Criminal Law for the 21st Century: *A Model Code for Singapore* BY **CHAN** WING CHEONG, STANLEY **YEO** & MICHAEL **HOR** [Singapore: Academy Publishing, 2013, xxxiii + 371 pp. Softcover: S$64.20]

The Singapore *Penal Code* (Cap. 224, 2008 Rev. Ed. Sing.) [*Penal Code*] is all but identical to the *Indian Penal Code, 1860* (No. 45 of 1860) [*Indian Penal Code*]. It is well-known that Thomas Babington Macaulay was in substance the sole author of the original draft of the *Indian Penal Code* and that many of the virtues of the original draft survived the legislative process. At the time of its enactment there was nothing comparable in the common law world. The clarity of expression and the precision of its drafting shone brightly when contrasted with what Stanley Yeo aptly describes in his introduction (at p. 1) as "the confusing and cumbersome state of English criminal law at the time".

Macaulay envisaged a criminal code as a comprehensive statement of all the criminal laws applicable within a particular jurisdiction. That ambition pre-dated the use of the criminal law by modern governments to regulate many aspects of commerce, finance, industrial and extractive processes, transportation, health provision *etc.*, in addition to its venerable role in deterring conduct arising from greed, lust and anger. Singapore is no exception and consequently much of its criminal law is to be found outside the *Penal Code*. In an age of instant electronic access to legislation, it would be of doubtful value to spend the time and effort which would be necessary to put all of Singapore's criminal law in one place.

What was always absent from Macaulay's conception of a penal code was what would now be called a "General Part". It would be unreasonable in the extreme to make this omission a ground of criticism against Macaulay. For common lawyers, the very idea of a general part is a product of criminal law scholarship dating from the mid-20th century (see Jerome Hall, *General Principles of Criminal Law* (1947); Glanville Williams, *Criminal Law: the General Part* (1953)). It is by means of a general part that a modern penal code can deliver general principles applicable across the board to guide the judiciary, the legal profession, and legal scholars, thereby serving the public interest in a just and efficiently-administered criminal law. Providing a general part for the Singapore *Penal Code* is the ambition of the three authors (all well-known and well-regarded scholars of the criminal law) of the volume under review. The scope of that ambition appears at the very beginning of

their proposed Penal Code (General Part) Act:

> 1.1—(1) This General Part of the Penal Code codifies the general principles of criminal responsibility under the laws of Singapore. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence was created.

The draft Penal Code (General Part) Act engages with proof of: criminal responsibility and establishing guilt; the principle of concurrence; external elements of offences; voluntariness; omissions; causation; fault elements; transferred fault and defences; offences without specific fault elements; corporate criminal liability; extensions of criminal responsibility; and defences. As would be expected of authors of this calibre, the process of formulating a general part is based on careful and thorough scholarship. Following on from the introduction, each chapter commences with a draft legislative provision setting out a general principle of criminal responsibility. That is followed by a summary of such current law in Singapore that has a bearing on the general principle and an examination of recent formulations of the principle arising from law reform activity in England and Wales, and Australia, supplemented by some references to the *Rome Statute of the International Criminal Court,* 2187 U.N.T.S. 90. The result is a general part expressed in terms and concepts familiar to Anglophone criminal lawyers.

Whatever the merits of the authors' general part for the jurisdiction of Singapore, there are proposals which would much improve the condition of English criminal law. Of particular interest is s. 6.1, entitled "Abetment", which in spare and elegant terms encompasses inchoate liability in the form of promoting and facilitating offences together with conspiracy (a criminal conspiracy under this section requires at least one act or illegal omission done in pursuance of the criminal objective), culminating with complicity in the form of assistance in the completed crimes. This would provide a clear and measured statement of the principles of criminal liability applicable to persons who are not the direct perpetrators of the crime charged. The contrast between this economical provision and the current state of English law could not be more marked. The same field of liability is covered by the common law and statutory conspiracy, complex and prolix statutory offences of encouraging and assisting crime (see Part 2 of the *Serious Crime Act 2007* (U.K.), 2007, c. 27), the principles of complicity and the doctrine of joint enterprise. This makes for a large corpus of law with many overlapping and, on occasion, contradictory rules. There is persistent over-criminalisation and frequent appeals, often based on minor factual differences between the instant case and previous authority.

A similar contrast can be made between the draft code's section dealing with corporate liability (s. 4.4) and the manner in which the same field is covered in England. Section 4.4 strikes a fair balance between various bases of liability—an agent acting within the scope of his office or employment; acts expressly or impliedly authorised or permitted by the company or by its corporate culture; failure to create and maintain a corporate culture requiring compliance with the relevant offence provision—and gives clear guidance as to the circumstances where one or more of these routes to liability will come into play. In England, the common law of corporate liability

vacillates between a very strict version of the identification doctrine (as exemplified by the leading case of *Tesco Supermarkets Ltd. v. Nattrass* [1972] A.C. 153 (H.L.)) and unmediated vicarious liability. (Note that the attempt by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd. v. Securities Commission* [1995] 2 A.C. 500 (P.C.) (on appeal from New Zealand) to fashion a *via media* between the doctrine of identification and vicarious liability has not borne fruit.) The *Corporate Manslaughter and Corporate Homicide Act 2007* (U.K.), 2007, c. 19 [*CMCHA*] was a serious attempt to make companies more accountable in cases of death attributable to corporate activities. However the *CMCHA* contains a complex formula for liability which rests alongside various forms of exclusion and exemption. The *CMCHA* has been used sparingly and then, only in the case of small companies involved in incidents easily accommodated under the previous law. Singapore should fare better if it enacts s. 4.4.

Although the draft code is concerned with the substantive criminal law, it quite properly includes a provision relating to the burden of proof which opens with a firm statement of principle:

> 2.1—(1) 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.

Such a statement is more than a provision about proof beyond reasonable doubt; it amounts to a rule of law commitment on the part of the state to forebear from imposing criminal liability and subjecting an accused to punishment unless criminal wrongdoing is proved rather than suspected. It is an essential part of the compact between the private individual and the state of which he is a citizen. There is no indigenous statutory statement of this principle in England. Imposing burdens of persuasion on the defendants was commonplace in that jurisdiction, whether by express stipulation or by statutory implication all too readily inferred by the judiciary (see Andrew Ashworth & Meredith Blake, "The Presumption of Innocence in English Criminal Law" (1996) at 306). But that has changed with the incorporation of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222 [*Convention*] as a direct source of law, obliging judges to make the common law compatible with the *Convention* and to read statutes in a *Convention*-compatible manner, "[s]o far as is possible" (see s. 3(1) of the *Human Rights Act 1998*, c. 42). Article 6(2) of the *Convention* (which is part of a cluster of conditions necessary for a fair trial) provides, "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". This has had a salutary effect on the recourse to what are termed "reverse burdens of proof". Though not outlawed as such, many have been read down to impose merely a burden of production or have otherwise been reduced in scope (see Ian Dennis, "Reverse Onuses and the Presumption of Innocence: In Search of Principle" (2005)).

In light of this, thought might be given to better protection of the presumption of innocence for Singapore. Section 2.1(1) of the draft code is not absolute: s. 2.1(3) permits reverse burdens if "imposed explicitly". That was all too readily done in England but, as briefly sketched above, the impact of reverse burdens has been mitigated by the *Convention*. The protection offered by s. 2.1(1) would arguably be

fortified if the exception for explicit imposition of a reverse burden was removed. Additionally, there could be clauses that explicitly reference the right to a fair trial and the presumption of innocence, along with a duty imposed on the courts to read statutes in a way that would protect those rights, "[s]o far as is possible".

As fundamental in human rights terms as the presumption of innocence is the confinement of criminal punishment to persons who deserve to be punished. It is a human right that is very imperfectly protected in England. Strict liability offences requiring no proof of culpability abound. They are not confined to regulatory offences; serious offences such as the rape of a child and possession of a firearm are strict in every sense and lead to the imprisonment of persons who do not merit such treatment (for example, see *R. v. G.* [2009] 1 A.C. 92 (H.L.) (rape of a child) and *R. v. Rehman and Wood* [2005] EWCA Crim 2056 (possession of a firearm)). Liability on this basis, which excludes defences of reasonable mistake of fact and law, are referred to as offences of absolute liability in the draft code (s. 5.2). Disappointingly, this form of liability is permissible if "a law provides that an offence is one of absolute liability". Perhaps this is nothing more than a recognition of the limits of the possible. Absolute liability of this kind (usually called strict liability) is very familiar in common law countries. Such offences typically involve the regulation of activities to achieve standards of quality, and health and safety and are not concerned as such with the punishment of persons who deserve to be punished. Moreover, the defendants will often be companies rather than individuals. But condemnation and punishment is not completely left behind. The verdict is still "guilty". Imprisonment is frequently an available sanction even for regulatory offences. To find a person guilty of an offence and punish that offence with imprisonment without proof of any form of fault is in the words of Andrew Ashworth, "monstrously unfair" (see Andrew Ashworth, *Positive Obligations in Criminal Law* (2013) at 129). It would be desirable for the draft code to provide that imprisonment is not an available sanction for offences of absolute liability.

It is, of course, not possible here to examine even in a cursory way all the provisions in the draft code. What can be said without any equivocation is that this code project is very well conceived. And much of the product of this project in the form of the content of the code provisions will be thoroughly approved of by criminal lawyers from other jurisdictions. Inevitably, not everyone will agree with everything in it. For instance, this reviewer thinks that the principle of concurrence (s. 2.2) is too demanding and might lead to unmerited acquittals whereas the causation provision (s. 3.4) might lead to causal attributions on too broad a basis. Such differences are only to be expected. If the draft code were to be enacted as it stands, it would be a most valuable addition to the laws of Singapore. Its enactment would give great encouragement to those beyond Singapore who would like to see a similar development in their own jurisdiction.

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