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BOOK REVIEW

Criminal Law in Myanmar by **CHAN** WING CHEONG, MICHAEL **HOR**, MARK **MCBRIDE**, NEIL **MORGAN** AND STANLEY **YEO**, eds [Singapore: LexisNexis, 2016. lvii + 587 pp. Paperback: $208.65]

Criminal Law in Myanmar deserves a far wider audience than its title suggests. The authors propose an ambitious reform of the *Penal Code* (The Myanmar Code, Volume VIII, Part IX) [*Myanmar Penal Code*], which is a copy with minor variations of the *Penal Code 1860* (Act No 45 of 1860, India) [*Indian Penal Code*]. Myanmar, Burma as it was then, inherited the *Indian Penal Code* in 1886 together with the *Code of Penal Procedure 1861* (Act No 24 of 1861, India) and the *Evidence Act 1872* (Act No 1 of 1872, India). The *Indian Penal Code* was based on Thomas Macaulay's draft Penal Code of 1837 which, after long delay and revision by the Indian Law Commission, became law in India in 1860. The *Indian Penal Code* has been retained, its fundamental structure unchanged, in post-colonial Asian nations. The authors' proposals for reform are offered accordingly as a model for renovation of the Penal Codes of India, Malaysia and Singapore as well as Myanmar.

A spirit of cautious optimism prevails throughout. The *Constitution of the Republic of the Union of Myanmar* (2008) [*Constitution*] introduced a bicameral legislature, and separation of legislative, executive and judicial powers and recognised basic rights of liberty and justice. In the authors' view, these provisions of the *Constitution* have the potential "to become the nucleus of real constitutional rights" in the criminal law and, with a renovated *Myanmar Penal Code*, a "change for the better, at least in terms of modern democratic legality" (at p 4).

The authors, all members of the Faculty of Law at the National University of Singapore ("NUS"), are active proponents of the enduring virtues of the *Indian Penal Code*. *Criminal Law in Myanmar* was preceded by a comprehensive symposium on the jurisprudence of the *Indian Penal Code* at NUS in 2010, in which most of the authors participated. The symposium papers, many of which foreshadowed the proposals in the present text, appeared in 2011 under the title, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Wing-Cheong Chan, Barry Wright & Stanley Yeo, 2011) (see further Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (rev 2015); Stanley Yeo, *Criminal Defences in Malaysia and Singapore* (2005)).

The reforms proposed in *Criminal Law in Myanmar* are comprehensive, extending to the offences against the person and property, which belong to the 'Special Part' of the criminal law, and to the 'General Part', which comprises the principles of

criminal responsibility and defences of general application. The proposed revision of the General Part is the primary concern of the book. It is of particular interest both for its adaptation of significant elements drawn from the "General provisions of criminal responsibility" in Chapter 2 of the Australian Commonwealth Criminal Code[1] and for some significant departures from that model.

The structure of *Criminal Law in Myanmar* reflects its reform agenda. Most of the text is devoted to the General Part. A comprehensive discussion of the elements of criminal culpability and the general defences in 20 chapters is followed by a mere six chapters dealing with fatal and non-fatal offences against the person, sexual offences and various offences of dishonest acquisition or deprivation of property. The text concludes with an essay on the need for reform of the general principles (at p 497), which serves as an introduction to the authors' draft of a new "Penal Code (General Part) Act" [*Draft Code*] (at p 507).

Each of the chapters on the Special Part provides a succinct discussion of the existing law relating to the various offences against the person and offences of dishonest acquisition. Defects are explored and each chapter concludes with a set of recommendations for reform. Of these, the discussion of the sexual offences is perhaps the most significant in terms of the contemporary significance of the reforms proposed. The *Myanmar Penal Code*, which faithfully reproduces most of the original provisions of the *Indian Penal Code*, presents a museum collection of Victorian sexual conventions and moral prohibitions, crystallised in legislative form. These offences are the subject of anguished legal and sexual politics and agitation for reform in Myanmar and other Asian jurisdictions. They are gender specific in their applications and indefensible in their discrimination against women and sexual minorities. Marital rape goes unrecognised and the sexual offences "against the order of nature"—the crimes that dare not speak their name in the *Myanmar Penal Code*—extend from anal rape, through the forbidden varieties of consensual intercourse among men and women to sexual conduct involving animals. The proposed reforms are presented with objective clarity and persuasive invocations of the *Constitution* and the international obligations that Myanmar has undertaken with respect to the rights of women and children and the right to privacy.

It is the general provisions, however, that occupy the most attention. They offer a rich array of possibilities for discussion. In this review I will consider just two among those possibilities. Both involve presumptions of criminal responsibility. The first is the presumptive threshold for criminal responsibility. The second is the presumption of extended criminal responsibility for individuals who attempt to commit crimes.

The General Part of a Code has at least three functions. First, it provides a repository for the essential conceptual vocabulary and grammar that will be deployed in the formulation of criminal offences. In the *Draft Code* these comprise: (a) the 'physical elements' of 'conduct', 'act', 'omission', 'states of affairs', 'circumstances' and 'results', and (b) the 'fault elements' of 'intention', 'knowledge', 'rashness' and 'negligence', an open-ended list that can be extended by legislative invention of

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[1] See *Criminal Code Act 1995* (Cth) [*Australian Criminal Code*], online: Australian Government Federal Register of Legislation <http://www.legislation.gov.au/Series/C2004A04868>. Chapter 2 of the *Australian Criminal Code* is an enactment, with minor changes, of the draft provisions in *Chapter 2, Final Report, General Principles of Criminal Responsibility* (Australia, Criminal Law Officers Committee, (Canberra: AGPS, 1993)).

new kinds of fault. Secondly, the General Part includes a declaration of principles that are accepted as fundamental to the attribution of criminal responsibility. These include the presumptive requirements for criminal responsibility, defences of general application and provisions relating to proof of the elements of offences. Thirdly, and perhaps most important, the General Part provides a "pivotal source of reference" (at p 498) for courts in the interpretation of existing legislation and a source of principled guidance for legislatures in the formulation of new legislation, such that "future penal legislation should be drafted with the General Part fully in mind" (at p 503). Considered as a guide to legislative practice, the General Part should be supplemented, ideally, by a detailed manual for legislators, as it is in Australia by the Commonwealth *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (see Australia, Attorney-General's Department (2011)).

This duality of function in provisions of the General Part that are addressed both to the courts and the legislature is apparent in the authors' draft provisions on 'strict' and 'absolute' liability. These are intended to provide a guide for legislatures in specifying the fault elements of offences. In the *Draft Code*, proof of intention, knowledge, 'rashness' (a Code synonym for 'recklessness') or negligence with respect to any physical element of the offence, would be necessary only if the Parliament made specific provision for one or other of these fault elements when framing an offence. Offences which do not specify a fault element are said to impose 'strict liability'. In the absence of legislative specification of a fault element, defendants would be required to prove a defence of mistake of fact on the balance of probabilities or another of the defences. The authors accept without question that the defendant bears the burden of proof when relying on mistake or other general defences. Reversal of the burden of proof is said to be required by *The Evidence Act* (The Myanmar Code, Volume VII, Part XXIX), which is also said to affirm "the principle that everyone is presumed innocent until proven guilty" (at p 10). The principle is severely restricted, for it has no application to defences.

The proposed defence of mistake in section 11(2) of the *Draft Code* does not immediately reveal its purpose (at p 514):

> A person is not criminally responsible for an offence of strict liability if, at or before the time of committing the conduct constituting the physical element of the offence, the person is under a mistaken belief or is ignorant of facts which, had those facts existed, the conduct would not have constituted the offence.

It only becomes apparent from the authors' discussion of the defence of mistake in their *Draft Code* that nothing short of proof that the defendant's ignorance or mistake was *reasonable* in the circumstances could amount to an exculpation of offences of strict liability.[2] The *Draft Code* makes no specific reference to the requirement that

[2] See *Draft Code*, s 11(2) (at p 514). But see Illustration (c) and the discussion at pp 110, 111. Compare s 11(1) (at p 514), which deals with a defendant's denial of a 'subjective' fault element on the ground of mistake or ignorance. Here, the fact that the mistake or ignorance was unreasonable is, at most, evidence that the denial of the fault element is false. Section 11(1) has its own problems. Since the defendant is denying an element of the prosecution's case, it seems inappropriate and likely to cause confusion to place this provision among the defences, which must be proved by the defendant. See also *Draft Code*, s 18 (at p 522), in which s 18(1) also seems to characterise a denial of a 'subjective fault

the mistake be reasonable before it can amount to a defence, but the omission was obviously inadvertent.

As a consequence, 'strict' liability marks the presumptive threshold of criminal culpability in the *Draft Code*. Unreasonable ignorance or unreasonable mistakes relating to criminative circumstances or results will be sufficient for criminal responsibility unless Parliament chooses to specify a fault element. If Parliament seeks to exclude reliance on a defence of reasonable mistake or ignorance, it must do so by an explicit provision that imposes 'absolute' liability.

There is, in these provisions, a sharp departure from Chapter 2 of the *Australian Criminal Code*, which has influenced the authors in other respects. Chapter 2 locates the presumptive threshold of culpability at 'recklessness', which is equivalent to 'rashness' in the *Indian Penal Code* and the *Draft Code*.[3] In default of any specific legislative provision to the contrary, Australian federal criminal law requires the prosecution to prove 'recklessness'—consciousness of a substantial risk of a criminative circumstance or result. That insistence on a requirement of advertent fault in the *Australian Criminal Code* was a consequence of the prevailing doctrinal preference for subjective criteria of culpability in the mid to late-20th century. Considerations of political acceptability may explain the authors' rejection of 20th century subjectivism in their *Draft Code*. There is, however, no attempt to present a principled argument in support of their decision to make strict liability the presumptive threshold of criminal responsibility. Their extensive discussion of English "common law *mens rea*" and its doctrinal deficiencies (at pp 76-80) has no bearing on the location of a presumptive threshold of liability in the general provisions of the Code. It is true that the existing offences in the *Myanmar Penal Code* do generally specify the required fault element (at p 73). But that was a consequence of Macaulay's sophisticated deployment of the concepts of intention, knowledge and belief in the way he framed the offences of the Special Part. The General Part of the Code must serve as a guide to future legislators who may be less sophisticated or scrupulous than Macaulay. A presumptive threshold of rashness in the *Draft Code* would require the legislature to be explicit when it chooses to eliminate fault, lower the threshold and require defendants to prove their innocence by way of a defence of reasonable mistake or reasonable ignorance.

A similar presumptive approach and reversal of the burden of proof is proposed for each of the other defences or exceptions to criminal culpability. Apart from reasonable mistake of fact, the familiar exculpations for private defence, duress, necessity, mental impairment, intoxication and consent are all available to defendants unless specifically excluded by the legislature. Of these, private defence, duress,

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element as a defence', to be proved by the defendant. The contradiction is discussed in Stanley Yeo, *Criminal Defences in Malaysia and Singapore* (2005), at p 192.

[3] See *Australian Criminal Code*, s 5.6, on "Offences that do not specify fault elements". The Australian provisions include a refinement neglected in the *Draft Code*. Modern legislative prohibitions frequently differentiate among the physical elements of offences, requiring fault with respect to some but imposing strict or even absolute liability with respect to others. For a succinct outline of element analysis, with references, see Paul H Robinson, *Structure and Function in the Criminal Law* (1997) at pp 39-49. The *Australian Criminal Code* distinguishes accordingly among strict and absolute liability with respect to elements of offences and strict and absolute liability with respect to offences *tout suite*. See *Australian Criminal Code*: s 5.6 "Offences that do not specify fault elements"; s 6.1 "Strict liability"; s 6.2 "Absolute liability".

necessity and consent are available to defendants who were reasonably mistaken about the circumstances in which they acted. There are partial or qualified versions of some of these defences. Intoxicated offenders who escape liability for an offence because the prosecution cannot prove a requisite fault element will be convicted of a lesser offence of "unintentionally causing that offence due to extreme intoxication" under section 18(3) of the *Draft Code* (at p 522). Offenders who use unreasonable and excessive force in defence of person or property or in response to occasions of necessity or duress are liable for lesser penalties. These partial or qualified defences are of particular significance in jurisdictions like Myanmar, where murderers still face the possible infliction of the death penalty.

There is, perhaps, some uncertainty over the degree to which the authors intend liability to be 'strict' in their *Draft Code*. The threshold of responsibility is located at the point where the offender falls short of 'reasonable' standards of conduct or cognition. There are unresolved inconsistencies, however, in determining what is to count as 'reasonable' when defendants of less than average cognitive capacity act on a mistaken understanding of the circumstances or likely results of their conduct.[4] In cases of mistaken private defence, necessity or duress the authors accept that the question whether a defendant's belief was reasonable cannot be answered without consideration of their "personal characteristics or circumstances" (see *Draft Code*, Explanation 2 at pp 517, 518). The same flexible adjustment of the objective standard of reasonableness is apparent in their proposed definition of the fault element of negligence, which would require a court to take account of the defendant's "intellectual and mental capacity, skills, experience and any other personal characteristics over which he has no control" (see *Draft Code*, Explanation at p 510). The *Draft Code* leaves it uncertain, however, whether the defence of reasonable mistake of fact would require or permit a court to take a similar individualised approach. Uncertainty is compounded by the inclusion, at various points, of yet another objective standard, when liability is incurred unless a defendant had 'reason to believe' in the existence of facts that might provide a ground for denial of culpability or an exculpation. The gnomic definition of this expression in section 26 of the current *Myanmar Penal Code* fails to elucidate its meaning: "A person is said to have 'reason to believe' a thing if he has sufficient cause to believe that thing but not otherwise."

The problem about objective standards and the meaning of reasonableness is compounded in the authors' discussion of mistaken belief in the crime of rape (at pp 414-417). They would prefer, for the sake of a desirable consistency with other serious offences against the person, a requirement of proof that the defendant was aware that his victim had not consented though there is also a passing suggestion that the legislature might employ a specially tailored fault element—a requirement that the prosecution prove that the defendant "knew *or ought to have known*" that he acted without consent (at p 417). The authors concede, however, that legislatures are likely to prefer a more objective approach. Their *Draft Code* is apparently intended to allow a defence of 'consent' to rape, though there was no consent in fact, if the defendant

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[4] HLA Hart, in a seminal paper, argued that the standard of what was 'reasonable' in negligence should be geared to the capacities of the individual: see "Negligence, *Mens Rea* and Criminal Responsibility" in HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at pp 136, 149-155, 261, 262. For a recent account of the unresolved controversy over the 'objective' standard, see AP Simester *et al*, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (rev 2016) at pp 160-166.

could prove that he 'had reason to believe' that consent had been given. "For a claim of consent to be established, the person doing the harm causing act must know, or have reason to believe, that the consent was freely given by the recipient" (at p 524).

Alternatively, the defendant might simply rely on the defence of reasonable mistake. There is a faint suggestion that the *Draft Code* defence of reasonable mistake, which derives from the existing defence of reasonable "mistake... in good faith" in sections 76 and 79 of the current *Myanmar Penal Code*, might set a variable standard when dealing with defendants of impaired capacity (at p 109). A poignant example of just such an error is central in Norval Morris' parable of "The Brothel Boy" (*The Brothel Boy and other Parables of the Law*, 1992) which happens to be set in 1920s colonial Burma. A young man of 20, the child of a prostitute raised in a brothel in circumstances of gross emotional, cognitive and social neglect, who suffers consequential social and cognitive impairment, has intercourse with his victim in the mistaken belief that she is a prostitute who consented to intercourse in return for the money he offered to pay her. In the parable, he is convicted and hanged. To ask what such a deprived individual might 'have reason to believe' begs the question whether it is the reasons of this social and cognitive incompetent or the reasons of a person of normal competence that are to count when criminal responsibility for a serious offence is in issue.

The *Draft Code* includes two 'Extensions of Liability': Abetment and Attempt. Of these, Abetment is by far the most interesting but discussion of its intricacies is well beyond the scope of this brief review, and deserves a monograph of its own. Abetment was Macaulay's inspired invention of a form of concomitant criminal liability that encompassed the common law concepts of incitement, conspiracy and complicity. It has affinities with the 1993 UK Law Commission's proposals for a unified approach to derivative liability, which reached their final disappointing conclusion in the provisions of the *Serious Crime Act* 2007 (UK), c 27, Part 2, which introduced the offences of assisting or encouraging crime.

In its current version, the *Myanmar Penal Code* allows three extensions of liability. Abetment is accompanied by conspiracy and attempt. Each of these extensions is available to supplement and extend liability for the offences of the Special Part, whether in the *Myanmar Penal Code* or other legislation, unless excluded by the legislature. Both conspiracy and attempt were subsequent additions to Macaulay's draft Penal Code of 1837. Conspiracy was an unnecessary and confusing supplement, since abetment includes conspiracy. The authors wisely eliminate conspiracy as an independent ground of culpability in their *Draft Code*. They would, however, retain the law of attempt in the General Part (at p 535):

> Whoever, with intent to commit an offence punishable by this Code or by any other written law shall, if he intentionally does anything that, under the circumstances as he believes them to be, is an act constituting a substantial step in a course of conduct planned to culminate in the commission of an offence, be deemed to have attempted to commit the offence.[5]

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[5] The provision in the text is a corrected version of the following formulation, which has been afflicted by a typographical gremlin (at p 535):

> Whoever, with intent to commit an offence punishable by this Code or by any other written law, shall be deemed to have attempted to commit the offence if he intentionally does anything that, under

Liability for attempt in this proposal would extend the existing scope of the attempt offence in section 511 of the *Myanmar Penal Code*, which is limited to crimes punishable by imprisonment. The *Draft Code* abandons that limitation to include offences punishable by fine alone. The authors propose various doctrinal refinements, requiring fault elements of 'intention' and 'planning', specifying a 'substantial step' criterion for proximity and proposing an implicit rule that impossibility does not bar conviction for attempt. Their proposals are intelligently responsive to familiar doctrinal problems in the law of attempt. Since the problems are familiar and the subject of an extensive literature, I will conclude this review on a more challenging subject. Why was it necessary to supplement Macaulay's draft Penal Code of 1837 with an extended form of liability for attempting to commit an offence? Thurman Arnold long ago characterised the law of attempt, with its perennial doctrinal dilemmas, as a "complete obstacle to intelligible judicial speech and an encumbrance on intelligent judicial action" (Thurman Arnold, "Criminal Attempts: The Rise and Fall of an Abstraction" (1930) 40 Yale LJ 53 at p 79). For Arnold, the law of attempt was nothing more than a "power or discretion" given to judges to extend statutory prohibitions beyond their literal applications. Though Bentham was prepared to contemplate such extensions, Macaulay made no such provision for judge-made law. It seems very likely that he considered such a power objectionable in principle and unnecessary in practice. If one examines Macaulay's draft, it is immediately apparent that very many and perhaps most of the offences are preparatory in form. The same can be said of the *Indian Penal Code*. Crimes requiring proof that the offender caused a harm are exceptional. The vocabulary of prohibition in these preparatory offences is highly sophisticated in its deployment of the fault elements of intention, knowledge, belief and purpose and equally sophisticated in its specification of the physical elements of the offences. In drafting preparatory offences, Macaulay could draw on long established English legislative practice, which made frequent use of legislative prohibitions that took the form: "doing X with intent to Y", or "doing X knowing that Y". Chapter XII—Of Offences Relating to Coin and Government Stamps is perhaps the best example of the technique, both because of the sophistication of its provisions and Macaulay's penetrating Note on the fault elements of the coining offences, differences in degrees of culpability and the inadvisability of imposing a form of strict liability (see *A Copy of the Penal Code Prepared by the Indian Law Commissioners* (1851) at Chapter XII, Note I). Nowadays the coining offences are practically obsolete, but the techniques of prohibition have been generally adopted, with very little change, particularly in framing offences directed against the continuing proliferation of crimes of illicit commerce.

Thurman Arnold saw the problem clearly. Nothing but confusion can follow, if courts attempt to superimpose the law of attempt on schemes of legislative prohibition directed against preparatory conduct. The vice of the law of attempt, in his view, was its generality and abstraction. "While the common law writers have been busily engaged in trying to make all attempts look alike the legislatures have been equally busy putting attempts back where they belong as adjuncts of the particular crime attempted" (Arnold at p 60).

the circumstances as he believes them to be, is an act constituting a substantial step in a course of conduct planned to culminate in the commission of an offence.

It is almost certainly too late to dispense completely with the legislative extension of liability to individuals who attempt to commit an offence. That is no reason however, for a presumption that the ambit of liability for each new offence created by the legislature must be supplemented automatically by the law of attempt. Of course it is possible for legislatures to exclude applications of the law of attempt when legislative provisions are specific in their application to conduct that is preliminary, preparatory or symptomatic of social harm. The *Australian Criminal Code*, which does include a presumptive extension of liability for attempt among the general principles of responsibility, specifically excludes its application in many of the offences involving electronic commerce and communications.[6] It is better, however, to eliminate the presumption and require specific legislative invocation of attempt liability when resort to judicial discretion might be unavoidable. Clarity and precision, the primary virtues of Macaulay's codification, provide a measure of assurance that the content and meaning of the criminal law will be, so far as possible, the work of the legislature, not the courts (at pp 499, 500).

Criminal Law in Myanmar is an invaluable addition to the jurisprudential literature on the *Indian Penal Code*. It provides a summation of extensive earlier scholarship by the authors in support of their *Draft Code* and their proposals for renovation of the existing provisions of the *Indian Penal Code* in its various incarnations. It was always the most intelligent, elegant and successful of the 19th century codifications of the criminal law. A refurbished General Part would ensure its continued longevity. In their prefatory remarks, the authors invite comment and critique on the proposals. That is perhaps unduly modest: their *Draft Code* would provide an admirable framework for a new symposium on the general principles of criminal responsibility in the *Indian Penal Code*.

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[6] See *eg*, the exclusions in the following Divisions of the *Australian Criminal Code*: Division 372 "Identity fraud offences", Division 471 "Postal offences", Division 474, "Telecommunication offences", Division 477 "Serious computer offences" and Division 478 "Other computer offences".