

# Various laws sanctioning the crime law general essay

Law



The Sexual Offences Act 2009[1] is the main piece of legislation sanctioning rape of children in Scotland. Generally, rape has been defined to include penetration of the vagina, anus or mouth of a person without his consent by another person's penis[2]. Accordingly, this makes rape a gender neutral offence where the complainant can either be a girl or a boy. A very interesting peculiarity of this law is the fact that it makes separate provisions for 'young' and 'older' children, whereby young children refers those who are under the age of 13 years while older children are those who are 13 years of age or above but under 16 years. The penalties are harsher, the younger the child. This distinction undeniably makes the task of the prosecution easier. Besides, very young children are afforded the enhanced protection they deserve. Consent is disregarded where the child complainant is under the age of 16 years, making the crime a strict liability offence. This strict legal framework perfectly demonstrates how the Scottish legislator is doing his level best to safeguard the most vulnerable, not only from uncanny sexual predators but from their own naivety. The rationale behind further criminalising rape of those children, who are under the age of 18 years, by a person in a position of trust[3] is to show that children of all age groups are considered to be particularly vulnerable to such a crime and not only the very young. However, the Act does not distinguish between adults and children complainants suffering from a mental disorder[4]. Another serious loophole is the fact that no provision is made for the offence of incest, thus making the law appear disjointed and scattered. As a result, other legislation has to be resorted to when prosecuting the crime[5]. For the sake of convenience, it ought to have been in that act itself. In relation to

protections afforded to children, there is a restriction imposed on the media not to publish or broadcast the identity of the child complainant[6]. In the same vein, the public can be excluded from the courtroom so that the intimidated child complainant can best testify in court[7]. Other special measures[8] which are normally arranged include; testifying via live television link in a separate room, behind a screen in the courtroom itself and pre-recorded interview of the victim. Those facilities spare the victim from having to face the accused. With regard to children with disabilities, the law provides for a ' supporter', where the job of the latter is to ease communication between, for example, a deaf complainant and the court[9]. This reflects how far reaching the scope of protection is in Scotland so that disabled children are not unfairly prejudiced. Additionally, convicted sex offenders in the United Kingdom can be barred from working with children in the education sector[10]. Besides, those people have a duty to notify their names and addresses to the police so as to keep track of them[11]. It has been deemed wiser to cater for the long term protection of children. The sole existence of a legal framework would definitely not be enough to safeguard children from potential offenders or from those who might relapse.

### **3. 2 FRANCE**

The French Penal Code[12] criminalises rape of children, whereby rape is construed as non consensual penetration of the vagina, anus or mouth by the penis, any other part of the body or any object. A distinctive feature about the French law is that a woman can be charged for rape of a child since penetration does not necessarily have to be made by a penis. It constitutes an aggravating circumstance[13], firstly, where the crime is

committed against a minor who is under the age of 15 years and secondly, if it is committed by a family member, relative or by any other person having authority over the victim. Accordingly, the penalty is tougher. Owing to the young age of the child, a need has been felt to make provision for heightened protection. With regard to incest on minors, the French legal regime has recently been reinforced[14]. The case is tried before the court of the assizes, consisting of 3 judges and 9 jury members. This clearly highlights the seriousness of offences against morality in France. The French law further allows the child victim to personally bring an action against the accused as soon as he or she reaches majority[15]. The aim is to encourage reporting of the crime since it is understandable that fear can sometimes hamper a child to divulge such a traumatic experience. During the investigation process, the child is normally assisted by a psychologist whose task is to reformulate questions of the police[16]. Besides, the child victim is entitled to medico-psychological expertise at an early stage of the investigation so as to determine the extent of mental and physical harm[17]. Facilities which are afforded during trial include; in camera proceedings[18] and testifying via audio-visual facilities[19]. Restrictions are further imposed on the media regarding publication of the child's identity[20]. It is laudable how the criminal justice system assists the child, using a staged approach, so that he or she can successfully go through the court process. The law reinforcing protection of children has made provision for a social and judicial treatment for convicted offenders[21]. Failure to abide by those measures may result in five years of imprisonment. This aim is to circumvent the vicious cycle of recidivism.

### 3.3 AUSTRALIA

In Australia, the respective criminal code[22]of each state criminalises rape of children while their child protection legislations[23]provides for corresponding protective measures. The definitions used to describe the crime vary across those jurisdictions. Generally, rape involves non consensual penetration of the vagina, anus or mouth of a person, by a penis, any other part of the body or any object[24]. This implies that the crime is gender neutral. Age is considered as the determining factor when sanctioning rape of children[25]. A distinction is made between young and older children, where the younger would be in the cohort of those under the age of 10, 12 or 13 years while the older children are in the range of 16, 17, or 18 years of age[26]. This varies in the different states. In fact, the penalties are higher, the youngerthe younger the child[27]. This nuance demonstrates that the focus of the legislator is on the safeguard of younger children. To further reinforce such protection, consent to sexual intercourse is disregarded as a defence where the child is under a specific age depending on the states[28]. Each of those jurisdictions provides for incestuous sexual intercourse with children either separately[29]or under the same heading[30]as those of adults complainants. Besides, harsher penalties are provided for where the offender is in a position of authority in relation to the child[31]. The purpose of this provision is to particularly punish odd behaviours of persons who were meant to safeguard the interest of the child. Apart from the Northern Territory[32], none of those states differentiates between the adult and the child complainant who is mentally handicapped. This ought to be reviewed to include physical disabilities. The law should

make it clear how odious it is to take undue advantage of a child suffering from disabilities. Normally, rape of children is tried before the District or County Court of the respective states[33]. A ground breaking provision found in the Australian law is pre-recorded evidence. The child testimony is recorded about a month before the trial and this may subsequently be played if a second trial is held or on appeal[34]. Additionally, overlapping facilities in the various states include; in camera proceedings[35], testifying by closed circuit television or behind a screen in the courtroom itself, special seating facilities where the child does not have to face the accused and prohibitions imposed on the media as regards publication of the victim's identity[36]. In a nutshell, this demonstrates the determination of the Australian criminal justice system to curb the trauma of child complainant. 3.

4 CANADA Where rape is committed against children who are under the age of 16 years, it is termed as 'sexual interference' in the Canadian Criminal Code[37]. It comprises non consensual sexual touching of a child, with any part of the body of the offender, including the penis or any object. In this case, 'touching' encompasses vaginal or oral penetration. The definition is broad enough to infer that the crime is not gender specific, where the complainant as well as the accused can be of either sex. The law provides separately for unlawful anal intercourse[38] A major downside is the fact that rape of children is not sanctioned by tougher penalties as opposed to rape[39] of adults in general[40]. However, the law has been drafted in such a way so as to give ample protection to those complainants who are under the age of 16 years since the defence of consent cannot be raised by the accused[41]. The law further sanctions 'sexual exploitation'[42]. It involves

rape of children in the cohort of 16 to 17 years by a person in a position of trust or authority. This demonstrates that the legislator is also concerned about the protection of older children since they are equally at risk. Although, the law provides for 'sexual exploitation' against persons with disabilities[43], it does not differentiate between the child and the adult complainant. In the same way, incestuous intercourse[44] is criminalised under the same heading for both adults and children. Instead, it should have been an aggravating factor, carrying higher penalties where the crime is perpetrated against a child. The criminal justice system is well equipped so that the child can best give evidence in court. First of all, the public is excluded from the courtroom in order to spare the child from additional trauma[45], other facilities include; testifying behind a screen or via video outside the courtroom, evidence is recorded in advance and may subsequently be played at trial[46] and lastly, a duty is imposed on the media to keep anonymous identities of victims[47]. Those provisions are primarily meant to improve the child's experience in court. Additional measures have effectively been devised with the intention of providing post-sentence punishments. In this respect, convicted offenders are prohibited to work with children[48]. In accordance with the Safe Streets and Communities Act 2012, offenders convicted of sexual offences against children are further forbidden from applying for suspension of their bad record[49]. Such a rigid legal framework aims at acting as a deterrent for potential offenders. Altogether, this comparative study can be an appropriate guidance for prospective reforms as regards the law sanctioning rape of children in Mauritius.