VIOLENCE AGAINST WOMEN; CAUSES AND CONSEQUENCES

1. **Definition and Scope of Criminal Law Provisions**

# Question 1

**Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant articles of the Criminal Code and the Criminal procedure code.**

In Mauritius, the law prohibits rape and it is considered as a crime. The offence of rape is criminalised under section 249(1) of the Criminal Code, which provides as follows:

249. Rape, attempt upon chastity and illegal sexual intercourse

***(1) (1) Any person who is guilty of the crime of rape, shall be liable to penal servitude for a term which shall not be less than 10 years.***

***(1A) Notwithstanding any other enactment, where a person is convicted of an offence under subsection (1), the Intermediate Court shall have -***

***(a) jurisdiction to inflict penal servitude for a term not exceeding 40 years;***

***(b) power to order sentences of penal servitude to be served consecutively, provided that the terms of such sentences shall not in the aggregate exceed 40 years.***

***(1B) Notwithstanding any other enactment, prosecution for the offence of rape may, at the sole discretion of the Director of Public Prosecutions, take place before a Judge without a jury where it is averred that the offence of rape was committed by 2 or more individuals.***

***(1C) Sections 151 and 197 of the Criminal Procedure Act, and the Probation of Offenders Act, shall not apply to a conviction for the offence of rape.***

***…***

*(6) No prosecution shall be instituted under this section except on an information filed with the consent of the Director of Public Prosecutions.*

Sections 151 and 197 of the Criminal Procedure Act provide as follows:

***151 Imprisonment in lieu of penal servitude***

*Where under any enactment a Court is empowered or required to pass a sentence of penal servitude other than a sentence of penal servitude for life, the Court may, unless the enactment otherwise provides, inflict imprisonment with or without hard labour, for any term not exceeding 5 years.*

***197 Absolute or conditional discharge***

*(1) Where a Court by or before which a person is charged with an offence (not being an offence the sentence of which is fixed by law) thinks that having regard -*

*(a) to the character, antecedents, age, health or mental condition of the person;*

*(b) to the trivial nature of the offence; or*

*(c) to the extenuating circumstances under which the offence was committed,*

*it is inexpedient to inflict punishment and that a probation order is not appropriate, the court may make an order discharging him absolutely or conditionally on his entering into a recognisance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding 3 years, as may be specified in the order, and in either case order him to pay the costs.*

*(2) In this section, "offence the sentence for which is fixed by law" means an offence for which the Court is required to sentence the offender to death or penal servitude for life or detention for a period to be prescribed by the Minister, or any offence referred to in section 205.*

It is to be noted that the Criminal Code, the Protection from Domestic Violence Act and the Child Protection Act also criminalise other forms of sexual violence, as set out in ***Annex A***.

There are other forms of sexual violence which are criminalised under the:

1. Domestic Violence Act
2. Child Protection Act
3. Criminal Code (for example, Sodomy, Attempt upon Chastity, Sexual Intercourse Under 16)

Sexual Intercourse with minors is unlawful under Section 249 (4) and (5) (a) of Criminal Code and Child Protection Act which are as follows: -

* *(4) Any person who has sexual intercourse with a minor under the age of 16 or a mentally handicapped person, even with his consent, shall, be liable to penal servitude for a term not exceeding 20 years.*
* *(5) (a) Any person who has sexual intercourse with a specified person, even with consent, shall commit an offence and shall, on conviction, be liable to penal servitude.*

Under this subsection, specified person –

1. *means any person who, in relation to the person, charged, comes within the prohibited degrees set out in articles 151, 152 and 153 of the Code Civil Mauricien;*
2. *includes -*
3. *a stepchild or an adopted child, of whatever age, of the person charged;*
4. *a child of whatever age whose custody or guardianship has been entrusted to the person charged by virtue of any other enactment or of an order of a Court;*
5. *a child of whatever age or a mentally handicapped person, other than the spouse of, but living under the same roof as, the person charged* **or who is the child of the partner of the person charged.**
* **Section 14 (1) of Child Protection Act**

*Any person who causes, incites or allows any child –*

1. *To be sexually abused by him or by another person …………………….*

*shall commit an offence.*

However, the Criminal Code and the Criminal Procedure Act do not provide the definition of rape. The Courts in Mauritius apply French doctrines and jurisprudence, and from these, the following three elements need to be proved to establish rape:

1. La conjonction sexuelle normale et illicite;

2. L'emploi de la violence ou plutot l'absence de consentement de la femme;

3. L'intention criminelle de l'agent."

# Question 2

Based on the wording of those provisions, is the provided definition of rape: (YES/NO)

**Sub- paragraph a**: Yes

**Sub paragraph b**: No

**Sub paragraph c:** Yes

**Sub paragraph d:** No

**Sub-paragraph e**: Yes. The offence of rape is based on the lack of consent on the part of the victim, and this lack of consent may be the result of the use of force or threat.

**Sub-paragraph f**: Yes

**Sub-paragraph g**: No

**Sub-paragraph h**: No

**Sub-paragraph i**: Yes, marital rape in Mauritius can be prosecuted under Section 249 of the Criminal Code as mentioned above coupled with Section 184 of the Courts Act

**Sub-paragraph j**: Yes

**Sub-paragraph k**: No. It is not expressly provided for.

# Question 3

**Are there provisions excluding criminalisation of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship / have a sexual relationship / had a sexual relationship? If so, please, submit it with corresponding translation.**

There are no such legal provisions in Mauritius.

In the case of ***Gopaul v State [2011 SCJ 193]***, the Supreme Court of Mauritius referred to the guidelines for rape set out by the Court of Appeal in England in circumstances where the victim is known or closely acquainted to the perpetrator of the offence and observed that “*‘relationship rape’ and ‘acquaintance rape’ are to be treated as being of equal seriousness to cases of ‘stranger rape’; it can be just as traumatic to be raped by someone you know and trust who has chosen you as his victim, as by a stranger who sexually assaults the first man or woman who passed by.*”

# Question 4

**What is the legal age for sexual consent?**

16 years. According to Section 249(4) of the Criminal Code, article 145 of the Civil Code, the legal age for sexual consent is **16 years.** However, section 14 of the Child Protection Act relating to sexual offences, more specifically subsection (2) in relation to the offence of causing a child to be sexually abused, makes reference to where the child has taken part whether as a willing or unwilling participant and a ‘child’ under the Child Protection Act is defined as any unmarried person under the age of 18.

# Question 5

**Are there provisions that differentiate for sexual activity between peers? If so, please provide them.**

There are no such legal provisions in Mauritius.

# Question 6

**Provide information on Criminal sanctions prescribed and length / duration of such criminal sanctions for criminalised forms of rape.**

The sanctions in cases of rape are set out below. However, the sentence in regards to rape before the Intermediate Court was amended in December 2008 and was raised to a minimum of 10 years’ penal servitude and up to a maximum of 40 years.

Under **section 249** of the **Criminal Cod**e:

1. Any person who is found guilty of the crime of rape is liable to penal servitude for a term not less than 10 years, but not exceeding 40 years.
2. Any person who commits an indecent act ‘attentat à la pudeur’ by force or without consent upon a person of either sex, shall be liable to penal servitude for a term not exceeding 10 years.
3. Any person who commits an indecent act ‘attentat à la pudeur’, even without violence and with consent, upon a child of either sex under the age of 12 shall be liable to penal servitude for a term not exceeding 10 years.
4. Any person who has sexual intercourse with a minor under the age of 16 or a mentally handicapped person, even with his consent, shall be liable to penal servitude for a term not exceeding 20 years.
5. Any person who has sexual intercourse with a specified person, even with consent, shall commit an offence and shall on conviction, be liable to penal servitude.
6. Any person who commits an indecent act ‘attentat à la pudeur’, even without violence and with consent, upon a specified person shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 16 years.

Section 13(2) of the Protection from Domestic Violence Act provides that “*Any person who does an act of domestic violence shall commit an offence and shall on conviction, be liable —*

*(a) on a first conviction, to a fine not exceeding 50,000 rupees;*

*(b) on a second conviction, to a fine not exceeding 100,000 rupees and to imprisonment for a term not exceeding 2 years;*

*(c) on a third or subsequent conviction, to imprisonment for a term not exceeding 5 years.*

Section 18(5) of the Child Protection Act provides that any person who commits an offence under section 14 of the Act “*… shall, on conviction, be liable -*

*(a) where the victim is mentally handicapped, to penal servitude for a term not exceeding 30 years,*

*(b) in any other case, to a fine not exceeding 100,000 rupees and to penal servitude for a term not exceeding 20 years.”*

# Question 7

**What does the legislation in your country provide in terms of reparation to the victim of rape and / or sexual violence after the conviction of the perpetrator.**

There are no specific legal provisions in terms of reparation. Mauritius does not have restorative justice system. So, after the conviction of perpetrator, no form of reparation is provided to the victims unless they file a civil case in Supreme Court to claim compensation for moral damage caused at their own cost. However, the victim is entitled to bring civil action and claim damages or any other remedy accordingly.

For instance;

1. for a child who has been abused by her father, she has the possibility of being removed from her place of residence and committed to a place of safety under Section 8 of the Child Protection Act;
2. for a woman who has been abused by her husband, she can be placed in a shelter or she may ask for a protection order or even an occupation order if the house belongs to the husband.
3. **Aggravating and mitigating circumstances**

# Question 8

**Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?**

**a. Is rape by more than one perpetrator an aggravating circumstance?**

Ans: Yes. In accordance with section 249(1B) of the Criminal Code, the commission of the offence of rape by more than one individual is considered as an aggravating circumstance.

**Section 249 (1B)** reads as follows:

Notwithstanding any other enactment, prosecution for the offence of rape may, at the sole discretion of the Director of Public Prosecutions, take place before a Judge without a jury where it is averred that the offence of rape was committed by 2 or more individuals.

**b. Is rape of a particularly vulnerable individual an aggravating circumstance or the imbalance of power between alleged perpetrator and victims?**

No. In respect to rape cases, the law does not specifically provide for the ´aggravating circumstances´ mentioned in sub-paragraphs b and c. However, these circumstances may be taken into consideration as aggravating circumstances by the Court at the sentencing stage.

**c. Is rape by spouse or intimate partner an aggravating circumstance?**

Ans: No

It is to be noted that although the circumstances described under sub-paragraphs **b** and **c** are not explicitly set out under section 249 of the Criminal Code dealing with rape (as opposed to the circumstance described in paragraph **a**), the Court will consider aggravating circumstances, which will depend on the particular facts and circumstances of each particular case, before imposing its sentence.

Furthermore, as regards the circumstances described under sub-paragraph b, section 249 of the Criminal Code caters for the offences of “attempt upon chastity” and “illegal sexual intercourse” (as set out in ***Annex A***), for which consent of the victim is considered irrelevant in as much as the victim is not in a position to give effective consent.

# Question 9

**Does the law foresee mitigating circumstances for the purposes of punishment? if YES please specify**

Yes. The Court considers mitigating circumstances for the purposes of punishment, which may include an early confession and guilty plea, cooperation with the authorities and remorse shown by the accused for the offence committed.

# Question 10

**Is reconciliation between the victim and the perpetrator allowed as part of a legal response? If so at what stage and what are the consequences?**

There are no legal provisions aimed at reconciliation. However, should the victim and the perpetrator reconcile and the victim indicate that he/she does not wish to proceed with the complaint, at any stage of the legal process, the matter will be referred to the Director of Public Prosecutions, who will then decide whether to pursue the matter against the perpetrator or not.

**a. Regardless of the law, is reconciliation permitted in practice and what is the practice in this regard?**

Cases of rapes and sexual assault are considered as serious offences and no reconciliation is allowed.

# Question 11

**Is there any provision in the criminal code that allows for the non-prosecution of the perpetrator?**

Yes. An accused will not be prosecuted if he is unfit to stand trial, as provided under section 74 of the Criminal Procedure Act:

***74 Unfitness to stand trial***

*(1) Where an accused suffers from insanity and on arraignment is found to be so suffering by a Court so that he cannot be tried on the information filed against him, the Court may direct the confinement of the accused in a mental health care centre under the Mental Health Care Act.*

*(2) The Court shall not make a finding under subsection (1) except on the evidence of not less than 2 registered psychiatrists.*

1. **If the perpetrator marries the victim of rape?**

There are cases where the victims do not want to proceed with the case or do a withdrawal in court under the oath as they may be getting married to the perpetrator. **If** there is no independent evidence, that is; medical report/ forensic report/ witnesses, the Director of Public Prosecutions will assess the case and the matter can be dismissed. Hence, the decision rest solely with the DPP.

1. **If the perpetrator loses his “socially dangerous” character or reconcile with the victim?**

If the perpetrator reconciles with victim and withdraws the case and there is no independent evidence it will assessed and decision will rest solely with the DPP.

1. **Prosecution**

# Question 12

**Is rape reported to the police prosecuted ex officio (public prosecution?)**

Under section 3(1) of the Criminal Procedure Act, the Director of Public Prosecutions is empowered to prosecute all offenders in the name and on behalf of the State.

**s. 3 Power of DPP**

*The Director of Public Prosecutions is empowered to prosecute all offenders in the name and on behalf of the State, by himself, or, under his directions, by his deputy, provided that, except in the Intermediate Court and in the District Courts, no person shall be so deputed to act on the trial of any party charged with a crime or misdemeanour, unless he is a barrister of 3 years' standing at the Bar."*

# Question 13

**Is rape reported to the police prosecuted ex parte (private prosecution)**

Should the Director of Public Prosecutions decline to institute a prosecution upon a complaint made by an aggrieved party, the aggrieved party or his representative may institute a prosecution under section 4(2) of the Criminal Procedure Act, known as ‘private prosecution’.

The normal practice is that all criminal proceedings are instituted by the DPP. However, if the DPP does not wish to prosecute a case, the aggrieved party may institute prosecution by virtue of s. 4 and 5 of the Criminal Procedure Act.

**s. 4. Prosecution by aggrieved party**

1. *In any case of crime or of misdemeanour triable before the Supreme Court, the Director of Public Prosecutions may, on the complaint of an aggrieved party, institute a prosecution on behalf and at the expense of the State.*
2. *Where the Director of Public Prosecutions has declined to institute a prosecution under subsection (1), the aggrieved party or his representative may, subject to section 5, institute a prosecution.*

s**. 5. Information given by aggrieved party**

*"(1) Where an aggrieved party or his representative intends to institute a prosecution, he shall produce before a Judge an information duly prepared, together with a certificate endorsed on it, under the hand of the Director of Public Prosecutions, specifying that he has seen such information and declines to prosecute at the expense of the State the party charged for the offence named in the information."*

- However, after having followed s. 4 and 5 above, the final decision to prosecute rest with the DPP. Moreover s.249(6) states that for cases of rape or sexual intercourse the consent of the DPP is vital.

**S. 249 (6) Criminal Code provides as follows:**

*"No prosecution shall be instituted under this section except on an information filed with the consent of the Director of Public Prosecutions"*

***In the Case of Edath-Tally v Micheal Glover [1994 SCJ 409] the Supreme Court, applying s. 72 (3) of the Constitution observed that "a person does not have an unfettered right to enter private prosecution on the criminal side and that his power to prosecute is subject to the power of the DPP to take over or discontinue."***

# Questions 14 and 15

**14. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women/ children?**

No

# Question 16

**Please provide information on the stature of limitations for prosecuting rape.**

There is no limitation period for prosecuting rape.

# Question 17

**Which are the provisions allowing a child who was the victim of rape and to report it after reaching adulthood, if any?**

There are no specific legal provisions on this issue, and a child may at any time report such a case to the relevant authorities, even after reaching adulthood.

Ultimately provisions under section 249 of the Criminal Code will have to be followed.

# Question 18

**Are there mandatory requirements for proof of rape such as medical evidence or the need for witnesses?**

There is no mandatory evidence, however, the medical report and the Forensic report are vital and most importantly prosecution will have to prove elements of the offence to the required standard.

However, medical evidence and testimonies of witnesses in favour of the rape victim do strengthen the cases.

# Question 19

**Are there rape shield provisions aimed at preventing judges and defence lawyers from exposing woman’s sexual history during trial?**

There are no such rape shield provisions. During cross examination defence lawyers may ask questions relating to the woman sexual history to discredit the victim’s testimony or to attack her credibility.

# Question 20

**Are there procedural criminal law provisions aimed to avoid re-victimization during the prosecution and court hearing? If yes, please specify.**

There are legal provisions aimed at protecting a person’s privacy during trial, and there are specific provisions for rape cases, as provided under sections **161A** and **161B** of the **Courts Act**:

***161A. Persons may be excluded from proceedings***

*Any judge, Magistrate or other person having by law authority to bear, receive or examine evidence may, where he considers it necessary or expedient -*

*(a) in circumstances where publicity would prejudice the interests of justice or of public morality;*

*(b) in order to safeguard the welfare of persons under the age of 18;*

*(c) in order to protect the privacy of persons concerned in the proceedings;*

*(d) in the interests of defence, public safety or public order,*

*exclude from the proceedings (except the announcement of the decision) any person other than the parties to the trial and their legal representatives.*

***161B Live Video and Television Link***

*Notwithstanding any other enactment, the Court may, in its discretion and on motion made by the prosecution, allow a complainant in a sexual offence case or any witness in relation to an offence under the Piracy and Maritime Violence Act 2011 to appear before it, and depone, through such live video or live television link system as may be approved in writing by the Chief*

*Justice.*

*In exercising its discretion under subsection (1), the Court shall ensure that there is a fair hearing in the matter.*

*"sexual offence case" means a case in which the accused is being prosecuted for rape, attempt upon chastity or illegal sexual intercourse in breach of section 249 of the Criminal Code.*

1. **War and/or conflict**

# Question 21

**Is rape criminalised as a war crime or crime against humanity? YES/NO**

Yes.

Relevant sections of the International Criminal Court Act read as follows:

***4. International crimes***

*(1) Notwithstanding any other enactment, any person who commits –*

 *(a) a crime against humanity;*

 *(b) genocide; or*

 *(c) a war crime,*

*shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 45 years.*

***2. Interpretation***

*In this Act –*

 *“crime against humanity” has the same meaning as in the Statute and in Part I of the Schedule; …*

*“war crime” has the same meaning as in the Statute and in Part III of the Schedule.*

**SCHEDULE**

[Section 2]

**PART I**

**CRIME AGAINST HUMANITY**

1. “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack –

(h) **rape**, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;

**PART III**

**WAR CRIME**

“war crime” means –

 (b) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts –

 (iii) committing **rape**, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2(f) of the Statute, enforced sterilisation, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(d) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely any of the following acts –

(i) committing **rape**, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2(f) of the Statute, enforced sterilisation, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;

# Question 22

**Is there a statute of limitations for prosecuting rape in war or in conflict context? YES/ NO**

There exist no statutes of limitations for prosecuting rape in war or conflict context.

# Question 23

**Are there any explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? YES/ NO**

No.

# Question 24

**Has the Rome Statute of the International Criminal Court (ICC) been ratified? YES/NO**

Yes, and the Statute has been implemented into national legislation through the International Criminal Court Act.

1. **Data**

# Questions 25

**Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.**

Below is the data from the Office of the Director of Public Prosecution for last 2 years.

**Rape Cases from year 2018-2020 up to date**

|  |  |  |  |
| --- | --- | --- | --- |
| **Year**  | **No. of cases advised** | **Prosecuted** | **sentence** |
| **2018** | 48 | 4 | 1 |
| **2019** | 45 | 3 | 1(Warning) |
| **2020 up to 01/7/2020** | 18 | 2 | Nil |

***Source: Office of the Director of Public Prosecutions***

**Statistics for rape cases, sexual intercourse with minor under 16 and sexual intercourse with specified person for the past 5 years are shown in table below:**

|  |  |  |
| --- | --- | --- |
| **Offence** | **Year** | **Total** |
| **2015** | **2016** | **2017** | **2018** | **2019** |
| **Rape** | 24 | 33 | 26 | 20 | 19 | 122 |
| **Sexual Intercourse with minor under 16** | 116 | 117 | 88 | 122 | 111 | 554 |
| **Sexual Intercourse with specified persons** | 1 | - | 1 | 1 | 2 | 5 |
| **Sexual Intercourse with mentally Handicap person** | - | - | - | - | 1 | 1 |

***Source: Mauritius Police Force***

1. **Other**

# Question 26

**Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.**

1. **Lengthy time process**

It has been observed that cases take a long time to reach the prosecution office. Sometimes the time delay between the commission of the offence and trial can be consequential. Given the long time period that has elapsed between the commission of the offence and trial, very often when the case comes for trial, the victim can either no longer remember the incident, or there is a withdrawal as they have reconciled. Hence, the time taken during enquiry and the way enquiry is done has to be reviewed.

1. **Legislative Framework**

Further consultations need to be effected to see whether amendments need to be brought to the existing legislation so that marital rape is expressly provided for.

**11 August 2020.**