Background Paper

Reform of Codes

[October 2010]

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(f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
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(i) two members of the civil society, appointed by the Attorney-General.

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Executive Summary

LAW REFORM COMMISSION OF MAURITIUS

Background Paper
“Reform of Codes”
[October 2010]

The Hon. Attorney-General has requested the Commission to review the Code Civil Mauricien, the Code de Commerce and the Code de Procédure Civile, recommend reforms thereto, and draft the provisions in those Codes in both English and French languages.

In this Background Paper to the Reform of the Codes, the Commission reviews the context in which the Codes have evolved over more than two centuries.

The Commission is of the opinion that the review would have to be carried out from a historical and comparative perspective. Our Codes would be compared with those in France, and in mixed legal systems, such as that of Quebec, Louisiana, and Seychelles. Approaches taken in other jurisdictions on issues covered by our Codes may also be examined the more so as comparative lawyers no longer put emphasis on the differences between the civil law and common law systems, but rather on their commonality and how they are complementary. The historical context in which the Codes in this country have evolved since their promulgation more than two centuries ago, which have lead to the development of the Mauritius legal system as a mixed or hybrid legal system, would also have to be borne in mind. The reform options to meet the contemporary challenges would have to be examined in the light of the socio-economic exigencies of our society in the context of globalization. We should always bear in mind that our legislature, even though borrowing rules from a variety of material sources, has always pursued ‘une finalité mauricienne’ thereby developing a distinct corpus of Mauritian law.
(A) Introductory Note

1. The Hon. Attorney-General has requested the Commission to review the Code Civil Mauricien, the Code de Commerce and the Code de Procédure Civile, recommend reforms thereto, and draft the provisions in those Codes in both English and French languages.

2. It is instructive, as a starting point, to take cognizance of the context in which the Codes have evolved over more than two centuries.

During the first thirty years of British colonial rule local ordinances, the Governor's Proclamations, and other Public Acts or Notices of the Executive Government, had usually been promulgated both in the English and French languages.\(^1\) The Order in Council of 25 February 1841\(^2\) put an end to that practice by providing that henceforth all Laws should be published in the 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, the Order in Council of 25 January 1962\(^3\) authorized the Mauritian legislature to legislate in the French language with regard to amendment to Codes which were drafted in French\(^4\) or in English.

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\(^1\) This had given rise to difficulties as to which of the English or French version would be regarded as the original and authentic version. But note that in \(R\ v.\ Ranjan Mirza\) (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.


\(^4\) The Code Napoléon, the Code de Commerce, and the Code de Procédure Civile.
and French. The Order in Council furthermore provided that the courts, in the administration and interpretation of the Codes drafted in English and French, would pay regard to the French version thereof.

After independence, the legislature of sovereign Mauritius paid tribute to both the civilian and common law legal traditions, inherited from the two successive colonial administrators. During the late 70s and early 80s the Codes inherited from the French colonial period, mainly the Code Napoleon and the Code de Commerce underwent substantial reform. These legislative reforms were effected in French language and using the French drafting style. In the late 80s and early 90s, the trust was introduced into the statute book and was made to co-exist with the civilian concept of 'la propriété'.

(B) The Historical Evolution of the Civil Code in Mauritius

3. The French Civil Code of 1804 was promulgated in the French colonies of Isle de France and Réunion on 23 October 1805; it was re-promulgated on 21 April 1808 as the Code Napoléon. The said Code remained in force after the British assumed sovereignty in Mauritius; in accordance with 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'.

5 The Penal Code.


7 There was an 'Arrêté Supplémentaire au Code Civil pour son application aux Isles de France et de la Réunion', dated the 1er Brumaire An XIV [23 October 1805], to adapt its provisions to the circumstances which then obtained in the colony, namely slavery. See Lane (1946) Vol. II, at pp. 310-311; also the Code Decaen No. 109.

4. During the British colonial period, various amendments were effected to the Code Napoleon. The various legislative reforms were meant to facilitate the task of the new colonial administration or assert its authority, meet the challenges of the emerging multicultural Mauritian society, and ease the development of the Mauritian economy. They were never prompted by the desire to make of Mauritius a 'common law jurisdiction'.

5. With the abolition of slavery on 1 February 1835, the Code Napoleon became the droit commun of all the inhabitants of Mauritius. Earlier, legislative measures had been taken with a view to ensure equality before the law of all the inhabitants, other than the slaves. The Ordinance of the Governor in Council of 8 November 1826 had thus repealed Article LI of the Code Noir, as well as Articles 67 and 68 of the Arrêté Supplémentaire au Code Civil, so that the affranchis would be "capables de recevoir des blancs toute donation entre-vifs, à cause de mort, ou autrement". An order in council of 22 June 1829 further provided that "toutes les incapacités généralement quelconques et qui frappaient à Maurice les sujets de Sa Majesté d'origine africaine ou indienne sont abolies".

6. In order to facilitate the task of the British colonial administration relating to the registration of births, marriages and deaths, the Civil Status Ordinance (Ordinance No. 17 of 1871, as amended by Ord. No. 26 of 1890) repealed the provisions of the Code relating to l'état civil,

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11 On 4 September 1833, the British Parliament abolished slavery in Mauritius. The abolition of slavery was proclaimed for 1 February 1835 and lead to the repeal of the Code Noir: Vide R. D'Unienville , L'Évolution du Droit Civil Mauricien (Port Louis: Best Graphics, 1994) at p. 46.


and re-enacted most of them in English language.\textsuperscript{14} The Supreme Court, time and again, expressed the view that the provisions of the civil Status Ordinance were a mere translation of the articles of the code and that, in interpreting these provisions, it would be guided by French doctrine and jurisprudence (case-law).\textsuperscript{15}

7. A number of reforms were prompted by the willingness of the British administration to assert its authority. Thus the Rivers, Streams, and Canals Ordinance\textsuperscript{16} provides that "les eaux et lits des rivières sont du domaine public" (which contrasts with the solution adopted much later in France by the Loi du 8 Avril 1898). Legislation was also introduced to delimitate the "domaine privé de l'Etat": the Crown Lands Ordinance;\textsuperscript{17} the Forests, Mountain and River Reserves Ordinance.\textsuperscript{18}

8. The most important amendments to the Code Napoleon during the British colonial period concerned the field of family law and the law of persons (le droit des personnes). The abolition of slavery was followed by a massive immigration from India of indentured labourers to work in the sugar cane fields.\textsuperscript{19} The emergence of Mauritius as a multi-ethnic and pluri-religious society, with mores quite different from those in France, prompted legislative reforms regarding wills, succession rights and marriage.

\textsuperscript{14} R. D'Unienville, \textit{L'Évolution du Droit Civil Mauricien} (Port Louis: Best Graphics, 1994) at pp. 65-76.


\textsuperscript{16} Ordinance No. 35 of 1863.

\textsuperscript{17} Ordinance No. 18 of 1874.

\textsuperscript{18} Ordinance No. 13 of 1875.

In 1882, about two thirds of the children were illegitimate. Most of the non-European immigrants were living, in the eyes of the law, as concubins, since not civilly married. The prohibitive cost of a civil marriage (it cost about Rs. 50), led the descendants of slaves to live in the concubinage pur et simple, whilst the Indian immigrants (both Hindus and Muslims) contented themselves with a religious marriage. This prompted the Legislature to take measures with a view to solve this problem. Thus the Ordinance No. 21 of 1883 removed the prohibition laid down by Articles 757 and 758 of the Code Napoleon "de rien laisser aux enfants naturels par testament ou donation entre vifs". The enactment by the local legislature of the Indian Marriages Ordinance was a solution to the problem Indian immigrants faced regarding the recognition of their children born out of their religious marriage as legitimate.

This ordinance provided that Hindu and Muslim priests would be appointed by the Governor to act as civil status officers during the celebration of religious marriages. The marriage, though religious in its form, was governed by the provisions of the Code Napoleon, and was for all intents and purposes treated as a civil marriage. The ordinance was meant to do away with the "règles de publication pour le mariage".

By virtue of Ordinance No. 29 of 1912, entitled "Donation inter vivos and Wills (Amendment) Ordinance", "toute personne domiciliée à Maurice" was afforded the possibility "avant son mariage d'acquérir la pleine et complète liberté de tester en consignant son intention dans un acte authentique et en déclarant ce fait à l'officier de l'état civil célébrant le mariage". This rule enabled Hindus and Muslims, as well as the British

20 Out of 12955 births, 8477 children were illegitimate: vide R. D'Unienville, L'Évolution du Droit Civil Mauricien (Port Louis: Best Graphics, 1994) at p. 348.


22 Ordinance No. 28 of 1912.

23 This problem was highlighted in the Report of the Royal Commission of 1909 (the Swettenham Commission): vide R. D'Unienville, op. cit. note 22, at p. 45.

24 It is interesting to note that the Supreme Court was called upon in two cases to determine whether the parties to the marriage under the Indian Marriages Ordinance were in fact Hindus, the Procureur General seeking "l'annulation du mariage" on the basis that at least one of the parties is Christian: vide Procureur General v. Goundan & ors. [1926] M.R. 105; Procureur General v. Naraidoo & ors. [1940] M.R. Vol. II p. 128.
expatriates, "de règler leurs successions d'après leurs lois personnelles et non d'après les dispositions du Code".  

9. Amendments were also effected to the Code Napoleon with a view to favour the development of the sugar industry, by facilitating the "crédit hypothécaire". These legislative reforms took into account developments which had occurred in France. Thus the Transcription and Mortgages Ordinance of 1863 was very much inspired by the French Loi du 23 Mars 1855. Ordinance No. 19 of 1868 on the sale of immovable properties was much in line with the provisions of the French Lois of 1841 and 1858.

10. Though most of the reforms brought about to the Code Napoleon were inspired by French law or were changes, which were required by the then sociological context, some of them resulted in a blending of English law with French law. Thus the Ordinance No. 14 of 1872, entitled "an ordinance to amend the law relating to divorce" combined French grounds of divorce, such as "adultère, excès, sévices et injures graves" with English grounds, such as "sodomy, bestiality, cruelty, desertion". This led judges on occasion to carry out a comparative study of French and English grounds of divorce. In Chung Sik (h.) v. Chung Sik (w.) [1947] MR 78, the Supreme Court thus expressed the view that the French theory of 'abandon du domicile conjugal' and the English theory of desertion appear to amount to virtually the same thing.


27 Ordinance No. 36 of 1863.


29 Ibid. at p. 228.

The law relating to matrimonial regimes saw the co-habitation of rules borrowed from French law, with those derived from English law. As from 1949, spouses could at the moment of their marriage opt for the "régime légal de la communauté des biens", of French inspiration (Articles 1399 seq. of the Code Napoleon), or the "régime de la séparation des biens", of English inspiration (Ordinance No. 50 of 1949). The Ordinance permitted a married woman to retain her full capacity to deal with her property both movable and immovable and to act in all matters whatsoever as if she was not married.31

11. Whenever the legislature has considered the provisions of the Code Napoleon as unsatisfactory, it has enacted legislation to derogate from the provisions of the Code Napoleon, the legislation constituting the *lex specialis* compared with the *lex generalis* of the Code Napoleon. Some of the legislation adopted was inspired by UK statute law. Thus, the Landlord and Tenant Ordinance No. 13 of 1960, of English inspiration, complemented the provisions of the Code Napoleon concerning the *louage d'immeubles*, thereby establishing two legal regimes for the lease of immovable property. The provisions of the Landlord and Tenant Ordinance expressly derogated from the provisions of the Code Napoleon to ensure better protection to tenants in the context of a housing crisis.

Articles 1780 and 1781 of the Code Napoleon [these provisions deal with "louage d’ouvrage"] were made to co-exist with labour statutes of English inspiration.32 As a result, the general principles of the Code Napoleon governing the law of contracts were not abrogated in the matter of labour contracts, and were still applicable unless expressly or impliedly repealed by the various enactments constituting the labour legislation.33

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31 Ordinance No. 50 of 1949 was much inspired by the UK Married Women's Property Act of 1882: *vide* R. D'Unienville, *L'Évolution du Droit Civil Mauricien* (Port Louis: Best Graphics, 1994), at pp. 112 seq.

32 The principal statute was the Employment and Labour Ordinance of 1938. A.H. Angelo, “French and English Legal Cultures meet - Aspects of recent Mauritian Legislation”, (1976) 9 *Comparative & International Law Journal of Southern Africa* 372, at 373, points out that the Ordinance was of English inspiration and had its *raison d’être* in the large numbers of indentured Indian labourers who began arriving in Mauritius from about 1835.

12. All along the Judges of the Supreme Court were quite alive to the mixed legal heritage of the Mauritian Legal System and the need to preserve it. As far back as 1861, the Judges of the Supreme Court stated that "in this, as in every other case, where questions are raised on the Civil Code, we are in the habit of resorting to the decisions of the Courts ... which gave it birth". In *The Queen v. L'Étendry* [1953] MR 15, the Supreme Court reasserted that the normal rule of construction laid down by it, time and again, is to the effect that when our law is borrowed from French law we should resort for guidance as to its interpretation to French case law.

In *Pierrot v. De Baize* [1880] MR 158, the Judges of the Supreme Court pointed out, however, that though they are generally inclined to follow the decisions of the Courts in France and especially of the Court of Cassation upon questions of interpretation of the Codes, they would decline to do so where our Local Ordinance borrowed from the French Law is in many respects different from it. The view was expressed in *Re Pierre* [1973] MR 267 that where provisions of the Code Napoleon borrowed from the French Civil Code were not identical, the Court would examine whether the change of words in our text implies a change of intention. It was considered that unless our law differs from its source and that the intent of the Mauritian Legislature was different from that of France, the Courts will be guided by the decisions of French courts interpreting similar legislative provisions as ours.

Thus in *Mangroo v. Dahal* [1937] MR 43, the Supreme Court refused to follow the decision of the French Court of Cassation in *l'arrêt Jand'heur*, considering that no Court of Justice is empowered to alter a clear text of law (it thus ruled that Article 1384 of the Code Napoléon does not find its application when road accidents occur, but rather Articles 1382 or 1383 of the Code).

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34 *Carbonel, Bourdin Fils & Co. v. Letellier & ors.* (1861) MR 51.
13. It is also interesting to note that towards the end of the British colonial period, it was obvious that the institutions and rules inherited from the French and British traditions were interacting with each other. The law of defamation is a good example of such interaction. In *Forget v. La Presse Mauricienne & anor* [1958] MR 248, the Supreme Court observed that actions for libel are actions in tort known in French law as délits or quasi-délits and governed by Article 1382 of the Code Napoleon. But it went on to say that the defence of fair and bona fide comment on a matter of public interest as understood under the English law can be raised in an action for libel as ratio scripta because the principle on which that defence is based is common to both the English law and our own. The Court also held that the defence of qualified privilege, as contemplated by the English law of libel, cannot be pleaded in a civil action as nothing corresponding to that defence, namely publication of a defamatory article for the public good, appears to exist in French law.

14. When Mauritius attained sovereignty, a review of the Code Napoleon was undertaken and during the late 70s and early 80s the Code underwent substantial reforms, mainly in the field of family law and the law of persons. These reforms stemmed from the need to adapt the law to the social evolution and mores of the Mauritian society, while ensuring that gender equality and the best interests of the child lie at the heart of family relationships. The Legislature also enacted with a view to ensuring that those norms and institutions which one would expect to find in a civil code are incorporated in the Code Napoleon.

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36 R. Garron in an article in the (1980) issue of the Mauritius Law Review elaborates on the reforms to family law and the law of succession in the Code Napoleon; in an article in the (1982) issue, he discusses reforms to the Code Napoleon relating to the status of spouses and the exercise of parental authority; in the 1982 issue, he also deals with the reforms to the Code Napoleon about civil and religious marriages.

37 By virtue of Act No. 45 of 1990, adulterine children were recognized the same right as other natural children to have their ‘filiation’ established and to be heir to the succession of their parents. The Code Napoleon was amended by Act No. 26 of 1999 so as to ensure strict equality between husband and wife in respect of the legal administration of the property of their minor children and in the administration of the property belonging to the legal community of goods existing between them.

38 Act No. 37 of 1978 introduced in the Code Napoleon the concept of *co-proprité* (Articles 664 to 664-96) and enacted provisions relating to *la vente d'immeubles à construire* (Articles 1601-1 to 1601-45) and the *sociétés immobilières*
15. The mixed character of the Mauritian legal system has shown, through the interaction between the parent systems, the civil law and common law systems are complementary. The provisions of the Code Napoleon relating to louage des choses, of French inspiration, are made to apply to a lease governed by the provisions of the Landlord and Tenant (Control) Act, of English inspiration. The rules of French inspiration complement those of English inspiration. The Supreme Court has thus held that a tenant is under an obligation, by virtue of Article 1728 of the Code Napoleon, to use the rented premise according to destination. The legislature has, since independence, on certain occasions expressly indicated the manner in which rules borrowed from two parent systems will be called upon to apply to a given situation. It has thus laid down that the validity of a contract of association, a specific contract governed by statutory provisions of English inspiration, is to

(Article 1873-1 to 1873-27). Rules governing the contract of insurance (Articles 1983-1 to 1983-92) were laid down by Act No. 7 of 1983 in the part of the Code entitled 'Des contrats aléatoires'. The concepts of soustraitance and promotion immobilière were incorporated in the Code Napoleon by Act No. 9 of 1983.


"Il est évident que si l'on applique les principes généraux d'un système juridique dans l'interprétation des dispositions de l'autre système, il y a nécessairement mixité dans le sens de la complémentarité: un système étant, dans la circonstance, insuffisant, va être complété par l'application des règles ou des principes de droit commun de l'autre système en vigueur dans l'Etat concerné."


"Dans un Etat dont les règles générales des contrats sont régies par le Code Napoléon, il est logique de faire application de ces règles générales à un contrat régi par une loi spéciale d'origine britannique, en cas de difficulté d'interprétation de ce contrat spécial, c'est-à-dire au cas où la jurisprudence britannique n'apporte, en la circonstance, aucune solution à ce problème d'interprétation".

41 Article 1728 of the Code Napoléon states as follows:

"Le preneur est tenu ... d'user de la chose louée ... suivant la destination qui lui a été donnée par le bail, ou suivant celle présumée d'après les circonstances, à défaut de convention ..."

be appraised according to the _droit commun des contrats_ as laid down in the Code Napoleon.\textsuperscript{43}

16. New institutions emerged as a result of the mixed or hybrid nature of the Mauritian legal system.\textsuperscript{44} One may give as example the concept of _sûreté fixe_ & _sûreté flottante_, borrowed from English law and incorporated in the Code Napoleon after transformation (Articles 2202 to 2203-7).\textsuperscript{45} While fixed and floating charges are, in English law, a surety available

\textsuperscript{43}Article 1773-30 of the Civil Code lays down that "sous réserve des dispositions du Registration of Association Act, l'association est régie, quant à sa validité, son fonctionnement et sa dissolution par les principes généraux du droit applicables aux contrats et obligations".

\textsuperscript{44}R. Garron, «Le Droit Mixte: Notion et Fonction», In _La Formation du Droit National dans les pays de Droit Mixte: Systèmes Juridiques de Common Law et de Droit Civil_, [Ed. GRÉCO (Groupement de Recherches Co-ordonnées 'Océan Indien') du CNRS (Centre National de la Recherche Scientifique), Presses Universitaires d'Aix-Marseille, 1989], notes at p. 13 that:

"[U]n pays dit de 'Droit mixte' - c'est-à-dire un pays où coexistent deux systèmes - a tendance à réaliser ses objectifs nationaux par l'utilisation cumulative d'une pluralité de techniques. Ce qui constitue d'ailleurs la finalité principale du Droit mixte. Le Droit mixte, en effet, a pour fonction de réaliser une finalité politique, économique ou sociale par l'utilisation cumulative d'une pluralité de techniques émanant de systèmes juridiques différents."

\textsuperscript{45}R. Garron, 'Un Exemple d'Interaction des Systèmes: Le Droit des Sûretés l'Ile Maurice », In _La Formation du Droit National dans les pays de Droit Mixte: Systèmes Juridiques de Common Law et de Droit Civil_ [Ed. GRÉCO (Groupement de Recherches Co-ordonnées 'Océan Indien') du CNRS (Centre National de la Recherche Scientifique), Presses Universitaires d'Aix-Marseille, 1989], at pp. 137 seq, regards our law of sureties as a good example of interaction between the institutions of the two inherited legal traditions. He made the following pertinent observations at pp. 142-143:

"Compte tenu de l'analyse juridique à laquelle nous nous sommes livrés à partir de l'introduction de la floating charge à l'Ile Maurice, il apparaît que cet exemple est fondamental pour illustrer l'effet créateur de l'interaction des systèmes.

Cet effet créateur résulte à la fois de l'influence des systèmes juridiques en présence, en amont, et de l'aptitude du législateur d'un pays de droit mixte à utiliser opportunément les techniques de l'un ou l'autre de ces systèmes pour aboutir, en aval, à la finalité nationale recherchée.

Ainsi, à l'Ile Maurice, la situation juridique en amont était la suivante: un droit civil français des sûretés et un droit commercial d'origine britannique. Le droit commercial britannique, par le fait qu'il ne reconnaît pas le fonds de commerce en tant qu'institution juridique, interdisait au législateur mauricien l'utilisation des nouvelles techniques françaises de nantissement pour résoudre le problème crucial du crédit aux entreprises, lorsqu'après l'indépendance, en 1968-69, le gouvernement de l'Ile Maurice a décidé de développer ses zones franches.

Ne pouvant utiliser la technique française pour parvenir à la finalité pratique recherchée, le législateur mauricien - législateur de "Droit mixte" qui avait donc le choix d'utiliser les techniques de l'un ou l'autre des systèmes en présence - a fait appel à la technique britannique des floating charges (introduction des floating et fixed charges de type britannique à l'Ile Maurice par le "Loans charges and Privileges (Authorised Bodies) Act" de 1969).

L'effet créateur de l'interaction apparaît alors à l'évidence: il n'existait aucune mixité dans le droit mauricien des sûretés: en 1969, cette mixité a été créée, à la suite de l'interaction du droit commercial d'origine britannique et du droit civil d'origine française: _la mixité en amont a engendré la mixité en aval._"
only to companies, in Mauritian law natural persons too are entitled to have recourse to this device as borrowers.\textsuperscript{46}

17. Even in those areas where the Mauritian legislature has been inspired by English or French legislation, it has used the institutions and legal techniques borrowed from that parent system to pursue \textit{une finalité mauricienne}, thereby enacting an authentic Mauritian law.\textsuperscript{47}

The concept of \textit{'légitimation par adoption'} illustrates well this doing. The reforms to the Code Napoleon in the early 1980s did not alter the status of children born out of wedlock, who are the fruit of an adulterous relationship.\textsuperscript{48} Adulterine children could not be acknowledged by their father\textsuperscript{49} and could not therefore be legitimated by the subsequent marriage of their father and mother, as is the case for natural children.\textsuperscript{50} To circumvent this situation, the legislature evolved that new concept\textsuperscript{51}: it enabled a child, whose \textquote{filiation} is established with regard to the mother alone, to be legitimated through his adoption by his mother's spouse.\textsuperscript{52}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{47}] Vide L.E. Venchard, \textquote{L'Application du Droit Mixte à l'Ile Maurice} (1982) 4 \textit{Mauritius Law Review} 41, at pp. 41-43.
\item[\textsuperscript{48}] Act No. 45 of 1990 has amended Article 335 thereby removing the prohibition on children born outside wedlock, out of the fruit of an adulterous relationship, to be acknowledged by the father.
\item[\textsuperscript{49}] Article 335 of the Code Napleleon.
\item[\textsuperscript{50}] Article 331 of the Code Napleleon.
\item[\textsuperscript{51}] Articles 370 to 370-5 of the Code Napoleon deal with \textquote{la légitimation par adoption}.
\item[\textsuperscript{52}] R. Garron, \textquote{Le Droit Mixte: Notion et Fonction}. In \textit{La Formation du Droit National dans les pays de Droit Mixte: Systèmes Juridiques de Common Law et de Droit Civil}, [Ed. GRÉCO (Groupe de Recherches Coordonnées 'Océan Indien') du CNRS (Centre National de la Recherche Scientifique), Presses Universitaires d'Aix-Marseille, 1989], at pp. 17-18, elaborates on this new concept in the following terms: \textquote{C'est pour résoudre ce problème strictement local, que le législateur mauricien a créé un nouveau type d'adoption. Le concubin qui se marie, par la suite, avec la femme adultère, peut \textquote{adopter} l'enfant adulterin qui est né de ses rapports avec celle-ci. Par cette \textquote{adoption}, cet enfant va devenir légitime. Il s'agit, par conséquent, d'une \textquote{adoption} en vue seulement de la légitimation de son propre enfant. Il ne s'agit donc plus d'une adoption véritable. L'adoption, en effet, a pour finalité la création artificielle d'un lien de filiation qui n'existe pas effectivement. Dans l'hypothèse de la \textquote{légitimation par adoption} mauricienne, il n'est pas question de créer juridiquement une filiation artificielle puisque celle-ci existe effectivement: on veut simplement aboutir à une reconnaissance et à une légitimation par l'intermédiaire d'une institution plus discrète que les institutions}
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18. The Supreme Court has affirmed in an unequivocal manner after independence the existence of a distinct corpus of Mauritian law. It asserted in Regina v. Shummoogum & ors [1977] MR 1 that when we borrow a piece of legislation from a foreign country it ceases to be foreign law and becomes Mauritian law. The legislation should, in the opinion of the Court, be interpreted in the light of the general principles applicable to other statutes in pari materia and in such way that it does not destroy the coherence of our law. In Legoffe v. Severy [1981] MR 89 it was pointed out that where our law is at a junction where principles derived from French law meet principles derived from English law, our Courts have a liberty of manoeuvre whereby creative interpretation may lead our law forward in the best possible direction.

An area of the law where a Judge of the Supreme Court [Justice V. Boolell] has had recourse to both English and French principles concerns divorce. He considered in Ramsamy (h.) v. Ramsamy (w.) [1990] MR 58 that the principles governing the concept of separation for the purposes of desertion in English law may find their relevance in elucidating the concept of separation for the purposes of 'rupture de la vie commune' in Mauritian law53: the principles, being in his opinion, the same. In Dhayam (h.) v. Dhayam (w.) [1996] MR 21, the issue arose whether sexual intercourse, whilst divorce proceedings are pending, constitute condoning past misconduct by the other spouse and amounts to 'réconciliation'.54 French and English case law on the matter were examined and contrasted: English case law more readily sees in sexual intercourse an indication that spouses have reconciled whereas French law goes much further and insists on clear evidence of the forgiveness of past mistakes of the offending spouse and real intention of resuming conjugal life, sexual intercourse, being one of the ingredients but not necessarily the sole ingredient.
of such an intention. The judge decided to follow the English case law. He considered that while we stand guided by the decisions of French courts when interpreting articles of the Code Napoléon, French case law should not be followed blindly when English and French principles are equally similar.

19. In the late 80s and early 90s, with a view to developing business activities in Mauritius, the concept of the trust was introduced by statute.\textsuperscript{55} Legislation has been passed regarding the setting up of unit trust schemes [Unit Trust Act No. 26 of 1989] and offshore trusts [Offshore Trusts Act No. 29 of 1992]. The Office of Public Trustee was established by Act No. 27 of 1989. While many civilian scholars have doubted that the trust could be successfully accommodated with the civil law concept of \textit{patrimoine} and ownership of property,\textsuperscript{56} its incorporation in codified mixed jurisdictions need not however produce structural deformities into the property law.\textsuperscript{57} It is to be noted that the Trusts Act of 1989, as well as the Offshore Trusts Act of 1992, makes no reference to legal or equitable estates or interests. This demonstrates that it is possible to capture the working character of the common law trust without the law of estates.\textsuperscript{58} The trust legislation presents other interesting departures from the established law of trusts in the common law jurisdictions.\textsuperscript{59}

\begin{footnotes}
\item[59] Ibid. at pp. 366-367.
\end{footnotes}
(C) The Historical Evolution of the Code de Procédure Civile in Mauritius

20. The French Code of Civil Procedure ('Code de Procédure Civile') of 1807 was promulgated on 20 July 1808. The said Code remained in force after the British assumed sovereignty in Mauritius, in accordance with Article 8 of the 1810 Treaty of Capitulation (later confirmed by the Treaty of Paris in 1814). But, as a consequence of the new colonial administration and the adoption of a court structure, and the remedies which they provide, patterned in the tradition of the common law [leading to the enactment of special legislation and Rules of Court], many of the provisions of the Code were repealed.

21. The tension between rules borrowed from the parent systems had an impact on the interpretation of the 'Code de Procédure Civile regarding recourse to expert witnesses in cases of 'vérification d'écriture'. The Supreme Court held in Mauritius Fire Insurance Co. v. Lemeur [1893] MR 42 that the procedure laid down in Articles 193 and following the Code de Procédure Civile would not be applicable in Mauritius. It took the view that under the Rules of the Supreme Court, inspired by English law and practice, Judges will not name experts without a motion to that effect being made by the parties: the Rules of Court are to the effect that every question of disputed facts, however scientific and technical, shall, after examination of the witnesses, be determined by the Court sitting as a jury. The Court observed that there is in that respect a marked difference between the local forms of procedure and the procedure of France. The non-applicability of the procedure provided

60 Article 195 of the Code provides that “si le défendeur dénie la signature à lui attribuée ou déclare ne pas reconnaître celle attribuée à un tiers, la verification en pourra être ordonnée tant par titres que par experts et par témoins”.

61 The Supreme Court noted at p. 44:

"In France the procedure by way of reference to experts is very much resorted to – there appear to be attached to almost every Court in France Official experts, and it is not unusual for the judge or the judges concerned, without the parties moving them thereto, to appoint these official experts to make a report upon the technical questions which may be involved in the case."
for by the Code de Procédure Civile as regards ‘vérification d'écriture’ has since become an established principle of Mauritian law.  

22. Another example of interaction concerned 'examination on personal answers' ['l’interrogatoire sur faits et articles'], as provided by Articles 324 and 336 of the Code de Procédure Civile. The procedure adopted in Mauritius has been very much different from that followed in France, the provisions of Articles 325 to 335 of the Code de Procédure Civile having been repealed in 1872. In France the interrogatory occurred in the absence of the adverse party before a 'juge-commissaire' and its ambit was restricted to questions of which the party interrogated had been given advance notice. In Mauritius, the examination takes place viva voce before the tribunal which has jurisdiction over the claim and not as a separate inquiry on interrogatories before another tribunal or judge. Section 167 of the Courts Ordinance and Rules 89 to 93 of the then 1903 Rules of the Supreme Court assimilate the examination of a party on personal answers to the examination of a witness subject to the following differences. First, the party examined is not required to testify on oath or affirmation. Secondly, he is treated as an adverse witness for the purpose of obtaining from him admissions or statements derogatory to his own cause or to substantiate his opponent's cause. Thirdly, he is a party in the cause who has already submitted to the jurisdiction of the Court either as plaintiff or defendant, as otherwise he could not be required to submit himself for examination on personal answers.

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63 The object of 'l’interrogatoire sur faits et articles' is to obtain from an adverse party declarations which may constitute either an 'aveu judiciaire' under Article 1356 of the Code Napoleon or a beginning of proof in writing of the kind contemplated by Article 1347, opening the door to oral evidence, that is to say, a mode of securing evidence of a fact which could not by the terms of Article 1341 otherwise be proved in the absence of documentary evidence.

64 Section 6 of the Ordinance No. 8 of 1872.

65 Articles 324 to 336 of the French Code de Procédure Civile were repealed and replaced by the "Loi du 23 Mai 1942".

66 Ex parte Ismael (1941) MR 17 at 19.
23. It is a matter of regret that when the Codes of French origin were reviewed in the late 70s and early 80s, the Code de Procédure Civile was left unattended (save regarding provisions on arbitration). The language used in this Code is old fashion and many of the provisions are out-dated.

(D) The Historical Evolution of the Code de Commerce in Mauritius

24. On 14 July 1809, the French Code de Commerce of 1807 was promulgated in the then isle de France. The said Code remained in force after the British assumed sovereignty in Mauritius, in accordance with Article 8 of the 1810 Treaty of Capitulation (later confirmed by the Treaty of Paris in 1814).

25. In the field of commercial law, the British colonial period was marked by the repeal of various provisions of the Code de Commerce. The matters they dealt with were replaced by legislation relating to trade, shipping, banking and Finance, which were inspired by the then prevailing UK legislation. The new circumstances warranted these changes: banks and business organisations from Great Britain had been implanted in the country; trade with UK had significantly increased.

Legislation was introduced to regulate the stock brokers' profession. Provisions relating to the Stock Exchange ("Bourse de Commerce") were repealed and a Chamber of Brokers established. The provisions of the Code de Commerce relating to bankruptcy (Book III dealt with "De la Faillite et de la Banqueroute") were substantially modified, and replaced by legislation of English inspiration.

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67 Ordinance No. 11 of 1836 repealed articles 71-90 of the Code de Commerce dealing with "Des Bourses de Commerce, Agents de Change et Courtiers". This ordinance was subsequently repealed by Ord. No. 25 of 1945 (Brokers Ordinance).

68 Brokers Ordinance No. 25 of 1945.

69 Ordinance No. 10 of 1838, as subsequently amended by Ordinance No. 33 of 1853 and Ordinance No. 14 of 1864.
The provisions dealing with the jurisdiction of the *Tribunal de Commerce* were repealed by Ordinance No. 2 of 1850, establishing the Supreme Court and reforming the judicial system.\(^71\)

The Merchant Shipping Ordinance No. 17 of 1855, based on the UK Merchant Shipping Act of 1854, repealed the various provisions of the *Code de Commerce* relating to "commerce maritime",\(^72\) this ordinance was later replaced by Ordinance No. 19 of 1910, which took into account changes effected in the UK by the Merchant Shipping Act of 1894.\(^73\)

The provisions of the *Code de Commerce* relating to "*Sociétés Anonymes et la Commandite par actions*"\(^74\) were repealed and replaced by the Companies Ordinance No. 35 of 1912,\(^75\) which was largely inspired by the UK Companies Act of 1908.

The Bills of Exchange Ordinance No. 32 of 1914, based on the UK Bills of Exchange Act of 1882, repealed the provisions of the *Code de Commerce* dealing with "*La lettre de Change, le Billet à Ordre*".

26. After independence, the Code de Commerce, whose numerous provisions had been repealed during the British colonial period, also underwent reform.\(^76\) The aims of the reform were to bring the code in line with contemporary commercial practice and to ensure that the domestic law was in conformity with international treaty obligations concerning trade and

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\(^{70}\) The Bankruptcy Ordinance No. 15 of 1882 (*Lane (1946)*, Vol. II, Cap. 166, at pp. 15 seq.) was a mere copy of the 1869 UK Bankruptcy Act. This ordinance was amended by Ordinance No. 23 of 1887 which, though based on the UK Bankruptcy Act of 1882, did contain certain of the principles enshrined in the *Code de Commerce*: whilst in English law can be declared bankrupt both traders and non-traders, the Mauritian legislation provided that only traders could be declared bankrupt (this was in line with Article 437 of the *Code de Commerce*).

\(^{71}\) Articles 615-648 of the *Code de Commerce*, which constituted Book IV entitled "*De la juridiction commerciale*", were repealed.

\(^{72}\) Articles 190-272 of the *Code de Commerce*, which constituted Book II of the Code entitled "*Du Commerce Maritime*".

\(^{73}\) *Lane* (1946), Vol. IV, Cap. 346, at pp. 226 seq.

\(^{74}\) Articles 19(2), 29-38, 40-45 of the *Code de Commerce*.

\(^{75}\) *Lane* (1946), Vol. IV, Cap. 397, at pp. 467 seq.

\(^{76}\) Act No. 10 of 1983; Act No. 21 of t No 1985; Act No. 28 of 1985; Act No. 34 of 1985; Act No. 28 of 1986; Act No. 20 of 1992.
transportation.\textsuperscript{77} The evolution of the law in France was taken into account. The provisions of the \textit{Livre Premier} relating to \textit{sociétés} (Articles 17-50) were thus borrowed from the French \textit{Loi No. 66-537 du 24 Juillet 1966 relative aux sociétés commerciales};\textsuperscript{78} the French \textit{Loi du 3 Janvier 1967 portant statut des navires et autres bâtiments de mer} inspired the legislator when drafting Articles 191 to 230 of the Code.\textsuperscript{79} Laws of English inspiration remained nonetheless the bare bones of the Mauritian Commercial Law.\textsuperscript{80}

\textbf{(E) Concluding Observations: The Way Forward}

27. The review would have to be carried out from a historical and comparative perspective.

28. Our Codes would be compared with those in France, and in mixed legal systems, such as that of Quebec, Louisiana, and Seychelles. Approaches taken in other jurisdictions on issues covered by our Codes may also be examined the more so as comparative lawyers no longer put emphasis on the differences between the civil law and common law systems, but rather on their commonality and how they are complementary.\textsuperscript{81}

\textsuperscript{77} Eg the Warsaw Convention of 1929 and the Hague Protocol of 1955 relating to Civil Aviation; the 1924 Bruxelles Convention on Maritime Transportation.

\textsuperscript{78} L.E. Venchar et al., \textit{Codes Annotés de l'île Maurice : Code de Commerce et code de Procédure Civile} (1998), at pp. 8-15.

\textsuperscript{79} \textit{Ibid.} at pp. 23-33.

\textsuperscript{80} Article 17 of the Code of Commerce thus provides that "les dispositions de présent titre [Des Sociétés] sont applicables aux sociétés commerciales sous réserve des dispositions du Companies Act". Article 190 lays down that the provisions of the \textit{Livre Deuxième} "ne régit la navigation et le commerce maritimes que sous réserve des dispositions spéciales applicables en ce domaine", that is the provisions of the Merchant Shipping Act, of English inspiration.

\textsuperscript{81} M. Tancelin, \textit{« Problématique de la Mixité du Droit: Le Cas de deux Pays de l' océan Indien, Maurice et les Seychelles »}, (1981) \textit{VIII Annuaire des pays de l'Océan Indien} 95-101, observes at pp. 100-101 that:

"Les écoles contemporaines de droit comparé mettent l'accent sur les ressemblances du droit civil et de la common law à l'encontre des comparatistes des décennies précédentes qui se plaisaient à insister sur les différences. On ne voit plus aujourd'hui d'opposition diamétrale sur le terrain de la technique juridique, mais plutôt une sorte de complémentarité entre le système français et le système anglais pris comme archétypes. Les
29. The historical context in which the Codes in this country have evolved since their promulgation more than two centuries ago, which have lead to the development of the Mauritius legal system as a mixed or hybrid legal system, would also have to be borne in mind. The reform options to meet the contemporary challenges would have to be examined in the light of the socio-economic exigencies of our society in the context of globalization. We should always bear in mind that our legislature, even though borrowing rules from a variety of material sources, has always pursued ‘une finalité mauricienne’ thereby developing a distinct corpus of Mauritian law.


83 This aspect of Mauritian law was highlighted in the Report of the Committee on the Review of Legal Studies in Mauritius, (1983) Journal of the University of Mauritius 162, which was chaired by Mr. Justice Rajsoomeer Lallah (as he then was):

"[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 ..."


"[Le Droit Mixte est] un Droit dont les institutions émanent de systèmes juridiques différents et résultent de l'application cumulative ou de l'interaction de techniques qui appartiennent ou se rattachent à ces systèmes. Il n'est pas suffisant que deux systèmes juridiques différents coexistent dans le territoire d'un seul Etat; encore faut-il qu'un système agisse sur l'autre, et inversement. Cela est, en effet, nécessaire pour que naisse un véritable Droit Mixte ...

Pour qu'il y ait droit nouveau, pour que naisse un droit mixte spécifique, indépendant des deux systèmes juridiques en présence, il faut et il suffit que les différentes institutions en confrontation perdent leur nature propre. A ce moment là, dans la mesure où ces institutions ne correspondent plus à leurs finalités ou à leurs critères propres (c'est-à-dire à leurs finalités ou critères 'd'origine'), on peut dire alors qu'il y a création d'un droit mixte spécifique et nouveau ...

[L]e législateur d'un pays de Droit mixte ne dispose pas de techniques juridiques nationales: il se doit d'utiliser les diverses techniques des deux systèmes juridiques en vigueur, en l'occurrence, pour l'Ile Maurice, les techniques juridiques françaises et britanniques. Pour accomplir une finalité spécifique et strictement nationale, le législateur est souvent contraint de transformer l'une ou l'autre de ces techniques qui sont des 'instruments' juridiques en les détournant carrément de leurs propres finalités. Par le fait même ce législateur crée un droit national, un droit autonome à partir des institutions appartenant aux deux systèmes juridiques: le droit national ainsi créé, bien que, par hypothèse autonome et spécifique, se caractérise donc par la mixité de ses origines".