THE GENERAL EXCEPTION OF NECESSITY UNDER THE SINGAPORE PENAL CODE

I. INTRODUCTION

THIS article is concerned with the scope of the "general exception" of necessity under section 81 of the Singapore Penal Code (the "Code").[1] The Code, like many other criminal statutes of former British colonies such as Malaysia and Sri Lanka, was essentially a re-enactment of the Indian Penal Code, occurring in 1871.[2] The Indian Penal Code itself was drafted by the first Indian Law Commission of which Lord Macauley was the President and J.M. Macleod, G.W. Anderson, and F. Millet were the Commissioners. They drew not only from English and Indian laws but also from the French Code and Livingston's Code of Louisiana.[3] Accordingly, while the existence of a generalized defence of necessity may be the subject of some doubt under English law,[4] no such doubt exists under the Code because such a defence is expressly provided for by section 81, in the Chapter of the Code entitled "General Exceptions". As the said section is identical to section 81 of the Indian Penal Code, extensive reference will be made to decisions of the Indian courts.

II. NECESSITY UNDER THE CODE

Section 81 provides as follows:

> 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.

1 Cap. 224 (1985 Rev. Ed.).

2 More specifically, as the Straits Settlements Penal Code (Ordinance No. 4 of 1871), Singapore being a part of the Straits Settlements at the time. For a useful article surveying the historical background to the major criminal enactments of Singapore, see Andrew Phang Boon Leong, "Of Codes And Ideology: Some Notes On The Origins Of The Major Criminal Enactments Of Singapore" (1989) 31 Mal. L.R. 46.

3 See "Introductory Report Upon The Indian Penal Code" dated 14 October 1837 in *The Works of Lord Macauley, Speeches — Poems and Miscellaneous,* Vol. XI, at p. 12.

4 See generally, Smith & Hogan, *Criminal Law* (6th ed., 1988), pp. 222-229; G.L. Williams, *Textbook of Criminal Law* (2nd ed., 1983), Chapter 26; J.C. Smith, *Justification and Excuse in the Criminal Law* (Hamlyn Lectures 1988); and D.W. Elliot, "Necessity, Duress and Self-Defence" [1989] Crim. L.R. 611.

Explanation. - It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse[5] the risk of doing the act with the knowledge that it was likely to cause harm.

Illustrations

(a) *A,* the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat *B2* with 20 or 30 passengers on board, unless he changes the course of his vessel, and that, by changing his course he must incur risk of running down a boat *C,* with only two passengers on board, which he might possibly clear. Here, if *A* alters his course without any intention to run down the boat *C,* and in good faith for the purposes of avoiding the danger to the passengers in the boat *B,* he is not guilty of an offence, though he may run down the boat C, by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down the boat *C.*

(b) *A* in a great fire pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good faith, of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, *A* is not guilty of the offence.

It might fairly be said that section 81 of the Code is ambiguously drafted and the paucity of cases both from Singapore and other jurisdictions with criminal Codes *in pari materia* with the Code has not assisted in resolving the various interpretative problems. Broadly speaking, however, there is no doubt what was intended even though the said section makes no reference to the term "necessity" or any of its grammatical variants. Mayne, commenting on section 81 of the Indian Penal Code makes the observation that it "is intended to give legislative sanction to the principle that where, on a sudden and extreme emergency, one or other of the two evils is inevitable, it is lawful so to direct events that the smaller only shall occur."[6] In similar vein, Nigam writes: "[u]nder our law, Section 81 provides for such a defence of necessity, as is obvious from the two illustrations appended to it."[7] Gour, in a treatise on the Indian Penal Code, states that "it is a doctrine of necessity which has, since the sacrifice

5 In this article, the terms "excuse" and "justify" and their grammatical variants will be used interchangeably, in the sense of absolving a person from what would otherwise be a crime. No attempt will be made to discuss the distinction between the concepts of "Justification" and "Excuse" in the criminal law. Such a discussion would be beyond the scope of this article.

6 J.D. Mayne, *Criminal Law of India* (4th ed., 1914), Part I, at p. 157.

7 R.C. Nigam, *Law of Crimes in India* (1965), Vol. 1, at p. 337.

of Iphigenia, found ready recognition in all mundane transactions. It sanctions the doing of an evil so that good may come."[8]

Yet it is also interesting to note that the authors of the Indian Penal Code were certainly aware of the problems that might arise by the recognition of a general defence of necessity. In their Introductory Report they made the following remarks:[9]

> "... nothing is more usual than for thieves to urge distress and hunger as excuses for their thefts. It is certain, indeed, that many thefts are committed from the pressure of distress so severe as to be more terrible than the punishment of theft, and than the disgrace which that punishment brings with it to the mass of mankind. It is equally certain that, when the distress from which a man can relieve himself by theft is more terrible than the evil consequences of theft, those consequences will not keep him from committing theft: yet it by no means follows that it is irrational to punish him for theft; for though the fear of punishment is not likely to keep any man from theft when he is actually starving, it is very likely to keep him from being in a starving state. It is of no effect to counteract the irresistable *(sic)* motive which immediately prompts to theft; but it is of great effect to counteract the motives to that idleness and that profusion which end in bringing a man into a condition in which no law will keep him from committing theft. We can hardly conceive a law more injurious to society than one which should provide that as soon as a man who had neglected his work, or who had squandered his wages in stimulating drugs, or gambled them away, had been thirty-six hours without food, and felt the sharp impulse of hunger, he might, with impunity, steal food from his neighbours."

Similar observations have been made by English jurists. Lord Hale, for example, wrote:[10]

> "Some of the casuists ... tell us, that in case of extreme necessity, either of hunger or clothing, the civil distributions of property cease ... and therefore in such case theft is no theft, or at least not punishable, as theft; and some even of our own lawyers have asserted the same; and some very bad use hath been made of this concession by some of the Jesuistical casuists in France, who have thereupon advised apprentices, and servants to rob their masters, when they have judged themselves in want of necessaries, of clothes, or victuals.... I do therefore take it, that, where persons live under the same civil government, as here in England, that rule, at least by the laws of England, is false; and therefore, if a person being under necessity for want of victuals, or clothes, shall upon that account clandestinely, and *animo furandi* steal another man's goods, it is felony, and a crime by the laws of England punishable by death."

8 H.S. Gour, *The Penal Law of India* (10th ed., 1982), Vol. 1, at p. 583.
9 Above, note 3, at pp. 60-61.
10 1 Hale, *Pleas of the Crown,* at p. 54.

For these reasons, English judges have been reluctant to endorse a general defence of necessity. This reluctance is exemplified by the following statement of Lord Denning that "[n]ecessity would open a door no man can shut....The courts must, for the sake of law and order, take a firm stand."[11]

III. Scope of Defence

According to section 6 of the Code, every definition of an offence within the Code shall be understood subject to the exceptions contained in the Chapter entitled "General Exceptions". Accordingly, necessity is a defence to any crime defined by the Code, including murder. This is also ,clear from the opening words of section 81 which state that "[n]othing is an offence...." This phrase also makes it clear that section 81 would provide a complete defence to criminal offences outside the Penal Code as well. This can be contrasted with the general exception of consent contained in section 87 which does not extend to the causing of death or grievous hurt and the general exception of duress contained in section 94 which does not extend to murder and offences against the State.

Having said this, a question which immediately comes to mind is whether the defence under section 81 can be successfully pleaded against a charge of murder on facts similar to those in the famous case of *The Queen* v. *Dudley and Stephens*.[12] This will be discussed in greater detail later. The point that must be made here is that while the defence of necessity under the Code is potentially wide enough to excuse all crimes defined by the Code, the applicability of the defence is subject to conditions. Before the defence can be successfully pleaded, other elements of section 81 have to be satisfied and it is these elements which limit the apparent breadth of the defence.

IV. The Meaning Of "Criminal Intention"

Section 81 specifies that merely having knowledge that the act done is likely to cause harm does not of itself amount to an offence if there is no criminal intention to cause harm, and the act is done in good faith for the purpose of preventing other harm from occurring. Knowledge, accordingly, is not a term that need concern us in any great detail here. Its presence in the context of section 81 does not prevent the application of the defence. What is of greater importance, and which is certainly far more difficult as well, in the interpretation of section 81 is that of ascertaining the meaning of the phrase "criminal intention." If the phrase "criminal intention" means an intention to cause harm which is prohibited by the criminal law, the general exception provided by section 81 of the Code is very narrow indeed. The section will then only apply to those accused persons who do not intend to cause harm but who act knowing

[11] *London Borough of Southwark* v. *Williams* [1971] 2 All E.R. 175 at p. 179.
[12] (1884) 14 Q.B.D. 273.

that harm is likely to be caused. This literal approach is the one favoured by a number of Indian commentators. Gour, for instance, states:[13]

> "The section requires that the word 'intention' is here evidently used in a somewhat narrower sense and is distinguished from "knowledge". Its primary meaning is the aim or resolution of the mind to produce an effect.... Its secondary meaning is the presumption which the law makes of such a resolution from action accompanied by knowledge of the consequence. The section only requires that "criminal intention" in the first sense shall be absent, for intention in the second sense was certainly present in the mind of the captain in Illus. *(a)....*"

This interpretation finds support in the Indian decision of *Paryag* v. *State of Allahabad*.[14] The accused persons had dug a three-foot wide channel on a public road. The defence was that this was necessary in view of the fact that water had accumulated in their fields. They were convicted under section 431 (mischief by injury to public road, bridge or river) and applied for revision. In dismissing the application, the judge, Mahesh Chandra J. held:[15]

> "It will be evident from the wordings *(sic)* of this section that for an offence of mischief the act must be done either (1) with intent to cause wrongful loss or damage to the public or to any person, or (2) knowing that he is likely to cause such loss or damage. Sec. 81 IPC would cover only the second eventuality where an offence is done only with the knowledge that it is likely to cause harm. In fact S. 81 expressly says 'if it be done without any criminal intention to cause harm'. This shows clearly that the first eventuality contemplated in the definition of 'mischief, i.e., the intention to cause harm, is not covered by S.81 IPC.... If a man knows that a certain consequence will follow from his act it must be presumed in law that he intended that consequence to take place although he may have had some quite different ulterior motive for performing the act.... Under no circumstances can a person be justified in intentionally causing harm. The justification is only in a case where he has merely the knowledge that his act is likely to injure others or to cause harm. The difference is between the knowledge that it is a mere likelihood and the knowledge that the consequence must necessarily follows *(sic).* In the present case when the applicants dug the road there was no question of there being a mere likelihood of causing damage to the public property. The road which was public property was being damaged by the act itself. It was, therefore, an act done with that intent in law and not merely with the knowledge that it would cause harm. Sec. 81 IPC cannot, therefore, help the applicants in the present case."

[13] Above, note 8, at pp. 583-584.
[14] (1967) 37 A.W.R. 572.
[15] *Ibid.*, at pp. 573-574. Also see *Reg.* v. *Dhania Daji* (1868-9) 5 Bom. H.C.R. 59, at p. 61, where the Court held that "[t]he case does not come within the provisions of Sec. 81 of the Indian Penal Code, which applies only to acts done without any criminal intention to cause harm."

It should be noted that *Paryag* draws a distinction between knowledge that a consequence is a mere likelihood and knowledge that a consequence must necessarily follow. Such a distinction would appear logical. A person who knows that a consequence must necessarily follow can hardly be heard to say that he did not intend it. Again in somewhat similar vein, a treatise on the Indian Penal Code offers the following view:[16]

> "If harm is intended, the intention must not be 'criminal'. A harm or injury, accompanied by a criminal intention *(i.e., mens rea),* constitutes a crime. Hence, a man may not intentionally commit a crime in order to avoid another harm though he may intend a harm or injury or run the risk thereof for that purpose. In *Illustration (a)* to the section, the intentional running down of boat C would constitute culpable homicide if one of the persons therein is killed in consequence [See S. 299] and, therefore, *A* alters his course 'without any intention to run down the boat *C'.* Nor does *A* intend even harm because he 'may possibly clear' though he may run down the boat C. He, thus, merely risks causing harm. In *Illustration (b), A* runs no risk; he intentionally demolishes houses and causes harm thereby to their owners. But because he has no criminal intention in so doing, the section protects him from criminal liability for causing harm."

As mentioned earlier, this interpretation of section 81 is a very narrow one. Under this interpretation the general exception will only apply in situations analogous to Illustration (a) where the accused merely takes a risk of causing harm to others or knows harm is a likely occurrence. It will not apply to situations such as those which will be discussed below where the actor makes a conscious choice to cause harm in order to avert some greater harm. With the greatest respect, therefore, it is submitted that an alternative, more liberal approach, which is entirely consistent with the language used in section 81 and with some of the decided cases, should be adopted. There is no doubt, after all, that in Illustration (b) to section 81, A has every intention of causing harm. In the absence of a valid defence, therefore, there is no doubt that *A* has committed the offence of mischief under section 425 of the Code which provides that "[w]hoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or any person, causes the destruction of any property....or affects it injuriously, commits 'mischief'." Yet according to Illustration (b), *A* is not guilty of any offence. It is not enough merely to say, as the editors of *Nelson's The Indian Penal Code* have said, that he has no criminal intention. He obviously intends to cause harm and the particular harm in question constitutes an offence prohibited by the Code. He has therefore intentionally committed a crime and accordingly, on the literal interpretation put forward by commentators of the Code such as Gour, a criminal intention should have been held to be present. It might be said that the difference in approach can be justified on the basis that Illustration (a) involves a possible offence to human life while Illustration (b) involves an offence relating to property. This would mean,

16 *Nelson's The Indian Penal Code* (*7th ed.*, 1981), Vol. 1, at p. 162 (revised by SureshNarain Mulla and Chheda Lal Gupta).

however, that section 81, which purports to provide a defence of general application, would apply quite differently depending on the offence in question. Furthermore, the purpose served by both the illustrations in section 81 (like other illustrations in the Penal Code) is to show how the principles of law stated therein are to be applied. To go beyond that and to argue that the illustrations restrict the general words of section 81 would not appear to be justified. Another difficulty with the literal approach is that in two cases which we will discuss in greater detail later,[17] the accused persons intended to kick a police chief constable in one, and possibly intended to enter Malaysian territorial waters in the other. *Prima facie,* therefore, criminal offences had been intentionally committed. Nevertheless, section 81 was held to apply and the accused persons were acquitted.

In Illustration (b), *A* is said to have acted in good faith for the purpose of saving human life or property and the Illustration goes on to state that *A* is not guilty of the offence if "it be found that the harm to be prevented was of such a nature and so imminent as to excuse *A's* act." This then, it is submitted, is the key to understanding the phrase "without any criminal intention to cause harm". In other words, while there might be an intention to cause harm, this intention is not *criminal* simply because the actor has acted in good faith for the purpose of preventing or avoiding other harm to person or property. Put another way, there is no criminal intention to cause harm simply because section 81 justifies or excuses the doing of the act. This appears to be the view taken by Ratanlal and Dhirajlal although the opinion of the authors is expressed rather briefly. They say that criminal intention "simply means the purpose or design of doing an act forbidden by the criminal law *without just cause or ex*cuse."[18] (Emphasis added). Similarly, Koh and Myint Soe in speaking of Illustration (b) say that "the intention is not criminal because it was done in good faith for the purpose of saving human life or property, and the harm to be prevented was of such a nature and was so imminent as to excuse it."[19] Admittedly, this interpretation renders the phrase "without any criminal intention to cause harm" redundant. Such an approach, however, would seem to accord better with the overall scheme of the Code. For many of the offences defined in the Code, knowledge and intention (or their grammatical variants) constitute alternative mental states which a person may have with respect to the *actus reus* of the crime in question. No distinction is drawn between either state of mind. Both are equally blameworthy.[20] Section 425 of the Code, it will be recalled, provides that "[w]hoever, with *intent* to cause, or *knowing* that he is likely to cause, wrongful loss or damage.... commits 'mischief'." (Emphasis added). Section 426 of the Code simply states that a person who commits mischief shall be punished with imprisonment for a term which may extend to three months, or with fine, or with both. No distinction is drawn between

17 *Boston* v. *Valad Futtekhan* (1892) 17 Bom 626, and *Public Prosecutor v. Ali Bin Umar & Ors.* [1982] 2 M.L.J. 51.

18 Ratanlal and Dhirajlal, *Law of Crimes* (23rd ed., 1987), Vol. 1, at p. 213.

19 Koh Kheng Lian and Myint Soe, *The Penal Codes of Singapore and States of Malaya - Cases, Materials and Comments,* Vol. 1 (1974), at p. 37.

20 There are exceptions of course. See, for example, section 304 of the Code.

causing loss or damage with intent, or with knowledge as to its likelihood. Since the Code draws no such distinction in terms of blameworthiness, it would be illogical if a person who acts knowing that a consequence is likely were to receive the benefit of section 81 while a person who acts with intent to cause the consequence would not be able to do so.

It is submitted that this interpretation is consistent with the language used in section 81 and in this regard it will be useful to examine the relationship between the Illustrations and the substantive sections of the Code. The Privy Council on appeal from India has held that an illustration to a section cannot have the effect of modifying the language of the section which alone forms the enactment.[21] Yet it has also been held that the illustrations to an Indian statute are to be taken as part of the statute[22] and this must surely be true of the Code as well. And in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*,[23] Lord Shaw, stating the advice of the Privy Council on appeal from India, stated that in the construction of the Evidence Ordinance, it is the duty of the court to accept the illustrations as being both of relevance and value in the construction of the text. In his Lordship's opinion, it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, according to his Lordship, although not a part of the sections, have been expressly furnished by the Legislature as helpful in the working and application of the statute and should not be thus impaired. It is submitted that illustration (b) is neither inconsistent nor has it been used here to *modify* the language of section 81. The phrase "without any criminal intention" is an ambiguous one and capable of at least two different interpretations. Illustration (b) is therefore of value in assisting us as to which of the two interpretations is to be preferred. It is well here to remember the advice of Lord Shaw that it should only be a very exceptional case that would warrant the rejection of the illustrations on the basis of a supposed repugnancy to the enactment in question.

A third possible interpretation of the phrase is one offered by Clarkson. Being aware of the above views, he expresses a preference for the following one:[24]

> "Perhaps the best view and one that does give effect to the phrase 'criminal intention' (although a view unsupported by authority) is that the phrase refers to *motive.* A motive is a reason for acting. It is an emotion or desire that causes one to form a particular intention. Illustration (b) describes a person pulling down houses to prevent fire spreading. He does this 'with the *intention,* in good faith, *of saving human life or property'.* Here, in reality, the accused has the motive of saving life or property. This motive inspired him to act. In acting

21 *Bengal Nagpur Railway Company Limited* v. *Ruttanji Ramji* (1937) 40 Bom L.R. 746.
22 *Lala Balla Mal* v. *Ahad Shah* (1918) 21 Bom L.R. 558.
23 (1916) Bom L.R. 157.
24 Clarkson, "Necessity" in Chapter 7 of K.L. Koh, C.M.V. Clarkson, N.A. Morgan, *Criminal Law in Singapore and Malaysia — Text and Materials* (1989), at p. 163.

> it was his intention to pull down the houses (he did not merely foresee that they might fall down). He also had a further intention of halting the spread of the fire. However, all this was initiated by his original motive. Such a person acts with intention but because he is acting with a motive specifically provided for in s 81, he is not acting with a 'criminal intention' and is accordingly exempted from liability.
>
> If, however, his motive in pulling down the houses is not to save life or property, but rather to obtain vengeance upon his enemy, he is not acting with the appropriate motive specified in Illustration (b); he is thus acting with a 'criminal intention'. The fact that there was indeed a serious and imminent risk to human life or property is irrelevant. He has a blameworthy state of mind. The whole point of justifications and excuses is that they exempt from liability those who are not blameworthy even though they might have caused a harm. Accordingly, the blameworthy must not be allowed to shelter behind the protection of s. 81."

In other words, the actor's intention is not criminal if his motive for acting was to save human life or property. This interpretation put forward by Clarkson is certainly both attractive and persuasive. It would also achieve very much the same result as the interpretation put forward in this article. With respect, however, it does not seem supportable in principle to equate criminal intention with motive. Strictly speaking, a man's motive does not determine the criminality of his intention. Intention is criminal if that intention falls within the *mens rea* of the crime in question. As such, a person's motive is generally irrelevant although it might be relevant as evidence since people do not usually act unless they have a motive for doing so.[25] In addition, it is also difficult to see how a person who is motivated solely by vengeance or some other ulterior motive can be said to have acted in good faith,[26] and therefore section 81 would in any event be inapplicable in such cases. Finally, and this is a seperate point altogether, just as motive should not determine the criminality or otherwise of a person's intention, so too it is also not to be confused with intention. In *King Emperor v. Ram Sukh and Another,* the Court said that "[t]here seems to be no justification for thinking that 'intent' in the Indian Penal Code means ultimate aim and object, or that the word is used as a synonym for motive."[27]

V. Good Faith

Good faith is defined in negative terms in section 52 of the Code in the following manner:

> Nothing is said to be done or believed in good faith which is done or believed without due care and attention.

25 See generally, Smith & Hogan, *Criminal Law* (6th ed., 1988), at pp. 78-80.

26 See *State of Mysore* v. *Parappa Yallappa Mali* [1965] 2 Mys. L.J. 263.

27 (1933) 34 Cr. L.J. 1056. See also *Mir Chhittan* v. *Emperor* (1937) 38 Cr. L.J. 202, at p. 203, where the Court said that "[m]otive is not to be confused with intention."

The essence of good faith under the Code, therefore, is something which is done or believed with due care and attention. Accordingly, for section 81 to apply, the defendant must have acted with due care and attention. Whether the defendant did so act with due care and attention depends on all the circumstances. An objective element of reasonableness is introduced. For instance, a person such as the captain in Illustration (a) to section 81 who has to make a split-second decision cannot be expected to react with the same degree of care and attention as another who has ample time to deliberate over his course of action. This requirement of good faith is sensible. By introducing an objective element, the section precludes recourse to the defence of necessity where a person can be said to have acted unreasonably, for instance where he believes that a situation of necessity has arisen on grounds that are highly irrational, even if such belief were sincere. So too, the accused should not have recourse to section 81 if, through his own negligence, he has perceived a non-existent danger to exist, or a danger greater than that which was really in existence, and in the latter situation caused more harm than was necessary to resolve the actual danger (although from an objective standpoint, the extent of the danger if it had been correctly perceived would have been greater than the harm caused).

Equally, it is submitted that due care and attention would not be present if an alternative course of action which did not involve the causing of harm was readily available unless it could be shown the alternative course of action would not have been obvious to a reasonable person in the accused's position. The element of good faith would also be absent if the accused had knowingly and without reasonable excuse exposed himself to the danger.[28] Illustration (a), for instance, requires the captain to be without any fault or negligence. It is therefore submitted that this requirement of good faith precludes acceptance of the view taken by the Working Party of the Law Commission that the defendant's action ought to be tested according to his subjective belief whether it was necessary to commit the offence.[29] The requirement of objectivity is not necessarily unsatisfactory. Clarkson, for instance states that:[30]

> "[A] defence of necessity could lead to horrendous results if one were permitted to injure innocent persons and property because one thought, on totally irrational grounds, that it was necessary so to act. On this basis it follows that a defence of necessity will be available if the accused believes in good faith *(i.e.* with due care and attention) that:
>
> (1) that there is a situation of necessity, *i.e.* that there is a threatened harm to person or property;
>
> (2) that it is of such a nature as to justify his actions; and
>
> (3) that it is so imminent as to justify his actions."

[28] The English Law Commission has proposed that the presence of such circumstances should disentitle a person from relying on the defence of duress of circumstances, see below, note 68. This defence is based on principles similar to that of necessity but is more limited in scope.
[29] See Working Paper No. 55, "Defences of General Application", at para. 41.
[30] Above, note 24, at p. 160.

Good faith would also most likely be absent if the accused acted solely (or, perhaps even predominantly) with an improper motive in mind, *e.g.*, he bore a grudge against the complainant or wanted to rid himself of a competitor. In *State of Mysore* v. *Parappa Yallappa Mali*,[31] the accused had been arrested for being drunk. Shortly after being released on bail, the accused and others dragged one Sangayya, a Police Constable, to the Police Station and presented him to the Head Constable, complaining that Sangayya was drunk and that action should be taken against him. Although the Head Constable asked the accused and the others to make a formal complaint, they instead took Sangayya to a hospital where they asked a doctor to examine him. Thereafter, they dragged Sangayya to several other places before they finally brought him back to the Police Station. On being charged for being part of an unlawful assembly, for causing hurt and for wrongfully confining Sangayya, the accused claimed, *inter alia,* the benefit of section 81. The Magistrate who tried the case convicted the accused but on a petition to the Sessions Court, the Sessions Judge referred the case to the High Court with a recommendation that the conviction and sentence passed be set aside. Notwithstanding the fact that Sangayya was drunk, the judge of the High Court, Tukol J. held that section 81 did not apply for the following reasons:[32]

> "It is difficult to see how the accused can claim the benefit of this section.... The manner in which he dragged the complainant from place to place including the house of his Pleader goes to show, as observed by the Magistrate, that he 'had a grievance and wanted to wreck vengeance against the complainant'. The learned Sessions Judge has not adverted to this aspect of the case. The factual finding of the Magistrate on this point appears to be incontrovertible from the admitted and proved facts in the case. Therefore, one of the essential elements for claiming the benefits of S.81 viz., the act being without any criminal intention and in good faith, is wanting in this case. Further, the arrest cannot be said to have been affected for the purpose of preventing any harm to person or property. It is not the case of the accused that he either apprehended any danger to his person or property or that by leaving Sangayya free he was likely to cause harm to any other person or any other property. There is, therefore, no basis for claiming the benefit of section 81."

It is submitted, however, that the fact the accused might derive some satisfaction or benefit from his act does not in itself disentitle him from relying on section 81. This must ultimately be seen as a question of fact, *i.e.*, whether despite the presence of such an element, the accused can still be said to have acted with due care and attention. There is no reason, therefore, why a person who opens a dike thereby drowning the half-dozen inhabitants of a farm, this being the *only* way of saving an entire town, should not have the benefit of section 81 even if he bore a grudge against the said inhabitants and had long desired their deaths.

[31] [1965] 2 Mys. L.J. 263.
[32] *Ibid.*, at p. 267.

VI. Prevention Or Avoidance Of Other Harm To Person Or Property

We must now deal with another difficult question. Must the harm sought to be avoided be greater than the harm caused? Of course this assumes it can be said with a reasonable degree of certainty that one type of harm is in fact greater than another, that one type of harm can be weighed against another. Section 81 provides that the act done must be for the purpose of preventing or avoiding other harm to person or property. Obviously, before the general exception of necessity even becomes relevant, there must be some other evil present, whether to person or property, which is to be avoided. The absence of any danger to person or property was another reason why section 81 was held to be inapplicable in *State of Mysore* v. *Parappa Yallappa Mali*.[33] The essence of the defence is that the defendant is faced with a choice between not committing an offence and thereby allowing or making it likely that some harm will occur, or committing an offence in the hope of preventing the harm from occurring. According to the Explanation to section 81, whether or not the harm to be prevented was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that harm was likely to be caused is a question of fact. There is no express provision as found in the American Model Penal Code[34] that for the exception to apply, the evil to be avoided must be greater than the evil caused. The American Model Penal Code provides a general defence of necessity in the following terms:[35]

> (1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged....

One obvious criticism which might be levelled against this "balancing of harms" approach is that it can hardly be an easy task determining if the harm sought to be avoided is greater than that sought to be prevented by the law defining the crime. What, for instance, would be the position if, on facts similar to that in Illustration (a) of section 81, A knows that the two passengers in boat C are eminent scientists on their way to announce an important scientific discovery which will lead to the resolution of the world food crisis, a problem that is causing thousands to die every month? Should numerical preponderance prevail? Presumably it should. The offences of murder and culpable homicide exist to preserve life and more lives are saved in the immediate situation at hand. The fact that, incidentally, thousands of other people may die of starvation is surely irrelevant to the criminal law. After all, only by extending our current understanding of causation beyond recognition can we say that A's act has caused the

33 Above, note 31.
34 Proposed Official Draft of the American Law Institute (1962).
35 Article 3.02. It is unnecessary for the purpose of this thesis to note the qualifications the defence is subject to.

deaths of those others. And if *A's* act is not in law the cause of those deaths, there is then no reason why they should be a factor relevant to the process of the "balancing of evils". There must be a point at which the line is drawn. Accordingly, in deciding if the harm to be avoided is greater than that caused, it should only be permissible to consider the immediate factual occasion said to give rise to the situation of necessity.

The problem is further complicated, however, if different categories of harm are involved. Numerical preponderance is unlikely to be helpful here, if at all. Rather the question will have to be approached by more acutely focusing on the policy behind the law defining the offence. An example which readily comes to mind is that of a person who commits the offence of theft in order that his family might have food to survive. If it is by his neglect that they have no food, and he is attempting to rely on section 81, it is unlikely that he can do so for want of good faith. Apart from the element of good faith,[36] might it not be said that the policy behind the offence of theft, which is the protection of property, cannot be greater than the preservation of life. And if this is so, does it not then follow that in jurisdictions which recognise a general defence of necessity, hunger should be a defence to theft. This argument is unlikely to be accepted, however, because to do so would be to encourage disorder, with the likely consequence of a greater loss of life. In truth therefore, hunger and the consequent possible loss of life is a lesser evil than the policy behind the law of theft, which serves not merely to preserve property but also to prevent anarchy.[37] Would it be any different then if, in a country already ravaged by famine, an extremely small number of people are responsible for hoarding much of the already limited quantities of food? In these circumstances would not the disorder (and even the possibility of death being caused) consequent upon revolution or robbery be a lesser evil to mass starvation? That would certainly appear to be so. To say, therefore, that the harm to be avoided must be greater than the harm caused is to institute a complex inquiry for which there are often no ready solutions.

Another problem relates to the degree of preponderance which will suffice. For instance, when speaking of the harm avoided being greater than the harm caused, is this requirement satisfied if the harm avoided can be said to be only just, on balance, greater than the harm done; or should the harm have to be out of proportion to that caused; or must the harm avoided be out of *all* proportion. This is not merely an academic question. The Working Party of the English Law Commission in Working Paper No. 55 had recommended that there be a general defence of neccessity but that it should be confined to cases where the harm avoided was out of all proportion to that caused. Admittedly, of course, it is difficult to

[36] And in exceptional circumstances it might even be possible to say that good faith is present. If, for instance, in the example at hand, the person in question has not been guilty of any neglect but has in fact, though without success, exhausted every means available to him to provide for his family, it would be difficult to say that due care and attention was absent.

[37] As Lord Denning MR. said in *London Borough of Southwork* v. *Williams* [1971] 2 All E.R. 175 at 179, ".... if hunger were once allowed to be an excuse for stealing, it would open a door through which all kinds of lawlessness and disorder would pass".

draw an exact distinction between these different degrees of preponderance, and therefore the application of a defence of necessity defined in whichever manner will not in many cases be dissimilar. That notwithstanding, it is submitted that in the absence of express legislative provision, any defence of necessity should not be drawn as restrictively as in the last instance *(i.e.*, that the evil avoided must be out of all proportion to that caused); certainly not at least in jurisdictions which like Singapore have provisions placing the burden of proving the defence on the accused person.[38] Nor, it is submitted, should the defence be held to be applicable in terms as liberal as in the first instance. For it must be borne in mind that if the defence is made out, the result would be to excuse what would otherwise have been a criminal act and this consideration justifies a slightly more conservative approach. It is submitted, therefore, that the range of circumstances in which the defence ought to apply should be limited to cases where the harm sought to be averted is out of proportion to the harm caused, leaving the courts free to determine the boundaries of such a requirement on a case to case basis.[39]

Returning to section 81 of the Code, it has been pointed out earlier that there is no express provision to the effect that the harm sought to be averted must be greater than the harm sought to be prevented by the law defining the offence. It is open to argument, therefore, that in principle, section 81 is applicable even where the harm caused can be said to be greater than the evil sought to be avoided. As Gour puts it:[40]

> *"The harm caused need not be necessarily less than the harm averted,* though this question would become material when judging the good faith of an act otherwise criminal as the explanation appended shows.... [T]he section puts no limit on the harm that may justifiably be done in any case. It makes it a question of fact to be decided in accordance with the circumstances of each case. This view was evidently enacted, following the report of the English Criminal Law Commissioners, who had recorded the following opinion: 'We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence: we judge it better to leave such questions to be dealt with when, if ever, they arise in practice, by applying the principle of law to the circumstances of the particular case.' There can be no doubt but that this opinion has been embodied in the explanation, the effect of which is to leave the question of necessity as a defence to criminal liability for determination in each case."(Emphasis supplied.)

[38] Section 107 of the Evidence Act, Cap. 97 (1985 Rev. Ed.), provides as follows: "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exceptions or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him and the Court shall presume the absence of such circumstances."

[39] Compare the approach of the Working Party of the Law Commission which took the view that any generalised defence of necessity should be limited to cases where the impending harm is out of all proportion to the harm done by the defendant, above, note 29, at para. 41.

[40] Above, note 8, at pp. 589 & 593.

With respect, it is submitted that this approach should not be adopted, holding out as it does the possibility that section 81 might be applicable even where the harm caused is greater than the evil avoided, subject to the requirement of good faith being present. It must be remembered that a person who seeks to rely on the defence of necessity has already committed a criminal offence. He should accordingly only be allowed to plead the defence successfully if it can be shown that the policy behind the law defining the offence is outweighed by the evil which he has sought to avoid. To be fair to Gour, he does in another part of his book state that section 81 of the Indian Penal Code "permits the infliction of a lesser evil in order to avert a greater evil."[41] Notwithstanding this statement (which is confusing, considering the view expressed in the passage quoted earlier), Gour's overall approach is certainly to countenance *the possibility* that the defence might successfully be pleaded even where the harm caused can objectively be said to outweigh the harm averted.

It is submitted, however, that when interpreting section 81 the courts should insist that the harm sought to be averted must be objectively greater than the harm actually caused. While it is true that section 81 does not explicitly provide for such an approach, this construction of the section is the one most commonly adopted. Thus in a leading text on Criminal Law in India, the view is taken that the phrase "for the purpose of preventing or avoiding other harm to person or property" refers to a case "in which evil is done to prevent a *greater* evil. It is to this ground of justification that we must refer the extreme measures which may become necessary on occasions of contagious diseases, sieges, famines, tempests, shipwrecks. But the more serious a remedy of this nature is, the more evident ought its necessity to be."[42] (Emphasis supplied). There is also judicial authority for this view. In the case of *Boston Valad Futtekhan*,[43] a sentry on duty gave a kick to a police chief constable who was attempting to force his way past the sentries in front of a house on fire. The chief constable was doing this in the discharge of his duty but this was not known to the sentry as the chief constable was not in uniform. Jardine J., in deciding the case, observed:[44]

> "The kick would be justified under Section 81 of the Penal Code as given in good faith for the purpose of preventing *much greater harm,* the looting of the house or the spread of the fire, on the same principle, that the man is excused by that section, who in a great

41 Above, note 8, at p. 583.

42 Above, note 18, at p. 217. Also see Nigam, above, note 7, at p. 330, who takes the view that section 81 "excuses the doing of an evil so that good may result. However, it permits the infliction of a lesser evil in order to prevent greater evil." In addition, it is interesting to note the statement of the Working Party of the Law Commission that the illustrations to section 81 of the Indian Penal Code "make clear that the balancing of harms is implicit in the provision." The Working Party also felt that for the proposed defence of necessity to be successfully pleaded, the jury must find that the harm which the defendant thought he was avoiding was objectively greater than that actually done. "This objective element of the necessity defence", according to them, "is to be found in both the Model Penal Code and the Indian Penal Code", above, note 29, at paras. 37 and 43.

43 (1892) 17 Bom 626.

44 *Ibid.*, at p. 628.

> fire, pulls down other people's house to prevent the conflagration from spreading. As Boston did not know the official character of the Chief Constable, and his ignorance was a mistake of fact not of law, he must be dealt with as if the Chief Constable were an ordinary citizen." (Emphasis supplied.)

There are no cases on section 81 from Singapore and only one such case from Malaysia (Singapore was part of Malaysia between 1963 and 1965). This is the case of *Public Prosecutor* v. *Ali Bin Umar & Ors*.,[45] which appears to be an authority leaning in favour of the approach put forward in this article. In *Ali Bin Umar & Ors*., the respondents were Indonesian seamen who were arrested within Malaysian territorial waters on board a boat carrying 160 bags of tin ore. They were subsequently charged under section 49(1) of the Customs Act, 1967, as they did not have permission from the Director-General of Customs, Malaysia, to carry the said tin-ore in their boat. The respondents in their defence claimed they were on their way to Singapore to sell the tin ore there. The boat, however, had a broken rudder and drifted in distress into Malaysian waters. The magistrate who tried the case accepted the evidence of the respondents that the rudder of the boat was broken and the boat drifted into Malaysian waters and accordingly held that the offence under section 49(1) was not committed. As a consequence, all the respondents were acquitted and discharged. It is noteworthy that on this statement of facts the case thus far raises no issue of necessity. If the respondents had no control over the boat and it only drifted into Malaysian waters, their act could only be regarded as "involuntary". The general exception of necessity could never then be in issue, based as it is on the element of choice, *i.e*., the choosing of one evil to avert another.[46]

The Public Prosecutor appealed to the Malaysian High Court and the learned judge, Yusoff Mohammed J., obviously took a slightly different view of the facts. In dismissing the appeal he said:[47]

> "The defence of necessity on the other hand, is very controversial in nature and there are conflicting views on its applicability.... However, in certain circumstances, where a person is able to choose between two courses, one of which involves breaking the criminal law and the other some evil to himself or others of such magnitude that it may be thought to justify the infraction of the criminal law, the court would temper such situation with justice...."
>
> In the present case, I am of the view that out of necessity it justified the respondents to enter the Malaysian waters on specific reasons that the boat in which they were travelling was in distress due to the fact that the rudder of the boat was broken in International waters. In those circumstances it would be necessary for the respondents to seek shelter for the safety of the boat and to preserve the lives of

[45] [1982] 2 M.L.J. 51.
[46] Also see Clarkson, above, note 24, at pp. 156-157.
[47] Above, note 45, at pp. 52-53.

> the crew during such distress. In that situation it would be far fetched to imagine that the respondents would have to obtain permission of the Director-General under section 49(1) and (2) of the Customs Act for carrying the tin-ores which were not destined nor intended for export from Malaysia."

Yusoff Mohammed J. therefore took the view that the respondents had made a choice to enter Malaysian waters. This was done in order to avoid some evil "of *such magnitude* that it might be thought to justify the infraction of the criminal law." The learned judge might not have stated so explicitly but he was obviously of the view that the preservation of lives was more important than the violation of the Customs Act. It is submitted that this, coupled with his choice of words, renders *Ali Bin Umar* an authority in favour of the view that the harm averted must be greater than that caused.

Before moving to consider the English decision *of Dudley and Stephens,* it must be admitted that ethical problems can arise as a result of the application of a general defence of necessity. The English Law Commission in their "Report On Defences Of General Application",[48] gave an example of a situation requiring an immediate blood transfusion to be made in order to save an injured person. The only person who has the same blood type as the injured person refuses to give blood. Can he therefore be overpowered and the blood taken from him? The Law Commission thought that the necessity defence advocated by its Working Party would by its terms almost certainly answer the question in the affirmative and doubted whether this would be a generally acceptable solution.[49] It must be said, however, that ethical issues inevitably fall to be considered whenever circumstances exist which give rise to the question whether an infraction of the criminal law ought be justified or excused. This is as much true for necessity as for other defences, general or specific. That ethical issues are involved is not therefore decisive in itself. Ultimately, in the context of necessity, the question must be resolved by asking if the ethical issues which arise are of such manifest difficulty that they strongly militate against the existence of a general defence. The Law Commission obviously thought so and eventually recommended that there should be no general defence of necessity in the English Draft Criminal Code Bill and that whatever defence which does exist under Common Law should be abolished.[50] It is not the scope of this article to examine if section 81 should be abolished, but if the issue should arise in Singapore, such ethical questions must be borne in mind.

VII. The Case Of *The Queen* v. *Dudley And Stephens*

Earlier in this article the question was raised as to whether section 81 can be successfully pleaded against a charge of murder on facts similar

[48] Law Commission No. 83.
[49] *Ibid.,* at para. 4.27. This would probably be true also if the case fell to be decided under section 81 of the Code.
[50] *Ibid.,* at para. 4.33.

to that in the case of *Dudley and Stephens.* This decision has been most influential in inhibiting the development of any general defence of necessity under English law. The author will argue here that properly understood, *Dudley and Stephens* is no authority against the existence of such a defence and that the case would have been decided similarly even under the Code where a defence of necessity is expressly provided for. Briefly, the facts were that the crew of the yacht *Mignonette* were cast away in a storm on the high seas. They were compelled to put into an open boat and after a few days were without both food and water. On the twentieth day, Dudley with the assent of Stephen, killed the cabin boy and the survivors fed on his flesh. Four days after that, they were rescued by a passing vessel and both men were subsequently charged with murder. At the trial the jury, in a special verdict, found that if the men had not fed upon the body of the boy they would probably not have survived and that the boy being in a much weaker condition was likely to have died before them. At the time of the act there was also no sail in sight nor any reasonable prospect of relief and that under these circumstances there appeared to both the accused every probability that unless they fed upon the boy, or one of themselves, they would die of starvation. The jury found themselves unable to convict on the facts found. The legal effect of the special verdict was then argued before a Divisional Court of five judges who held that the act was murder.

It is arguable of course that *Dudley and Stephens* decided nothing about necessity, based as it was on the fact that no situation of necessity had arisen which would have justified the defendants killing the boy to provide food; for when they did so they did not, nor could they have known that in doing so they would save their lives – they might have been picked up the next day or they might never have been picked up at all. As Lord Coleridge C.J. stated: "In either case it is obvious that the killing of the boy would have been an unnecessary and profitless act."[51] Yet this is probably too narrow an understanding of the case. Indeed, it is difficult to resist the conclusion that *Dudley and Stephens* decided that the causing of death to a person under those circumstances to preserve the lives of three others did not give rise to a defence of necessity. Lords Simon and Kilbrandon certainly thought so in their dissenting judgments in *Lynch* v. *DPP*.[52] As a result, *Dudley and Stephens* has been the subject of criticism[53] and Professor Glanville Williams has commented that one unfortunate consequence of the decision is that it has cast doubt on the general validity of the defence of necessity under English law.[54]

It is submitted that while *Dudley and Stephens* was correctly decided, the case should be confined to its rather exceptional facts and should not prohibit generally the application of a defence of necessity under

51 Above, note 12, at p. 279.
52 [1975] 1 All E.R. 913, at pp. 936 and 944.
53 See Stephen, *A Digest of the Criminal Law* (9th ed., 1950), at p. 10. Also see Williams, "A Commentary On *R.* v. *Dudley and Stephens"* (1978) Cambrian L.R. 94.
54 See Williams, *ibid.,* at p. 99.

English law, even where death results as a consequence.[55] Sir James Stephen in his Digest gives the example of several men roped together on the Alps. They slip, and the weight of the whole party is thrown on one, who cuts the rope in order to save himself. Notwithstanding *Dudley and Stephens,* Stephen appears to take the view that this is not murder for he says: "[h]ere the question is not whether some shall die, but whether one shall live."[56] This distinction, it is submitted, is not pursuasive for the same could surely be said of *Dudley and Stephens.* Williams distinguishes the example from *Dudley and Stephens* on the ground that in the former, "there is no choice as to who is to die."[57] Perhaps a more satisfactory basis for distinguishing both sets of facts is that in the mountaineering incident, those who have slipped are endangering the life of the sole mountaineer left on the face of the cliff, a danger which the law both does not impose upon him nor require him to assume, and which he is accordingly entitled to free himself from.[58] The justification then is analogous to that in private defence. This will be so provided he has not voluntarily brought about the predicament he finds himself in and it goes without saying that there must be no other means by which he can avoid death. On this basis, if *A,* swimming in the sea after a shipwreck gets hold of a plank which is only large enough to support him, and *B* tries subsequently to get hold of the plank, *A* is entitled to push *B* off lest both should drown. However, one qualification at least is necessary, and this is that *A* will not be entitled to do so on the principle of *Dudley and Stephens* if both he and *B* have caught hold of the plank at the *same* time, for although *B* is endangering A's life the reverse is also true, and the 'equities' between the parties being equal, *A* has no right to cause the death of B.[59] It is the author's submission that the qualification is a desirable one and that a similar result would be arrived at under the Code. Section 81 should not allow parties whose lives are endangered to arbitrarily select which one of them is to die.

Another example raising different issues is given by Smith and Hogan. They ask:[60] "would it not be lawful to open a dike with the effect of drowning the half-dozen inhabitants of a farm, if this was the only way

55 The Working Party of the Law Commission has stated that "[t]he question whether necessity can ever justify the taking of human life is the most contentious to have been raised.... The cases themselves are not satisfactory; the ratio of the leading one, *R.* v. *Dudley and Stephens,* cannot be regarded as clear, and....may not be decisive on the issue as to whether taking of life may be justified", above, note 29, at para. 51.

56 Stephen, above, note 53.

57 Williams, above, note 53, at p. 99.

58 Prof. Smith, in giving the example of a man being pushed off a rope ladder to enable others to climb to safety, says that "[t]he man on the ladder was obstructing the passage of the people below. Though he was no way at fault, he was preventing them from going where they had a right, and a most urgent need to go. He was, unwittingly, imperilling their lives. 1 am not, of course, suggesting that there is a general right to kill a person in order to prevent him causing an obstruction. Only reasonable force may be used.... But what is reasonable depends on the circumstances.... So, if such a case ever did come before a court, it would not be too difficult, I believe, for the judge to distinguish *Dudley and Stephens:* and my own opinion is that he would be entirely right to do so", *Smith, Justification and Excuse in the Criminal Law* (Hamlyn Lectures 1988), at pp. 77-78.

59 Contrast Stephen, above, note 53, Illustration (2), at p. 11.

60 Smith and Hogan, *Criminal Law* (6th ed., 1988), at p. 228.

of saving a dam from bursting and inundating a whole town?" Unlike the previous example and *Dudley and Stephens,* the person claiming the defence of necessity is not here concerned with the preservation of his life. It is therefore even more arguable that under English law a defence of necessity can be successfully pleaded on these facts. There is no danger here of a person causing death merely to preserve his own life and the greater danger averted should provide sufficient justification for the act. It is almost certain that if such a situation were to arise in Singapore, section 81 could be successfully invoked as a defence, the facts being analogous to those found in Illustration (a) to the section.

Thus far the discussion has largely centred on the position under English law and we must now specifically return to the question originally raised which is whether section 81 can be successfully pleaded on facts similar to *Dudley and Stephens.* There are no cases on point as can be expected. It is submitted though that *Dudley and Stephens* should be decided similarly if the issue ever arose under section 81. The defence of necessity should not be applicable where death to a person is caused simply to preserve the life of another *without more.* As mentioned above, section 81 should not allow parties whose lives are imperilled to arbitrarily choose which one among them is to die. Alternatively, as the Working Party of the Law Commission pointed out: "the defendants had not chosen the lesser of two evils."[61] Accordingly, in the language of section 81, on the facts as found in *Dudley and Stephens,* the harm to be prevented or avoided would not be regarded as being of such a nature and so imminent as to justify or excuse the causing of death.

Thus it can be seen that while the defence of necessity under the Code is potentially wide enough to excuse all crimes defined by the Code, the applicability of the defence like any other is subject to conditions. The existence of a defence of necessity does not therefore invariably, contrary to Lord Denning's view,[62] open a door which no man can shut.

VIII. Relevancy of English Law

For the sake of completeness it will be useful to briefly outline the extent to which English law currently recognises a defence of necessity. Gour, in his treatise on the Penal Law of India states that "the English precedents show how far the doctrine of necessity has received the sanction of English law, and how far it will receive sanction if a similar question comes up for decision in this country."[63] With respect, it is submitted that this view cannot be correct. As has been pointed out, it is very doubtful if there is any general defence of necessity under English law. Since no such

61 Above, note 29, at para. 35.
62 Above, note 11.
63 Above, note 8, at p. 593.

doubt exists in India (or Singapore), it follows that English decisions cannot be a safe guide as to the scope of the defence under section 81. The scope of this defence has to be determined solely by reference to the words used in the said section without undue reliance being placed on English precedents. In this section of the article the law relating to necessity in England will be briefly examined. As a starting point, the difference in scope between the defence of necessity under English law and the Code can usefully be seen from an illustration given by Lord Denning M.R. in *Buckoke and others* v. *Greater London Council,*[64] where he said:[65]

> "A driver of a fire engine with ladders approaches the traffic lights. He sees 200 yards down the road a blazing house with a man at an upstairs window in extreme peril. The road is clear in all directions. At that moment the lights turn red. Is the driver to wait for 60 seconds, or more, for the lights to turn green? If the driver waits for that time, the man's life will be lost. I suggested to both counsel that the driver might be excused in crossing the lights to save the man. He might have the defence of necessity. Both counsel denied it. They would not allow him any defence in law. The circumstances went to mitigation, they said, and did not take away his guilt. If counsel are correct – and I accept that they are – nevertheless such a man should not be prosecuted. He should be congratulated."

These observations of Lord Denning are obviously *obiter* but when the Master of the Rolls is heard to say that an infraction of the criminal law is a case for congratulation, the state of the law must be ludicrous indeed. It must also be questioned if both counsel were correct in denying the existence of a defence of necessity on the facts illustrated by Lord Denning. As has been pointed out, if *Dudley and Stephens* is restricted to its particular facts, there is no reason why a defence of necessity need invariably be inapplicable in all cases in which death is caused. All the more so then when the infraction of the criminal law does not itself result in death being caused and occurs solely for the preservation of life. Should such a factual situation fall to be considered in Singapore, there is no doubt that section 81 will apply to afford a full defence to the driver of the fire engine provided he acts with due care and attention in not stopping at the red light.

While English law has not yet developed a general defence of necessity, "there are well established areas where necessity is allowed as a defence,"[66] One such area has been the development of a specific defence of necessity which is modelled on the defence of duress by threats, called duress of circumstances.[67] The English Law Commission has recently proposed[68] that such a defence should be provided by the English Draft

64 [19711 2 All E.R. 254.
65 *Ibid.,* at p. 258.
66 Elliot, above, note 4.
67 Indeed it is very likely that the driver of the fire-engine in Lord Denning's illustration in *Buckoke* would now be able to avail himself of the defence of duress of circumstances.
68 Law Commission No. 177: A Criminal Code for England and Wales: Commentary on Draft Criminal Code Bill, at para. 12.20.

Criminal Code Bill and this finds expression in clause 43 of the said Bill. Subsection (2) of clause 43 states the elements of the defence. The defence is limited to cases in which the perpetrator "knows or believes that it is immediately necessary to avoid death or serious personal injury to himself or another" and the danger "is such that in all the circumstances he cannot reasonably be expected to act otherwise." The test is accordingly partly subjective and partly objective. Sub-section (3) provides that the defence does not apply to the offences of murder or attempt to murder nor to a person who has knowingly and without reasonable excuse exposed himself to the danger.

The Law Commission stated that its members were fortified in their conclusion by the fact that the Court of Appeal had twice recently recognised a defence of this kind.[69] The first of those decisions was the case of *R* v. *Wilier.*[70] In *Wilier,* the accused was charged with reckless driving, after he had driven very slowly on a pavement in order to escape from a gang of youths who were obviously intent on doing violence to him and his passengers. At his trial the judge refused to leave the defence of necessity to the jury, ruling that the defence was not open to him. He was convicted and on appeal to the Court of Appeal, his conviction was quashed. Watkins L.J., who delivered the judgment of the Court, said the judge ought to have left to the jury the question whether the accused "was wholly driven by force of circumstance into doing what he did and did not drive the car otherwise than under that form of compulsion, i.e. under duress."[71] It is interesting to note that the trial judge in *Wilier* appears to have taken the view that necessity was a defence known to English law. While not thinking that such a defence was in point, the Court of Appeal did not comment adversely on the view taken by the trial judge. Not too much should be made of this, however, as the case of *R* v. *Denton*[72] points out, since the Court in *Wilier* did not really need to decide whether such a defence existed as a matter of law.

Following the decision of *Wilier* is the case of *R* v. *Conway,*[73] which again involved an appeal against a conviction of reckless driving. The Court of Appeal in its judgment concluded that:[74]

> ".... necessity can only be a defence to a charge of reckless driving where the facts establish 'duress of circumstances', as in *R.* v. *Wilier, i.e.* where the defendant was constrained by circumstances to drive as he did to avoid death or serious bodily harm to himself or some other person.... This approach does no more than recognise that duress is an example of necessity. Whether 'duress of circumstances' is called 'duress' or 'necessity' does not matter. What is important is that, whatever is called, it is subject to the same limitations as the 'do this or else' species of duress.... It follows that a defence of duress

69 *Ibid.,* at para. 12.21.
70 (1986) 83 Cr. App. R. 225.
71 *Ibid.,* at p. 227.
72 (1987) 85 Cr. App. R. 246.
73 [19881 3 AH E.R. 1025.
74 *Ibid.,* at p. 1029.

> of circumstances is available only if from an objective standpoint the defendant can be said to be acting in order to avoid a threat of death or serious injury."

Thus far the cases discussed have arisen in the context of reckless driving. In *R* v. *Martin,*[75] the appellant appealed on a point of law against his conviction on a charge of driving whilst disqualified, the point being whether the defence of necessity would be available to him in the circumstances of the case. The Court of Appeal, in holding that the defence should have been left to the jury, stated the following principles:[76]

> ".... first, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure on the accused's will from the wrongful threats or violence of another. Equally however it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances'.
>
> Second, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.
>
> Third, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result; second, if so, would a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused did? If the answer to both those questions was Yes, then the jury would acquit; the defence of necessity would have been established."

The effect of these decisions is to bring the defence of duress of circumstances closely in line with that proposed by the English Law Commission.[77] Modelled as it is on duress by threats, the defence of duress of circumstances is applicable to all offences other than those relating to murder. Another important limitation is that the defence is available only to avoid a threat of death or serious injury, and in these circumstances the accused must be shown to have been acting reasonably and proportionately. While the context does not suggest it, the analogy with duress by threats suggests that the element of reasonableness will be extended to encompass the requirement found in the English Draft Criminal Code Bill that the defence is not available to a person who has knowingly and without

[75] [1989] 1 All E.R. 652.
[76] *Ibid.,* at pp. 653-654.
[77] One important difference, however, is that unlike the English Draft Criminal Code Bill, the decisions require the defendant's perception of his situation to be based on reasonable grounds. For criticisms, see Elliot, above, note 4, at pp. 614-616; also see Smith & Hogan, above, note 60, at pp. 235-237.

reasonable excuse exposed himself to the danger. In *Conway,* it was stated that no wider defence to reckless driving was recognised in view of Section 36(3) of the Road Traffic Act, which showed that when Parliament intended a wider defence it made express provision. *Martin* extends this, saying that *Conway* is also authority for the proposition that the scope of the defence is no wider for reckless driving than for other serious offences. This of course leaves the question open as to which offences might be considered non-serious and how much wider, if at all, the defence would be for such offences. Presumably, as the defence of 'duress of circumstances' is modelled on duress, it is unlikely to be any wider for non-serious offences. If it were otherwise, it would be necessary to recognise some other basis for the defence and would also require an approach akin to that involved in the 'balancing of harms'.[78]

Apart from this, the comment is also interesting for at least two other reasons. First, if no wider defence is to be recognised, does this mean that *Conway* and *Martin* have, albeit in an indirect manner, put an end to the debate over whether English law recognises a general defence of necessity (at least for serious offences)? It is submitted that *Conway* and *Martin* should not have this effect. The authority of *Conway,* which was relied upon by *Martin,* must be restricted only to offences under the Road Traffic Act. *Conway* is no authority for any wider proposition as the Court placed much reliance on the fact that the legislature had specifically provided the defence found in Section 36(3) of the said Act when it had intended there to be a wider defence. In addition, the point does not appear to have been fully argued in *Martin* and was certainly unnecessary for the resolution of the case. Second, as Elliot points out, *Martin* leaves open the question whether some other limited defence of necessity might not be available in dangerous offences, e.g., one modelled on self-defence.[79] Logically, there would appear to be no reason why some such other limited defence should not be available. Like duress, self-defence is also closely related to necessity. The law should therefore be developed along similar lines so that if the accused is endangered by a wrongdoer *or from circumstances* brought about by another (aside from the 'do this or else' variety), he may use such force as is reasonable in the circumstances of the particular case to protect himself. Such a defence would provide the legal basis (in the absence of a general defence of necessity) for justifying the act of the sole mountaineer in the mountaineering scenario discussed earlier. An important qualification which should exist, however, is one which Elliot points out,[80] *i.e.,* that the accused must not aim at personal harm to an innocent person. That can only be justified by nothing less than the threat of death or serious bodily harm to the accused or another person.

One final point must be made. Professor J.C. Smith has argued that because of a reluctance to recognise general defences, especially the defence of necessity, English courts have sometimes relied on a manipu-

78 For a more detailed discussion, see Elliot, above, note 4, at pp. 616-617.
79 Above, note 4, at p. 616.
80 *Ibid.*
81 Hamlyn Lectures 1988, above, note 58, at pp. 61-72.

lation of one or other of the basic concepts of criminal law in order to achieve the same result. These defences are accordingly 'concealed'.[81] In the context of a concealed defence of necessity, the decision of the House of Lords in *Gillick* v. *West Norfolk and Wisbech Area Health Authority*[82] was cited as an example. If Professor Smith's proposition is correct, then it must be said that such a practice is unsatisfactory and can only lead to confusion when future cases fall to be decided on one or other of these basic concepts. Perhaps *Gillick's* case is some indication then of the advantage of recognising a more generalised defence of necessity under English law.

IX. Conclusion

From this brief survey of the English position, therefore, it is clear that English law has yet to recognise a general defence of necessity. There is no authority, however, precluding the courts in England from developing such a defence. As for the defence of duress of circumstances, it is clearly a limited one, which unlike the defence provided by section 81 of the Code, does not apply to all crimes, and is available only in circumstances where there is a threat of death or serious injury. The development of this defence and other analogous situations, however, may yet one day open the way to the recognition of a unifying principle such as that which occurred in *Donoghue* v. *Stevenson,*[83] or that which is argued for in the Law of Restitution, the concept of unjust enrichment. Finally to summarise, for the general exception of necessity contained in section 81 of the Code to be sucessfully pleaded, the following points should be noted:

(1) The defence of necessity contained in section 81 is a defence to all crimes, even murder.

(2) Section 81 is available if the defendant with due care and attention believes that a danger has arisen *and* it is necessary to act in the manner desired to avert the percieved danger. The test is an objective one.

(3) The harm sought to be avoided must, when judged objectively, be found to be out of proportion to that actually caused by the defendant.

(4) If points (2) and (3) above are present, it does not matter that the accused knew that his act was likely to cause harm, or that he intended to cause harm. Such intention is not regarded as criminal.

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[82] [1986J A.C. 112.
[83] [1932] A.C. 562.
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