LAW REFORM COMMISSION

Report and Draft Bill

« Reform of Defences in Criminal Law »

[LRC_R&P 171, June 2023]

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(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.

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Executive Summary

Report and Draft Bill about « Reform of Defences in Criminal Law » [LRC_R&P 171, June 2023]

In May 2016, the Law Reform Commission produced an Interim Report on "Reform of the Criminal Code" and in October 2019 it published a Discussion Paper on reform of general principles of criminal law wherein it tackled the issue of criminal responsibility. Following discussions with stakeholders and the Colloquium on Criminal Law it organised on 10 December 2021, the Commission is recommending, in this Report, changes to Book II and Book III (Title II, Chapter I) of the Criminal Code, to review defences in our criminal legislation.

The LRC thus proposes, *inter alia*, to reformulate provisions pertaining to self-defence by modernising the phraseology used and clarifying the text of this justification, by repealing Sections 246 and 247 of the Criminal Code and replacing them with a new provision which echoes Articles 122-5 and 122-6 of the French Penal Code. Moreover, it is proposed to add a new Section 46 on "State of Necessity" based on Article 122-3 of its French counterpart. The Commission also suggests to repeal and replace Section 245 dealing with "Homicide and wounds and blows under lawful authority" with provisions on "Order of the Law or Commandment of Lawful Authority". It is also proposed to insert a new Section 47 about "Consent of the victim" (based on Article 228 of the German Criminal Code). Finally, the Commission is recommending to amend Section 42 pertaining to "Psychological Disorder and Duress".

The LRC has identified these areas as fundamental in achieving a more equitable justice system that aptly considers the wide range of circumstances that could influence an individual's actions during the alleged commission of a crime.

Notably, the report proposes that the legal concepts of self-defence be clarified and redefined to provide a clear understanding of when and how these defences can be invoked, and that the concept of "*état de nécessité*" be included in our penal legislation.

Concerning duress, the Commission suggests an expanded definition to include situations of coercive control and psychological manipulation that might lead a person to commit a criminal act. The report also advocates for a reassessment of the defence of lawful authority in cases of homicide and wounds and blows. It emphasises the need for clear guidelines that prevent misuse of authority while ensuring adequate protection for law enforcement personnel acting in the line of duty.

Finally, the proposed "consent of the victim" defence underscores our commitment to the principles of individual autonomy and freedom.

A draft bill is annexed, which encapsulates all the proposed changes to the law. This bill serves as a model for the necessary legislative amendments that would embody the reformed principles of criminal defences.

EXPLANATORY NOTE

1. In order for a person to be found guilty of an offence, he must have performed the prohibited action while being aware of the legal prohibition. However, in some cases, individuals may not have intended to violate the law, due to a disorder affecting them or the circumstances in which they were brought to act. Specifically, the Criminal Code declares people who can claim external causes that remove any criminal character from their act, as not criminally liable. These are justifiable facts. The same applies to individuals who can claim causes related to themselves, eliminating the moral element of the offence, and which are causes of non-imputability.

2. Justifiable facts constitute causes of objective irresponsibility, while causes of non-imputability constitute causes of subjective irresponsibility. Our Criminal Code recognises three causes of non-imputability, namely, mental disorder, duress, and minority. While justifiable facts, on the other hand, amount to self-defence and the order of the law and the command of legitimate authority.

3. In its Interim Report of May 2016 on the reform of the Criminal Code, the Law Reform Commission proposes that some causes of irresponsibility be modified while others be added, like the state of necessity.

4. The Commission calls for a robust engagement between lawmakers, judicial authorities, and societal stakeholders for effective implementation of these reforms. It asserts that this would significantly enhance the fairness and adaptability of Mauritius' criminal justice system while setting a progressive precedent for other jurisdictions facing similar issues.

5. Criminal law serves as society's most potent tool for defining acceptable behaviour, distinguishing right from wrong, and outlining the consequences of crossing these boundaries. The principles it embodies are not merely legal, but deeply rooted in societal morality and ethical conceptions. It is hence vital that our legal structures, particularly defences in criminal law, reflect this profound philosophical underpinning, allowing for a richer, more nuanced approach to justice.

6. Present defences such as self-defence, duress, necessity, and lawful authority, whilst essential, are antiquated and fall short of capturing the full spectrum of human behaviour and morality. A thorough re-examination and reform are necessary to align them with contemporary societal understanding.[1]

7. Self-defence and the state of necessity, arguably the most primal of all defences, spring from the basic human instinct of survival.[2] Yet, our current legal framework often restricts the scope of these defences, resulting in instances where individuals are penalised for actions taken in desperation or fear. A reformed understanding, embracing a more liberal application of these defences, would better reflect this deeply rooted philosophical perspective.

[1] The Commission is of the view that more comprehensive research is required before formulating any proposals regarding the defence of whistleblowing. This research is crucial to ensure the creation of robust safeguards for those individuals who step forward to expose wrongdoing, misconduct, or illegal activities. The Commission understands the significance of this measure in fostering an environment where integrity and honesty are encouraged, which are foundational aspects of both transparency and accountability. The intention is to align with globally recognized best practices, further reinforcing these fundamental pillars of governance and corporate conduct.

[2] Thomas Hobbes, in his seminal work *Leviathan*, underlines the inherent human right to self-preservation. The right to defend oneself or others, or act out of necessity, embodies this Hobbesian principle.

8. The defence of duress, too, warrants a review. The notion that an individual may commit an act under coercion or threat fundamentally questions the concept of free will, a cornerstone of moral and legal responsibility.[3] The lawful authority defence, particularly in cases of homicide and wounds and blows, calls into question the philosophical debate on the balance of power and authority,[4] and thus is also assessed.

9. Finally, in line with advancing individual autonomy and upholding personal dignity, it is likewise proposed to introduce a new defence of the consent of the victim.[5]

10. Reforming defences in criminal law is more than a legal necessity - it is a philosophical and sociological imperative. The criminal justice system should serve as an accurate reflection of our moral and ethical understandings, adaptable to societal progression and new philosophical insights. By acknowledging and integrating these considerations into the heart of our legal framework, we can ensure a system that is both just and compassionate, understanding and accountable. This ethical overhaul of our criminal defences is a critical step towards a more enlightened and empathetic approach to justice.

11. The Law Reform Commission emphasises the necessity for a more intricate, up-to-date understanding of defences in criminal law. The proposed reforms aim to foster a more equitable criminal justice system that better comprehends the complexities of real-world circumstances and their impacts on human behaviour.

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[3] Philosophers like Immanuel Kant have long argued that moral and legal culpability requires a voluntary act. By broadening the scope of duress to include psychological and systemic coercion, the law can more accurately apply this Kantian principle, ensuring that only those who act of their own free will are held fully accountable.

[4] Philosopher John Locke argued for the importance of checks and balances in power structures, warning against the danger of misuse of power. In this light, it is crucial that laws regulating this defence are revised to prevent abuse, yet protect those legitimately exercising their duties.

[5] This defence acknowledges that certain acts, potentially deemed harmful, are lawful if performed with the free and informed consent of the individual, unless it violates public policy.

(I) CRIMINAL DEFENCES UNDER MAURITIAN LAW

(A) Justifying facts

12. Justifying facts can be presented as objective causes of irresponsibility because they prevent the constitution of the offence. Some justifying facts participate in a duty: thus, the law, the regulation, or the legitimate authority can command to act or to abstain, even if it means committing an offence. This *offence* is then not unjust because one cannot blame a person for having fulfilled their duty. Other justifying facts participate in a right: the legal system allows the realisation of an "offence" in the name of a legitimate interest; the incrimination therefore receives an exception, the prohibited becomes permitted. This is the case of the right to defend oneself or others against an illegitimate attack (self-defence).

(1) Self-defence

5. All societies throughout history have recognised the concept of self-defence.[6] For Cicero, self-defence constitutes a man's duty to restore his dishonoured honour.[7] Self-defence ensures impunity for the one who, in repelling a current and unjust aggression threatening him or someone else, is led to commit an offence harming the author of the danger. The European Convention on Human Rights, in its Article 2, § 2, expressly refers to the concept of self-defence: it indeed specifies that death is not inflicted in violation of the

[6] C. MASCALA, Fasc. JurisClasseur Pénal, Légitime défense, art. 122-5 et 122-6, 1 avril 2012, n°3.
[7] CICERO, Œuvres complètes, t. 3, *Pro Milone*, trad. M. Nisard, 1927, 4, 10, 11.

"right to life",[8] if the death that results from the use of force absolutely is necessary to ensure the defence of any person against illegal violence.

6. Under French law, the principle of self-defence is explicitly outlined in the Penal Code, under article 122-5, which states that a person is not criminally liable who, faced with an immediate threat to himself, another person, or property, carries out an act necessary for the defence of such rights, except when the act constitutes a wilful violation of a personal duty or law.[9] The act of self-defence is thus permitted in proportion to the act of aggression, providing the response was immediate, necessary, and in direct relation to the original threat. However, the Code emphasises proportionality in self-defence, prohibiting excessive or unreasonable reactions.

7. Comparatively, the legal framework in other jurisdictions may vary, but the principle remains relatively consistent. The United States, for example, follows the 'Stand Your Ground' principle in certain States, allowing an individual to use force, including deadly force, in self-defence when there is a reasonable belief of a threat.[10] Meanwhile, the United Kingdom maintains a somewhat similar principle, where reasonable force can be used in self-defence, as per the Criminal Justice and Immigration Act 2008, Section 76.[11]

8. According to Section 246 of our Criminal Code, there is neither crime nor misdemeanour, where homicide, wounds or blows are commanded by an actual necessity of the lawful defence of oneself or of another person. The following Section endeavours to interpret the concept of self-defence; thus, according to the text of Section 247, the

[8] ECHR art. 2 § 1.
[9] French Penal Code, Section 122-5, 1994
[10] B. L GARRETT, *The Law of Self-Defense*, Carolina Academic Press, 2019, pg. 59.
[11] A. SANDERS and R. YOUNG, *Criminal Justice*, Oxford University Press, 2007, pg. 97.

following cases are included in the cases of current necessity of defence: homicide has been committed, or wounds made, or blows inflicted in repelling during the night, the scaling or breaking of the enclosure, wall or entrance of a house, or inhabited apartment, or of the dependencies thereof; or the act has taken place in defending oneself against the author of any robbery or plunder executed with violence.

9. Self-defence therefore presupposes an act of aggression followed by an act of defence.

(2) Homicide and wounds and blows under lawful authority

13. According to Section 245 of our Criminal Code, there is neither crime nor misdemeanour, where homicide and wounds or blows are ordered by law, and commanded by lawful authority.

14. It must also be highlighted that the 'law' we are talking about must have mandatory force on the national territory.[12] Let's also remember that one cannot hide behind legitimate command if the order given is manifestly illegal.[13] Moreover, the more serious the act committed and the more blatant the illegality, the more easily one will reproach the subordinate for his passive obedience. This is what is known under the expression of 'intelligent bayonets'.[14]

[12] Consequently, a person on Mauritian soil could not justify a foreign law to excuse illegal acts on our territory.
[13] Thus, a police officer who would commit a rape on a person in detention could not claim the order he received from his superior.
[14] V. H. DONNEDIEU DE VABRES, *Traité élémentaire de droit pénal et de législation pénale comparée*, no 410.

15. In *Raghoonundun v The State* (1998) SCJ 143, it is reminded that the one who wishes to claim this justifying fact is to prove it, and this by reasoning from Section 125 of the District and Intermediate Courts (Criminal Jurisdiction) Act.[15]

(3) Consent of the victim

16. Despite the Latin maxim "*volenti non fit injuria*",[16] our criminal law does not recognise consent as a justifying fact or a cause of exoneration. Indeed, according to the Court of Cassation "the consent of the victim of a homicidal assault cannot legitimise this act".[17] This does not only apply to homicides but also to assaults on bodily integrity.[18] The fact is that criminal law is perceived as having the function not of acting to defend private interests, but rather of repressing social disorder, whereas the victim's consent falls under private interest, which is superseded by the general interest.

17. Indeed, Laws that protect people's lives are of public order, and no individual can absolve or legitimise a crime against persons.[19] For a long time, the Court of Cassation has considered that the victim's consent was not of a nature to make the offence of violence disappear. It was first led to judge it regarding conscripts who accepted, or even

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[15] « *(1) The description in the information of any offence in the words of the law creating such offence, with the material circumstances of the offence charged, shall be sufficient.*
(2) Any exception, exemption, proviso, or qualification, whether it does or does not accompany the description of the offence in the law creating such offence, may be proved by the defendant but need not be specified in the information or proved by the prosecutor. »

[16] In Roman law, the rule *"volenti non fit injuria"* applied exclusively to offenses that infringed on private rights over which the holders had free disposal. On the other hand, when the offense violated a provision of public order and social interest, the victim's acquiescence did not remove the criminal character from the act and did not stop prosecutions against their perpetrator.

[17] Crim., 23 juin 1838

[18] Crim., 1er juillet 1937

[19] Cass. crim., 16 nov. 1827 : Bull. crim. 1827, n° 284

solicited, mutilations on their bodies to avoid being enlisted. As early as 1813, the criminal chamber affirmed that wounds inflicted voluntarily can only be considered not to be a crime or offence when they have been commanded either by legitimate authority, according to the order of the law, or by the actual necessity of legitimate defence, and that outside these cases and those where the law authorises them, because of a utility recognised by it, such acts of violence are offences.[20]

18. It is to be noted that that is not the approach of all legal systems. Thus, according to the position of German law, the victim's consent is explicitly provided for in certain cases. Indeed, according to Section 228 of the German Penal Code (StGB), consensual bodily harm is not unlawful, unless it contravenes good morals.[21]

19. In our law, this justification is not admitted, as evidenced by the survival of Section 250 of the Criminal Code, as well as Article 6 of the Civil Code, according to which one cannot derogate by special agreements from laws that concern public order and good morals.

(B) Causes of non-imputability

20. Criminal law considers that an offence can only be blamed on an individual if, at the time of the facts, he had a clear conscience and a free will and that, if this was not the case, the offence is not attributable to him. Three causes can affect the necessity of a clear conscience and a free will in our law; these are mental disorder, duress, and criminal minority.

[20] Cass. crim., 13 août 1813
[21] X. PIN, *La théorie du consentement de la victime en droit pénal allemand (1) Eléments pour une comparaison*, RSC 2003, pg.259.

(1) Mental disorder

21. According to Section 42 (2) of our Criminal Code, *"insanity" includes mental disorder rendering the accused incapable of appreciating the nature and quality of the act or of knowing that it was wrong.*

22. There is a simple presumption that every person is of sound mind.[22] Thus, it falls on the one who invokes mental derangement to prove it.[23] But if the burden of proof rests on the accused, it does not have to be proof beyond a reasonable doubt,[24] as the prosecution must present during criminal trials.

23. The mental disorder must be contemporaneous with the act. However, this coincidence can prove difficult to demonstrate. This will be a matter of fact and it will be up to psychiatric experts to clarify these facts. [25]

24. As for intoxication, especially that due to alcohol abuse, if the intoxication was voluntary, it cannot constitute a cause for exoneration of responsibility.[26] One should even see in it the aggravating circumstance of premeditation, when it exists for the offence in question.[27]

[22] *Daniel M'Naghten's Case* (1843) 10 Cl & F 200 HL.
[23] *R v. Poinee* (1866) MR 85.
[24] *R v. Ramsomy* (1945) MR 75.
[25] However, according to *R v Poinee* (1866), the opinion given by experts in the matter should be considered less conclusive than in other cases. Psychiatry is not an exact science.
[26] *R c. L. G. L'Etendry* (1953) MR 15.
[27] Moreover, it goes without saying, but it goes all the better by saying it, that drunkenness cannot be considered exonerating for offenses which incriminate it directly, such as the violation of public and manifest drunkenness, or even the offense of driving a vehicle while intoxicated, as provided for in Section 123E of the Road Traffic Act.

(2) Duress

25. Section 42 (1) of our Criminal Code, which deals with both coercion and insanity under the same heading, is a direct copy of Article 64 of the old French Penal Code.

26. There are two possible types of duress, each subdivided into two categories. There is first psychological duress, and then we have physical duress, which can be either external or internal.[28]

(C) Excuses

27. According to Section 240 of our Criminal Code, manslaughter and wounds and blows, are excusable, as far as it is provided for hereinafter, if they have been provoked by severe blows or violence towards individuals.[29] Section 244 provides that where the fact of excuse is proved, if it relates to an offence deemed to be a crime, the punishment shall be reduced to imprisonment, and, if it relates to a misdemeanour, the punishment shall be reduced to imprisonment for a term not exceeding one year.

[28] External physical duress can be manifested by violence exerted by a third party or by force stemming from a natural event. A ruling that examines the latter is *Bhojah v. R* (1993) MR 256. As for internal physical duress, one can consider the example of a traveler who, suffering from a narcolepsy attack, misses the station where, according to his ticket, he was supposed to disembark, which under normal circumstances would have constituted the offense of traveling without a ticket.

[29] This Section is inspired by Article 321 of the French Penal Code of 1810.

28. Provocation can be taken into account in order to attenuate, or even eliminate, the repression for the benefit of the person who reacted to it by committing an offence. It is a traditional solution of repressive rights. Indeed, it is considered that the acts of provocation have caused the person provoked to feel anger or fear which diminishes the seriousness of his act, especially since here the provocateur was not content to incite them to act, he has performed unlawful acts, such as attacks against persons or property"[30].

29. Section 243 provides that the crime of castration, where it is provoked by any immediate violent outrage on chastity, shall be deemed to be an excusable crime or wound.[31]

30. In a way that could not be more anachronistic, Section 242 of the Code provides that manslaughter committed by the husband on his spouse, as well as on the accomplice, at the moment when he surprises them in *flagrante delicto* of adultery, is excusable, inspired in this by article 324 of the French Penal Code of 1810, as well as by the old English law.[32] As the courts remind, *in order to constitute an excuse, a person has to catch his spouse red-handed in the act of adultery with the other accomplice in the conjugal roof.*[33]

[30] J-Y. LASSALLE, *Provocation*, Répertoire de droit pénal et de procédure pénale, octobre 2003 (actualisation : juin 2011), n° 2.
[31] This provision echoes article 325 of the former French Penal Code.
[32] G. BINDER, *Criminal Law (Oxford Introductions to U.S. Law)*, 1st Edition, Oxford University Press, 2016, p. 188: *"Hale considered adultery to mitigate the killing of the wife's paramour, because it was a legal wrong against the husband. The force had to be used at the scene because it had to be preventive in aim".*
[33] *Police v Ramphul Tanooraj* (2006) INT 213.

(II)REFORM PROPOSALS

(1) Repeal of Sections 242 and 243

31. Following the reformulation of self-defence, it is recommended to repeal Section 243 of the Criminal Code, relating to "Castration under provocation". Additionally, it is being suggested that Section 242 of our Criminal Code relating to "Manslaughter in case of adultery" be repealed. This has no *raison d'être* in a modern society, the said provision coming to endorse sexist violence, this violence constituting a means for men to "reaffirm their domination, their possession over the victim".[34]

(2) State of necessity - New Section 46

32. It is worth noting the absence of the state of necessity within our Criminal Code, as it was moreover so rightly recalled in *Seegobin v R* (2002) SCJ 163,[35] as well as the fact that the old French Penal Code of 1810, on which ours is modelled, did not provide for it.[36]

33. In the *Interim Report* dated May 2016 on the Reform of the Criminal Code, it is proposed to insert a new Section which would read as follows: "A person is not criminally liable if confronted with a present or imminent danger to himself, another person or property, he performs an act necessary to ensure the safety of the person or property, except where the means used are disproportionate to the seriousness of the threat".[37]

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[34] H. TOURÉ, *Le crime passionnel : étude du processus de passage à l'acte et de sa répression*, Thèse, Paris 8, 2007, pg. 28.
[35] The said judgment states that: *In our law there is no such defence as the defence of necessity.*
[36] E. CARTIER, « Contrainte et nécessité », Annale de l'Université des Sciences sociales de Toulouse, 1982, pg. 27
[37] Based on article 122-7 of the French Penal Code.

34. The state of necessity implies a danger that the author strives to neutralise by a reaction. The danger in question here must arise from circumstances other than human aggression, which rather gives rise to self-defence. However, the threat from an animal generates the state of necessity.[38]

35. It must be a serious and objective danger. Some decisions consider that the danger must also be unpredictable, [39] and not be due to the faulty behaviour of the defendant.[40]

36. There must be no disproportion between the means employed and the seriousness of the threat. The means employed must be understood in a broad sense and, as in the field of self-defence, they will often be assessed according to the damage caused by the offence that is alleged to have been committed under the empire of necessity. The approach that should be taken in this matter has been established by case law. It consists of comparing the seriousness of the damage likely to arise from the realisation of the danger encountered with that of the damage actually caused by the offence: if the latter is greater than the first, the safeguard reaction will be deemed disproportionate and cannot be guaranteed of impunity. It has been held that a drunk motorist who drives his vehicle on the grounds that if he does not move his car it will suffer damage caused by certain members of his family, cannot benefit from impunity. Indeed, the necessary act must protect an interest superior to that which is sacrificed, which is not the case of the vehicle in relation to the risk caused by driving under the influence of alcohol.[41]

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[38] Crim. 7 nov. 1988, n° 87-91.321
[39] Crim. 22 sept. 1999, n° 98-84.520, Bull. crim. n° 193 ; D. 2000. Somm. 114, obs. Roujou de Boubée.
[40] LÉAUTÉ, *Le rôle de la faute antérieure dans le fondement de la responsabilité pénale*, D. 1981. Chron. 295
[41] C. MASCALA, *Ibid*, n° 45.

37. Regarding the object of the danger, it can either threaten people or property, such as the need to commit a break-in to go and fight the fire threatening a building. In the event that he threatens a person, the latter may be either the defendant himself or a third party. It should be noted that the person exposed to danger is not necessarily threatened with regard to his life or his physical integrity. It can be in his honour or in his probity and find himself in a situation such that it is necessary, to defend them in court, to commit an offence such as a breach of professional secrecy.[42]

38. Since the state of necessity constitutes a justifying fact, from a purely legalistic point of view, it must as in the matter of self-defence, operate *in rem*, that is to say withdraw from the event which produced its character *in jus* (contrary to the law). The offence that it could materially constitute disappears and no penal or civil consequences can therefore be drawn from it. It is both public action and civil action that cease to have an object. In principle therefore, as in the hypothesis of the order of the law or of self-defence, if the state of necessity must be retained: on the one hand, at the criminal level, the dismissal of the case or the acquittal (or even, *ab initio*, the dismissal of the prosecution) is essential, and, on the other hand, at the civil level, any action for damages directed against the author of the 'necessary' offence is to be excluded, whether or not one seeks to base it on the notion of fault.[43]

(3) Consent of the Victim – New Section 47

39. From a sociological point of view, including the consent clause in the Mauritian Criminal legislation could lead to a more holistic representation of societal values. Society is an evolving entity, and what is considered 'harmful' changes over time and across cultures. Recognising the role of consent ensures that the law evolves with these changes,

[42] M. DANTI-JUAN, *État de nécessité*, Répertoire de droit pénal et de procédure pénale, juillet 2015, n° 26.
[43] C. MASCALA, *ibid*, n°s 58 and 59.

validating the agency of the individual while continuing to ensure societal safety. On a philosophical level, the defence of consent reflects the principle of individual autonomy and free will, foundational tenets of democratic societies. If an individual willingly consents to an act that may cause them harm, there should be space in the law to recognise this consent as valid, provided it does not breach public policy.

40. When a person consents to an act, they inherently acknowledge the potential consequences, therefore, one can argue that no harm is done to them - at least in the moral and legal sense. This principle, often referred to as the "No Harm Principle",[44] has long been upheld in multiple legal systems worldwide and should be considered in our Code to uphold the rule of law in situations where consent is given.

41. The addition of the defence of the consent clause in the Criminal Code could modernise the law, reflect evolving societal values, and strengthen individual autonomy.

42. It is thus proposed to insert a new Section 47,[45] which would provide that:

"(a) Notwithstanding any provision in this Code to the contrary, any act between consenting adults, where the individuals have the capacity to give consent, shall be deemed to be lawful, provided that such act:

(i) Does not result in non-consensual harm to others;

(ii) Does not involve coercion, duress, manipulation, or undue influence; and

(iii) Does not violate public order[46] or public policy.[47]

[44] John Stuart Mill, a 19th-century philosopher and political economist, articulated the harm principle in his work *On Liberty* (1859). The harm principle posits that the actions of individuals should only be limited to prevent harm to other individuals. Mill wrote that "over himself, over his own body and mind, the individual is sovereign". Therefore, he believed that society or the state should not interfere with an individual's actions unless they cause harm to others. In essence, the freedom to act as one wishes is fundamental, except when such actions infringe on the rights or well-being of others. This principle, revolutionary at the time, forms the cornerstone of many contemporary democratic societies' notions of personal liberty and autonomy. However, the definition of 'harm' and its scope remains an ongoing debate among philosophers and legal scholars.

[45] Modelled on Section 228 of the German Criminal Code.

(b) For the purpose of this section, 'consent' shall mean the free and informed agreement to the act by the person concerned.

(i) Consent must be established at every stage of the act. It must be ongoing, freely given, informed, and reversible at any point.

(ii) An individual is incapable of giving consent if the individual is incapacitated due to the use of drugs or alcohol, or is unable to understand the nature or condition of the act.

43. Recognising consent in the law acknowledges and respects individuals' rights to exercise their autonomy over their own bodies and minds. A democratically inclined legal system should not infringe on an individual's freedom of choice when their actions, though potentially self-harming, do not violate the rights of others or the public order. Introducing such legislation would not only respect personal liberty but would also enhance the dignity of individuals. By acknowledging their capacity to make decisions that impact their own well-being, the law inherently respects their personal agency and dignity.

[46] "Public order" here shall be given the same meaning as in article 6 of the Code civil Mauricien. Public order, often referred to as public safety or public peace, pertains to the societal standard of freedom from disorder and disruption. It implies the absence of activities that would disrupt society's smooth functioning, infringe upon individuals' rights, or threaten public safety. Public order involves a balance between individual freedoms and the collective interests of the community or the state.

[47] In the context of the legal provision, "public policy" would refer to those actions that the society or state has determined to be harmful, unethical, or against the societal interests, even if those involved in the action are consenting adults. For instance, actions that could exploit vulnerable individuals, propagate systemic harm, or risk the public's safety or health, could be deemed against public policy, even if performed with consent. Examples could include certain extreme forms of physical harm, exploitation, or endangerment. Public policy ensures that individual rights and freedoms do not infringe upon the collective rights and interests of the community or the state. Its definition and application may vary depending on the cultural, ethical, and societal norms of a particular jurisdiction or society.

(4) Self-defence – New Section 246

44. In France, self-defence of property is allowed but does not cover intentional homicide committed to interrupt the execution of a crime or misdemeanour against property, which is not the case in Mauritius. Moreover, our Criminal Code does not clearly state that the response of self-defence must be proportionate to the attack, while the French Penal Code, on the other hand, specifies it in full and excludes self-defence if it there is disproportion between the means of defence employed and the seriousness of the attack, as far as attacks against persons are concerned. *Idem* for the defence of property.

45. For all these reasons, as well as to modernise the phraseology used and make the text of this justifying fact clearer, the LRC suggests the repeal of Sections 246 and 247 of the Criminal Code to replace them with new provisions inspired by articles 122-5 and 122-6 of the French Penal Code.

- Section 246 (1)

46. According to the new Section 246 (1), a person is not criminally liable if, confronted with an unjustified attack upon himself or upon another, he performs at that moment an action compelled by the necessity of self-defence or the defence of another person, except where the means of defence used are not proportionate to the seriousness of the attack.

47. The benefit of self-defence can only be granted if the aggression is real, that is to say if it exists in a certain way, the objectives of the aggressor being unequivocal. However, the

legitimising aggression can also be simply apparent and probable, but it cannot be imaginary.[48]

48. The judge must also take into account that the person who has been attacked and claims self-defence is under the influence of the emotion caused by the attack, and of the natural interpretation that he can give to the situation and the attitude of the aggressor (*vide* about a madman shot dead by a police brigadier who could fear for his life and that of the other people present, Crim. 20 Apr. 1982, JCP G 1983. II. 19958).[49]

49. Requiring that the aggression must be current means that the danger and peril which threaten cannot be possible or future: the person who claims to be threatened cannot justify an offence committed in a preventive manner either.[50]

50. The peril must not be past, otherwise the defence is no more than revenge driven by fear, emotion, or anger, and cannot be justified.

51. The aggression cannot be considered unjust if there is resistance to the lawful acts of law enforcement officials. Similarly, there can be no self-defence against self-defence; indeed, the aggressor against whom the assaulted individual legitimately defends himself cannot logically maintain that he had the right to defend himself in turn against this response. It is thus clear that a person who, by a serious fault, provoked the aggression of which he claims to be the victim cannot invoke self-defence. This aggression ceases, in this case, to be unjust. The original fault committed excludes, for its author, both criminal and civil irresponsibility attached to the justifying fact that it claims to invoke.

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[48] R. BERNARDINI, *Légitime défense, Répertoire de droit pénal et de procédure pénale*, avril 2014, n° 40.
[49] B. BOULOC, H. MATSOPOULO, *ibid*, p. 152.
[50] Crim. 27 juin 1927, S. 1929. 1. 356. - T. pol. Oulchy-le-Château, 20 juin 1946, Gaz. Pal. 1946. 2. 54 ; RSC 1946. 433, obs. Magnol.

52. Defence must be necessary and measured,[51] which is not said in the current text. The act of response must be in proportion to the gravity of the act of aggression. It is up to the trial judges to assess this proportionality by reasoning *in concreto*, by placing themselves in the shoes of an ordinary individual. The response must not exceed the measure of resistance required to counter the aggression.

- Section 246 (2)

53. According to the new sub-section (2), a person is not criminally liable if, to interrupt the commission of a crime or a misdemeanour against property, he performs an act of defence, other than wilful homicide, where the act is strictly necessary for the intended objective as the means used are proportionate to the gravity of the offence.

54. Let us note, on the one hand, that if any "attack" is sufficient to characterise aggression against persons (sub-section (1)), on the other hand, aggression against property must necessarily be "a crime or misdemeanour", and this according to the definitions provided by Sections 4 and 5 of the Criminal Code. This excludes contraventions against property. But above all, the defence of property cannot justify the voluntary homicide of someone who only wanted to seize monetary values. Human life takes precedence over the value of a good.

- Section 246 (3)

55. Regarding the proof of self-defence, it is up to the person who invokes the state of self-defence to provide proof of it. However, according to the new Section 246 (3), a person is presumed to have acted in a state of self-defence in two cases: if he performs an action to repulse at night an entry to an inhabited place committed by breaking in, violence or

[51] J. PRADEL, *Droit pénal général*, 19e éd., 2012, Cujas, n° 332

deception; and to defend himself against the authors of larcenies or plundering carried out with violence. The victim is then freed from the burden of proof. But, as it is a simple presumption, a rule of form and not of substance, proof to the contrary can always be provided, for example, if there was no necessity or proportionality of the response.

(5) Order of the Law or Commandment of Lawful Authority– New Section 245

56. The wording of our Section 245 suggests that the two notions overlap whereas the fact that the two concepts are divided into two paragraphs in the French Penal Code, as well as the particular terminology used, shows on the contrary the nuance that exists between the two. Indeed, the terms used by the French legislator are more explicit; on the one hand, it saw fit to grant a distinct paragraph to each of these two objective causes of impunity, thus conferring on them a certain autonomy, on the other hand, the conditions of existence and the field of each of these are distinguished.

57. Reason why the Commission proposes the repeal of this Section 245 and replaces it with a new Section titled "The Order of Law or Commandment of Lawful Authority"[52] and which would read as follows:

"(a) A person is not criminally liable who performs an act prescribed or authorised by law.

(b) A person is not criminally liable who performs an act commanded by a lawful authority, unless the act is manifestly unlawful."

58. The legislative or regulatory nature of the provisions does not matter, but the hierarchy of standards should be respected: only a text with a value equal to or greater than the

[52] Whose source of inspiration is article 122-4 of the French Penal Code.

incriminating text can provide exemption from it. The order or permission of a regulation cannot thus allow the commission of a crime or an offence. On the other hand, the justifying text may be of a criminal nature (procedural or substantive text), but also of a civil nature in the broad sense. Thus, a police officer who conducts a search in accordance with the rules does not commit a home invasion, nor is an arbitrary arrest committed by a person who places an individual under arrest against whom there are plausible reasons to suspect that he has committed or attempted to commit an offence.[53] Beyond the law or the regulation, case law also retains the permission of custom as a fact justifying the commission of an offence. Thus, in the event of violence caused during the practice of certain sports or in respect of religious convictions.

59. Whether the order of the law is addressed to an agent of the public authority or to a private individual, the defendant will only be justified if he has acted within the limits of the legal prescriptions. Jurisprudence in fact sanctions overzealousness, abuse, or even clumsiness likely to cast doubt on the fair necessity of the agent's behaviour – just necessity – which, it should be remembered, remains, in this matter, one of the fundamental criteria the justification of the person prosecuted. Thus, a police officer who, having carried out an arrest on the public highway and driving the apprehended person in a police vehicle, handcuffed, may not effectively invoke the order of the law, administers several slaps to him and hits him with a blow to his head into the premises of the police station.[54]

[53] As Section 12 of the Police Act properly permits.
[54] C. MASCALA, JurisClasseur Pénal Code > Art. 122-4, 31 mai 2017, n° 44.

(6) Psychic or neuropsychic disorder – New Section 42 (1) & (2)

60. Section 42 confuses in one and the same provision the notion of insanity and that of duress, which is not satisfactory from a legal point of view. Moreover, it does not distinguish according to whether there is 'abolition' or simply 'alteration' of discernment. Finally, it uses the outdated term "insanity", which does not meet modern medical terminology requirements. Because of this, the Commission recommends truncating the words: "in a state of insanity at the time of the act" and replace them by the words: "suffering at the time, a psychological or neuropsychological disorder having destroyed his discernment or control over his actions".[55]

61. As we know, our Criminal Code is derived from the French Penal Code of 1810. However, at that time, psychiatry was a brand-new science, and the term 'insanity' designated for the Penal Code any form of mental alienation removing the individual's control of his actions, and not a particular form characterised by the abolition of intellectual faculties, following old age or a progressive disease such as general paralysis. The law therefore no longer takes into consideration insanity, but it takes into account any psychic or neuro-psychic disorder, on condition that it has abolished discernment or control of acts.[56]

62. The terms psychic and neuropsychic disorder designate in criminal law all forms of insanity which remove the individual from control of his acts at the very moment when he committed them.[57] It applies to affections of the intelligence, as well as congenital and procured by the effect of a disease.

[55] The new provision is taken from article 122-1 of the French Penal Code.
[56] B. BOULOC, *ibid*, n^{os} 452 et 453.
[57] Crim. 14 déc. 1982, Gaz. Pal. 1983. I. Pan. 178

63. It is also suggested to insert a new sub-section (2) according to which: "A person who, at the time he committed the offence, was suffering from a psychological or neuropsychological disorder which reduced his discernment or impeded his ability to control his actions, remains punishable; however, the court shall take this into account when it decides the penalty."

64. The psychological disorder must exist at the time of the events. The previous state of an accused considered, before the facts, as unbalanced or weak-minded is not enough to remove his responsibility for the acts incriminated.[58] And the same applies to mental disorder which did not appear until after the events.[59]

(7) Duress – New Section 42 (3)

65. It is suggested to reword Section 42[60] by substituting the words: "where he has been compelled to commit such act by a force which he could not resist" by "when acting under the influence of a force or duress to which he could not resist".

66. Unlike the psychic or neuropsychic disorder, which destroys discernment and abolishes consciousness, duress is a psychological cause which deprives the will of all latitude. Duress comes in the two forms of physical duress, sometimes called, wrongly, *force majeure*, and relating to the forces of nature, to the fact of a third party or an animal, and moral constraint resulting from fear, threat or suggestion.[61]

[58] Cass. crim., 27 mars 1924 : Bull. crim. 1924, n° 141.
[59] CA Toulouse, 2 nov. 2000 : JurisData n° 2000-130900. – CA Nimes, 28 sept. 2004 : JurisData n° 2004-277221.
[60] And this in light of article 122-1 of the French Penal Code.
[61] M-L. RASSAT, JurisClasseur Pénal Code > Art. 122-1 et 122-2, Fasc. 20, 4 juin 2019, n° 74.

CONCLUSION

67. Our criminal justice system functions as an essential pillar of our society, preserving law, order, and social harmony. It reflects societal norms and values, marking a balance between individual rights and collective security. As societies evolve, their justice systems must adapt to meet changing needs and understandings, a principle no more applicable than within the realm of criminal law defences.

68. The use of defences in criminal law, including self-defence, duress, necessity, and the exercise of lawful authority, is a complex and multifaceted issue that frequently intersects with societal realities. A vigorous defence mechanism acknowledges the intricate relationship between societal conditions and individual actions, allowing for a more nuanced determination of criminal culpability.

69. Sociological theories offer invaluable insights into this dynamic. They spotlight the societal pressures, influences, and structural factors that may contribute to an individual's involvement in criminal activity. An understanding of these forces is key to reforming defences in criminal law. For instance, traditional law confines duress to threats of immediate physical harm, often neglecting psychological coercion or manipulation. Yet, sociology underscores the power of societal factors such as poverty, subcultures of violence, and systemic oppression, which can create environments of 'psychological duress'.[62]

[62] Robert Merton's Strain Theory, for example, argues that societal pressures can compel individuals to commit acts they would ordinarily avoid. By broadening the definition of duress to include such scenarios, the law would recognize the complex realities that many defendants face.

70. Similar considerations apply to the defences of self-defence and necessity. Societal factors significantly influence the perception and reaction to threats.[63] Hence, legal definitions of self-defence and necessity should reflect these sociological realities, making allowances for the disadvantaged and oppressed who might otherwise find themselves unjustly criminalised. The reform of lawful authority defence, particularly in cases of homicide or wounds and blows, is equally necessary.[64] Strengthening regulations around this defence will serve to prevent unwarranted violence and ensure that authority is exercised within just and fair boundaries.

71. Reform of defences in criminal law, therefore, is a legal as well as a sociological necessity. A justice system attuned to societal realities can more effectively serve its function - maintaining social order, ensuring justice, and promoting individual and collective growth. It is high time that we embrace the sociological perspective in our legal mechanisms, ensuring they are designed for the society they serve, rather than in spite of it. By undertaking comprehensive reform of criminal law defences, we take a critical step towards a more nuanced, equitable, and socially responsive legal system.

72. Courts must identify the moral element of the offence in their exercise of qualification. However, certain causes of criminal irresponsibility exist, which can be both objective and subjective. The subjective causes of irresponsibility are characterised by the fact that they focus on the agent's own psychological dispositions (*in personam*). The objective causes, for their part, constitute what is known as "justifying facts", and result from circumstances external to the person of the agent (*in rem*), apply to all (*erga omnes*) and

[63] Conflict theory, pioneered by Karl Marx, highlights that societal power structures often place certain groups in precarious positions, thereby escalating the likelihood of using force for self-preservation.
[64] Max Weber's insights on authority and power dynamics emphasize the risk of misuse of power by individuals in authoritative positions.

suppress the civil liability of the author. The distinction is important given that if the author of the act is found to have a justifying fact, neither the co-authors nor the accomplices can be prosecuted, whereas with regard to the causes of non-imputability, the co-authors or accomplices will not benefit from the impunity of the main perpetrator.

73. Our Criminal Code lists certain justifying facts (objective causes) and causes of non-imputability (subjective causes) capable of benefiting the accused. Among the first, there is self-defence but also the authorisation of the law or the order of legitimate authority. Among the second, it is necessary to take into account duress, as well as the mental disorder.

74. The state of necessity would also be erected as a justifying fact. A person would not be criminally liable who, faced with a present or imminent danger which threatens himself, others or property, performs an act necessary to safeguard the person or property, unless there is a disproportion between the means employed and the seriousness of the threat. The danger in question must be present and imminent, harm physical, moral or patrimonial interests. Thus, a woman who stole meat to feed her children was found guilty of theft, her financial difficulties being insufficient to characterise a real and imminent danger.[65] It must be certain and not possible (exclusion of the putative danger). This danger must also be unjust, that is to say, it must not come from a previous fault of the author or draw its source from the order of the law. The courts must assess the value of the interest sacrificed in the light of the interest safeguarded; thus, for the justification to be raised successfully, the interest safeguarded must have a higher value than that of the interest sacrificed. Only then can the commission of the offence appear reasonable and prevent the exercise of a criminal conviction.

[65] CA Poitiers, chambre des appels correctionnels, 11 avr. 1997 ; *Mme G. c/ SA Rocadis*.

75. As for self-defence, it would be reformulated in order to explicitly provide for a solution already enshrined in case law, namely that the response of self-defence must be proportionate to the attack. In addition, it will be indicated that the self-defence of property can in no way legitimise intentional homicide, given that the life of people outweighs the value of property. Concerning the order of the law and the commandment of legitimate authority, this provision would be reviewed so that it is specified that these are two different forms of justifying facts and that it applies to the person who performs an act ordered by the legitimate authority, except if this act is manifestly illegal.

76. The subjective causes of criminal irresponsibility would also be reviewed. The LRC proposes that the provision concerning insanity and duress be modified in order to take into account medical advances in this area. Thus, insanity would be reclassified as a "psychic or neuropsychic disorder" and a distinction would now be made between the abolition of discernment, which would remove the responsibility of the defendant, and its simple alteration, which would only lead to a reduction in sentence.

77. The call for a thorough review of defences in the Mauritian Criminal Code finds its justification in the evolving contours of societal understanding and the essence of justice itself. As we navigate through the complex corridors of the 21st century, our legal framework must adapt and innovate to serve the broader purposes of justice, and retain its relevance in the ever-changing social, cultural, and philosophical landscape.

78. Just as Harper Lee, in her classic novel *To Kill a Mockinghird*, poignantly reminds us that "the one thing that doesn't abide by majority rule is a person's conscience", the defence of consent offers a conduit for the recognition of individual autonomy in the sphere of criminal law. It stands as an acknowledgment that within the bounds of public order and safety, personal conscience and the ability to make informed, consensual decisions should be held sacrosanct.

79. But as with all legal evolution, this must be performed delicately, with an unerring commitment to the balance of individual freedoms and societal interests, reminiscent of the equilibrium embodied in the scales of Lady Justice.[66] The necessity for a comprehensive review of the defences in the Mauritian Criminal Code is paramount in the context of the rapidly evolving societal norms and values. The dynamics of our society are changing, and so are our interpretations of what constitutes harm, consent, and infringement of rights.

80. The legal system must stay abreast of these changes to ensure it continues to serve its core purpose – to uphold justice, protect citizens' rights, and maintain societal harmony. It is vital to remember that the law is not just a rigid instrument of control but a flexible system capable of evolving and adapting to the changing realities of the society it serves. As society progresses, so too must our legislation, always reflecting the current understanding of fairness, justice, and human rights.

81. The Law Reform Commission is fully committed to ensuring that our criminal law aligns with these evolving societal values. The LRC's focus remains on fostering a robust, relevant, and progressive legal system that adequately caters to the contemporary needs of the Mauritian society. The review of criminal defences, thereby, stands not only as a testament to our dedication to modernisation and improvement, but also to our resolve to foster a legal system that is truly reflective and respectful of the societal values it is built to serve.

[66] The works of Fyodor Dostoevsky, notably *Crime and Punishment*, persistently illustrate that laws and punishments that disregard the individual's complex human experience can fail to serve true justice. It is a cautionary tale for us, to ensure our legal reforms are not merely punitive but rather, grounded in the understanding of human behavior and freedom.

ANNEX

THE CRIMINAL CODE (AMENDMENT) BILL

(No. .... of 2023)

Explanatory Memorandum

The object of this Bill is to amend the Criminal Code to reform various defences in criminal law. The primary intent is to ensure that these defences reflect the evolving societal norms, modern legal principles, and uphold the human rights and dignity of all individuals involved. The Bill proposes, *inter alia*, to –

(a) redefine the concept of self-defence, aiming to establish clearer guidelines regarding the proportionality of force used in defending oneself, others or property, and to better define the circumstances under which this defence can be lawfully invoked;

(b) restyle the defence of insanity in light of the advances in psychological and psychiatric understanding;

(c) review the defence of duress, by providing more precise criteria for determining whether a person acted under same;

(d) revisit the defence of lawful authority to ensure it is not misused to justify acts that infringe upon individuals' rights and freedoms, while still permitting necessary actions by law enforcement and other authorities;

(e) introduce a new defence of the consent of the victim, which acknowledges that certain acts, potentially deemed harmful, are lawful if performed with the free and informed consent of the individual, unless it violates public order; and

(f) insert the defence of the state of necessity, which recognises that in certain exceptional circumstances, otherwise unlawful acts may be justified to prevent a greater harm or danger.

2. The changes proposed in this Bill serve to align the Code with current realities and societal values while ensuring that it continues to protect and uphold the rights of all individuals within our jurisdiction.

THE CRIMINAL CODE (AMENDMENT) BILL

(No. .... of 2023)

ARRANGEMENT OF CLAUSES

Clauses

A BILL

To amend the Criminal Code

ENACTED by the Parliament of Mauritius, as follows –

1. Short title

This Act may be cited as the Criminal Code (Amendment) Act 2023.

2. Interpretation

In this Act –

"principal Act" means the Criminal Code.

3. Section 42 of principal Act amended

Section 42 is amended –

(a) The title to Section 42 ["Insanity"] is repealed and replaced with the following: "Psychological Disorder and Duress"

(b) In subsection (1), by –

(i) deleting the words "en état de démence au temps de l'action" and replacing them by the words "atteint, au moment des faits, d'un trouble psychique ou neuropsychique ayant aboli son

discernement ou le contrôle de ses actes" in the French version, and deleting the words "in a state of insanity at the time of the act" and replacing them by the words "suffering at the time, a psychological or neuropsychological disorder having destroyed his discernment or control over his actions"; and

(ii) deleting the words "a été contraint par une force à laquelle il n'a pu résister" and replacing them by the words "a agi sous l'empire d'une force ou d'une contrainte à laquelle il n'a pu résister" in the French version, and by deleting the words "where he has been compelled to commit such act by a force which he could not resist" and replacing them by the words "when acting under the influence of a force or duress to which he could not resist"; and

(c) By repealing subsection (2) and replacing it with the following new subsection –

(2) La personne qui était atteinte, au moment des faits, d'un trouble psychique ou neuropsychique ayant altéré son discernement ou entravé le contrôle de ses actes demeure punissable ; toutefois, la juridiction tient compte de cette circonstance lorsqu'elle détermine la peine.	(2) A person who, at the time he committed the offence, was suffering from a psychological or neuropsychological disorder which reduced his discernment or impeded his ability to control his actions, remains punishable; however, the court shall take this into account when it decides the penalty.

4. New Section 46 inserted in principal Act

The principal Act is amended by inserting immediately after section 45 the following section –

S. 46 État de nécessité N'est pas pénalement responsable la personne qui, face à un danger actuel ou imminent qui menace elle-même, autrui ou un bien,	**S. 46 State of necessity** A person is not criminally liable if confronted with a present or imminent danger to himself, another person or property, he performs an act

accomplit un acte nécessaire à la sauvegarde de la personne ou du bien, sauf s'il y a disproportion entre les moyens employés et la gravité de la menace.	necessary to ensure the safety of the person or property, except where the means used are disproportionate to the seriousness of the threat.

5. New Section 47 inserted in principal Act

The principal Act is amended by inserting immediately after section 46 the following section –

S. 47 Consentement de la victime	**S. 47 Consent of the victim**
(a) Nonobstant toute disposition contraire du présent code, tout acte entre adultes consentants, lorsque les personnes sont majeures et ont la capacité de donner leur consentement, est réputé licite, à condition que cet acte :	(a) Notwithstanding any provision in this Code to the contrary, any act between consenting adults, where the individuals are of legal age and have the capacity to give consent, shall be deemed to be lawful, provided that such act:
(i) N'entraîne pas de préjudice non consensuel pour autrui ;	(i) Does not result in non-consensual harm to others;
(ii) n'implique pas de coercition, de contrainte, de manipulation ou d'influence indue ; et	(ii) Does not involve coercion, duress, manipulation, or undue influence; and
(iii) Ne viole pas l'ordre public ou les politiques publiques.	(iii) Does not violate public order or public policy.
(b) Aux fins de la présente section, le « consentement » désigne l'accord libre et	(b) For the purpose of this section, 'consent' shall mean the free and informed agreement to the act by the person concerned.

éclairé à l'acte par la personne concernée. (i) Le consentement doit être établi à chaque étape de l'acte. Il doit être continu, librement donné, éclairé et réversible à tout moment. (ii) Un individu est incapable de donner son consentement s'il est frappé d'incapacité en raison de l'usage de drogues ou d'alcool, ou s'il est incapable de comprendre la nature ou les conditions de l'acte.	(i) Consent must be established at every stage of the act. It must be ongoing, freely given, informed, and reversible at any point. (ii) An individual is incapable of giving consent if the individual is incapacitated due to the use of drugs or alcohol, or is unable to understand the nature or condition of the act.

6. Section 242 of principal Act repealed

Section 242 of the principal Act is repealed.

7. Section 243 of principal Act repealed

Section 243 of the principal Act is repealed.

8. Section 245 of principal Act repealed and replaced

Section 245 is repealed and replaced by the following section –

S. 245 L'ordre de la loi ou le commandement de l'autorité légitime N'est pas pénalement responsable la personne qui accomplit un acte prescrit ou autorisé par des dispositions législatives ou	**S. 245 Order of the Law or Commandment of Lawful Authority** A person is not criminally liable who performs an act prescribed or authorised by

réglementaires. N'est pas pénalement responsable la personne qui accomplit un acte commandé par l'autorité légitime, sauf si cet acte est manifestement illégal.	law. A person is not criminally liable who performs an act commanded by a lawful authority, unless the act is manifestly unlawful.

9. Section 246 of principal Act repealed and replaced

Section 246 is repealed and replaced by the following section –

S. 246 De la légitime défense	**S. 246 Self-defence**
(1) N'est pas pénalement responsable la personne qui, devant une atteinte injustifiée envers elle-même ou autrui, accomplit, dans le même temps, un acte commandé par la nécessité de la légitime défense d'elle-même ou d'autrui, sauf s'il y a disproportion entre les moyens de défense employés et la gravité de l'atteinte.	(1) A person is not criminally liable if, confronted with an unjustified attack upon himself or upon another, he performs at that moment an action compelled by the necessity of self-defence or the defence of another person, except where the means of defence used are not proportionate to the seriousness of the attack.
(2) N'est pas pénalement responsable la personne qui, pour interrompre l'exécution d'un crime ou d'un délit contre un bien, accomplit un acte de défense, autre qu'un homicide volontaire, lorsque cet acte est strictement nécessaire au but poursuivi dès lors que les moyens employés sont	(2) A person is not criminally liable if, to interrupt the commission of a crime or a misdemeanour against property, he performs an act of defence, other than wilful homicide, where the act is strictly necessary for the intended objective as the means used are

proportionnés à la gravité de l'infraction.	proportionate to the gravity of the offence.
(3) Est présumé avoir agi en état de légitime défense celui qui accomplit l'acte :	(3) A person is presumed to have acted in a state of self-defence if he performs an action:
1° Pour repousser, de nuit, l'entrée par effraction, violence ou ruse dans un lieu habité ;	1° to repulse at night an entry to an inhabited place committed by breaking in, violence or deception;
2° Pour se défendre contre les auteurs de vols ou de pillages exécutés avec violence.	2° to defend himself against the authors of larcenies or plundering carried out with violence.
(4) N'est pas pénalement responsable la personne qui, face à un danger actuel ou imminent qui menace elle-même, autrui ou un bien, accomplit un acte nécessaire à la sauvegarde de la personne ou du bien, sauf s'il y a disproportion entre les moyens employés et la gravité de la menace.	(4) A person is not criminally liable if confronted with a present or imminent danger to himself, another person or property, he performs an act necessary to ensure the safety of the person or property, except where the means used are disproportionate to the seriousness of the threat.

10. Commencement

This Act shall come into operation on a date to be fixed by Proclamation.