Note on the Judicial and Legal Provisions Act 2018 of Mauritius

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In May 2018, Mauritius adopted the Judicial and Legal Provisions Act 2018 (Act).[1] For the most part, the Act addresses various rules relating to the judicial process. However, a few provisions of the Act impose direct restrictions on freedom of expression. This Note analyses those provisions from the perspective of international law, and especially the guarantee of the right to freedom of expression.

Contempt in the face of Court

Section 3 of the Act amends the Courts Act by adding a new section 18D. Contempt in the face of Court. This provision makes it an offence wilfully to insult a judge, usher or officer of the Supreme Court during a sitting, wilfully to interrupt the proceedings of the Court or otherwise to misbehave in Court. When such an event happens, any usher or officer of the Court may take the person who is responsible into custody until the end of the sitting. Following that, the Court may commit the person to a period of up to seven days imprisonment or impose a fine of up to Rps. 25,000 (approximately USD 720).

From a substantive point of view, it is legitimate for courts to sanction those who interrupt their proceedings. Otherwise, courts could not function properly. It is also legitimate for courts to sanction those who "misbehave" in court, as long as this is interpreted in an appropriately narrow fashion to cover only actions which actually disrupt the court and/or undermine its ability to function in a normal fashion.

[1] Act No. 3 of 2018, 4 May 2018.

However, it is problematical to sanction individuals for insulting judges and especially ushers and officers. In many democracies, rules on what is sometimes called "scandalising the court" have effectively fallen into disuse due to senior courts having interpreted them extremely narrowly. The reason for this is that judges, and certainly ushers and officers, can use other legal tools, such as the law on defamation, to defend their reputations. In addition, as public officials, it is well established under international law that these individuals should tolerate a greater degree of criticism than ordinary citizens.

The UN Human Rights Committee set out a clear standard for this in its 2011 General Comment No. 34:

> Contempt of court proceedings relating to forms of expression may be tested against the public order (*ordre public*) ground. In order to comply with paragraph 3, such proceedings and the penalty imposed must be shown to be warranted in the exercise of a court's power to maintain orderly proceedings.[2]

In other words, it is only where statements threaten the orderly proceedings of courts that contempt powers of this sort may be used while other laws, notably defamation laws, should be used for the protection of reputation.

From a procedural point of view, it is reasonable to empower ushers and officers to detain those who are considered to have committed contempt, among other things to allow for orderly court proceedings to continue. In terms of a conviction under this provision and the imposition a sanction of imprisonment or fine, however, certain procedural protections are needed. First, the judge in whose court the incident occurred should not sit in judgment on the case because this would represent a conflict of interest. Second, in any proceeding the accused person has the right to a full defence and other criminal due protections, such as the presumption of innocence. Although this may be implied, it would be useful to make it explicit in the provision.

Outrage against public and religious morality

Section 5(a) of the Act replaces section 206 of the Criminal Code with a rule making it an offence, by any one of a number of modes of communication, to commit "any outrage against any religion, or against good morals or against public and religious morality". Specifically excluded from this are matters of opinion on religious questions, as long as they are expressed "decently". Although there are some minor changes, this is largely the same as the previous section 206 of the Criminal Code, albeit the penalties have been increased from one to two years' imprisonment and from Rps. 10,000 to 100,000 (approximately USD 300 to 3,000).

[2] General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, para. 31. Available in all six UN languages at: http://undocs.org/ccpr/c/gc/34.

This is essentially a broad form of blasphemy law. Once again, the UN Human Rights Committee has set a clear standard for this in its 2011 General Comment No. 34:

> Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.[3]

Article 20(2) of the international Covenant on Civil and Political Rights (ICCPR) deals with hate speech (see below), so the Committee is saying that while it is acceptable to prohibit incitement to hatred on the basis of religion it is not otherwise appropriate to limit criticism of religions or speech about religion which is merely offensive to others.

Section 5(a) is particularly problematical as a form of blasphemy law because it protects not only a religion, which is a reasonably defined set of values, but also good morals and public morality. The latter are not only undefined but also prohibiting speech which offends against them runs directly contrary to the whole idea of freedom of expression, which specifically protects the right to offend others, as the European Court of Human Rights made clear in one of its first cases on freedom of expression:

> [F]reedom of expression … is applicable not only to "information" or "ideas" that are favourably received … but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".[4]

Stirring up racial hatred

Section 5(b) of the Act replaces section 282 of the Criminal Code with a rule establishing the following as an offence:

> Any person who, with intent to stir up contempt or hatred against any section or part of any section of the public distinguished by race, caste, place of origin, political opinion, colour, creed or sex [disseminates content via one of a variety of modes of communication] which is threatening, abusive or insulting.

This is similar to the previous section 282 although "sex" has been added to the list of prohibited grounds, the means of communication have been amended and the penalties have been increased from ten to twenty years' imprisonment and from Rps. 25,000 to 100,000 (approximately USD 720 to 3,000).

Article 20(2) of the ICCPR addresses the issue of hate speech, stipulating:

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[3] *Ibid.*, para. 48.

[4] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49 (European Court of Human Rights).

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Section 5(b) has some of the attributes of Article 20(2), including a requirement of intent, reference to the idea of 'hatred' and some analogous prohibited grounds. However, it goes beyond Article 20(2) in the following problematical ways:

- It prohibits not only hatred but also contempt. While this is arguably a similar sort of emotion, it would be preferable to remain within the strict parameters of international law given the sensitivity of these sorts of restrictions on freedom of expression.
- It includes "political opinion" among the list of prohibited grounds. While some of the other prohibited grounds in section 5(b) also go beyond the strict parameters of the list in Article 20(2), they are at least analogous to the Article 20(2) grounds. Political opinion is different inasmuch as it is perfectly legitimate to hold strong feelings of opprobrium (hatred) against a political belief, whereas it is socially problematical in relation to the other grounds. Furthermore, protection of political speech, even where it is strongly worded and indeed unreasonable, is at the very heart of the democratic rationale for protecting freedom of expression. The risk of abuse of this provision is therefore high.
- It fails to require that the speech involved incites others to certain specific results, namely discrimination, violence or hostility. This is a key means within Article 20(2) of ensuring that the application of the rule is not overbroad or abusive.

Section 5(b) is also problematical inasmuch as it provides for wholly excessive sanctions for hate speech, namely a possible term of imprisonment of twenty years.

Recommendations:

- The reference to insulting a judge, usher or officer of the Supreme Court in the new section 18D of the Courts Act should be removed.
- In any proceeding under section 18D that might lead to a sanction of imprisonment or a fine being imposed, the accused person should benefit from full criminal due process protections. This should include, among other things, the right to have the case heard by a different judge than the one in whose court the incident under consideration occurred and the right to present a full defence.
- Section 206 of the Criminal Code should be repealed in its entirety.
- Section 282 of the Criminal Code should be substantially amended to bring it into line with Article 20(2) of the ICCPR, as outlined above.