Book Review

CRIMINAL LAW FOR THE 21ST CENTURY

A Model Code for Singapore*

by Chan Wing Cheong, Stanley Yeo & Michael Hor

CHOO Han Teck
LLB (Hons) (National University of Singapore), LLM (Cambridge); Judge of the Republic of Singapore.

> There's only one degree of freshness – the first, which also makes it the last.[1]

1 The "General Part" is a distinct formal part of the division between the "General Part" and the "Special Part" in many criminal codes, especially those from continental European countries. Lord Thomas Macaulay adopted that form when he produced the Indian Penal Code 1860,[2] on which the Singapore Penal Code ("Penal Code")[3] is based. English criminal law is not based on a codified system, but Glanville Williams was credited for introducing that division informally into English criminal law.[4] Hitherto, in England, the areas which concerned the General Part were disparate, and did not seem to have as great an influence as they do today. *Blackstone's Commentaries on the Laws of England*[5] covered criminal law in the fourth volume, of which only the first three chapters (roughly 10% of the volume) concerned matters of the General Part. Even *A History of the Criminal Law of England* by James Fitzjames Stephen[6] had only roughly 13% on the General Part in the entire 1,300-page work. However, the established and conventional jurisprudential view in the common law world now is that "a system of criminal law can claim to be coherent, rational and principled only in so far as it is structured by an extensive General Part".[7] The role of the General Part is to lay down the general principles that can and ought to apply throughout the vast expanse of the criminal law.

2 Any attempt to review the criminal law naturally identifies the General Part as the starting point because it occupies the heart of this

---

* Academy Publishing, 2013.
1 Mikhail Bulgakov, *The Master and Margarita* (Penguin, 1997).
2 Act No 45 of 1860.
3 Cap 224, 2008 Rev Ed.
4 Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons, 1953).
5 Clarendon Press, 1765.
6 Macmillan & Co, 1883.
7 *Philosophy and the Criminal Law: Principle and Critique* (Antony Duff ed) (Cambridge University Press, 1998) at p 2.

branch of law. The authors of *Criminal Law for the 21st Century – A Model Code for Singapore* devoted their effort entirely to the General Part. They profess to revitalise the Penal Code, making the fair comment that "the Penal Code has for so long been incomprehensible and inaccessible to the layperson that the law has become virtually the sole domain of lawyers".[8] Indeed, if we are to maintain that ignorance of the law is no excuse, lawyers, judges and legislators share the responsibility of making sure that the law is, at least, clear, precise and comprehensible to the public. The authors agree with the lavish praise by Sir James Stephen, who had described the Indian Penal Code as a finished picture compared to a sketch, and "much better expressed, than Livingstone's Code for Louisiana".[9] Nonetheless, two reasons may be given for a need to "revitalise" the Penal Code, in spite of the amendments made in 2007. The first is the number of amendments to the Penal Code over the years and the creation of new offences in other statutes may create doubt or ambiguity towards the existing General Part. The authors are of the view that "some concepts underlying the Penal Code are problematic or have become obsolete".[10] The second is that new ideas and theories about crime and punishment, the twin foundations of the criminal law, have developed tremendously in modern times. A General Part must take into account such developments in jurisprudence.

3 Using the current General Part in the Penal Code as a base, the authors' model comprises of seven parts, namely:

Part 1: Purpose and Application;

Part 2: Proof of Criminal Responsibility and Establishing Guilt;

Part 3: External Elements of Offences;

Part 4: Fault Elements of Offences;

Part 5: Offences which do not require Fault;

Part 6: Extensions of Criminal Responsibility; and

Part 7: Defences.

Every Part is divided into individual chapters to deal with its subsections. In each Part, the authors begin with their draft proposal (including explanations and illustrations) and a general explanatory note on the salient features of the provision. Finally, the authors present a commentary on the current law and the reasons for the proposed

8 Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century – A Model Code for Singapore* (Academy Publishing, 2013) at p 11.

9 Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century – A Model Code for Singapore* (Academy Publishing, 2013) at p 1.

10 Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century – A Model Code for Singapore* (Academy Publishing, 2013) at p 3.

changes. In this segment, the authors compare their draft with similar provisions from other jurisdictions such as England, Australia and also the Statute of the International Criminal Court ("ICC Statute").

4 In explaining the Purpose and Application of the proposed General Part, the authors take to heart the basic idea of a criminal code, citing Macaulay: "Not only ought everything in the code to be the law; but nothing that is not in the code ought to be law."[11] They thus expressed the ideal that once in place, "the exercise can commence of gradually revising other existing penal legislation to accord with the general principles and rules of interpretation found in the General Part".[12] Part 2 of the book proposes to codify the presumption of innocence and the standard of proof in criminal law. The proposed s 2.1(1) reads: "No person may be convicted of a criminal offence unless each and every fact necessary to constitute criminal liability has been established beyond a reasonable doubt." This provision (and its illustration) may seem basic but it serves the important function of a beacon in a major criminal code, where hitherto, lawyers rely on experienced hands passing on the wisdom of Viscount Sankey's "golden thread": "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject to any statutory exception."[13] The authors may perhaps claim in mitigation that they are criminologists and not legislative draftsmen.[14] Sub-paragraph (3) begins with "Exceptionally, Parliament may by law derogate from the requirements of this section in order to impose on the accused either a burden to prove any fact on a balance of probabilities, or to adduce supporting evidence, which, if unrebutted, would be sufficient to raise a reasonable doubt." The legislative draftsman is unlikely to use the word "exceptionally" here. The rest of this provision can also benefit from a revised version. The reluctance to use the small Roman numeral throughout the book has created a slight disorderliness, particularly obvious in s 2.1(2) at page 26.[15] Section 2.2 of Part 2 deals with the proposal to codify the coincidence between the *actus reus* of the offence with the *mens rea*. As they do in s 2.1, in which "burden of persuasion" is used instead of "the legal burden of proof" (and "burden of production" in place of the

11 Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century – A Model Code for Singapore* (Academy Publishing, 2013) at p 20.

12 Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century – A Model Code for Singapore* (Academy Publishing, 2013) at p 21.

13 *Woolmington v Director for Public Prosecutions* [1935] AC 462 at 481, *per* Viscount Sankey.

14 The Parts are separately written but liability is joint. See confession at p vi of Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century – A Model Code for Singapore* (Academy Publishing, 2013).

15 The same problem appears in Part 6 in s 6.1(2) at p 154.

evidential burden), the authors adopt the more modern descriptions "fault element" and "physical element" (in s 2.2) in place of the older terminology of "mental" and "physical" elements of the offence. Here the authors propose a proper match between the physical act and the mental element required for the offence. Hence, if *A* strikes *B* with the intention of killing him but *B* does not die; *A* thinking that *B* has died, throws him into the sea causing *B* to die by drowning, there will be a concurrence of the mental and physical elements of the offence of killing *B*. However, if *A*'s intention is to cause hurt without killing, then he is not guilty of killing *B* if he throws *B* into the sea where *B* dies of drowning.

5 Part 3 comprises four sections: physical elements, voluntariness, omissions and causation. The instance of a physical act, the responsibility of creating or maintaining a state of affairs (without actually doing any physical act, such as allowing one's home to be used as a gambling place), the voluntary nature of a criminal act, and culpability based on an omission, are difficult and often overlapping concepts that involve not just criminal law but also evidence law. The discussion of *Mohamad Ibrahim v Public Prosecutor*[16] in s 3.2(5) is out of place because the authors are here dealing with the voluntariness of the offender's act but have digressed to a discussion on the instances in which "it may be fair to impose criminal liability on those who are not able to meet the law's demands but are able to ask for help". In the case cited, the accused claimed that he could not read English and therefore did not know that he was in possession of obscene books. The defence was rejected on the ground that he could have asked someone who could read English to tell him. The accused there might not have met the law's demands but it can hardly be said that his was an involuntary act, or that voluntariness was remotely relevant.[17] Section 3.4 is a bold proposal given that presently, there is no provision on causation in the Penal Code; the philosophical notions of causation can lead to reams of indeterminable arguments; and the Canadian and English Law Reform Commissions have a different definition. The authors may be right in claiming that their model is an improvement over the definition in the other codes, but that claim has to be tested.[18] The concepts under this Part are connected by an important question, not generally obvious or discussed except in academic circles: does criminal liability require an act? It must be assumed that the answer to that question has to be "no" if the law creates offences of omission in some cases, and the removal of involuntariness

16 [1963] MLJ 289 at 392.

17 What if the man he asked was the one who gave him the books?

18 The limitations inherent in the nature of a book review prevent a fuller discussion of this important and fascinating point.

as a defence in others. Douglas Husak defends that answer in his essay, "Does Criminal Liability Require an Act?"[19]

6 Part 4 provides for the "Fault Elements", or better known as *mens rea*. The choice of name is not as important, but modern criminologists see Latin descriptions to be inaccurate and out-of-date. "Fault Elements" is gaining in popularity although the term appears ostensibly too wide, especially to the uninitiated or the lay person. The idea of providing a legislative definition of the various mental states of mind that form part of the criminal act meets the stated aim that nothing that is not in the Penal Code should be an offence, however, in this regard, two general points might be made. First, a provision to provide the definitions of the mental states ought perhaps to include the definition of "dishonesty", presently found in s 24 under "General Explanations" in the Penal Code. Secondly, where negligence and rashness (or recklessness) are concerned, they are clearly distinguishable in the extremes but they are states of mind that defy comparisons in some instances, just as it is not possible to tell at which precise point a person turns bald or when grey turns to black. There is scope for parliament to consider making negligence a non-custodial offence and reserve the possibility of imprisonment only for rash acts. When the courts have to make loose and general distinctions between two kinds of conduct, it is generally easier to decide whether a particular case justifies a custodial sentence than to differentiate between degrees of carelessness to fit either "negligence" or "rashness". That would leave the question of the length of the imprisonment to the trial judge, who will have all the circumstances of the case taken into account. The proposals in Part 4 also include a section on "transferred intent", which is presently provided for under specific provisions such as s 301 of the Penal Code, and a section to provide for the criminal culpability of corporations. It was envisaged from the promulgation of the Penal Code that corporations can be subject to criminal liability under the Penal Code[20] but the difficulty has always been to determine how a mental state might be attributed to a corporation. The proposal by the authors under ss 4.4(1)(*b*), 4.4(1)(*c*) and 4.4(1)(*d*) which makes references to "a high managerial agent" and "the corporate culture" of the corporation as a basis for imputing the criminal act to the corporation may prove to be highly contentious. A "high managerial agent" may not be the same as a "controlling officer", a term proposed by the English Law Reform Commission, and one which seems a little more straightforward.

19 *Philosophy and the Criminal Law: Principle and Critique* (Antony Duff ed) (Cambridge University Press, 1998) at p 60. Most disagreements in this area are located in the question, "What are acts?"

20 Section 2 provides that every "person" is liable to punishment under the Penal Code, and s 6 defines "person" to include an incorporated company or association.

7 Part 5 provides for offences in which the mental element is irrelevant. These are known in the common law as "strict liability offences". An offence is regarded as a strict liability offence if the physical act constituting the offence has been made out but not the *mens rea* for the offence. It is generally accepted, however, that the defence of due diligence is available even in strict liability cases. There is an even stricter class of offences in which that defence is not available to the accused, namely, offences of "absolute liability".[21] The important and useful proposal here is that the argument as to whether an offence is a strict liability offence, or an absolute liability offence, or neither, will no longer arise because the proposals in Part 5 require the Legislature to specify when it wishes to create strict and absolute liability offences.

8 Part 6 deals with the situations in which criminal liability is extended to more than one person, and also where the intended offence was aborted or did not take place. It covers, first, offences involving abetment. In this regard, the authors propose that the law be rationalised by applying the law of abetment under this part to all criminal offences. Secondly, the well-known, well-worn, and now (it is argued) redundant s 34 law of common intention should be repealed since group liability once covered by that section would be subsumed under the revised law of abetment under this Part. The proposal in Part 6 will be consonant with the position adopted in countries like the US where a person is criminally liable for the crime of another only if he had abetted that other to commit it. In chapter 6.2, the authors refer to the "bewildering array of legislation"[22] providing for attempts to commit an offence. The authors hope to create one provision to rule them all. They point out that "there is no convincing reason why some criminal attempts should attract treatment which is different from other criminal attempts."[23] Although s 95 of the Penal Code provides for the general exception of acts that cause slight harm (what the authors refer to as "*de minimis*"),[24] there is no general provision governing the abandonment or renunciation of an attempt to commit a crime. The authors propose that provision be made so that although the conduct prior to the renunciation remains criminal, the renunciation should be treated as a significant mitigating factor. Robert Batey discussed the main problem in the law of attempt in *The Minority Report and the Law of Attempt* and

21 See *MV Balakrishnan v Public Prosecutor* [1998] SGHC 416.

22 See Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century – A Model Code for Singapore* (Academy Publishing, 2013) at p 187, Commentary.

23 Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century – A Model Code for Singapore* (Academy Publishing, 2013) at p 185.

24 The authors generally avoid Latin phrases perhaps in their attempt to revitalise the Code, but strangely kept this phrase when s 95 does not; conversely, the authors refer to "renunciation" instead of the Latin *locus poenitentiae*, side by side with *de minimis*, but this is a small point.

pointed to the fact that the "law has never settled on a single way to phrase the act requirement for attempt, other than to say the defendant must have gone beyond 'mere preparation' to commit the crime".[25]

9 Part 7 deals with the general defences, namely, acts of children, acts under intoxication (voluntary and involuntary), mistake (of fact and law), private defence, duress and necessity. In this Part, no significant changes to ss 82 and 83 are proposed, except to raise the age from seven to ten in s 82. However, the re-wording by the authors again may cause some mild discomfort to a legislative draughtsman. Presently, s 82 reads, "Nothing is an offence which is done by a child under 7 years of age." The authors propose adding: "Subsection (1) is an absolute rule which allows for no exceptions."[26] This immediately raises the question whether there are absolute rules in the Penal Code which permits exceptions.[27] The proposal in chapter 7.2 to have an overriding provision exculpating an actor from criminal liability is in line with changes elsewhere in the Commonwealth where the law in this area was modelled after the outdated *M'Naghten* rules.[28] The main provision affected is s 84 because the authors hope to expunge the unhelpful phrase, "unsoundness of mind", and replace it with "impairment of mind" which is the preferred terminology in modern codes.[29] The change, as the authors explain, is not a superficial change of name. It is accompanied by addressing the actor's ability in three aspects, to:[30]

> (a) appreciate the consequences of his own conduct,
>
> (b) know that his conduct was contrary to law or was morally wrong, and
>
> (c) control his conduct.

They considered the difference between the use of "ability" (preferred in England and Australia) and "capacity" (in the ICC Statute) and recommend the former, believing that that enables the accused person to succeed if he were able to show that he "was dispossessed of the relevant mental faculty at the time of the offence". That worry might be over a question of semantics. The matter of greater interest and concern

25 [2004] 1 *Ohio State Journal of Criminal Law* 689 at 694.

26 Subsection (1) is the proposed change to the present s 82.

27 On the subject of legislative drafting, the authors use the phrase "For the avoidance of doubt" in p 154 when this phrase is avoided by strict stylists of the language on the ground that its use implies that some doubt might have lingered in that which had preceded. In legislation, the preference is to use "Explanation" instead of "For the avoidance of doubt".

28 *M'Naghten's Case* (1843) 10 C & F 200.

29 Once s 84 is amended, the defence of "diminished responsibility" in Exception 7 of s 300 of the Penal Code will also have to be reconsidered.

30 See Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century – A Model Code for Singapore* (Academy Publishing, 2013) at p 207.

lies with the problems involved in deciding on the nature and degree of wrongness that may be attributed to the offender before he can succeed in this defence. Many issues coagulate in this singular question, not least its connection to punishment, for without punishment, how can there be crime? One such issue is the extent, if any, to which the well-being of an offender should be considered when comparing his interests with the interests of those affected by his wrongdoing.[31]

10 The defences of involuntary and voluntary intoxication are presently covered by s 85(2) and s 86(2) of the Penal Code, respectively. They remain under separate provisions in the authors' proposals. In the first, the authors hope to rationalise the basis for a defence that relies on the absence of a fault element, the requisite mental state for the offence. They point out the irrelevance of the defence being dependent on the malicious or negligent state of mind of a third party (the one who causes the intoxication in the accused person). The authors also disapprove of the notion that where intoxication is concerned, not knowing the wrongness of his conduct alone is insufficient even though under the insanity defence (s 84), not knowing the wrongness of his conduct entitles the accused person to rely on the defence.[32] Voluntary intoxication poses difficult problems especially where intention-based offences are concerned. There are two matters of fact that must coincide: the fact of intoxication and the fact that by reason of that intoxication the accused person was unable to form the requisite mental element for the offence. Such problems are partially resolved by placing the burden of proof on the accused person, thereby removing, at least, the notion that he gains a more favourable position than an accused person relying on the other general defences.

11 Where the defence of mistake is concerned, "mistake" is used synonymously with "ignorance" although under certain circumstances, the word ignorance might seem more appropriate and palatable to grammarians and stylists of the language. Ignorance is associated with a passive belief that the fact required for the commission of the offence was non-existent, whereas a mistake assumes a positive act of cognizance that the requisite fact does not exist. The controversial proposal in this section lies in the explanation to s 7.6 which the authors drafted as follows: "Explanation – A person is not criminally responsible for an offence if his mistake about that offence was based on a reasonable reliance on official or professional advice."[33] The argument is

31 See John Gardner, "On the General Part of the Criminal Law" in *Philosophy and the Criminal Law: Principle and Critique* (Antony Duff ed) (Cambridge University Press, 1998) at pp 232–236.

32 The requirement of unsoundness of mind is equated to the intoxicating substance, and the mental state of a third party is not an issue in a s 84 defence.

33 Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century – A Model Code for Singapore* (Academy Publishing, 2013) at p 258.

that a man should not be criminally responsible in that situation because he believed that he was entitled at law to do what he did. Does it matter then that his belief was not obtained from professional advice but otherwise genuinely and reasonably held? The issue of making exemptions from criminality in cases of a mistake of law is more a matter of policy than principle. In chapter 7.7, the authors point out that the Penal Code presently presents the right of private defence in 11 sections which have a number of overlaps. They thus hope that their proposed draft will present an adequate general defence in one section comprising five subsections and various explanations. This Part produces a more general, but not wider proposition for the application of private defence. It trims away many of the individual conditions such as those found in s 100. The authors hope to avoid confusion that sometimes arises when the question of a necessary response is also raised in considering the proportionality of that response. The former takes into account other options in order to determine whether the act of the accused person was an act in private defence. The latter compares the proportionality of the harm done with the harm to be averted.[34] In chapter 7.8, the authors hope to make adjustments to the long standing though rarely used defence of duress. The authors expand the present requirement under s 94 (that only the threat of imminent death qualifies to invoke this defence) to include a threat of grievous hurt. This naturally assumes that "grievous hurt" carries the same meaning in the Penal Code. The authors have not indicated whether they are in full agreement that the present definition of grievous hurt in the Penal Code is adequate or whether that provision also needs to be amended. The last segment of the book concerns the authors' version of the defence of necessity, presently encoded in s 81 of the Penal Code. The authors obviously sought to make this provision clearer by making the conditions more specific. The authors hope to replace s 81 with their s 7.9 which contains two subsections, with three subsections to subsection (1) and four subsections to subsection (2). The current provision reads, "Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property." This is also another rarely used defence, but the generality of s 81 may seem vague and uncertain to some, but in the view of others, the question of what is necessary necessarily depends on everything and everyone involved at the critical moment of the action in question. Can Parliament legislate or the courts judicially provide a rule for each instance?

34 See Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century – A Model Code for Singapore* (Academy Publishing, 2013) at p 268, s 7.7(3).

12 To revitalise a code such as the Penal Code is to give it a fresh vitality and invigorate it. As views about crime and punishment change, the Penal Code, which carries a substantial portion of the laws that dictate this area of law, must keep pace with social norms and attitude. Parliament has to be the gauge of changes in those norms and attitude, but it will need ideas to see how modern it thinks the criminal law should be. *Criminal Law in the 21st Century – A Model Code for Singapore* is a source worth examining. For students of current law, this book exposes the areas that invigorate discussion and debate.