



LAW REFORM COMMISSION

Issue Paper

Reform of Criminal Code

[November 2011]

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About the Commission

THE LAW REFORM COMMISSION OF MAURITIUS consists of –

- (a) a Chairperson, appointed by the Attorney-General;
- (b) a representative of the Judiciary appointed by the Chief Justice;
- (c) the Solicitor-General or his representative;
- (d) the Director of Public Prosecutions or his representative;
- (e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
- (f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
- (g) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
- (h) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
- (i) two members of the civil society, appointed by the Attorney-General.

Under the direction of the Chairperson, the Chief Executive Officer is responsible for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible for taking the minutes of all the proceedings of the Commission and is also responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission.

The Commission may appoint staff on such terms and conditions as it may determine and it may resort to the services of persons with suitable qualifications and experience as consultants to the Commission.

Executive Summary

Issue Paper «Reform of Criminal Code» [November 2011]

The Commission is reviewing of its own initiative the Criminal Code, which dates as far back as 1838, to determine whether it still reflects contemporary values.

In this Issue Paper, the evolution of the Criminal Code and the criminal law over the past two centuries is first examined. This is followed by a survey of developments in other jurisdictions. The guiding principles for the Criminal Law Reform process are then considered.

The review of the Criminal Code shall be carried out from an international and comparative perspective. Standards evolved by UN and other international bodies would have to be considered. The provisions of the Criminal Code would be compared with equivalent provisions in the French Penal Code, the Indian Penal Code, the Canadian Criminal Code and criminal codes/legislation in other jurisdictions, but careful consideration would have to be given to local conditions and culture before making any legal transplant. The characterization of criminal offences would have to be rethought and the impact of human rights on the design of the Criminal Code considered.

The consultation process would be as broad as possible. It would involve a wide range of criminal justice actors: police officers, judicial officers, lawyers, and civil society organizations.

(A) Introductory Note

1. The Commission is reviewing of its own initiative the Criminal Code, which dates as far back as 1838, to determine whether it still reflects contemporary values. In this Issue Paper, the context in which the Criminal Code was adopted and its evolution is first examined. This is followed by a survey of developments in other jurisdictions. The guiding principles for the Criminal Law Reform process are then considered.

(B) The Criminal Code of Mauritius and its Historical Development

2. Because of its history, Mauritius had originally inherited its laws from its two successive colonial administrators, France and England. The most important developments in the legal field, during the French colonial period (1715-1810), occurred in the last twenty years. While some of the Codes elaborated, during the Napoleonic era in France, were made to apply in the colony (the Civil Code, the Code of Civil Procedure, the Code de Commerce), the Penal Code of 1810 and the French 'Code d'Instruction Criminelle' of 1808 were not promulgated during French rule. As far back as 1791 a penal code was elaborated, which was enacted by the 'Assemblée Coloniale' on 7 August 1793.¹ On that same day, the Colonial Assembly promulgated the 1789 French 'Déclaration des Droits de l'Homme et du Citoyen' (Declaration of the Rights of Man and the Citizen).²

¹ M. Lavoipierre, "L'Evolution du Droit Pénal Mauricien" in *Études de Droit Privé Français et Mauricien, Annales de la Faculté de Droit d'Aix-en-Provence*, T. 57 (1969) 127 at 128. *Vide* also L.E. Venchard, "L'Évolution du Droit Pénal Mauricien", in *Codes Annotés de l'Île Maurice* (1994), Vol. I, at p. X.

² *Vide* R. D'Unienville, *Histoire Politique de l'Île de France*, vol. 2 (1791-1794) at p. 58. Articles 5 and 8 of the Déclaration lay down the principle of the « légalité des incriminations et des sanctions pénales. » It is not astonishing therefore that the Assemblée Coloniale adopted on the same day as the Déclaration the French Penal Code of 1791.

3. By virtue of Article 8 of the 1810 Treaty of Capitulation (later confirmed by the Treaty of Paris in 1814), the inhabitants were allowed to 'preserve their religion, laws, and customs.' In the first years of British colonial rule (1810-1968), there was a willingness on the part of the new colonial authority to adhere to the terms of the Treaty of Capitulation. In a despatch to the then Governor, Sir Charles Colville, dated 16 April 1831, in response to a request to prepare and publish a Criminal Code better adapted to the existing state of society than that which was then in force in the colony, the Secretary to the Colonies informed the latter that:

"[T]here does not exist any necessity for the assumption by the Ministers of the Crown of the arduous office of framing this Code themselves, since, both in England, and in almost every part of the Continent of Europe, but more especially in France, the revision of the Criminal Code has, of late years, occupied the attention of the most eminent Jurists and Statesmen.

Their labours have removed the greater part of the difficulties in which the subject was formerly involved; and it would be in the highest degree irrational if any feelings of national rivalry were permitted to obstruct the adoption of any of those improvements in the Criminal Code for which Europe is indebted to the profound wisdom and research of the authors of the French Digest.

[H]owever gradual the assimilation of the Colonial to the English Code may be as a firm bond of union between the two Countries, His Majesty will not sacrifice to this uniformity of system, the more important object of treating with respect either the habits and inclinations of his faithful subjects in the colony, or even those honest prejudices, which the colonists of French origin may cherish in favour of the institutions of the Country under the dominion of which they formerly lived."³

4. On 15 February 1832 a Penal Code was adopted but it did not meet with the approval of the Secretary to the Colonies, with the result that the penal code promulgated in 1791 regained force of law.⁴ By Ordinance No. 6 of 1838 a new Penal Code was enacted, largely inspired by the French Penal Code of 1810 as amended by the French Act of 28 August 1832,⁵ which was drafted in English and French.⁶

³ C. Lane, *Laws of Mauritius* (1946), Vol. II, *Cap. 197: Preparation of a Criminal Code*, at pp. 641-642.

⁴ L.E. Venchard, "L'Évolution du Droit Pénal Mauricien", in *Codes Annotés de l'Île Maurice* (1994), Vol. I, at p. XII

⁵ *Ibid*, at p. XIII.

5. From 1841 until 1962, amendments to the Code could only be made in English language.⁷ During that period, reforms have been largely inspired by English law, and were in a few instances modeled on provisions of the Indian Penal Code.⁸ Thus the offences of coining ("*fausse monnaie*", that is falsely making or counterfeiting any coin)⁹, of sedition¹⁰, of infanticide (murder of a newly born child)¹¹ were inspired by the prevailing UK legislation.¹² The offence of a public servant taking gratification, accepting a reward, for doing an act which does not form part of his duty, as provided by Article 393 of the Penal Code¹³, was inspired by section 161 of the Indian Penal Code.¹⁴
6. A Penal Code (Supplementary) Ordinance, of English inspiration,¹⁵ was enacted in 1870.¹⁶ It provided for a number of offences, such as coinage offences, fictitious stamps, vagrancy,

⁶ In *R v. Ramjan Mirza* (1891) MR 9, the Supreme Court considered that both the English and French versions are to be regarded as texts of the Penal Code; the accused is to benefit from a contradiction or a difference between the two texts, where any exists.

⁷ A number of reforms were introduced with a view to anglicize the procedure. Thus as from 1841 (the Order in Council of 25 February 1841) all laws had to be published in English language only. Any versions in the French language of such Ordinances, Proclamations, Acts and Notices, which might be published by the Executive Government for the information of the inhabitants would be reputed to be translations only, and not original documents. Courts of justice were required to make reference to the English versions only. Much later, however, towards the end of British colonial rule, in 1962, an Order in Council (dated 25 January 1962) authorised the Mauritian legislature to legislate in French language with regard to amendments to Codes which were drafted in French or in English and French.

⁸ L.E. Venchard, "L'Évolution du Droit Pénal Mauricien", in *Codes Annotés de l'Île Maurice* (1994), Vol. I, at p. XIII.

⁹ Sections 92, 97-99 of the Penal Code, as amended by Ordinance No. 29 of 1965.

¹⁰ Section 283 of the Penal Code, as amended by Ordinance No. 29 of 1909.

¹¹ Section 220 of the Penal Code, as amended by Ordinance No. 10 of 1935.

¹² M. Lavoipierre, "L'Évolution du Droit Pénal Mauricien" in *Études de Droit Privé Français et Mauricien, Annales de la Faculté de Droit d'Aix-en-Provence*, T. 57 (1969) 127 at 133.

¹³ Now section 132 of the Criminal Code.

¹⁴ Vide *Director of Public Prosecutions v. Coureur & anor.* (1982) MR 72.

¹⁵ M. Lavoipierre, "L'Évolution du Droit Pénal Mauricien" in *Études de Droit Privé Français et Mauricien, Annales de la Faculté de Droit d'Aix-en-Provence*, T. 57 (1969) 127 at p. 134.

¹⁶ Lane, *Laws of Mauritius* (1946), Vol. II, Cap. 196, at pp. 605 seq.

disclosure of official secrets, obscene publications, disorderly houses. The offence of conspiracy was added to the Penal Code (Supplementary) Ordinance in 1965.¹⁷ Although it was then introduced as part of a legislation designed to cope with problems of public order, it has revealed itself over time as an interesting and helpful offence in the enforcement of the criminal law; it offers a practical solution, for authorities entrusted with the decision to prosecute, to problems arising in cases where for legal, evidential or practical reasons, the charging of a more specific offence is considered unsatisfactory or impracticable.¹⁸

7. The question has arisen as to the text of the Penal Code to be followed, when there is a difference between the English and French versions.¹⁹ *In Re Canhye* (1863) MR 164, it was submitted that the French version of the Penal Code is that by which the Court should stand guided, but the matter was not decided. Despite instances when the Supreme Court relied on the wording of the French text to interpret the ambit of a provision in the Penal Code,²⁰ it decided in *R v Mirza* (1891) MR 164 that both the English and the French versions of the Penal Codes, having been approved by the Crown, should be considered as legal texts and that, when a difference exists between the two texts, the accused should get the benefit of it. In *Procureur Général v Mérandon*, however, the view was taken that the French text is to be followed where it differs from the English text.²¹

¹⁷ It was introduced by the addition of section 109 to the already 108 existing sections of the Penal Code (Supplementary) Ordinance. This addition was effected by section 4 of the Penal Code (Supplementary) (Amendment) Ordinance No. 23 of 1965.

¹⁸ E. Balancy, *The Law of Conspiracy* (1984) at pp. 1-3.

¹⁹ For a discussion of the approach taken by the Supreme Court for the interpretation of the penal code, when there are differences between the English and French versions, vide P.R. Domingue, "L'application de la légalité des délits et des peines en Droit Mauricien: Problèmes liés au caractère mixte du système juridique», (2002) vol. XV *Problèmes Actuels de Science Criminelle* 33 at 44.

²⁰ Vide *A v R* (1870) MR 156, and *R v Sapermal* (1881) MR 157.

²¹ This view was confirmed after independence with the enactment of the Interpretation and General clauses Act. Section 10 of the Act now provides that where in an enactment a French term or expression is used, or an English term or expression is explained by reference to a French term or expression, the interpretation of the enactment shall be in accordance with that of the French term or expression.

8. On independence (1968), Mauritius was endowed with a written Constitution, which is the supreme law. The Existing Laws Order in Council was to the effect that the existing laws would continue to remain in force unless inconsistent with the Constitution. After independence the Penal Code has been reenacted as the Criminal Code. The Criminal Code has undergone a number of amendments,²² but the changes in the criminal law have been made by special laws, such as the Dangerous Drugs Act. Quite often the changes effected in the criminal law have been influenced by standard-setting at the international level.²³

(C) Reform of Penal Codes and other Criminal Law Developments in other jurisdictions

9. In many jurisdictions, studies have been conducted for the review/reform the criminal law.²⁴
10. In France, after twenty years of preparation, a new criminal code was adopted in 1992. The view was taken that, with the Penal Code of 1810, «la société française ne disposait pour penser l'ordre public que d'un ensemble de catégories anciennes qui n'avaient jamais été remises à plat dans leur totalité, malgré les multiples modifications ponctuelles que le

²² For instance, a section 39A, entitled 'Culpable Omission', was added by Act No. 24 of 2006.

The offence of Culpable Omission applies to persons who wilfully fail to prevent the commission of another offence or to offer assistance to a person who is in danger.

²³ International treaties and conventions, such as the International Convention for the Suppression of the Financing of Terrorism, the UN 1961 Single Convention Narcotic Drugs (as amended by the 1972 Protocol), and the Council of Europe Convention on Cyber criminality.

²⁴ The Law Commission of England has conducted, inter alia, the following studies: A Criminal Code for England and Wales (LC177, 1989); Criminal Law: Rape within Marriage (LC205, 1992); Legislating the Criminal Code: Offences against the Person and General Principles (LC218, 1993); Legislating the Criminal Code: Corruption (LC248, 1998); Legislating the Criminal Code: Fraud and Deception consultation paper (LCCP155, 1999); Murder, Manslaughter and Infanticide (LAW COM No. 304, 2006).

As to the work of the Law Reform Commission of Ireland: *Report on Vagrancy and Related Matters* (LRC 11–1985), *Report on Rape and Allied Offences* (LRC 24 – 1988), *Report on Non-Fatal Offences Against the Person* (LRC 45 – 1994), *Report on Penalties for Minor Offences* (LRC 69-2003), *Report on Corporate Killing* (LRC 77-2005), *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008).

texte initial avait connues et qui en avaient déséquilibré les structures»,²⁵ and that «il semblait logique de considérer ce texte comme ‘un instrument juridique obsolète’ et de rechercher une nouvelle formulation d'ensemble.»²⁶

(D) Concluding Observations: The Guiding Principles for Criminal Law Reform Process

11. The review of the Criminal Code shall be carried out from an international and comparative perspective. Standards evolved by UN and other international bodies would have to be considered. The provisions of the Criminal Code would be compared with equivalent provisions in the French Penal Code, the Indian Penal Code, the Canadian Criminal Code and criminal codes/legislation in other jurisdictions, but careful consideration would have to be given to local conditions and culture before making any legal transplant. The characterization of criminal offences would have to be rethought and the impact of human rights on the design of the Criminal Code considered.

12. The consultation process would need to be as broad as possible. It should involve a wide range of criminal justice actors: police officers, judicial officers, lawyers, and civil society organizations.

²⁵ Vide Lascoumes Pierre, Depaigne Anne, *Catégoriser l'ordre public: la réforme du code pénal français de 1992*, In (1997) 27 *Genèses*, 5 at 6.

²⁶ Vide Robert Badinter, Introduction au Projet de Nouveau Code Pénal, in Mireille Delmas Marty, «Code pénal d'hier, droit pénal d'aujourd'hui, matière pénale de demain» (Paris. Recueil Dalloz, 1986).

In the part of the «exposé des motifs» entitled «Exprimer les valeurs de notre temps», Robert Badinter, had this to say:

« Le code est inspiré par les droits de l'homme ... Ce sont ceux qui fondent la conscience française en notre temps ... Ils constituent l'affirmation d'une éthique sociale fondée sur une certaine idée de l'homme, considéré comme un être titulaire de droits fondamentaux dont le respect s'impose à tous, y compris à l'État».

It is to be noted that whereas « les codes du XIXe siècle étaient principalement centrés sur la défense de l'État et de la propriété individuelle», «le nouveau code pénal prend pour fin première la défense de la personne humaine et tend à assurer son plein épanouissement en la protégeant contre les atteintes».