Unrestrained Killings and the Law: Provocation and Excessive Self-Defence in India, England and Australia by **Stanley Yeo** [New Delhi, Oxford University Press, 1998, xxi + 210 pages, ISBN 019564400-X].

In common law jurisdictions a partial defence to murder, leading to a lesser crime, may frequently be found in the defences of provocation and excessive self-defence. The loss of self-control on the part of the provoked accused, or the application by the accused of an unreasonable and unnecessary amount of force in a given set of circumstances, gives rise to the phrase "unrestrained killings" in this book by Stanley Yeo. This well researched analysis of unrestrained killings is a welcome addition to comparative criminal law literature. Yeo has undertaken a critical examination of the defences of provocation and excessive self-defence by comparing the legal authorities that exist in India, England and Australia.

While it may be argued that certain basic criminal laws are consistently recognised, regardless of jurisdiction, the particular criminal law may differ markedly from one country to another. Indeed, in a federated country the criminal law is capable of being interpreted in a variety of ways within that one national entity.

So why an analysis of criminal laws across India, England and Australia? More particularly, why conduct a comparative analysis of this aspect of the criminal law?

Let's answer the latter question first. Drawing on justifications for comparative analysis, Yeo argues that to compare the law in this way "extends and enriches the 'supply of solutions' and offers the scholar of critical capacity the opportunity of finding a better solution for his [or her] time and place."[1] Further, the book may be useful to law reform experts, amongst others, who have to engage in comparative study as well.

But why an analysis of the criminal law of these three countries? There are two reasons for this. The first is their common English heritage, which is the basis for the colonial manifestations in India and Australia. Secondly, an analysis of this type allows the cultural differences that affect the development of the common law to be fully examined.

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[1] At 2.

The English legal system shows the natural progression of an established legal system. By comparing Australian law to this, it is possible to see the development of a wholly transplanted law that has been subjected to quite different political and socio-economic conditions. Similarly, the Indian Penal Code of 1860 is based largely on an English common law inheritance and it continues to give deference to the English system of law. An examination of Indian law therefore allows an understanding of the advantages and disadvantages of the codification of the criminal law.

Yeo states that the book has several aims:

1. to present the existing laws and latest law reform proposals of England, Australia and India on the defences of provocation and excessive self-defence;
2. to assess the extent to which these laws and proposals reflect legal principle and notions of justice;
3. to confirm the correctness of specific aspects of the defences through the commonality of the laws of England, Australia and India;
4. to reject certain aspects of the defences found in the laws of some of the jurisdictions studied through legal argument, comparative analysis and appeal to notions of justice; and
5. to draw up model provisions which contain all the best features of the defence formulations examined.[2]

By dividing the book into four chapters Yeo is able to fulfil these aims.

Chapter One is titled "About this Work"[3] and introduces the book and its rationale. The concluding comments to this chapter suggest that the colonial offsprings have developed more sound and just laws than their English parent. The primary reason for this is the perceived xenophobia of English judges and Yeo argues that English judicial officers are reluctant to consider legal problems that may have been dealt with in a foreign jurisdiction.[4] Yet, owing to the original structure of the colonial court systems and the doctrine of precedent, English decisions are still applied

[2] At 4-5.
[3] At 1-8.
[4] At 7.

with much respect in jurisdictions with similar laws. Such colonial respect and consideration have developed in recent times to include the acquisition of value by way of observation and criticism. Yeo therefore argues that Australian and Indian laws on these defences have benefited from such comparative analysis although he observes that more may be gained if the comparison is extended three ways rather than with English law alone.

Chapter Two, "Provocation",[5] is next examined from the viewpoint of this defence. Specifically, this chapter begins with definitions of provocation as they exist in the three countries. The English system is dealt with first, since the system is the basis from which the laws of Australia and India are developed. An analysis of the Australian law is next, since it is a direct offspring of the English law. This is followed by the Indian law, which differs most from the English heritage due to the fact that it is a codified system of law.

Following this discussion, Yeo examines the nature of provocative conduct. The order of comparison is retained for each of the specific issues covered. In this section, the traditional problems for the defence of provocation are highlighted, namely:[6]

(1) whether words alone may be deemed to be provocative conduct;
(2) whether provocation may be accumulated over a series of acts;
(3) whether provocation must be in the accused's presence;
(4) whether provocation may be self-induced; and
(5) whether lawful acts may be deemed provocative conduct.

Next, Yeo presents a critique of the so-called subjective and objective components of this defence.[7] In this discussion, the book canvasses the dimensions of an actual loss of self-control by the accused person followed by an examination of the ordinary or reasonable person test. Judicial officers and legislators, in all three jurisdictions examined, have declared the latter test to be necessary to ensure appropriate standards of behaviour within the community. With this latter "objective" test, the effect of different social structures within the different countries is most evident.[8]

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[5] At 9-116.
[6] At 14-45.
[7] At 46-65.
[8] See generally 56-92.

Yeo prefers the Indian approach, which allows for the consideration of ethnicity when determining the characteristics affecting the power of self-control of the "ordinary" person. He acknowledges that such an approach is closer to reality than the English and Australian approaches. The Indian approach works and it is appropriate for a country that has a clearly delineated social structure.[9] Unfortunately, the pragmatic problems of introducing ethnicity into this component of the ordinary person test for England and Australia are recognised and Yeo does not recommend its extension into those jurisdictions.[10] This is a drawback in relation to a comparative approach to criminal law when the sound jurisprudential or logical thinking behind the law of a particular country is unworthy of general application because of the cultural relativism that exists. The chapter draws to an end with an analysis of the reactions of an accused person to provocative conduct, followed by a formal conclusion.[11]

Interestingly, when the key points of the defence of provocation are compared, the English, Australian and Indian law all appear to have developed in a similar direction, albeit at a different rate. This is largely due to the ability of Australian and Indian lawmakers to actively consider and criticise their English heritage whereas the reverse is not the case.

Chapter Three examines the defence of excessive self-defence.[12] Like the defence of provocation, this defence, if established, reduces the crime of murder to a lesser crime.[13] In this chapter the author begins with an overview of the meaning of excessive self-defence which is essentially a form of defence in which the accused, acting honestly in the defence of self, used more force than a reasonable person would in similar circumstances.[14] The chapter then examines the defence under Indian law

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[9] The author refers to differences by way of "caste, race, religion and socio-economic considerations": at 92.

[10] The characteristic of ethnicity, unlike youthfulness, may not be one that the typical juror in a more heterogenous society may be able to fully appreciate. Accordingly, expert evidence would, most likely, need to be called. The limitations of such evidence being that it may be overly generalised and open to criticism in societies where strict cultural and ethnic divisions are not the norm.

[11] At 93-116.

[12] At 117-175.

[13] Manslaughter or, in India, culpable homicide not amounting to murder.

[14] A more precise definition may be found at 117.

where it is recognised as Exception 2 to section 300 of the Penal Code, which defines the offence of murder. The choice of Indian law as the starting point for this discussion is due to the fact that English law and the current Australian position do not recognise such a defence.

Following the analysis of the Indian position, the history, current position and law reform proposals of both the English[15] and Australian[16] approaches are addressed. The chapter concludes with an examination of the theories and morality that underpin the need for a defence of excessive self-defence.[17]

Of particular interest in this chapter is the seeming contrast between a fear held by Australian judges that this partial defence may be used by juries as a "half-way house"[18] on the one hand, and the poor adherence to the specifics of the defence in certain Supreme Court judgments in India, on the other hand.[19] The former is used in the context of a compromise between criticism and empathy for the accused's conduct and it is presumed that the latter occurs for similar reasons.

Although Chapter Three is equal in research and writing style to the chapter on provocation, overall it is slightly less satisfactory because of the choice of subject matter. Limiting this chapter to an examination of "excessive" self-defence only leaves the reader wanting more. However, there is a reason, found in Chapter One. Excessive self-defence is selected because it acts as a companion to provocation. Like provocation, excessive self-defence is, or has been, recognised as a partial defence to murder. It is arguably an example of an "unrestrained killing" and it is an area in which little comparative work has been conducted.[20] These reasons are cogent and valid.

If the comprehensive treatment of the law of provocation in Chapter Two is any guide, readers will benefit from a substantial comparative critique of

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[15] At 134-141.
[16] At 141-167.
[17] At 167-175.
[18] At 152.
[19] At 131-134.
[20] At 1-8.

the complete defence of self-defence.[21] Understandably, the nature of excessive self-defence places it outside the justifiability of self-defence proper, both morally and theoretically. Yet this partial defence arises by virtue of the accused's need to utilise some form of legally sanctioned self-protection in the first place. However, if excessive self-defence is incorporated into the general defence of self-defence, the book will need to change its title and will become a bigger book. But this will not affect most of its stated aims, which will remain the same apart from including the production of a larger work as an additional aim to the list.

Chapter Four on "Improving the Law"[22] provides suggestions to law reformers and lawmakers on improvements to the two defences. Yeo remodels "provocation" and "excessive self-defence" by referring to his earlier criticisms of existing laws. He incorporates the valuable features of those laws and uses law reform proposals where they are available. The remodelled defences are then examined in the light of examples, some of which are drawn from illustrations used in the Indian Penal Code.[23] This chapter neatly draws the book together and reiterates most of the key criticisms in a succinct and practically valuable manner.

So, have the enunciated aims of this book been met? Yeo has clearly and meticulously presented the existing laws and latest law reform proposals from the three countries for the defences of provocation and excessive self-defence. This is accomplished by a comprehensive examination of the history of the current case law and legislation. In the course of that presentation he assesses the extent to which the law and law reform proposals reflect acknowledged legal principles and notions of justice. Further, he either confirms the correctness of or rejects certain aspects of the defences by way of legal argument, comparison and appeals to notions of justice. He concludes the work by drawing up model provisions that contain all the most valuable features of the defence formulations examined.

In conclusion, this book is a valuable contribution to the field of criminal law in three countries. In particular, the book is of primary benefit to the criminal law practitioner, student or academic in any common law

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[21] Chapter Two has 106 pages whereas Chapter Three is almost half the size at 59 pages.
[22] At 176-185.
[23] At 179-180 and 184.

jurisdiction who is interested in the possible developments in the defences of provocation and excessive self-defence. This book is also of value to practitioners and law-reformers in civil law jurisdictions who may wish to examine the evolution of this particular area of criminal law by way of comparison with the common law. Overall, the book is well researched, well written, and well worth serious consideration.

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