object. The main aim of the proposed Bill is to repeal and replace the CPA by providing for a more appropriate, comprehensive and modern legislative framework on children's rights. In addition, it explicitly mentions that another goal of the Bill is to give better effect to CRC and the African Children's Charter.<sup>38</sup> It is observed that such a statement may be interpreted as the state's

34 Ministry of Gender Equality and Family Welfare 'Child Perpetrator Support Unit', [http://gender.govmu.org/English/Department/Pages/Psychological\\_percent20Services\\_Child-Perpetrator-Support-Unit.aspx](http://gender.govmu.org/English/Department/Pages/Psychological_percent20Services_Child-Perpetrator-Support-Unit.aspx) (accessed 10 March 2020).

35 CRC (n 3).

36 Eg, the Early Childhood Development Policy; National Children's Policy; Education Reform Policy; National Gender Policy; National Policy Paper on Family; National Children's Council; Drop in Centres.

37 CRC (n 6) paras 25, 27, 29, 37, 49 & 69.

38 See The Children's Bill 29 of 2019 'Explanatory Memorandum' 13 September 2019, <http://mauritiusassembly.govmu.org/English/bills/Documents/intro/2019/bill2919.pdf> (accessed 20 March 2020).

admission that thus far the CPA and other related pieces of legislation on children's rights are not necessarily consistent with international standards and the Bill aims at rectifying such inconsistency. In accordance with the above objectives, the explanatory memorandum states that the Bill makes provision

- (a) for the better care, protection and assistance to children and their families;
- (b) for the respect and promotion of the rights and best interests of children;
- (c) for the setting up of structures, services and means for promoting and monitoring the sound, physical, psychological, intellectual, emotional and social development of children;
- (d) for children under the age of 12 not to be held criminally responsible for any act or omission;
- (e) for child witnesses and child victims under the age of 14, subject to certain conditions, to be competent as witnesses without the need for them to take the oath or making solemn affirmation;
- (f) for the setting up of a Children's Court, consisting of a civil division, a protection division and a criminal division; and
- (g) for addressing the shortcomings in the Child Protection Act.

### 3.1 Best interests of the child

The best interests of the child is a cardinal principle which is one of the pillars of CRC, the other three being child participation, non-discrimination and life, survival and development.<sup>39</sup> This principle is enshrined in article 3 of CRC, giving the child the right to have his or her interests assessed and taken into account as a primary consideration in all actions and decisions in both the public and the private sphere.<sup>40</sup> The CRC Committee has also identified article 3 as a general principle for the interpretation and implementation of all the rights of the child provided for in CRC.<sup>41</sup> The Committee has further underlined the principle of the best interests of the child as a threefold concept consisting of a substantive right, a fundamental interpretative legal principle and a rule of procedure.<sup>42</sup> This clearly

39 See in general European Commission 'CRC and its four guiding principles', <https://europa.eu/capacity4dev/sites/default/files/learning/Child-rights/2.7.html> (accessed 20 March 2020); Save the Children 'Child rights programming', [https://resourcecentre.savethechildren.net/node/2015/pdf/getting\\_it\\_right\\_chapter2\\_0.pdf](https://resourcecentre.savethechildren.net/node/2015/pdf/getting_it_right_chapter2_0.pdf) (accessed 20 March 2020).

40 UN CRC Committee General Comment 14 'The right of the child to have his or her best interests taken as a primary consideration' 29 May 2013 UN Doc CRC/C/GC/14 para 1.

41 UN CRC Committee General Comment 5 'General measures of implementation of the Convention on the Rights of the Child' 3 October 2003 UN Doc CRC/C/GC/2003/5 para 12.

42 General Comment 14 (n 40) para 6.

highlights the importance of this sacrosanct principle regarding children's rights.

The African Children's Charter has also enshrined this principle in article 4 which provides that in all actions concerning the child, undertaken by any person or authority, the best interests of the child is the primary consideration. The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has likewise employed this principle in numerous decisions that interpret the African Children's Charter.<sup>43</sup> While the African Children's Committee has not dedicated any specific general comment on the principle of the best interests of the child, it nonetheless has highlighted the application of this principle as an interpretative tool in its Joint General Comment on ending child marriage.<sup>44</sup> A similar approach underlined by the application of the principle was taken in the General Comment on the right to birth registration, name and nationality and the General Comment on State Party Obligations.<sup>45</sup>

It is now apposite to assess the extent to which this principle has been domesticated by the Children's Bill after showcasing its importance and application at the international level as a guiding principle. Section 5 of the Bill is dedicated to the best interests-principle in the following terms: 'The best interests of a child shall, in respect of any matter concerning the child, be paramount and be the primary consideration by any person, court, institution or other body.' This section is similar to article 4 of the African Children's Charter in that it considers this principle as a primary one. It is worth noting that section 5 also elaborates on a list of actions or behaviour expected from every person, court, institution or any other body in order to be in line with the best interests-principle.<sup>46</sup>

43 See generally *Michelo Hunsungule & Others (on behalf of children in Northern Uganda) v The Government of Uganda* Communication 1/Com/001/2005 (2005); *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya* Communication 2/Com/002/2009 (2009).

44 See Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage (2017) para 6, [https://www.acerwc.africa/wp-content/uploads/2018/04/ENGLISH\\_Joint\\_GC\\_ACERWC-ACHPR\\_Ending\\_Child\\_Marriage\\_14\\_March\\_2018.pdf](https://www.acerwc.africa/wp-content/uploads/2018/04/ENGLISH_Joint_GC_ACERWC-ACHPR_Ending_Child_Marriage_14_March_2018.pdf) (accessed 20 March 2020).

45 General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child: Right to Birth Registration, Name and Nationality para 14, [https://www.acerwc.africa/wp-content/uploads/2018/04/General-Comment\\_Art6\\_ACRWC\\_English.pdf](https://www.acerwc.africa/wp-content/uploads/2018/04/General-Comment_Art6_ACRWC_English.pdf) (accessed 20 March 2020); General Comment 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child and Systems Strengthening for Child Protection 11.

46 Sec 5(2): '(a) respect, protect, promote and fulfil the rights and the best interests of the child; (b) respect the inherent dignity of the child; (c) treat the child fairly and equitably; (d) protect the child from discrimination; (e) bear in mind the needs of the child for his development, including any special needs which may

From an interpretation viewpoint, one may argue that a person or institution not adhering to these compulsory actions or behaviours will automatically be in breach of the best interests-principle.

This is in stark contrast with the way in which the best interests-principle was previously domesticated in the CPA. It is noted that there was no specific or stand-alone provision that enshrined the principle. Therefore, there was no legal obligation to consider the principle as 'paramount' and as a 'primary consideration' as is the case now under the new law. The principle was merely referred to in the CPA in relation to the issuance of a mentoring order<sup>47</sup> and committal to a place of safety.<sup>48</sup> Nonetheless, it has to be noted that courts in Mauritius have utilised the best interests-principle wherever appropriate despite its absence as a substantive rule in the CPA. For instance, in the case of *Gungahreessoon v Ministry of Women, Family Welfare and Consumer Protection* the issue of an emergency protection order was discussed at length and the application for a discharge order was rejected after the Court had duly considered the best interests of the child in question, even though the section providing for a discharge order did not mention the principle. The Court held that '[i]n the light of the foregoing and in view of a rise in the prevalence of child sexual abuse cases in our society, this court is not satisfied that it would be in the best interests of the child to grant a discharge order under section 6 of the Child Protection Act'.<sup>49</sup>

It is argued that the principle is now properly domesticated in line with what CRC and the African Children's Charter require. The principle is an enforceable and justiciable right. In addition, it also is in line with the UN Committee's threefold elaboration of the concept as a substantive right, an interpretative tool and a rule of procedure.

### 3.2 Protection of children

The CPA contained provisions related to ill-treatment, child trafficking, the abandonment of children, the abduction of a child, sexual offences on children, indecent photography of children and mendacity. While most of these offences have been retained and

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be due to a disability; (f) where appropriate, give the child's family member an opportunity to express his views; (g) as far as possible, act promptly.'

47 Sec 3D: '[w]here the Permanent Secretary reasonably believes that it is in the best interest of a child to be placed under the Scheme'.

48 Sec 8(2): 'Upon an application under subsection (1), the Court shall order an urgent enquiry ... as may enable it to deal with the case in the best interests of the child.'

49 *Gungahreessoon v Ministry of Women, Family Welfare and Consumer Protection* 2008 RDR 122.

further elaborated upon by the Bill, other much-needed new offences have been added. This part considers the new provisions related to the protection of children.

### 3.2.1 *Non-discrimination*

Children arguably were conferred protection against discrimination by the Constitution and the Equal Opportunities Act which constitute the legislative framework for non-discrimination in Mauritius.<sup>50</sup> However, the CRC Committee noted that discrimination persists against children and recommended that a general prohibition on direct and indirect discrimination be incorporated into a Children's Act.<sup>51</sup> Section 8 of the Bill provides for further protection from discrimination against children on the listed grounds applicable not only to the child but also to the child's parent.<sup>52</sup> The fact that this section prohibits discrimination against a child on the grounds of his or her parent's colour, for instance, is a very commendable and useful addition. It is in line with the African Children's Charter and CRC which also protect the child against discrimination based on the parents' attributes.<sup>53</sup> However, one criticism that may be levelled against section 8 of the Bill is that the list of grounds is limited with the notable absence of the term 'or other status'. It is argued that other grounds such as ethnicity or sexual orientation of the child or parents therefore are not covered by the provision.

### 3.2.2 *Child marriage*

Child marriage has become a real issue in Mauritius with statistics alarmingly showing that between January and August 2019, 101 minors contracted marriage.<sup>54</sup> It should be noted that the legal age of marriage is set at 18 by the Mauritian Civil Code<sup>55</sup> but exceptions

50 Secs 3 & 16 of the Constitution.

51 UN CRC, Concluding Observations on the combined third to fifth periodic reports of Mauritius 27 February 2015 UN Doc CRC/C/MUS/CO/3-5 para 27: 'While noting the establishment of the Equal Opportunities (Amendment) Act, the Committee is concerned that discrimination persists, notably in the form of obstacles to accessing and enjoying various services and facilities, particularly for children from disadvantaged and marginalised families, including street children, children who are affected and/or infected by HIV/AIDS, children using drugs, children deprived of their family environment, children with disabilities and minor offenders.'

52 'No person shall discriminate against a child on the ground of the child's, or the child's parent's, race, caste, place of origin, political opinion, colour, creed, sex, language, religion, property or disability'.

53 Art 3 African Children's Charter; art 2 CRC.

54 'From January to August 2019, 101 minors have said "yes"' *L'Express* 11 January 2020.

55 Art 144 Mauritian Civil Code.

to this minimum age is possible<sup>56</sup> and have been extensively granted with the consent of parents and courts.<sup>57</sup> The CPA did not impose the age of marriage at 18 years because a child is defined as any unmarried person under the age of 18.<sup>58</sup> It is noted that this is to conform to CRC rather than the African Children's Charter. The CRC Committee urged the state of Mauritius to ensure that the minimum age of marriage, set at 18 years, is strictly enforced, in line with the state party's obligations under the African Children's Charter.<sup>59</sup>

The Bill explicitly addresses the issue of child marriage in section 9. It provides that no person may force a child to be married civilly or religiously and anyone in contravention of this section is liable to a fine not exceeding US \$285 and imprisonment not exceeding two years. The definition of a child has also been amended to mean 'a person under the age of 18' in order to align it with section 9. However, it is argued that section 9 does not stand as a blanket prohibition as required under the African Children's Charter.<sup>60</sup> The operative word in section 9 is no one shall 'force' a child to be married. It implies that if the child himself or herself consents together with their parents, then he or she can be married. It suffices for the parents to prove that the child was not forced. In addition, there is no indication yet from the state that article 145 of the Mauritian Civil Code will be repealed which allows one to reasonably conclude that consenting children and parents are able to agree to the marriage of a child.

### 3.2.3 *Corporal or humiliating punishment*

Corporal or humiliating punishment was not regulated by the CPA. Section 13 of the Education Regulations of 1957 prohibits corporal punishment at school. The CRC Committee noted that '[c]orporal punishment is applied in general as part of the school culture, even though it is prohibited by the Education Regulations of 1957, and that corporal punishment is not explicitly prohibited by law in all settings, including home and alternative care settings, as well as the penal system'.<sup>61</sup> It also urged the state of Mauritius to

ensure that its legislation, including a children's act, explicitly prohibits corporal punishment in all settings. The Committee also urges the

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<sup>56</sup> Art 145.

<sup>57</sup> UN CRC Concluding Observations (n 51 above) para 25.

<sup>58</sup> Sec 2 CPA.

<sup>59</sup> UN CRC Concluding Observations (n 51 above) para 26.

<sup>60</sup> Art 21(2) provides that child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

<sup>61</sup> UN CRC Concluding Observations (n 51) para 37.

State party to promote positive, non-violent and participatory forms of child-rearing and discipline. The State party is further encouraged to establish a clear reporting system for incidents of corporal punishment, notably in schools.<sup>62</sup>

The Bill has accordingly provided for corporal or humiliating punishment in section 11. It provides that no parent or other person responsible for the care, treatment, education or supervision of a child may inflict corporal or inflict humiliating punishment on the child as a measure to correct or discipline the child. Offenders may get a fine not exceeding US \$285 and a term of imprisonment not exceeding two years. The law, however, is silent on a reporting system as recommended by the CRC Committee.

### 3.2.4 *Child prostitution and child pornography*

Sexual offences against children are on the rise in Mauritius with the country being considered 'a source, transit and destination country'.<sup>63</sup> Article 27 of the African Children's Charter is explicit regarding the fact that it is the state party's responsibility to protect children from sexual exploitation and sexual abuse and to take all measures to prevent the use of children in prostitution and in pornographic activities.<sup>64</sup> A similar legal obligation is imposed on state parties by the CRC.<sup>65</sup> In addition, Mauritius on 14 June 2011 ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography which further amplifies the legal obligation on Mauritius to protect children from such extremely harmful activities.

The CPA contained one section entitled 'sexual offences' which provided for both child prostitution and pornography.<sup>66</sup> However, it was a provision of the law that lacked substance. For instance, the wording of the section was limited to 'any person who causes, incites or allows any child to engage in prostitution shall commit an offence'. On the contrary, the new Bill has dedicated a whole and separate section to the offence of child prostitution.<sup>67</sup> This provision is more explicit and is worded as follows:

62 As above, para 38.

63 YUVA 'Help us eradicate child prostitution in Mauritius' 13 June 2016, <https://yuvamauritius.com/2016/06/13/help-us-eradicate-child-prostitution-in-mauritius-yuva/> (accessed 20 March 2020).

64 Art 27.

65 Art 34.

66 Sec 14 CPA.

67 Sec 17 of the Bill.

No person shall –

- (a) offer, obtain, procure or provide a child for prostitution;
- (b) cause, coerce or force a child to participate in prostitution;
- (c) profit from, or otherwise exploit, a child's participation in prostitution; or
- (d) have recourse to child prostitution.

It is argued that the scope of the law regarding child prostitution has been widened significantly so that it encompasses more. While the previous law criminalised child prostitution for causing, inciting or allowing this, the new law provides for more grounds on which the offence is punishable. This also eases the task of prosecuting bodies given that such offence is tried in accordance with the principle of beyond reasonable doubt as the standard of proof. More convictions are likely to be possible under the new provision and this certainly will act as a strong deterrent to potential offenders.

A similar argument applies to the offence of child pornography which so far is provided for in the CPA without explicit details essential for prosecution.<sup>68</sup> Indeed, it merely states that a child shall be deemed to be sexually abused if he or she has taken part in any activity of a pornographic, obscene or indecent nature.<sup>69</sup> The Bill completely departs from this position and provides for a comprehensive definition of what child pornography entails.<sup>70</sup> It even criminalises simulated explicit sexual activities, implying that it need not be real for it to constitute an offence.<sup>71</sup> Undoubtedly, a judicial body would have had to struggle with the interpretation of the term 'pornography' to determine whether it included simulated activities since the CPA did not define the term. Therefore, this may be considered a significant upgrade providing for better protection.

### 3.2.5 *Right to privacy*

The importance of children's right to privacy is highlighted by the fact that the African Children's Charter elaborately guarantees the protection of children's privacy in article 10.<sup>72</sup> Such protection is reiterated by the CRC.<sup>73</sup> A child is guaranteed the right to privacy

68 Art 14(2).

69 As above.

70 See sec 18(4).

71 Sec 18(4)(a).

72 No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

73 Art 16.

under the Constitution of Mauritius.<sup>74</sup> However, this right has been interpreted as only guaranteeing privacy in relation to the home, property and body of a person.<sup>75</sup> What is debatable is the extent to which a child's privacy will be respected and guaranteed in certain circumstances, such as where he or she is the victim of sexual abuse and at the same time the subject of media coverage. The CRC Committee highlights this issue as follows: 'While noting the constitutional protection of the right to privacy, the Committee is concerned at instances where the privacy of children who have been victims of abuse or have been in conflict with the law is not respected by the media.'<sup>76</sup>

As a remedial action and in the absence of any reference to the right to privacy in the CPA, the Bill enshrines this right in section 23.<sup>77</sup> It provides for strict guidelines regarding publication in the media of photographs, pictures, video or audio recordings of children as witnesses, victims or offenders.<sup>78</sup> Courts of law in Mauritius are also encouraged to use initials or pseudonyms of a child involved in any legal proceedings.<sup>79</sup> It is argued that the insertion of the right to privacy in the Bill is an effective measure given that, with the soaring popularity of social networks and digitalisation, it is too easy for a child to have their privacy violated, sometimes beyond repair.

#### 4 Child offenders and the juvenile justice system

Previously, the rights of children in the juvenile justice system of Mauritius were not explicitly regulated by law. For example, thus far there has been no minimum age of criminal responsibility under Mauritian law, with the result that a child as young as nine or ten years could be criminally convicted as required by article 17(4) of the African Children's Charter.<sup>80</sup> This was raised as a matter of concern by the CRC Committee.<sup>81</sup> In addition, the legal framework governing child offenders, child victims and child witnesses were to be found, in a rather scattered manner, in various pieces of legislation aided by judicial precedence. The law in general was also silent on a number of matters such as the admissibility of evidence of children and the

<sup>74</sup> Sec 9 of the Constitution.

<sup>75</sup> See R Mahadew 'Does the Mauritian Constitution protect the right to privacy? An insight from *Madhewoo v The State of Mauritius*' (2018) 18 *African Human Rights Law Journal* 204.

<sup>76</sup> UN CRC Concluding Observations (n 51) para 35.

<sup>77</sup> No person shall do an act which affects the privacy of the child.

<sup>78</sup> Sec 23(2).

<sup>79</sup> Sec 23(3).

<sup>80</sup> There shall be a minimum age below which children are presumed not to have the capacity to infringe the penal law.

<sup>81</sup> UN CRC Concluding Observations (n 51) para 69.

mandatory nature of a competency test before allowing a child to testify.<sup>82</sup> It could therefore be fairly said that Mauritius was not aligned with the requirement of the CRC Committee on the rights of children in the juvenile justice system.

#### 4.1 Child Offenders

The Juvenile Offenders Act 1935, to which amendments were made in 1991 and 1998 and which now would be repealed by the Children's Bill after it comes into force, was the only piece of legislation on juvenile offenders. Its primary focus was the Juvenile Court and its administration and there was less focus on the child or the young person than the offender.<sup>83</sup> It defines a child as a person below 18 years of age and a young person as someone above 14 years but below 18 years of age. It does not provide for a minimum age of criminal responsibility as recommended by the CRC Committee.<sup>84</sup>

The Children's Bill addresses the minimum age of criminal responsibility in section 43, by providing that a child under the age of 12 shall not be held criminally responsible for any act or omission. In fact, section 44 provides for a procedure regarding a child under 12 suspected of having committed an offence which is in line with the child's welfare, development and best interests. Children in such cases are to be referred to a probation officer rather than police officers and to a psychologist for an assessment of the state of mind of the child at the time of the alleged commission of the offence.<sup>85</sup> Henceforth, a child under the age of 12 years who has committed an offence cannot be sent to correctional youth centres or youth rehabilitation centres.

Article 17(1) of the African Children's Charter imposes legal obligations on state parties to ensure that a child who has infringed penal law should, as a matter of right, be given special treatment in a manner consistent with the child's sense of dignity and worth. Section 45 of the Bill attempts to maintain this dignity and worth by mandatorily requiring the assessment of a child offender by a probation officer. There is a need to assess the educational level, cognitive ability, domestic and environmental circumstances,

82 See *Jeetah A K v The State* 2014 SCJ 337.

83 Sec 3 on the constitution of a juvenile court; secs 5 and 6 on powers and procedures of the court; sec 9 on bail and detention; secs 15 and 16 on restrictions on punishment and punishment of certain grave crimes.

84 UN CRC General Comment 10 (n 82) para 30.

85 Secs 44(1)(b) & 44(1)(c).

age and maturity of the child.<sup>86</sup> Information obtained during the assessment is required to be kept confidential failing which a fine not exceeding 10 000 rupees or a term of imprisonment not exceeding six months may be imposed by a court.<sup>87</sup>

#### **4.2 Discretion to prosecute juvenile offenders aged 12 years or above but below the age of 14 years**

The Children's Bill provides for a discretionary power on the Director of Public Prosecutions (DPP) whether to prosecute a juvenile offender aged between the ages of 12 and 14.<sup>88</sup> Section 49 provides a list of factors to be taken into account while such discretion is being exercised. These are (i) the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child; (ii) the nature and seriousness of the offence; (iii) the impact of the offence on any victim and the community; (iv) the appropriateness of diversion; and (v) such other relevant factors as the DPP may in the circumstances determine. The DPP is also empowered to call for an assessment of the child by a probation officer.<sup>89</sup>

The criminal capacity of a juvenile offender is another factor that the authorities take into account before deciding on prosecution. According to section 49(3), a magistrate of the criminal division of the Children's Court may, on his own motion or at the request of the DPP or the child's legal representative, order an evaluation of the criminal capacity of a child aged 12 years or above but below the age of 14 years by a suitably-qualified person. The evaluation consists of an assessment of the cognitive, moral, emotional, psychological and social development of the child.<sup>90</sup>

It is noted that the above measures are in line with the requirements of the CRC Committee. It prescribes that states have a discretion to decide on the exact nature and content of the measures for dealing with children in conflict with the law without resorting to judicial proceedings, and to take the necessary legislative and other measures for their implementation.<sup>91</sup> Under the CPA there was a serious lack of such measures and juvenile offenders were not afforded any treatment that would be in line with their best interests.

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86 Sec 45(4)(f).

87 Secs 46(1) & 46(3).

88 Sec 49(1).

89 Sec 49(2).

90 Sec 49(3)(b).

91 UN CRC General Comment 10 (n 82) para 27.

### 4.3 Best interests of juveniles not to be prosecuted or criminal proceedings against juvenile to be discontinued

Indeed, the best interests of a juvenile offender are supposed to be the guiding principles in matters of juvenile justice administration.<sup>92</sup> The Children's Bill provides that if the DPP considers that it is in the best interests of the juvenile offender, then he or she shall not be prosecuted for an offence and the criminal proceedings instituted against the juvenile shall be discontinued.<sup>93</sup> In such a case, the DPP may request a probation officer to assess whether it is in the best interests of the juvenile offender to enrol in a diversion programme in accordance with section 50(1) of the Bill.

Section 51 provides that a diversion programme shall be an individualised non-residential supervision and rehabilitation scheme implemented by the Ministry responsible for the subject of probation and aftercare services for the purpose of rehabilitating the juvenile without resorting to formal criminal proceedings. It is also a programme designed to meet the specific needs of a juvenile offender.<sup>94</sup> It is argued that such a measure provides for another remedial opportunity for a juvenile offender and refrains from adopting a strictly punitive approach which is not in accordance with the leading principles for juvenile justice spelled out in article 40(1) of CRC.<sup>95</sup>

## 5 Children's Court

Court proceedings with regard to juvenile offenders in Mauritius have been criticised by civil society organisations as being too lengthy with unduly prolonged delays for cases to be heard which contributed to the anguish and suffering of juvenile offenders.<sup>96</sup> Ordinary courts, although through special sittings, used to hear cases of children in conflict with the law and detained in correctional youth and youth rehabilitation centres.<sup>97</sup> There was a serious lack of specialised judges adjudicating on children matters.<sup>98</sup> This situation was highlighted with concern by the CRC Committee and it recommended that Mauritius should 'expeditiously establish juvenile justice tribunals

92 UN CRC General Comment 10 (n 82) para 10.

93 Sec 50(1).

94 Sec 51(3).

95 UN CRC General Comment 10 (n 82) para 71.

96 CRC 'Alternative Report for Mauritius' March 2014 28, [https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MUS/INT\\_CRC\\_NGO\\_MUS\\_18011\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MUS/INT_CRC_NGO_MUS_18011_E.pdf) (accessed 30 March 2020).

97 As above.

98 As above.

with adequate human, technical and financial resources, designate specialised judges for children and ensure that such specialised judges receive appropriate education and training'.<sup>99</sup>

### 5.1 Children's Court with its divisions

The Children's Bill attempts to align the juvenile justice system with reference to a juvenile court with the recommendations of the CRC Committee by the establishment of the Children's Court. Section 66 of the Bill establishes the Children's Court as a specialised court with a civil division, a protection division and a criminal division. It is worth noting that this court is to be presided over by a judge, and not a magistrate, as designated by the Chief Justice.<sup>100</sup> It is contended that hearings and sessions involving children will benefit from the experience of a judge as compared to that of a magistrate. The civil division of the Court will have exclusive jurisdiction to try any action entered under the Mauritian Civil Code for adoption, the sale of a minor's rights, the appointment of a guardian and sub-guardian, the search for maternity and paternity as well as any other civil action as the Chief Justice may direct.<sup>101</sup>

The protection division of the Court will have exclusive jurisdiction to try any application under Part III of the Bill<sup>102</sup> which concerns children in need of care and protection.<sup>103</sup> Specifically for this division, the Chief Justice has the power to designate one or more magistrate of the intermediate court to exercise jurisdiction.<sup>104</sup> As for the criminal division of the Court, it will have exclusive jurisdiction to try (i) in the case of a child victim, prescribed offences committed on the child;<sup>105</sup> (ii) in the case of a child witness, cases where a child is a witness as per section 75(1)(b) of the Bill; and (iii) in the case of a juvenile offence, any criminal offence committed by the child.<sup>106</sup> The setting up of the Children's Court addresses the gap of a lack of specialised judicial mechanisms for children's rights. Previously, cases involving children, both civil and criminal, were heard by either district courts or the intermediate court or the Supreme Court depending on the nature of the matter. None of these courts is specialised in hearing children's rights-related matters and the magistrates or judges are

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99 UN CRC Concluding Observations (n 51) para 70.

100 Sec 70.

101 Sec 69.

102 Sec 72.

103 These include the assessment order, emergency protection order, placement order, ancillary order, long-term care order, contact order and mentoring order.

104 Sec 73.

105 Sec 75(1)(a).

106 Sec 75(1)(c).

not necessarily trained to deal with children's rights-related cases. It should also be highlighted that the CPA had no provisions regarding a children's court.

## 5.2 Proceedings before the Children's Court

The Bill has explicitly highlighted the need of a child-friendly environment by prescribing how any court proceedings involving a child are to be conducted.<sup>107</sup> First, proceedings should be conducted in a language which is simple and comprehensible to the child by taking into account the age and level of maturity of the child. Second, proper arrangements must be made in the courtroom to hear the evidence of a child and for the child to be accompanied by a parent.<sup>108</sup> Third, there is a legal obligation on a court to ensure that during the proceedings, no person treats a child in a manner that is disrespectful of the child's dignity, taking into account the child's personal situation and immediate and special needs, age, gender, disability and level of maturity.<sup>109</sup> Fourth, there is also a provision that prohibits a court from requiring a child to give evidence against his will or without the knowledge of any of his parents. Fifth, section 79(3) of the Bill provides that every court shall ensure that a child is treated in a caring and sensitive manner which is respectful of his dignity throughout the proceedings by considering the personal situation and immediate and special needs of the child. The CPA contained no provisions regarding proceedings in court for children's matters, especially with regard to the friendly and accommodating environment that a children's court should have. This, therefore, may be considered a very significant upgrade in the system of administration of justice for children.

## 6 Conclusion and the way forward

If passed into law, the Children's Bill undoubtedly will enhance the legal and normative framework governing the rights of the child in Mauritius. As discussed above, several aspects of children's rights have been aligned with international standards following recommendations by the CRC Committee. Going forward, however, some changes still need to be effected to the existing legal architecture on children's rights in Mauritius to justify and render more effective the significant and positive changes that the Children's Bill will bring. First, it is essential for the state of Mauritius

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107 Sec 79.

108 Sec 79(1)(b).

109 Sec 79(2).

to domesticate both CRC and the African Children's Charter, taking into account the status of the country's dualist legal tradition where domestication is compulsory for international legal instruments to have legal effect domestically. Domestication will further bolster the legal framework on children's rights given that it will present the possibility to argue child-related cases using both the Children's Bill and CRC and international children's rights instruments in a complementary manner.

While the establishment of a Children's Court is a positive step, it is necessary to have judges and magistrates who are well-versed and trained in children's rights matters. Therefore, intensive training and education of judges and magistrates as well as legal practitioners are mandatory. They must become highly conversant with the UN and the African Union (AU) systems on children's rights to be able to draw inspiration from these while interpreting and adjudicating domestic cases that concern children's rights. Civil society organisations also have a crucial role to play especially in disseminating the Children's Bill. They need to ensure that the new law with all its novel provisions is widely introduced and utilised around the country by stakeholders working in the field of children's rights. They should also ensure that the available mechanisms under the African Children's Charter, such as shadow reporting and the submission of complaints to the African Children's Committee, are fully and effectively utilised.

With the implementation of the recommendations made above, children's rights in Mauritius will be effectively respected, promoted, protected and fulfilled. At the same time, parents, teachers and society need to cultivate the correct mentality and attitude to raising and dealing with children. Only then will the law be able to effectively protect the Mauritian child.