

# THE STATUS AND ROLE OF FRENCH LAW IN MAURITIUS

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*The importance of French law in Mauritius can only be understood in the light of its tumultuous history. In 1715, the French took possession of the island, which had been abandoned by the Dutch, and renamed it Isle de France. French colonial rule lasted until 1810. However, despite passing under the British flag, and the gaining of independence in 1968, Mauritian law, both civil and criminal, still revolves around French law. The legacy of French law in Mauritius, embedded through the historical nexus of colonial administration, has profoundly shaped the contemporary legal landscape, intertwining French legislation with local legal traditions and Common Law to forge a unique system.*

*Pour bien comprendre l'importance du droit français à l'île Maurice, il faut s'attacher à prendre en considération son histoire mouvementée.*

*En 1715, les Français prirent possession de l'île, alors abandonnée par les Hollandais, et la rebaptisèrent 'Isle de France' et la période de colonisation française durera jusqu'en 1810.*

*Cependant, en dépit du retour sous le pavillon britannique puis de son indépendance le 12 mars 1968, on observe que le droit mauricien, tant civil que pénal, s'articule encore toujours autour du droit français. En effet l'héritage du droit français à Maurice a profondément façonné le paysage juridique contemporain de cette, entremêlant la législation française avec les traditions juridiques locales et la Common Law pour finalement élaborer un système de droit hybride.*

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## I INTRODUCTION

Law is closely linked to the language that conveys it. Notwithstanding what some people claim, the English language is not the official language of Mauritius.<sup>1</sup> Indeed, the Constitution of Mauritius law does not mention an official language, unlike the French<sup>2</sup> or Indian Constitution.<sup>3</sup> Certainly, to be a member of the National Assembly, one must master the language of Shakespeare,<sup>4</sup> and the official language of the National Assembly is English, even if members can speak in French.<sup>5</sup> In addition, English is the language used in administration, especially when it comes to writing. However, most newspapers are published in French, and the majority of satellite channels are in French. According to the OIF French Language Observatory, in 2014, there were 911,000 French-speaking Mauritians, that is 73% of the population, with Mauritius being "one of the pillars of the Francophonie in the Indian Ocean".<sup>6</sup>

The place of French in Mauritius, and by extension, the place of French law, can only be understood in the light of the country's tumultuous history. In 1715, the French, already present on Reunion Island (then called *Ile Bourbon*), officially took possession of the island, which had just been abandoned by the Dutch, and renamed it *Isle de France*. French colonial rule lasted until 1810 when the French were defeated by the British, despite winning the Battle of Grand Port that same year, the only naval battle won by the Napoleonic fleet over Britain.<sup>7</sup>

The defeat was sealed by the Treaty of Paris of 1814 and confirmed by the final Act of the Congress of Vienna in 1815. Britain returned the island of Reunion to France but retained Mauritius and the island of Rodrigues, as well as Seychelles. All the inhabitants of Mauritius had to take an oath of allegiance to the King of England

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1 *Pointu v Minister of Education and Science & Anor* (1995) MR 132:

Mauritius is a sovereign and democratic State. This is what section 1 of the Constitution provides. It is a multiracial, multicultural and multilingual society. The languages that are commonly and currently used in everyday life are English, French, Creole and Bhojpuri. Other languages which we shall refer to as Oriental languages are also spoken in certain families and the choice of the actual language spoken would depend, to a large measure, on the origin of the families.

2 See French Constitution, art 2.

3 <http://rajbhasha.nic.in/en/constitutional-provisions/>.

4 The Constitution of the Republic of Mauritius, s 33(d).

5 Section 49.

6 <https://www.francophonie.org/Langue-Francaise-2014/projet/Rapport-OIF-2014.pdf>.

7 As evidenced by the inscription on the Arc de Triomphe in Paris.

by an Order of December 1810, but they were authorised to preserve their religions, laws, habits and customs, as well as their language, French.

The fact of coming under the British banner naturally brought upheavals in terms of the judicial system of the island. However, at the beginning, the French jurisdictional order was maintained, just like the Napoleonic Code<sup>8</sup> and the Criminal Code.<sup>9</sup> In the same vein, the inhabitants of the island were allowed to keep their language and their customs. But the laws that would follow would be of English inspiration, especially with regard to procedure before the courts; this is how the country has, over time, defined itself as a country of mixed law,<sup>10</sup> straddling Common Law and continental law. Thus, after 1814, bridges were cut with France, which explains why the Criminal Code also cut the umbilical cord, so to speak, with the French counterpart. However, the Mauritian Criminal Code<sup>11</sup> is not influenced by British criminal law and it is only in a scattered manner that certain provisions have been added to the original Penal Code, the Anglo-Saxon influence mainly resulting in the promulgation of special laws, dealing with specific subjects such as drug trafficking, cybercrime or money laundering.

However, despite the passage under the British flag and the independence acquired in 1968, Mauritian law, both civil and criminal, still revolves more or less around French law, both that decreed by the legislator and the opinions of the *doctrine*, or sometimes even judgments of the Court of Cassation. Thus, with regard to tort liability, the *Jand'heur* judgment<sup>12</sup> was, after much procrastination, adopted

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8 The French Civil Code of 1804 was promulgated on Isle de France on 23 October 1805 and was repromulgated on 21 April 1808 under the name "*Code Napoléon*".

9 The Criminal Code was adopted on 15 February 1832, without however receiving the approval of the Secretary of the Colonies, which had the consequence that the Criminal Code promulgated in 1791 continued to apply. By Ordinance No 6 of 1838, however, a new Criminal Code was promulgated, largely inspired by the French Penal Code of 1810, and it was written both in the language of Shakespeare and in that of Molière.

10 Domingue PR "The historical development of the mixed legal system of Mauritius during the French and British colonial periods" (2002) 4 University of Mauritius Research Journal 61-93.

11 Despite the fact that the Criminal Code is written in both languages (with a few exceptions), the Interpretation and General Clauses Act provides at s 10: "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".

12 The *Jand'heur* judgment of 1930 specifies that the presumption of liability established by art 1384 para 1 of the Civil Code against the person who has in his custody the inanimate thing which has caused damage to others, can be rebutted only by proof of a fortuitous event or *force majeure* or a foreign cause which is not attributable to it. It is not enough to prove that the guardian did not commit any fault or that the cause of the harmful event remained unknown. There is no need to distinguish whether or not the thing which caused the damage was operated by the hand of man, whether it is a dangerous thing or not.

by the Mauritian legislator in 1983 and two new paragraphs were added to art 1384 of the Mauritian Civil Code, this legislative reform being ratified by Mauritian jurisprudence.

The sources of Mauritian law, as we see, are not single. The foundations on which it rests are both French and English law. But over time, both the legislator and case-law have been able to identify a law that we can qualify as purely Mauritian law, since, as it was said in the Report of the Committee on the Review of Legal Studies in Mauritius: "[I]n spite of its origins, Mauritian Law ceased over the years to be partly English and partly French but has developed into a significant body of law with a philosophy, doctrine and jurisprudence of its own..."

Nevertheless, in *The Queen v L'Étendry* (1953) MR 15, the Supreme Court reaffirmed that the normal rule of interpretation is that, when Mauritian law is borrowed from French law, we should resort, as to its interpretation, to French case law.

## II CIVIL LAW

The Mauritian Civil Code is inspired by the French Civil Code.<sup>13</sup> However, certain notions have been borrowed from English law. This has given rise to "fixed and floating charges", which come directly from Great Britain and which were incorporated into the Civil Code in arts 2202 to 2203-7. However, this was not a copy and paste of English law, since while in English law these securities were the prerogative of companies, in Mauritian law individual borrowers can also have recourse to them. Furthermore, in the late 1980s and early 1990s, the "trust" was introduced into Mauritian legislation and coexists with the civil law concept of "property".

The reforms of the Civil Code mainly concerned family law and personal law, in order to respond to the needs of a changing Mauritian society, as well as to ensure better gender equality while safeguarding the interests of children within family structures.

As to the Code of Civil Procedure, it is inspired by the French Code of Civil Procedure of 1807. The latter was promulgated on 20 July 1808. This code remained in force after the British took possession of Mauritius, in accordance with art 8 of the Treaty of Capitulation of 1810 (confirmed by the Treaty of Paris in 1814). But, following the new colonial administration and the adoption of a judicial structure, and the remedies they offered in the Common Law tradition (leading to the adoption

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<sup>13</sup> Published under the title of Civil Code of the French, it then became the Napoleonic Code (9 September 1807).

of special laws and procedural rules), many provisions of the Code have been repealed.

The tension between the rules borrowed from the two systems, French and English, has had an impact on the interpretation of the Code of Civil Procedure concerning the use of expert witnesses in cases of "handwriting verification". The Supreme Court ruled in *Mauritius Fire Insurance Co v Lemeur* (1893) MR 42 that the procedure provided for in arts 193 et seq of the Code of Civil Procedure would not be applicable in Mauritius. The Supreme Court considered that, under the Rules of the Supreme Court, inspired by English law and practice, that judges do not appoint experts without a motion to this effect being presented by the parties: The Rules of Court provide that any question of disputed facts, both scientific and technical, after examination of witnesses, must be determined by the court sitting as a jury. The Court observes that there is a marked difference in this regard between local procedures and French procedure. The non-applicability of the procedure provided for by the Code of Civil Procedure regarding "handwriting verification" has since become an established principle of Mauritian law.<sup>14</sup>

### **III COMMERCIAL LAW**

In the field of commercial law, the British colonial period was marked by the repeal of various provisions of the Commercial Code.<sup>15</sup> The issues dealt with were replaced by laws relating to commerce, navigation, banking and finance, inspired by the British legislation of the time. The new circumstances justified these changes: banks and commercial organisations from Great Britain had been established in the country and trade with the United Kingdom had increased considerably. Legislation has also been introduced to regulate the profession of stockbrokers.<sup>16</sup>

The provisions relating to the jurisdiction of the Commercial Court were repealed by Ordinance No 2 of 1850 which established the Supreme Court and reformed the judicial system. The Merchant Shipping Ordinance No 17 of 185 repealed the various provisions of the Commercial Code relating to "maritime commerce", which took into account the changes made in the United Kingdom by the Merchant Shipping Act of 1894. The provisions of the Commercial Code relating to limited companies and limited partnership by shares were repealed and replaced by the Companies Ordinance No 35 of 1912, largely inspired by the British Companies Act

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14 Vide *Triveli v Mooraby* (1926) MR 112 and *Pydiah v Pooteeram* (1962) MR 72.

15 On 14 July 1809, the French Commercial Code of 1807 was promulgated in the Ile de France. This Code remained in force after the British took sovereignty over Mauritius, in accordance with art 8 of the Treaty of Capitulation of 1810.

16 Brokers Ordinance No 25 of 1945.

of 1908. The Bills of Exchange Ordinance No 32 of 1914, based on the Bills of Exchange Act of 1882 of the United Kingdom, repealed the provisions of the Commercial Code relating to the bills of exchange and the promissory notes.

The Commercial Code also underwent its share of reforms after Independence. The objective was to align Mauritius with contemporary business practices and ensure that national law was in compliance with international treaty obligations relating to trade and transport. The evolution of French law in this area was also taken into consideration, as evidenced by the first book on "companies" (arts 17-50).<sup>17</sup> The French law of 3 January 1967 relating to the status of ships and other maritime vessels also inspired the Mauritian legislator in its drafting of arts 191 to 230.

#### **IV CRIMINAL LAW**

The Penal Code of 1810 as well as the Criminal Code of 1808 were not promulgated in Mauritius during the French period. However, from 1791, a Penal Code was drawn up and promulgated by the Colonial Assembly in 1793. The current Criminal Code dates from 1838.

The mixed nature of the Mauritian judicial system sometimes gave rise to contradictory rules. These paradoxes were resolved by the Mauritian legislator after Independence. The Supreme Court has also made its contribution to the development of mixed law. Thus, concerning the burden of proof of contracts which may constitute a breach of trust (embezzlement), the Full Bench, in the *Sewnarain v Queen* judgment,<sup>18</sup> overturned a decision which dated from 1885. It considered that in cases of breach of trust, the rules of proof of civil law did not apply and that the use of oral evidence should always be permitted. It said that the practice of blindly following French *doctrine* and jurisprudence on breach of trust was obsolete given that since the 1850s, Mauritius had moved to an adversarial criminal procedure.

When it comes to the interpretation of texts, the courts often resort to French *doctrine*, and turn mainly to two 19<sup>th</sup> century authors, Émile Garçon and René Garraud. Thus, to define "attempt", the Supreme Court, in *Jawaheer v R* (1943) MR 192, has recourse to Garraud:<sup>19</sup>

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17 LE Venchard et al *Codes Annotés de l'île Maurice : Code de Commerce et Code de Procédure Civile* (1998) at pp 8-15.

18 *Sewnarain* (1986) MR 149: "We hold accordingly that the civil law rules of proof regarding contracts have no place in cases of embezzlement. It follows that oral evidence should always be acceptable."

19 English translation: "When the agent, by a circumstance independent of his will, is arrested after having forced the lock of an exterior door, or broken the lock of a secretaire, or after having carried out an escalation, or after having used a false costume to enter an inhabited house, he is guilty of

Lorsque l'agent, par une circonstance indépendante de sa volonté, est arrêté après avoir forcé la serrure d'une porte extérieure, ou brisé la fermeture d'un secrétaire, ou après avoir procédé à une escalade, ou après s'être servi d'un faux costume pour pénétrer dans une maison habitée, il est coupable d'avoir commis une tentative de vol avec effraction, ou avec escalade, ou avec usage de faux costume, usurpation de faux titre, ou allégation de faux ordre.

To determine when the larceny is complete, it is again Garraud that the Court cites; in *Essary v Queen* (1981) MR 425, the French author expresses himself as follows:<sup>20</sup>

Mais est-il certain que le vol soit consommé alors que l'enlèvement ne l'est pas ? Sans doute, le délit est terminé dès que la soustraction est achevée ; mais on peut se demander si la chose est complètement sortie de la possession du légitime propriétaire tant que le voleur, qui l'a saisie et qui la tient, est dans la maison même où il l'est venu chercher ? Le coupable n'est-il pas en action de vol jusqu'au moment où l'enlèvement de la chose soustraite étant achevé, il n'a plus à défendre, contre le légitime propriétaire, la chose dérobée ? C'est à cette période de l'opération seulement que l'exécution se trouvant complète l'agent passe de la tentative à la consommation du délit.

The Supreme Court also turns to Garraud to differentiate the author of a crime from the accomplice. Thus, in *Ghurburn v R* (1990) MR 206, 209, it is stated that:<sup>21</sup>

L'auteur est celui qui commet les actes matériels constitutifs du crime ou du délit ou ceux qui sont nécessaires à cette exécution : par exemple dans le vol, l'auteur est l'individu qui s'empare des valeurs ou qui aide à l'effraction du coffre fort... . Le complice est celui qui accomplit des actes qui, sans faire partie de l'exécution du délit

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having committed an attempted burglary, or escalation, or with use of false costume, usurpation of false title, or allegation of false order."

- 20 English translation: "But is it certain that the larceny is consummated while the kidnapping is not? Without doubt, the crime is over as soon as the subtraction is completed; but we can ask ourselves if the thing has completely left the possession of the legitimate owner as long as the thief, who seized it and is holding it, is in the very house where he came to get it? Is the culprit not engaged in theft until the moment when the removal of the stolen thing is completed, he no longer has to defend the stolen thing against the legitimate owner? It is only at this period of the operation that the execution is complete, the agent passes from the attempt to the consummation of the crime."
- 21 English translation: The perpetrator is the one who commits the material acts constituting the crime or offence or those which are necessary for its execution: for example, in larceny, the perpetrator is the individual who seizes the valuables or who assists in the break-in of the safe....The accomplice is the one who performs acts which, without being part of the execution of the crime, are necessary for this execution, facilitate it with help or assistance. He is only an accomplice, for example someone who helps the author of a larceny by keeping watch or holding a ladder.... Acts of aid or assistance in the commission of a crime are not the acts of the crime.

on être nécessaires à cette exécution, le facilitent par une aide ou une assistance. Il n'est que complice, par exemple celui qui aide l'auteur d'un vol en faisant le guet ou en tenant une échelle... . Les actes d'aide ou d'assistance dans la consommation d'un délit ne sont pas les actes du délit.

## **V CONCLUSION**

It is essential to recognise the unique legal heritage that underpins the Mauritian legal system. The fusion of French civil law and British Common Law traditions has bestowed upon Mauritius a distinct legal identity, a bijuralism that is both complex and enriching. This synthesis, while presenting certain challenges, has also facilitated the development of a dynamic legal framework capable of adapting to contemporary legal issues.

The influence of French law remains palpable in several key areas of Mauritian law, particularly in the realms of civil, commercial and criminal law. The Civil Code, despite the passage of time, continues to exert a significant influence, a testament to the enduring legacy of French legal principles. This is not merely a historical artefact but a living tradition that continues to shape legal interpretations, judicial decisions, and legislative developments in Mauritius. Moreover, the role of French law extends beyond the confines of the courtroom and the legislative chambers. It is deeply interwoven with the cultural and intellectual fabric of Mauritian society.

The status and role of French law in Mauritius can be appreciated not merely as a relic of colonial history but as a dynamic and integral component of the nation's legal and cultural identity. It is a foundation upon which the future of Mauritian law can continue to build, evolve, and adapt to the challenges of a rapidly changing world. The ongoing relevance of French law in Mauritius serves as a reminder of the power of legal traditions to transcend their origins, contributing to the creation of a legal system that is both uniquely Mauritian and universally resonant.