

Analysing Provisional Charges in the Mauritian Criminal Justice System



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ABSTRACT: This research paper examines the role of the provisional charge practice within the criminal procedure of Mauritius and its impact on the overall criminal justice process, with a focus on arbitrary arrests and violations of the Right to Liberty. It also conducts a comparative analysis of similar practices in the United Kingdom, France and South Africa. The study finds that the issues associated with the provisional charge in Mauritius are prevalent in the selected countries, highlighting the importance of police involvement in the charging process. The study concludes that even jurisdictions with strong legal frameworks can experience abuses of power and violations of the Right to Liberty, emphasizing the need for integrity and safeguards within the criminal justice system.

KEYWORDS: Provisional Charge, Right to Liberty, Constitutional Rights, Inhuman Treatment, Human Rights, Police and Criminal Evidence Act 1984

INTRODUCTION

“It is better to risk saving a guilty person than to condemn an innocent one.” (Voltaire)

This quote serves as a perpetual reminder of the necessity for a system that safeguards the rights of the innocent and reinstates justice in instances of rule and regulation violations.

The introductory part of this paper focusses on the central problem and objectives of the paper, providing background and context on the utilisation of the provisional charge within the criminal procedure of Mauritius. Special attention is given to crucial terminology that will be utilised throughout the study, allowing for a comprehensive understanding of the objectives, purpose, and issues surrounding the potential misuse of the provisional charge in Mauritius. The primary goal of this paper is to analyse the patterns and trends in criminal procedures in other countries, with a particular focus on the potential connection between the provisional charge and arbitrary arrests, detention, violation of the right to liberty, non-compliance with the rule of law, police abuse of power, and malpractices in the pre-charging investigation process. The research aims to investigate various criminal proceedings worldwide that may be relevant to the use of the provisional charge by the Mauritian Police Force, with the intention of expanding the existing theoretical knowledge to address and clarify the research problem.

BACKGROUND OF THE STUDY

Mauritius has inherited both the criminal procedure and institutional and political aspects of the British legal system. The country currently faces challenges such as arbitrary arrests, illegal detention, failure to provide reasons for arrest, quashing of provisional charges prior to trial, and post-arrest police investigations. These challenges have long been associated with the use of provisional charges in Mauritius, leading to concerns raised by high-profile individuals like the Director of Public Prosecutions, Satyajit Boolell, who highlighted the inadequate judicial control and potential for abuse of provisional charges. (Boolell 2015)

One major issue with the provisional charge system is the lack of a legal framework governing its use, despite its survival and acceptance within the Mauritian criminal justice system. To address these problems, it is crucial for Mauritius to establish appropriate rules, procedures, principles, and mechanisms to prevent arbitrary and unlawful arrests, as well as the initiation of police investigations following arrest and the laying of provisional charges. Additionally, the criminal procedure that regulates police powers must protect the rights of suspects, particularly regarding the right to liberty, and provide adequate safeguards during police investigations and the charging process.

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RESEARCH PROBLEM

The Mauritian criminal justice system grapples with procedural non-compliance by the police and the misuse of provisional charges, which pose significant challenges. Police officers, as the vanguards of the criminal procedure process, risk discrediting themselves, the law, and the state when they abuse their authority concerning provisional charges. Thus, it becomes paramount for law enforcement agencies to reinforce respect for the criminal justice system and the rule of law, as the abuse of police powers undermines these fundamental goals. An essential question arises: Are the grounds for arrest and the application of provisional charges justified by law? While the provisional charge is not explicitly mentioned in Mauritian law, the powers of arrest are governed by the District and Intermediate Courts Act. Section 22 of this Act permits police officers to arrest individuals without a warrant in various cases, including reasonable charges of crime or dangerous wounds. Section 12 of The Police Act further empowers police officers to arrest individuals when their identity is not immediately ascertainable. Section 13F of The Police Act allows police officers to arrest those suspected of posing threats to public safety or order. In the *Dahoo v. State & Commissioner of Police* case, the Supreme Court clarified that an arrest could be deemed unlawful, even if within the scope of police powers, if there has been an improper exercise of those powers. The Constitution of Mauritius plays a crucial role in overseeing criminal procedures and protecting the rights of suspects upon arrest. Article 7 of the Constitution safeguards personal liberty, except in cases of "reasonable suspicion of having committed or being about to commit a criminal offense." Regrettably, this constitutional provision is sometimes disregarded when detentions lack valid and legal justification.

The compromise of the Right to Personal Liberty in the Mauritian criminal justice system is closely linked to the failure of the police to adhere to legal procedures during the initial stages of criminal investigations. This study highlights that the misuse of the provisional charge, originally intended as a tool for judicial control of suspects, is a major factor contributing to the potential abuse of power by the police. Such misuse can lead to arbitrary and unlawful arrests, which constitute the primary focus of this research.

PURPOSE AND AIMS OF THE RESEARCH

The primary objective of this research is to conduct a comparative analysis of Mauritian legislation in relation to the criminal procedure of other jurisdictions. The goal is to identify similarities between Mauritius' controversial provisional charge system and deficiencies within the criminal justice systems of other countries. To achieve this, three countries, namely the United Kingdom, France and South Africa, have been selected for comparative research due to their adherence to common law and civil law traditions. The study also aims to review existing literature on the provisional charge, examining its historical use, application, and the controversies surrounding it. This research underscores how the use of the provisional charge is entangled within a procedural system that leads to arbitrary arrests and a disregard for the rule of law. Additionally, the comparative report reveals that, despite differences in criminal procedures and issues other than the provisional charge, the outcomes in those countries are similar to those in Mauritius. The overarching goal of the research is to discuss, analyse, and compare Mauritian legislation and policies related to the power of arrest and the use of provisional charges in the investigative process. Through critical analysis and a review of past and present reports, the research aims to identify any legislative shortcomings and contribute to the existing body of knowledge on the provisional charge. The comparative analysis will be conducted at both the national and international levels in conjunction with the mentioned countries.

Conducting this analysis holds significant importance as it seeks to determine the alignment of existing police legislation concerning arrest powers and grounds, along with the absence of legislation governing the use of provisional charges, with the provisions of the Constitution of Mauritius and international legal norms and best practices. The key challenge in achieving an efficient criminal procedure system lies in the longstanding practice of the police using provisional charges without conducting thorough investigations. Furthermore, this paper also addresses the potential impediments within the Mauritian Police Force's internal organization, which may hinder the effective enforcement of law and order.

PROBLEM STATEMENT, RESEARCH QUESTIONS

Numerous legal scholars and legal practitioners have highlighted a departure from the original purpose of the provisional charge, which was intended to be used provisionally by the police to establish judicial control over an investigation. In contemporary practice, it is contended that a mere allegation from a third party is adequate to warrant the arrest of an individual and the laying of a provisional charge against them. This practice has drawn significant criticism, primarily due to its potential to facilitate police abuse of power and the fact that charging an individual, even provisionally, without a prior investigation, runs counter to the principles of the rule of law.

This paper critically examines the consequences of the absence of a legal framework governing the use of the provisional charge and seeks to ascertain whether the Mauritius Police Force requires updated and modernized legislation. To achieve these research objectives, the study poses the following research questions:

- How has the provisional charge system become integrated into police investigations?
- What is the relationship between the provisional charge and the powers of arrest?
- Does the provisional charge system infringe upon human rights and result in arbitrary arrests?

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Consequently, this research aims to shed light on the deficiencies within the provisional charge practice. By comparing the provisional charge system in Mauritius with the criminal procedure and prosecution processes of other jurisdictions, similarities and differences can be identified. This, in turn, will serve as a valuable guide to develop ideas and findings for enhancing the Mauritian system, ultimately promoting justice and respecting individuals' rights.

METHODOLOGY

The methodology for this research emphasises the importance of comparative analysis in gaining a deeper understanding of complex issues. Drawing on the quote, "Thinking without comparison is unthinkable. And, in the absence of comparison, so is all scientific thought and scientific research," the research adopts a comparative approach as a widely-used technique in the social sciences. Comparative analysis serves as a method for identifying patterns and differences, enabling researchers to better comprehend the causal processes underlying events. It helps to elucidate the various variables related to the research subject, particularly in the context of globalization and technological advancements.

This research underscores the value of comparative analysis at different levels, be it regional, national, or across broader geographical boundaries. It facilitates the examination of specific subjects within distinct environments, allowing for the analysis of continuity and change, ultimately deepening the understanding of the topic at hand.

The primary focus of this methodology is to employ comparative analysis to enhance the understanding of the Provisional Charge, a system unique to Mauritius. While it may seem incomparable on the surface, the process of gathering evidence before formally charging an individual is a fundamental step in democracies to safeguard constitutional rights. Although this practice is present in all democratic countries, the charging and prosecution process can vary based on the legal framework. The fundamental principle of upholding individual rights and preventing abuses of power is consistent worldwide.

The comparative analysis will be instrumental in assessing the impact of the Provisional Charge on the Criminal Procedure and its implications for the Right to Liberty. By examining the criminal procedures of the UK, France and South Africa, this research aims to create a frame of reference for evaluating the Provisional Charge. The findings from each country will be compared to the Mauritian system, revealing both similarities and differences. This comparative approach will aid in comprehending every aspect of the Provisional Charge, identifying its shortcomings, and drawing insights from other countries for potential improvements.

Ultimately, this methodology anticipates that the comparative analysis will lead to valuable conclusions and recommendations regarding the Provisional Charge system.

LITERATURE REVIEW

The provisional charge, a practice with historical roots dating back to British colonization in Mauritius, lacks specific legislation or a defined description within the Constitution. This chapter serves as the foundational explanation of the provisional charge's role in the criminal justice system, relying on excerpts from court cases. It provides an overview of the constitutional and legislative framework relevant to this practice, outlining the relationships between different phases of the criminal procedure, starting with arrests, investigations, charging, and prosecution. The Mauritius Police Force's role is extensively discussed, being central to the ongoing debate regarding the efficiency of the provisional charge.

The negative public perception of the provisional charge system is highlighted, with concerns that it presumes the suspect's guilt without concrete evidence. Additionally, while the provisional charge lacks extensive documentation in Mauritius, reports and newsletters have offered valuable insights into its presence within the Mauritian Criminal Justice system. As such, this chapter forms the bedrock of the research.

THE PROVISIONAL CHARGE AND THE ROLE OF THE POLICE

The provisional charge in Mauritius is a process that has been in existence since British colonial rule, originally derived from a repealed ordinance in 1852. This practice is fundamental in bringing a suspect before the court. However, it is noteworthy that neither legislation nor the Constitution provides an exact definition of the provisional charge system.

In the case of *Mootoosamy V Queen*, the court emphasized that the distinctive feature of the provisional charge is to bring a suspect before the court, offering judicial control over the individual. Another case, *DPP v IOIB and Ajay Shanto*, detailed that a provisional information is entered when a suspect is arrested or taken into custody, enabling judicial supervision and control over the detainee. No trial occurs during this stage, and evidence is not required to be presented. If evidence is necessary, the provisional information is struck out, and formal charges are filed.

The case of *Director of Public Prosecutions v. Indian Ocean International Bank* uses a similar rationale to illustrate the provisional charge system. Furthermore, the case of *Alain Gordon-Gentil and others v State of Mauritius* establishes that the provisional information is a mechanism to inform the court of the reason for an individual's arrest. It can only relate to offenses recognized by the law, not arbitrary acts.

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Jugnauth P K v The Secretary to the Cabinet and Head of the Civil Service Affairs & Co. clarifies that the provisional charge is a preliminary stage where the prosecution conducts investigations and has not decided regarding filing criminal charges. The provisional charge does not determine issues of guilt, and the accused does not face the risk of conviction or sentencing at this stage. The State v. Bundhun characterizes the provisional charge as an indication of the offense a person is suspected of, typically filed early in an inquiry when the investigation is in its initial stages.

Despite its role in the investigative process, Mauritius lacks specific laws regulating police investigations and the use of the provisional charge. An opinion paper published by the Law Reform Commission of Mauritius proposed the introduction of a Police Criminal and Evidence Bill, which could provide an avenue for reviewing and updating rules of evidence, based primarily on common law. This reform is expected to improve the respect for the Right to Liberty.

However, the provisional charge system can give the impression that the police are infringing on an individual's liberty to buy time for their investigation. It's important to note that, after the Right to Life, the Right to Personal Freedom is a fundamental right guaranteed by Section 5 of the Constitution. The research delves into the unique aspect of the provisional charge in the Mauritian judicial system, which has prompted calls for its abolition. Satyajit Boolell, the Director of Public Prosecutions (DPP), discussed provisional charges in the DPP's newsletter titled 'The Provisional Charge Conundrum'. The DPP expressed concerns shared among members of the Bar that judicial control is insufficient, and provisional charges are sometimes used as a pretext for arbitrary arrests and detentions. The absence of any mention of the provisional charge in Mauritian law raises questions about its fairness and potential violations of Section 5 of the Constitution, which safeguards the Right to Personal Liberty.

The "Mauritius 2020 Human Rights Report" by the American Government noted instances where police officers hindered suspects' access to their lawyers, potentially leading to prolonged detention without the lawyer's ability to examine the validity of the arrest, thereby risking violations of the Right to Liberty.

Despite the provisions in the Police Act 1974 granting officers the authority to make arrests, this should not serve as an excuse for circumventing the law. According to the DPP, the abolition of the provisional charge system would necessitate a change in police investigative approaches. They would be required to ensure the collection of strong and reasonable evidence before arresting a suspect and filing formal charges.

The practice of provisional charges is closely related to arbitrary arrests in Mauritius. The District and Intermediate Courts Act specifies conditions under which a police officer may arrest an individual, allowing for arrests without a warrant under certain circumstances. Similarly, the Police Act empowers police officers to arrest individuals when they have reason to suspect the commission or imminent commission of an offense that threatens public safety or public order.

In the case of Dahoo v. State & Commissioner of Police, the Supreme Court made an important observation that even if an arrest falls within the powers of the police, it can still be deemed unlawful if there has been an improper exercise of those powers. This implies that the provisional charge system can potentially lead to mistakes and abuses of power.

The Mauritius 2020 Human Rights Report highlights arbitrary detentions and arrests as significant human rights issues. An example cited in the report involves the arrest of at least seven citizens for criticizing the government. The State Department also documented the arrest of a social activist in September 2020 after he organized a demonstration against the government, allegedly due to a bounced check.

However, it is worth noting that Section 5 of the Constitution of Mauritius provides for compensation in cases of illegal detention, offering some safeguards for individuals subjected to such actions.

The provisional charge, as previously discussed, is a longstanding and integral practice within the Mauritian Criminal Procedure. This chapter primarily focuses on the roles and authorities of the Mauritius Police Force. The significance of the provisional charge lies in its close connection to the efficacy of every phase of the Mauritian criminal justice system. In essence, if the process fails to adhere to the grounds of arrest or if investigations are not carried out correctly, it can result in arbitrary arrests and a breach of Section 5 of the Constitution.

COMPARISON WITH THE UNITED KINGDOM (UK), FRANCE AND SOUTH AFRICA

UNITED KINGDOM

The first comparative analysis takes us to the United Kingdom, the source of influence for the Mauritian legal system. While the provisional charge system is a legacy of British colonization, it remains exclusive to Mauritius. In the United Kingdom, the criminal procedure is governed by the Police and Criminal Evidence Act (PACE), a comprehensive legislation that outlines the conditions for police officers to make arrests and file charges based on the nature of the offense. This chapter offers an overview of the structure of the British criminal procedure, with PACE serving as the cornerstone of the British criminal justice system.

POLICE AND CRIMINAL EVIDENCE ACT (PACE)

The Police and Criminal Evidence Act (PACE) in the United Kingdom was enacted following the recommendations of the Royal Commission on criminal procedures. This consultative paper raised concerns about the accountability and responsibilities of the

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police in the prosecution process, particularly in distinguishing between legal grounds for arrest and other justifications. The commission questioned the criteria for selecting offenses for arrest, highlighting the need for clarity in this regard. The commission also delved into the role and powers of the police in criminal investigations, emphasizing the coexistence of practice and the law. It stressed the importance of maintaining a balance between apprehending offenders and safeguarding citizens' fundamental rights. The commission expressed reservations about detaining individuals for interrogation when reasonable evidence was already available, prompting a call for the regulation of police powers in this context. Additionally, a second report by the Royal Commission on Criminal Justice underscored the importance of securing convictions for offenders and ensuring the acquittal of the innocent. The report scrutinized the police's approach to gathering evidence and reiterated the significance of reviewing police powers and conduct, particularly with a focus on protecting the rights of suspects. The report even contemplated the introduction of sanctions for poor police performance. Furthermore, the report emphasized the critical nature of the early stages of police investigations, as any flaws at this stage could lead to the deprivation of an innocent person's constitutional rights. The commission believed that a lack of alignment between law and practice would erode public confidence in the criminal justice system. After scrutinizing two reports calling for changes in police investigative practices, the United Kingdom introduced the Police and Criminal Evidence Bill (PACE). This legislative initiative aimed to reform the police force's image, gain public support, and foster better cooperation. William Whitelaw, a former home secretary, described PACE as a "hotch-potch of statute and common law." The Police and Criminal Evidence Act includes Section Code G, which addresses the code of practice for the statutory powers of arrest by police officers. This section outlines the circumstances under which an individual should be arrested based on reasonable evidence. It emphasizes that the power of arrest must be exercised fairly, responsibly, with respect for individuals suspected of committing offenses, and without unlawful discrimination. According to Code of Practice G, the exercise of the power of arrest must be fully justified and lawful. Section 24 of PACE specifies the two factors required for a lawful arrest. The O'Hara Principle, established in the case *O'Hara v. Chief Constable of the R.U.C* in 1996, reinforces the basis for obtaining reasonable evidence. It clarifies that a reasonable suspicion for an arrest need not be based solely on the arresting officer's own observations; it requires a genuine and reasonably based suspicion in the officer's mind. In the case *Parker v Chief Constable of Essex*, the court emphasized that the bar for reasonable cause to suspect, as set out in Section 24 of the PACE 1984 Act, is relatively low. The importance of obtaining reasonable grounds is reiterated in the Supreme Court, as demonstrated in the case *Dumbell v Roberts*, which stated that reasonable grounds are lower than a prima facie case and significantly less than the evidence required for a conviction. In *Hussien v Chong Fook Kam*, it was determined by the Court that "prima facie proof consists of admissible evidence, while suspicion may take account of matters that could not be put in evidence." (*Hussien v Chong Fook Kam*, 1970). Another relevant case, *DPP v Armstrong*, established that "The factors in the mind of the arresting officer fall to be considered cumulatively." (*DPP v Armstrong*, 1999). In *Raissi v. The Commissioner of Police of the Metropolis*, the Court addressed the lawfulness of an arrest. The Court emphasized that the sensitivity of the arresting officer's doubt goes beyond the power of arrest and has broader implications (*Raissi v. The Commissioner of Police of the Metropolis*, 2008). The role of the police is pivotal in the British criminal procedure. In the report by Sir Henry Fisher on the Confait case, it is acknowledged that the police's role is not only to seek sufficient evidence and grounds for charging a suspect but also to explore and reject all other alternatives (Fisher, 1977). In a research paper titled "Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search," Bowling and Philips observed that the disproportionate use of police powers negatively impacts the law-abiding population, leading to a loss of public support for and de-legitimization of the police (Bowling, 2007). Mylonaki and Burton discussed the effectiveness of PACE in the British system, arguing that "PACE is too reliant on self-regulation of police observation and supervision of the rules and lacks a redefinition of the regulation of investigative powers" (Mylonaki & Burton, 2010). However, the Police and Criminal Evidence Act (PACE) has not always had the desired effect on police operations. In a report by former judge Sir William Macpherson, criticisms were raised regarding the incompetence of some officers, leadership failures, and a lack of public trust (Macpherson, 1999). Former minister for policing, security, and community safety, Tony McNulty, emphasized the need to review the criminal justice system to ensure a proper balance favoring the law-abiding majority and victims, as well as effective punishment for offenders. The Rights to Liberty is a fundamental aspect of the criminal procedure in many democracies, protected by the Human Rights Act. A comparative study on "Human Rights in Criminal Procedure" emphasized that the prolonged detention of suspects for interrogation purposes could be seen as conflicting with Section 5 of the Human Rights Act. If detention lacks valid legal justification, it may lead to the release of the suspect on habeas corpus, as supported by the research findings.

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The study also pointed out that the UK lacks an administrative authority to counter-verify the justifications for detention, which raises concerns about the respect of suspects' liberty in police practices.

In conclusion, this chapter underscores the central role of the police in the criminal justice process and the need for balanced, adequate, and proportionate investigative powers to address lawbreakers. The Police and Criminal Evidence Act (PACE) is a cornerstone of the UK's criminal justice system, designed to ensure valid grounds for arrest and proper investigations. However, the chapter highlights that despite this strong regulatory framework, there are still flaws in the system that can lead to abuses of power and violations of the Rights to Liberty. Therefore, in the UK, even with a robust regulatory framework, there may still be vulnerabilities if the procedural process is not followed correctly.

FRANCE

The French criminal procedure features a distinctive role known as the examining magistrate (*juge d'instruction*), and it is this procedural aspect that sets the French system apart from others. Notably, the French system is characterized by the preliminary examination and the unique practice of interrogation by an individual who serves as both an investigator and a judge.

Furthermore, the French criminal procedure involves both judicial police authorities and administrative police (*Gendarmerie*), but the judicial police unit operates independently of the administrative police, with a more significant role in the criminal justice process compared to the Mauritian police.

In terms of safeguarding the Rights to Liberty, the French system also incorporates the role of a "*juge des libertés et de la détention*," who holds the final authority on provisional detention and may review and approve release requests not granted by the examining judge. Therefore, for the purposes of this research, the activities of these two institutions, the judicial police and the examining judge, and their interactions with each other, are particularly noteworthy.

THE EXAMINING MAGISTRATE AND THE JUDICIAL POLICE

In the French criminal system, the *juge d'instruction* plays a central role, particularly in complex and serious cases, with powers and duties outlined in Article 49 of the Code de Procédure Penal. For the most intricate offenses, a more thorough investigation may be initiated when the public prosecutor appoints an investigating judge as part of a judicial investigation. Notably, this judicial investigation, including the appointment of an investigating judge, is mandatory for crimes.

The investigating judge possesses extensive powers to carry out their duties effectively, including issuing detention and arrest warrants, granting bail, conducting searches and seizures at the residences of both the accused and third parties, ordering on-site visits to the scene of the crime, and seeking expert opinions.

The investigating judge can make various decisions, such as dismissing a case or referring it to the Public Prosecutor of the Court of Appeal, particularly when the offense is a crime. The French criminal trial is akin to a judicial inquiry, where the judge actively participates in the investigation and fact-finding process. Furthermore, it has been noted that the investigating magistrates have helped ensure that individuals in positions of political, economic, and media power are no longer exempt from criminal legal actions, thus advancing the principle of equality of citizens before the law.

In addition, the judicial police play a crucial role in supporting the investigating judge. This unit is distinct from the administrative police force, known as *la Gendarmerie*. This separation is essential as it divides the responsibilities of administrative powers from investigative powers to prevent potential abuses.

JUGE DES LIBERTES

In the French criminal system, the role of the *juge des libertés* is vital in safeguarding the fundamental Rights to Liberty and ensuring that it is not compromised by the examining judge. The *juge des libertés* has the authority to make determinations regarding the extension of pre-trial detention for a suspect and assess requests for release, thereby contributing significantly to the operational system of the judiciary while upholding the constitutional Rights to Liberty.

A notable case, *Consorts Baud*, involved a compensation claim filed by the family of a person who was fatally wounded during a police operation in Lyon. The administrative authorities challenged this decision before the *Conseil d'État*, contending that the death had occurred during a judicial police operation. This case highlights the distinction made between administrative police and judicial police.

However, the role of the examining magistrate has drawn criticism, and many legal experts advocate for the abolition of this system. Professor Laurent Kennes from the University of Bruxelles argues that the evolution of investigative systems has revealed the limitations of the examining magistrate system. He emphasises that for decades, the only changes made have been aimed at increasing control over the examining magistrate's work, attributing this to the judge's dual role as both judge and party.

In a legal review titled "*Les implications constitutionnelles de la suppression du juge d'instruction*" by Thomas Meindl, the impartiality of the examining judge is questioned. Meindl believes that the examining magistrate should be abolished because the fusion of investigative and jurisdictional powers in this magistrate is no longer acceptable. He argues that a magistrate overseeing an investigation cannot reasonably ensure the protection of the rights of the person under investigation.

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Another report by Professor Marie-Claude Beernaert and Doctor of Legal Science Laurent Kennes, titled "Du juge d'instruction vers le juge de l'enquête: le projet de réforme," underscores the importance of establishing equal rights and eliminating the ambiguous character of the examining magistrate. They emphasize the need to protect society from criminals while safeguarding the rights of the innocent. According to Beernaert and Kennes, the examining magistrate cannot provide all the necessary guarantees for impartial and independent judicial oversight of the investigation they are conducting.

The hybrid status of the examining magistrate in the French legal system has faced criticism from various quarters. The Criminal Justice and Human Rights Commission, led by Mireille Delmas-Marty, in their report on "La mise en état des affaires pénales," decried the role of the examining magistrate. Delmas-Marty argued that the very nature of investigations requires examining magistrates to build assumptions of guilt for some and innocence for others, highlighting the contentious nature of this role.

The relationship between the examining magistrate and the police is another aspect under scrutiny. In the report titled "Police, the Prosecutor and the Juge D'Instruction: Judicial Supervision in France, Theory and Practice," the author noted that the pretrial investigation system structurally and ideologically excludes defense personnel associated with suspects or accused individuals. This setup does not provide sufficient guarantees for protecting the rights of the accused, and it sees silence or refusal to confess as contrary to the investigation's objectives.

Cassamajor, a French magistrate, discusses the interaction between the police and the justice system in his book, "Le bras séculier: justice et police." He points out a relationship of dominance between the police and the judiciary, driven both by the law strengthening the judiciary's control over the police and the more active practices of investigating magistrates. Despite this adversarial relationship, Cassamajor believes that it is what allows these two institutions, the police and the judiciary, to function effectively as a system.

However, the French criminal procedure is not without flaws, and there have been cases that exposed loopholes in the system. For example, the case of Patrick Dils highlighted the issue of judicial errors stemming from poorly conducted judicial police investigations, which ultimately misled the examining judge. Another case, that of Loic Secher, resulted in his acquittal after 16 years in jail due to a false testimony in a rape case, further raising questions about the judicial system. The paradox lies in the fact that it is precisely these particular instances of judicial error that reveal the typical functioning of the judicial system.

This chapter highlights the distinctions between the French criminal justice system and those of Mauritius and the UK, primarily focusing on the role of the examining magistrate. The examining magistrate is an active participant in the investigation and fact-finding process, which is a notable feature of the French system. This dual function of the examining magistrate has sparked controversy, as it raises concerns about potential abuse of power. Conversely, the French system is perceived to have established a separation of powers within its criminal procedure, which could serve as a safeguard against abuse of power.

SOUTH AFRICA

The South African Criminal Justice system comprises six primary components, including the police, the prosecution service, presiding officers (magistrates or judges), the Department of Justice, the prison system, and probation officers. Despite having a legal framework governing criminal procedure in South Africa, issues related to Human Rights violations, unlawful detention, and challenges in enforcing the rights to criminal procedure, criminal law, evidence, and sentencing persist.

One noteworthy concern is the practice of arrest without a warrant, which is legally permitted in South Africa. This practice has raised apprehensions about the potential for abuse of power, resulting in arbitrary arrests and infringements on the Rights to Liberty. This chapter underscores the critical importance of maintaining a balance of power among the various actors in the South African criminal justice system to ensure its effectiveness.

THE ROLE OF SOUTH-AFRICA POLICE SERVICE

South Africa's criminal procedure is primarily governed by the Criminal Procedure Act, and it is further reinforced by the Bill of Rights, which serves to enhance the protection of the rights of the accused and the innocent in the criminal justice system. This legal framework plays a crucial role in criminal proceedings, particularly in the collection of evidence for the prosecution process.

In the case of *S v Van der Meyden*, the court established a fundamental principle, stating that in a criminal case, the burden of proof rests with the state. The state is required to prove the guilt of the accused beyond a reasonable doubt. Consequently, if there exists any reasonable possibility that the accused might be innocent, the accused is entitled to acquittal.

Furthermore, in the case of *R v Mlambo*, Malan JA articulated the concept of "proof beyond reasonable doubt." He emphasized that the prosecution's burden is to eliminate every hypothesis inconsistent with the accused's guilt and to demonstrate that no reasonable alternative exists that is consistent with the accused's innocence.

RIGHTS TO LIBERTY

In South Africa, the criminal justice system faces challenges related to the principle of arrest without a warrant, authorized by the Criminal Procedure Act, leading to concerns about the necessity, justifiability, and proportionality of arrest powers and potentially jeopardizing the Rights to Liberty. South African jurisprudence, such as the *Seria v Ministry of Safety Security* case, emphasizes

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the significance of the Rights to Liberty, with the court holding that compensation for unlawful detention should reflect society's values.

South African Common Law provides for the Right of not being unlawfully detained, known as "interdictum de libero homine exhibendo," which is analogous to the habeas corpus remedy and is designed to secure the release of individuals unlawfully detained and deprived of their Rights to Liberty.

South Africa's Constitution, specifically Section 35, stipulates that evidence obtained in violation of any right in the Bill of Rights must be excluded if its admission would render the trial unfair or prejudice the proper administration of justice. This serves as a deterrent to unlawful police conduct during pre-trial criminal procedures by rendering evidence obtained unlawfully inadmissible in court.

Moreover, the Constitution includes a test of the constitutionality of evidence gathered against a suspect, as outlined in Section 36, which provides a limitation clause that the police must adhere to for their actions to be considered constitutional. Factors such as the nature of an individual's rights, the importance of the limitation's purpose, the extent of the limitation, the relationship between the limitation and its purpose, and the availability of less restrictive means are considered in determining whether a limitation.

In a report from the South African Law Reform Commission, the National Director of Public Prosecutions expresses the view that the country's criminal justice system has reached a stage where it is no longer advisable to depend on traditional procedures. The commission's report raises several important questions, including whether there should be the implementation of a Code of Conduct to govern police interrogations, the necessity for improved criteria regarding the admissibility of evidence, and the need for appropriate amendments to the Criminal Procedure Act. These proposed changes and reforms reflect a growing recognition of the evolving demands and challenges faced by South Africa's criminal justice system.

The South African criminal procedure grapples with the challenge of striking a proper balance between police powers and individual rights. One contentious issue in this regard is the principle of arrest without a warrant, which has the potential to result in arbitrary arrests and a failure to adhere to the proper grounds for arrest. Therefore, it is crucial to maintain valid legal justifications for arrest, with the police being required to provide evidence supporting their decision. However, similar to the situation in Mauritius, the grounds for arrest in South Africa are subject to interpretation, which can lead to abuses of power.

Furthermore, despite South African legislation providing for the protection and respect of the Rights to Liberty, the criminal procedure is flawed, and individuals continue to be unlawfully detained. This highlights the need for reforms and improvements in the criminal justice system to ensure the proper protection of individual rights.

ANALYSIS

This section delves into the assessment and analysis of the criminal procedure systems in four countries: Mauritius, the United Kingdom, France, and South Africa. Each of these nations has established laws or constitutional provisions concerning police powers and grounds for arrests, as well as the protection of the Rights to Liberty. Moreover, all these jurisdictions have ratified and signed various Human Rights Conventions and protocols, enabling individuals to file complaints with bodies like the African Commission on Human and Peoples' Rights or the United Nations Human Rights Council. Consequently, these countries possess multiple regulatory tools governing their criminal justice systems. While these tools may vary from one jurisdiction to another, there are recurring patterns that connect them.

The focus of this section will be on the information gathered during the presentation of the processes in the other countries compared to the practice of provisional charge in Mauritius, which plays a central role in the criminal procedure. This chapter will be divided into two key areas of analysis. The first involves a comparison of the process leading to provisional charges with equivalent practices in other jurisdictions. The second area examines the impact of this process on the deprivation of the Rights to Liberty and issues of arbitrariness.

POWERS OF ARREST, INVESTIGATION, CHARGING A SUSPECT MAURITIUS

Mauritius has established legal provisions in the Police Act and the Constitution that grant the police the power to make arrests based on reasonable suspicion. However, the definition of "reasonable suspicion" in these laws is considered vague and lacking precision, which allows room for interpretation. This vagueness has led to a debate about the reliability and legality of police investigations and arrests, particularly in the context of the provisional charge practice, as highlighted in the problem statement.

As discussed in a previous chapter, the provisional charge practice in Mauritius is closely intertwined with the actions of the police. Repeated themes in this context include concerns about the abuse of power, the professionalism of the police force, their independence, and impartiality. The motivations behind police arrests are subject to scrutiny, raising questions about the validity of the grounds for arrests and the provisional charge process.

The criminal justice system in Mauritius faces several issues, including premature arrests with or without reasonable suspicion. This has led to a deviation from the original purpose of the provisional charge system, which was meant to be used when there was evidence to justify a judicial control during the investigation.

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While the District and Intermediate Courts Act provides procedures for arrests and charging suspects, the provisional charge is unique to Mauritius and is not explicitly mentioned in any updated legislation or the Constitution. This uniqueness makes it challenging to assess its legality and compare it to the charging process in other countries.

Arresting individuals based on reasonable suspicion and provisionally charging them before an investigation starts appears to be problematic. In most countries, the police must be able to justify arrests as soon as they are made. Even though the provisional charge may be struck out later, the suspect faces public opinion and reputational damage as if they had a formal charge.

Proponents of the provisional charge system argue that it allows for judicial control, but it also carries the risk of becoming a repressive tool in the hands of zealous or corrupt police officers, raising questions about its encouragement of lawful practices. Despite not being explicitly codified in laws, the provisional charge has endured over the years and has been accepted by all stakeholders in the criminal justice system.

It's notable that in complex cases, the decision to impose a provisional charge is made based on the advice of the Director of Public Prosecution and the police prosecution unit, despite their lack of legal expertise. These officers lack the ability to question the evidence gathered during the investigation, potentially leaving suspects vulnerable to unlawful arrests and police abuse.

However, the criminal justice system in Mauritius does offer a recourse for suspects through the judiciary, as they can present a motion to challenge the provisional charge. In many cases, the provisional charge has been struck out, demonstrating that the judicial process can serve as a means of achieving justice.

UNITED KINGDOM

In contrast to Mauritius, the British criminal procedure is primarily regulated by the Police and Criminal Evidence Act (PACE), serving as the core framework for powers and grounds of arrest and legal guidelines on detention. While analysing this law, a parallel pattern emerges concerning the grounds for arrests, where the term "reasonable grounds" essentially carries the same meaning as "reasonable suspicion." This lack of precise definition for the grounds of arrest can pose a risk to criminal investigations and potentially lead to unlawful arrests.

In contrast to Mauritius, PACE governs police investigations in the UK, offering specific guidelines and rules for officers to adhere to when gathering evidence before deciding on the charges to be filed. Additionally, the law holds the police accountable in case of non-compliance, aiming to prevent miscarriages of justice and bridge the gap between investigation and the court proceedings. These measures are designed to ensure the lawfulness and validity of arrests and charges filed.

One notable criticism of the UK's Criminal Procedure pertains to the extensive powers granted to the police through PACE. These amendments have raised concerns about the potential for abuse of power, paralleling the issues regarding the criminal procedure in Mauritius.

Regarding the efficiency of PACE, it may seem like an ideal framework for a criminal procedure. However, in the UK, numerous complaints have been filed in courts against the police or the state, alleging misconduct or unlawful arrests. The option of recourse to the judiciary in cases of unlawful grounds for arrests is available. According to the Home Office, in April 2021, 14,393 complaints were lodged against police officers in the UK, with 92% of cases resulting in no outcome. This raises questions about the integrity of the police, their training, and their capacity to conduct proper investigations, potentially posing a threat to the system.

In contrast to Mauritius, in the United Kingdom, sections of the Police and Criminal Evidence Act (PACE) are frequently revised and updated to address contemporary challenges. This proactive approach to legal reform ensures that the framework remains relevant and adaptable to modern-day issues, ultimately contributing to the reduction of miscarriages of justice and enhancing the overall effectiveness of the criminal justice system.

FRANCE

Similar to Mauritius, France has a distinctive criminal procedure that establishes a particular relationship between the judiciary and police investigations. However, when compared to Mauritius, the French police have a more administrative role and possess fewer powers related to prosecution. This distinction has given rise to the existence of both administrative police (La Gendarmerie) and judicial police, creating a form of separation of power. This separation ensures that power is not concentrated within a single entity, thereby helping to mitigate potential police abuses.

Nonetheless, this division of responsibilities between two sections of the police has raised concerns about lengthy procedures that may not always yield the truth. Questions regarding the effectiveness of this dual-function system have been legitimately expressed. Some argue that the allocation of two different functions to a single police case may be seen as inefficient and could lead to confusion.

One of the most controversial aspects of the French criminal procedure, as noted by Renaud Van Ruymbeke in his book "Le juge d'instruction," is the existence of the examining judge. Similar to the provisional charge system, there have been calls for the abolishment of the examining judge's role, deeming it outdated. The low rate of referrals to the examining judge is particularly striking, raising concerns about whether the criminal procedure can still function effectively without this position.

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Additionally, the competency of the judiciary to conduct investigations is a subject of question. While the separation of powers between administrative and judicial police is generally appreciated, the fact that the examining judge simultaneously acts as a judge and a party raises concerns about potential abuse of power. Consequently, the dual role of the examining magistrate has become a point of controversy, as it calls into question the capacity of a judge to conduct investigations. The extensive powers granted to these magistrates to fulfill their duties may also raise concerns about the potential for abuse of power.

Despite facing criticism regarding the roles of the judicial police and the examining magistrate, this process has demonstrated that the judicial police, in comparison to a regular Mauritian police unit, have more authority and empowerment during their investigations. This enhanced authority can help prevent miscarriages of justice. Additionally, the involvement of the judiciary in investigations, particularly in complex cases like money laundering, financial crimes, or corruption, instils confidence in the criminal procedure.

However, similar to Mauritius and its provisional charge practice, there is a call for a reform of the French criminal justice system by many. It's important to note that while reforms are sought, implementing changes that create uncertainties in judicial practices may potentially lead to miscarriages of justice during the trial phase.

SOUTH AFRICA

The South African criminal procedure features a prosecuting body known as the National Prosecuting Authority, which bears close resemblance to the Director of Public Prosecution in Mauritius. The NPA's role includes determining the procedures to be followed, particularly in complex cases. Charging decisions made by the National Prosecuting Authority help ensure the lawfulness of arrests and detention based on a legal foundation.

Furthermore, the National Prosecuting Authority serves as a crucial link between the police and the court in the South African criminal justice system. Given their significant prosecutorial powers, it is essential that they maintain impartiality.

A challenge within the South African model is the non-prosecution of high-profile cases, which tarnishes the reputation of the National Prosecuting Authority and raises questions about its commitment to treating all cases equally. This situation erodes public confidence and invites criticism regarding the institution's independence.

It is worth noting that, even in cases involving high-profile individuals, public opinion should not be the sole determinant of whether the NPA proceeds with prosecution. Justice should not be rushed to align with public sentiment.

Another critical aspect of the South African criminal procedure is the grounds and powers of arrest. Similar to Mauritius, the term "reasonable doubts" is considered too vague and imprecise. What may appear reasonable to one person may not be deemed as such by another, leaving room for varying interpretations.

Additionally, neither the South African Police nor the Mauritian Police Force have a defined code of conduct enshrined in legislation for the investigative process. The absence of a clear guideline may complicate the stages leading up to the involvement of the NPA and raise concerns about the lawfulness of arrests. Moreover, the lack of a code of conduct for the police may potentially lead to the abuse of power and mismanagement during their investigative process, referred to as the police docket.

DEPRIVATION OF RIGHTS TO LIBERTY-ARBITRARY ARRESTS

MAURITIUS

The protection of the Rights to Liberty in Mauritius is guaranteed by Section 5 of the Constitution. This means that any deprivation of the Rights to Liberty is considered a violation of the law unless it is authorized by the law, typically through an arrest.

In Mauritius, the practice of arresting individuals before investigating and provisionally charging suspects prior to the gathering of evidence could be deemed as potentially unlawful and a violation of human rights, particularly the Right to Liberty. This situation is exacerbated by the lack of legal regulation governing the Mauritius Police Force's investigative procedures, which may contribute to illegal detentions, arbitrary arrests, and wrongful deprivation of human rights.

However, there is a safeguard at the court level, where judges at the Bail and Remand Court determine whether bail should be granted or denied, effectively deciding whether an individual should continue to be deprived of their Right to Liberty.

Furthermore, the prolonged pre-trial detention of suspects in Mauritius, whether they are facing a provisional charge or not, may be viewed as illegal and a violation of the Rights to Liberty. The practice of police having the authority to arrest and detain suspects for up to 24 hours without filing charges, and in some cases, up to 36 hours incommunicado in drug or terrorist cases, can be perceived as a deprivation of liberty when individuals are not informed about the reasons for their detention.

Additionally, the fact that one in three cases of provisional charges is struck out in court suggests that some individuals may be unlawfully detained and deprived of their Rights to Liberty. Furthermore, depriving someone of their Rights to Liberty when provisional charges do not lead to convictions could result in illegal detention, indicating that the initial judicial control exercised by the police was unlawful.

In Mauritius, the primary recourse for an individual who feels aggrieved due to a potentially unlawful detention is to invoke the principle of habeas corpus. Therefore, the behaviour and professional conduct of the police play a pivotal role in determining whether a detention is lawful or if a suspect is being unjustly deprived of their fundamental Rights to Liberty.

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UNITED KINGDOM (UK)

Similar to Mauritius, the United Kingdom's laws also provide protection for the Rights to Liberty, which is enshrined in Article 5 of the Human Rights Act. This protection is reinforced by the Police and Criminal Evidence Act (PACE), which ensures that evidence is gathered in a manner that facilitates lawful arrests. Consequently, there is a reduced likelihood of innocent individuals being wrongfully convicted, as the police are obligated to release suspects when no reasonable evidence is found.

However, it has been observed that granting excessive power to the police can pose a threat to the deprivation of the Rights to Liberty, as an abuse of power could lead to arbitrary arrests. As mentioned earlier, PACE does not guarantee that the correct procedures are always followed, thus potentially undermining lawful detention and respect for the Rights to Liberty.

Another crucial aspect of the British criminal procedure is the existence of the PACE clock, which regulates the duration of detention without charging a suspect. Similar to Mauritius, the UK police can detain individuals for over 24 hours without filing charges, and this period can extend to 36 hours with the authorization of the court. Detaining a suspect for an extended period, without reasonable grounds, can be perceived as a violation of the Rights to Liberty if the suspect is not guilty.

Furthermore, the United Kingdom stands as the only country in Europe without a time limit regarding immigration detention. This may potentially infringe upon Article 5 of the Human Rights Act unless it is authorized by a judge. The principle of the law being equitable for all individuals, including migrants, is underscored. According to the National Statistics of the UK, 24,497 immigrants were detained in 2021, representing a 65% increase from 2020.

Individuals, regardless of their nationality, should be granted a fair trial and the right to provide an explanation following their arrest. It is essential that the police do not treat individuals differently based on their nationality, as such differential treatment could be seen as a form of discrimination, which violates fundamental human rights principles that protect against such discrimination.

Furthermore, the role of the police in the early stages of an investigation is of utmost importance. They must be capable of demonstrating that a detention is lawful. In the absence of a proper safeguard mechanism, there is a risk that innocent individuals may become ensnared by the legal system and unlawfully detained.

FRANCE

In France, much like in Mauritius, the Rights to Liberty is safeguarded as a constitutional right. This protection is reinforced through the responsibilities of the liberties and custody judge, who is entrusted with ensuring that no one is arbitrarily and unlawfully deprived of this right.

While in Mauritius, the provisional charge may be considered a means of exercising judicial control over a suspect, in the French judicial system, the proportionality of such control is assessed by the liberties and custody judge. However, it's worth noting that this magistrate steps in after detention has already been determined by a judge following a judicial inquiry. A more efficient system to prevent the violation of this constitutional right might have been established if the liberties and custody judge could collaborate with the prosecutor or examining magistrate from the outset.

When the liberties and custody judge identify detention as unlawful, it implies that an error was made at the early stages of the investigation, highlighting that the French criminal procedure is not immune to instances of police abuse of power.

Nevertheless, the role of the liberties and custody judge remains pivotal in the French criminal justice system, serving as a safeguard to protect against the violation of the Rights to Liberty and to prevent arbitrary arrests.

SOUTH AFRICA

In South Africa, the protection of the Rights to Liberty is guaranteed by the Bill of Rights. Similarly, to Mauritius, where the misuse of provisional charges can result in the deprivation of an individual's Rights to Liberty, in South Africa, the practice of arresting without a warrant often leads to unlawful detention and highlights concerns about the abuse of police power.

Both in South Africa and Mauritius, there is a significant gap between the point of arrest and the trial process. Many arrests do not culminate in trials or convictions; instead, individuals experience prolonged detention, which can later be deemed unlawful if the correct arrest procedures have not been followed or if there were no reasonable grounds for arrest. This pattern, where individuals are unfairly deprived of their Rights to Liberty during the period between arrest and trial, is observable in both the South African and Mauritian criminal justice systems.

Furthermore, South Africa places particular emphasis on assessing the practice of arrest without a warrant to determine the extent to which it may violate an individual's Rights to Liberty. This is akin to Mauritius, where the misuse and abuse of "arrest without warrant" can result in arbitrary arrests and concerns about the violation of this fundamental right.

CONCLUSION

Mauritius, the UK, France, and South Africa all maintain robust legal frameworks that bestow police with the authority to make arrests, while their respective constitutional and legal provisions protect the Rights to Liberty. However, disparities emerge among these jurisdictions concerning their distinct criminal justice procedures. This divergence encompasses the entire process, commencing with arrest, transitioning through investigation, suspect charging, and culminating in prosecution.

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Each country's criminal justice procedure exhibits a blend of advantages and shortcomings, including concerns related to police abuse of power, the grounds for arrest, and detention. As deduced from the prior analysis, an excessive delegation of power to law enforcement or the prosecuting body, without adequate safeguards, can pose a significant risk and potentially lead to violations of the Rights to Liberty. Moreover, the mere presence of specific laws governing arrests, investigations, prosecutions, or detentions does not guarantee the lawful execution of an arrest. Thus, the critical imperative lies in establishing an appropriate balance of power throughout the criminal justice procedure and ensuring the good faith of all parties involved in the process.

RECOMMENDATION

This section serves as a synthesis of the significant findings and recommendations derived from the comprehensive analysis of the provisional charge's role in the criminal justice process in Mauritius, in conjunction with the assessment of the criminal procedure systems in the UK, France, and South Africa, where notable similarities and distinctions were contrasted with the provisional charge. The recommendations are categorized into two primary sections: the first section focuses on enhancing the powers and grounds of arrest, as well as the process of charging a suspect. The second section delineates key recommendations aimed at implementing corrective measures to prevent the violation of the Rights to Liberty and curbing arbitrary arrests. These recommendations have been informed by the lessons learned from the strengths and weaknesses observed in each of the jurisdictions studied, with the ultimate goal of enhancing the criminal justice process.

RECOMMENDATIONS FOR POWERS & GROUNDS OF ARREST AND CHARGING A SUSPECT

It is imperative to strengthen existing laws concerning arrests and detentions to ensure the protection of suspects' rights and prevent unlawful and arbitrary arrests, as evidenced by the analysis of the five jurisdictions. Well-defined legal frameworks serve to educate individuals about their rights and provide remedies in cases of power abuse and infringements of the Right to Liberty. Such legal amendments should be coupled with procedural safeguards that span from the early stages of an investigation to the eventual trial process.

Drawing inspiration from the British system, the introduction of the Police and Criminal Evidence Act (PACE) should be considered as a response to police power abuse and arbitrary arrests. PACE would provide a regulatory framework for police investigations and offer a clear definition of the grounds for arrest. Simultaneously, the provisional charge should be abolished to establish an effective process for charging a suspect.

The opinion paper by the Law Reform Commission on the introduction of a Police and Criminal Evidence bill highlights the potential benefits of such legislation, including improved use of provisional information, past convictions, and the enforcement of victims' rights, with provisions for providing full information to the Court and other parties in a criminal case and the ability to exclude unfair evidence.

To ensure a smooth transition, authorities should organize extensive awareness campaigns and provide training for all stakeholders involved in the Mauritian Criminal Procedure, including the public, police, judiciary, and the press. This could involve various methods such as news shows, campaigns in strategic locations, seminars, legal workshops, and consultations with Mauritian stakeholders and British legal experts experienced with PACE. Comprehensive training programs should be developed for stakeholders to facilitate the implementation of the new regulations, including enrolling in relevant courses and taking examinations. As observed in the examined jurisdictions, a police and criminal evidence Act alone may not prevent unlawful detention and arbitrary arrests if police officers are corrupt, biased, or unprofessional. Therefore, legal provisions should be coupled with sanctions for non-compliance. A clear code of conduct for police officers should be established, outlining grounds for arrest, detention and interrogation procedures, and holding officers accountable for any violations of these amendments through the enforcement of sanctions. This mechanism will serve as a fundamental aspect of a police officer's duty and act as a safeguard against power abuse. Another proposal is to establish a new criminal procedure scheme that enhances the Provisional Charge system to make it more effective while serving its intended purpose. One approach to achieve this improvement involves empowering the prosecuting organ, such as the Mauritian police prosecuting authority, to act as an investigative body for the judiciary. Their role would be to ensure that arrests are made based on reasonable grounds and that appropriate charges are filed. This setup is similar to the model in France, where the police focus on administrative work, and investigative responsibilities are transferred to their prosecution unit. By restricting the police to administrative tasks, this change could help prevent abuses of power and arbitrary arrests, especially in light of repeated criticism of the police in Mauritius.

The police prosecution unit would continue to use the provisional charge upon arrest. This would follow investigations conducted by specialized and trained officers who must use the most appropriate and lawful methods to achieve their objectives. This approach may enable the provisional charge system to be used more effectively and efficiently.

Additionally, the consideration of introducing an examining magistrate, as seen in France, should be explored. In complex cases requiring the independence and integrity of both the police and the judiciary, an examining magistrate, along with a special team, could be an ideal solution. This magistrate would ensure that the correct charges are filed and that the investigation is conducted on

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a legal basis. In the early stages of an investigation, the provisional charge could be retained to maintain judicial control over the suspect until the investigation is complete and formal charges can be pressed.

However, a significant criticism of the examining magistrate relates to the dual nature of their duties. Therefore, important safeguards need to be implemented to ensure that one duty does not compromise the other. In essence, the examining magistrate should act as a guarantee that both the investigation and prosecution will lead to the Court determining that the arrest was based on reasonable grounds and was lawful.

PROTECTION OF RIGHTS TO LIBERTY

The ability to arrest and provisionally charge an individual without investigation may raise concerns about the violation of the Rights to Liberty. To ensure that legislations and practices do not infringe upon these rights, it is crucial to establish best practices that reinforce human rights protections during an arrest. While law enforcement agencies and the judiciary have extensive powers to execute their roles effectively, safeguards should be implemented to ensure that these authorities act in a rational and proportionate manner concerning the Rights to Liberty. Consequently, a guideline should be developed alongside any amendments to the powers of arrest and prosecution. This guideline should encompass a set of measures for all stakeholders involved in the criminal justice system, holding them accountable in case of Rights to Liberty violations. Thus, a high degree of precaution regarding the protection of this human right should be observed at every stage of the process, beginning with the arrest of an individual. In essence, best practices should be adopted during the arrest stage and throughout police detention. Mandatory regular audits should be conducted to assess compliance with the established guidelines.

This approach would ensure that, without reasonable evidence, a suspect should not be deprived of their Rights to Liberty, except in specific circumstances already outlined in the law. Furthermore, for petty or minor offenses where provisional charges are involved, there should be alternatives to arrest and detention. For such cases, the police could issue a severe warning instead of detaining the individual, making detention the last resort, especially when suspects require judicial control pending trial.

In addition, Human Rights Desks should be established in all police stations to ensure that fundamental rights are respected and to encourage suspects to file complaints if they believe their basic rights have been violated or if they have been unlawfully detained. To raise awareness and improve practices that protect these rights, collaborative awareness programs involving all stakeholders in the criminal justice system should be launched. Both the public and everyone involved in the judicial system should be well-informed about their rights and freedoms. Training programs should also be established to enhance work practices that guarantee these rights.

Furthermore, since Mauritius is a party to the African Charter, it has an obligation to implement the Luanda Guidelines. These guidelines offer best practices for the conditions of arrest, police custody, and pre-trial detention in Africa. The Luanda Guidelines, adopted by the African Commission on Human and Peoples' Rights in 2014, outline the duty of states to ensure various rights, including the Rights to Life, Dignity, Equality, Security, a fair trial, and an independent judiciary for all individuals. Notably, these guidelines describe the process from the moment of arrest to trial, emphasizing the decisions and actions of the police, the role played by the judiciary, and the involvement of other actors in the criminal justice sector. This framework serves as a blueprint for African countries to prevent unlawful and arbitrary arrests.

The introduction of new amendments to legislation aimed at enhancing powers of arrest, investigation, and detention is vital for improving the criminal justice system. These changes can include refining or eliminating the provisional charge practice, enhancing grounds for arrests, and preventing violations of Rights to Liberty. However, the success of these amendments relies on more than just administrative modifications; they must be effectively implemented in practice. Without adequate preparation and training for the various stakeholders involved, the risk of continuing bad practices leading to unlawful arrests and violations of Rights to Liberty remains.

While many jurisdictions have successfully updated their legislations to enhance their criminal justice procedures, others have faltered in establishing necessary safeguards. This has created opportunities for abuse of power, arbitrary arrests, and infringements on basic human rights. Therefore, the overhaul of the process not only brings positive aspects but also introduces a different perspective, suggesting that these changes could potentially worsen the situation if not well-implemented and supported by essential guidelines.

In conclusion, it is not merely a matter of amending the law but also the responsibility of all stakeholders to fulfil the most crucial role: acting in good faith and embracing best practices in order to ensure the protection of fundamental human rights and the effectiveness of the criminal justice system.

AVENUES FOR RESEARCH

The Criminal Procedure is a multifaceted and intricate process, and additional research is necessary to identify other factors that affect powers and grounds of arrest, police investigations, and the safeguarding of the Rights to Liberty. Although this paper has established a connection between these critical processes and the use of the Provisional Charge, the full extent of the Provisional Charge's influence on the criminal procedure remains uncertain. Another significant concern within the criminal justice system is

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pre-trial detention. Future analyses of the Mauritian Criminal procedure could explore the extent of pre-trial detention's impact and its effects on the overall criminal justice process.

CONCLUDING REMARKS

This study has provided insights into different criminal procedure systems and the factors and stakeholders that influence them. In this comparative analysis, several critical factors have emerged as essential for the delivery of effective criminal justice. Key components include clear grounds for arrest, the establishment of a proper code of conduct for the police, and comprehensive training for all stakeholders on the appropriate use of the Provisional Charge practice and how to perform their roles effectively to safeguard fundamental human rights.

The study suggests that the Provisional Charge may not be the sole root cause of issues in the Mauritian Criminal Procedure. It is evident that abuse of power and violations of the Rights to Liberty are not unique to the Provisional Charge but are present in other countries like the UK, France, and South Africa.

Rather than focusing solely on the impact of the Provisional Charge, the government should collaborate with various organizations to create a more conducive environment for all stakeholders to carry out their duties effectively while ensuring that the rights of suspects are upheld and respected.

REFERENCES

Legislations

- 1) African Commission on Human and Peoples' Rights, African Commission on Human and Peoples' Rights Legal instruments, <https://www.achpr.org/legalinstruments/detail?id=49>. Accessed on 30 October 2022.
- 2) Art. 49, Code de procédure pénale (France)
- 3) Constitution of South Africa, 1996, s 36.
- 4) Constitution of South Africa, 1996.
- 5) Constitution of South Africa, s 35.
- 6) Constitution of Kenya, 2010.
- 7) Criminal Procedure Act 51 of 1977, s 49 (South Africa).
- 8) Criminal Procedure Act 51 of 1977 (South Africa).
- 9) Human Rights Act 1998, s 5 (UK).
- 10) Police and Criminal Evidence Act 1984, s 24 (UK).
- 11) Police and Criminal Evidence Act 1984, s 41 (UK).
- 12) Police and Criminal Evidence Act 1984 Code G (UK).
- 13) Police Act 1974 (Mauritius).
- 14) Persons deprived of liberty act 2014 (Kenya).
- 15) The Constitution 1968, s 5(5) (Mauritius).
- 16) The Constitution of Kenya, 2010.

Bibliography

- 1) Bowling, B., & Coretta, P. (2007). Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search. *Modern Law Review*, 70(6), 936 - 961.
- 2) Cassamayor, Le Bras Séculier: Justice et Police, (1960).
- 3) Coste, François-Louis. « Deux révisions. Les affaires Dils et Sécher », *Histoire de la justice*, vol. 30, no. 1, (2020).
- 4) Dave Opiyo And Caroline Wafula, Kenya: Police's Ability to Prosecute Cases Put to Question, Dec 2007, <https://allafrica.com/stories/200712270986.html>. Accessed on 30 October 2022.
- 5) Dido Madina Diana, Critical analysis of the development of prosecutorial independence, 2018, Strathmore University of Law.
- 6) H A P Fisher, Report of an inquiry into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait, Dec 1977, p 10.
- 7) Jacqueline Hodgson, Police, the Prosecutor and the Juge D'Instruction: Judicial Supervision in France, Theory and Practice, (2001). <https://www.ojp.gov/ncjrs/virtual-library/abstracts/police-prosecutor-and-juge-dinstruction-judicial-supervision-france>. Accessed on 30 October 2022.
- 8) Jennifer Brown, Police powers: detention and custody, (House of Commons Library 2021).
- 9) Justice Malala, High-profile criminal cases expose inequality in South Africa's justice system, (The Guardian, Nov 2014), <https://www.theguardian.com/world/2014/nov/04/south-africa-crime-oscar-pistorius-wealth-power>. Accessed on 30 October 2022.
- 10) Kennes, Laurent et Scalia, Damien. "Du juge d'instruction vers le juge de l'enquête. Analyse critique et de droit comparé."

Analysing Provisional Charges in the Mauritian Criminal Justice System

- 11) Law Reform Commission, Draft Police and criminal evidence bill, Opinion Paper, (March 2012).
- 12) Lucie Juvet Legrand, Socio-anthropologie de l'erreur judiciaire, (Mars 2010).
- 13) Martin Schönsteich, Introduction, Assessing the crime fighters The Ability of the Criminal Justice System to solve and Prosecute crime, (1999).
- 14) Meindl, Thomas. « Les implications constitutionnelles de la suppression du juge d'instruction », Revue de science criminelle et de droit pénal comparé, vol. 2, no. 2, (2010).
- 15) Migai Akech, Kenya: Justice sector and the rule of law, (March 2011).
- 16) Mireille Delmas-Marty - Serge Lasvignes, La mise en état des affaires pénales, (Janvier 1991).
- 17) Mukuha G, The role of police prosecutors in Kenya' Unpublished LLB Thesis, University of Nairobi., Nairobi, (1990).
- 18) Mylonaki, E., & Burton, T. (2010). A Critique of the Deficiencies in the Regulation of Contemporary Police Powers of Detention and Questioning in England and Wales. The Police Journal, 83(1), 61–79.
- 19) Oak Foundation, Uniting to stop indefinite detention in the UK (May 27, 2021), <https://oakfnd.org/uniting-to-stop-indefinite-detention-in-the-uk/>. Accessed on 30 October 2022.
- 20) Official Statistics, Police Misconduct, England and Wales year ending 31 March 2021, <https://www.gov.uk/government/statistics/police-misconduct-england-and-wales-year-ending-31-march-2021/police-misconduct-england-and-wales-year-ending-31-march-2021>. Accessed on 30 October 2022.
- 21) Pierre Lyon-Caen, Le juge d'instruction: La menace d'une repression (2010).
- 22) Renaud van Ruymbeke, Le juge d'instruction, (Presses Universitaires de France (PUF) 1988).
- 23) Satyajit Boolell, Provisional Charge Conundrum, E-Newsletter Dec 2015, Office of DPP.
- 24) Satyajit Boolell, Time to bring the Police and Criminal Justice Act, E-Newsletter May 2022.
- 25) Silvia Randazzo, Human Rights and Deprivation of Liberty in Kenya, (2016).



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