

THE SYMBIOSIS BETWEEN CRIMINAL CODES AND THE COMMON LAW

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ABSTRACT

This article identifies the advantages which flow from judicial examination of the inter-relationship between criminal code provisions and common law pronouncements on criminal law. It outlines when judges interpreting and applying code provisions may be permitted to refer to common law pronouncements, and when common law judges might benefit from a study of code provisions. Australian, Canadian and Indian cases are used to illustrate the propositions that can be obtained from these courses.

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I. INTRODUCTION

This article is not concerned with whether the criminal law should be codified or should remain in the hands of common law judges. Rather, it seeks to highlight the propositions that can be derived by studying certain jurisdictions whose criminal laws have been influenced by both criminal codes and the common law. Such a convergence of these two forms of criminal law is bound to produce interesting outcomes. This is because the judges in these jurisdictions could approach the law in any one of at least two ways. They could insist on confining their pronouncements entirely within the particular form (whether code or common law) that the law of their jurisdiction takes; or they could study both forms of the criminal law and seek, as far as possible, to adopt the best or worst of what both codes and the common law have to offer. The first of these approaches is conventional and, while entirely proper, misses out on the opportunity to reach the best available solution to a legal problem by comparing the ways by which a code and the common law resolve the matter. The second approach involves a comparative study of code provisions and common law decisions, and it is here that propositions may be drawn from past cases to ensure that, in future, only the best and not the worst features of the two forms of criminal law are embraced.

What then are the best and worst features of criminal codes and common law developed criminal law?¹ Broadly stated, the major strength of a code lies in its potential to lay down a schematic, comprehensive and readily understood set of laws. Its major weakness lies in the fact that a code cannot hope to provide answers to each and every problem that may arise in the future. In contrast, the less prescriptive and gradually evolving nature of the common law places it in a better position than a code to resolve these emerging problems. However, this common law strength is also a weakness as common law judges are apt to take a piecemeal approach to resolving problems, rather than the systematic and comprehensive approach which codes attempt to provide.²

Australia, Canada and India lend themselves particularly well to this study since they possess the required mixture of codes and common law. Additionally, their criminal laws originate from basically the same source, namely, 19th century English law, thereby allowing for broad inter-jurisdictional comparisons to be

1 See T. Letourneau and L. Cohen, *Codification and Law Reform: Some Lessons from the Canadian Experience*, 10 *STATUTE LAW REVIEW* 183 (1989); M. Goode, *Codification of the Australian Criminal Law*, 16 *CRIMINAL LAW JOURNAL* 5 (1992); R. Cross, *The Making of English Criminal Law*(5): Macaulay, *CRIMINAL LAW REVIEW* 519 (1978); A. Ashworth, *Interpreting Criminal Statutes*, 107 *LAW QUARTERLY REVIEW* 419 (1991).

2 See A.T.H. Smith, *Judicial Lawmaking in the Criminal Law*, 100 *LAW QUARTERLY REVIEW* 46 (1984).

made. Australia comprises several criminal jurisdictions with some having their own criminal codes and others being common law based.³ Canada is governed by a single criminal code⁴ but a residual clause⁵ contained in the code, together with the *Canadian Charter of Rights and Freedoms*,⁶ have produced a common law system alongside the code. As for India, its criminal law is contained in a single code but some of the code provisions have been judicially interpreted in ways which more closely reflect the English common law than the precise wording of the code.⁷

In this article, I will suggest that the following propositions should be applied in the interaction between codes and the common law:-

- where the wording of a code provision is clear, judges should adhere closely to the meaning of those words and assume that the provision exhaustively pronounces the law on the matter. Judges may obtain a better understanding of the law by examining the similarities and/or differences between the common law and the code provision;
- where the wording of a code provision is unclear in some respect, judges should look first to other closely associated provisions in the code for guidance, followed by identical or otherwise similar provisions of other codes and, only then, have recourse to the common law for support or elucidation;

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- 3 The Code jurisdictions are the Northern Territory, Queensland, Tasmania and Western Australia, while the common law jurisdictions are New South Wales, South Australia and Victoria. The Northern Territory code was formulated in 1983, the Queensland and Western Australian codes were drafted by Samuel Griffith in the late 19th century and the Tasmanian code was derived from James Stephen's draft code as amended by the English Royal Commission of 1879, viz. *Report of the Royal Commission to consider the Law Relating to Indictable Offences*, British Sessional Papers, House of Commons, 1878-1879.
- 4 The Canadian code, like its Tasmanian counterpart, was based on James Stephen's draft code as amended by the English Royal Commission of 1879: *Supra* note 3.
- 5 Namely, §8(3) which is discussed below. The residual clause provides for the continuation of common law defences which are not otherwise provided for in the Code. Until its abolition in 1954, a residual clause continued in force all common law offences not specifically dealt with in the Code.
- 6 The Charter was added to the Canadian Constitution in 1982. Under §52 of the Constitution Act, 1982, laws passed by Parliament can be struck down by the courts should they be found to violate one of the rights in the Charter.
- 7 The Indian code was primarily the work of Thomas Macaulay in the first half of the 19th century. A likely explanation for the judicial adherence to English common law was that many judges were English trained at least until the time of Indian independence. This judicial tendency to invoke the English law has been attributed by one Indian commentator to "*the inexplicable desire to bring Indian law in line with English Law*": see R. Kelkar, *Provocation as a Defence in the Indian Penal Code*, 5 JOURNAL OF THE INDIAN LAW INSTITUTE 319, 338 (1963).

- judges of common law jurisdictions should, wherever possible, take a holistic approach when making pronouncements on the criminal law. In this regard, studying a code could prove most instructive;
- judges of common law jurisdictions should endeavour to state the law in simple and readily comprehensible terms. Referring to code formulations may help achieve these highly desirable objectives.

I shall now present each proposition in turn and use judicial decisions from Australia, Canada and India to illustrate the advantages accruing from them, and the negative consequences of not following them.

II. JUDGES SHOULD CLOSELY FOLLOW THE CLEAR WORDING OF A CODE PROVISION

Since codes are generally intended to be clear, exhaustive and comprehensive pronouncements of the law, judges should always give the wording contained in a code its plain meaning, without any recourse to the previous law. Otherwise, all the benefits gained by codification will be dissipated. This seems an all too obvious proposition which has been the subject of pointed declarations by judges of the highest courts in the three jurisdictions under consideration.⁸ For instance in *Brennan v. The King*, the High Court of Australia issued the following warning in respect of interpreting a particular provision in the *Criminal Code* of Western Australia:-

[The provision] forms part of a code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered.⁹

The need for such a declaration indicates that there have been occasions when judges have gone astray. One reason for doing so might be the perception held by some judges that the code was merely a restatement of the then existing

8 For an Australian example, see *R v. Barlow*, (1997) 93 A Crim R 113, 136-137 per Kirby J.; for a Canadian example, see *Victoria (City) v. Bishop of Vancouver Island*, [1921] 2 AC 384, 387 per Lord Atkinson [Privy Council]; and for an Indian case, see *Gokul Mandar v. Pudmanund Singh*, (1902) 4 Bom LR 793, 796 per Lord Davey [Privy Council].

9 *Brennan v. The King*, (1936) 55 CLR 253, 263 [High Court of Australia] per Dixon and Evatt JJ. [Hereinafter, "*Brennan*"], citing *Bank of England v. Vagliano Bros*, [1891] AC 107, 144-145 per Lord Herschell [House of Lords]. See, *R v. Barlow*, (1997) 93 A Crim R 113, 125 [High Court of Australia] per McHugh J., and at 136 per Kirby J.

common law such that it was permissible to draw upon that law. Another reason might be the familiarity and/or affinity which some judges, by their training or experience, may have had with the common law. Whatever the explanation, judges when interpreting a code provision should confine themselves to the plain and natural meaning of the wording of the provision. Only when such a meaning has been declared might they usefully refer to the meaning given by the common law. Where the meaning is the same under the code provision and the common law, such a comparative exercise will simply confirm that common law and code provisions are often the same. Where there is a difference, this could serve to bring out more clearly the explanation for the Code framer's particular choice of words, and from there to discover the reason for deviating from the common law at the time of codification.

The Australian case of *Jervis v. R* contains a good example of this proposition being followed.¹⁰ The accused, who was party to a plan to obtain blood from the victim, had supplied her knife to a co-accused who used it to kill the victim. The co-accused was convicted of murder and the accused was convicted of manslaughter. On appeal against her conviction to the Queensland Court of Criminal Appeal, the accused argued that Section 7 of the *Criminal Code* of Queensland extended criminal responsibility to an accomplice only as regards the offence committed by the actual perpetrator and not some other offence. The approach taken by de Jersey J. in that court is instructive. He began by invoking the basic principle of statutory construction that words in a code should, as far as possible, be given their natural meaning.¹¹ Applying this principle to the section under consideration, de Jersey J. observed that the obvious purpose of Section 7 was to render liable for the offence committed not only the actual perpetrator, but also those who aided, counseled or procured the perpetrator to commit that offence. Therefore, the natural construction of the term "*the offence*" appearing throughout the section refers to the offence which had been committed by the perpetrator, and not some other offence.¹² His Honour acknowledged that this view went against certain common law authorities which had been followed by a majority of the Tasmanian Court of Criminal Appeal in *R v. Murray*.¹³ De Jersey J. thought that the majority in *Murray*

10 *Jervis v. R*, (1991) 56 A Crim R 374 [Court of Criminal Appeal, Australia]. [Hereinafter, "*Jervis*"]

11 Citing the passage in *Brennan* reproduced earlier in the main text accompanying footnote 9.

12 *Jervis*, 400-401. Admittedly, his Honour was in dissent, the majority preferring to give a technical interpretation to "*the offence*" appearing in §7 as the crime of "*unlawful killing*" which could comprise both murder and manslaughter.

13 *R v. Murray*, [1962] Tas SR 170, 176 [Tasmanian Court of Criminal Appeal] per Burbury CJ. and agreed to by Gibson J. [Hereinafter, "*Murray*"]

was unduly influenced by the common law on the issue, at the expense of giving effect to the plain language of the section.¹⁴ In conclusion, he said that should legislature regard the application of the plain wording of Section 7 as producing a socially undesirable result, the solution would be amendment so as to bring the code into line with the common law position.¹⁵

There is another possible ground supporting de Jersey's decision in *Jervis* to interpret Section 7 of the Queensland code as confining accessorial criminal responsibility to the offence committed by the perpetrator. It is that a distinction may be drawn between plain words and doctrines when considering the effect, if any, of the common law on a code provision. According to Toohey J. in the High Court of Australia case of *R v. Falconer*, "[c]learly, it is permissible to look to [common law] decisions to throw light on the terminology of the Code."¹⁶ However, "[t]here is no room for common law doctrines unless they are incorporated in the Code itself."¹⁷ Applying this distinction to *Jervis*, the court was there concerned with the doctrinal issue of the scope of accessorial criminal responsibility under the code. Since the wording of the operative section clearly expressed that doctrine quite differently from the common law equivalent, it was not permissible to incorporate the common law into the code.

The Supreme Court of Canada case of *Jobidon v. The Queen* is an example of judicial departure from the plain meaning of a code provision.¹⁸ The appellant had been convicted of unlawful act manslaughter for killing the deceased in a fist fight which both men had consented to engage in. The Crown based the "unlawful act" component of the charge on physical assault which, according to Section 265(1) (a) of the *Criminal Code*, occurs when, "without the consent of another person, [the accused] applies force intentionally to that other person". A majority of the Supreme Court affirmed the conviction. Gonthier J., who delivered the judgment for the majority, reached this conclusion after deciding to follow the English common law ruling in *Attorney-General's Reference (No 6 of 1980)*¹⁹ that public policy "vitiates consent between adults who intentionally apply force causing serious hurt or non-trivial

14 *Murray*, 404, and preferring the dissenting judgment of Crawford J in *Murray* (at 195) who disavowed recourse to the corresponding common law principles.

15 *Supra* note 14.

16 *R v. Falconer*, (1990) 171 CLR 30, 65 [High Court of Australia]. [Hereinafter, "*Falconer*"]

17 *Falconer*, 67.

18 *Jobidon v. The Queen*, (1991) 66 CCC (3d) 454 [Supreme Court of Canada]. [Hereinafter, "*Jobidon*"] For an Indian example, see the case of *Sabal Singh v. State*, AIR 1978 SC 1538 [Supreme Court of India] which defined "good faith" in terms of recklessness in spite of the existence of a code definition of that term, namely, §52 which reads: "Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention."

19 *Attorney-General's Reference (No 6 of 1980)*, [1981] 2 All ER 1057 [Court of Appeal].

bodily harm to each other in the course of a fist fight or brawl".²⁰ With respect, this flies directly in the face of the plain wording of Section 265(1)(a) which specifies that an assault occurs only if intentional force was applied "*without the consent of*" the victim or complainant. As Sopinka J. observed in his dissenting judgment: "*The effect of [Gonthier J.'s] approach is to create an offence where one does not exist under the terms of the Code by application of the common law. The offence created is the intentional application of force with the consent of the victim.*"²¹

In Sopinka J.'s view, since Canadian criminal law was codified, it was untenable for judges to ignore the plain wording of the code provision by a robust application of judge-made policy. It is submitted that this is the correct view. The majority in *Jobidon* should have kept closely to the plain wording of the provision in question. Having done so, it might have usefully engaged in an in-depth discussion of the issue by contrasting the code position with the English common law. The majority might then have gone on to suggest reasons why the Code framers regarded an individual's right to consent to a fight as prevailing over the interest of avoiding breaches of the peace. In this regard, the majority might have referred to some of the Australian code provisions which have taken a similar position and considered judicial interpretations of those provisions.²² Had the court in *Jobidon* undertaken such an inquiry, its judgment would have provided Canadian judges in subsequent cases with a much better appreciation of the theoretical and practical workings of the issue of consent in the law of assault.

In India, there is a line of case authorities which have read a requirement of reasonable retaliation into the provision on provocation in the *Indian Penal Code*. The Privy Council decision in *Attorney-General (Ceylon) v. Perera* is, perhaps, the most notable of the cases which have done so.²³ This has been done despite the fact that the code provision on provocation says nothing whatsoever about the requirement. The requirement is derived from the English common law and stipulates that

20 *Jobidon*, 494.

21 *Jobidon*, 460.

22 See, §246 of the *Criminal Code* of Queensland as interpreted in *R v. Raabe*, [1985] Qd R 115, 125-126 per Derrington J. [Western Australia Court of Criminal Appeal]. See also *Carroll v. Lergesner*, [1991] 1Qd R 206 [Western Australia Court of Criminal Appeal] and the discussion of that case by G. Syrota in *Consensual Fist Fights and other Brawls: Are they a Crime?*, 26 UNIVERSITY OF WESTERN AUSTRALIA LAW REVIEW 169 (1996).

23 *Attorney-General (Ceylon) v. Perera*, [1953] AC 200 [Privy Council]. The Privy Council was interpreting the provision on provocation contained in the Penal Code of Ceylon (now Sri Lanka) which is identical to the provision in the Indian Penal Code. For other cases, see *State v. Sarwan Singh*, (1954) Cr LJ 1505 [Supreme Court of India]; *State v. Dattu Genu Gaikwad*, (1974) Cri LJ 446 [Supreme Court of India] and most recently *Arun Raj v. Union of India*, Criminal Appeal No. 1123 of 2008 (13th May, 2010), available at <http://judis.nic.in/supremecourt/helddis.aspx> [Supreme Court of India].

*"the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter".*²⁴ In contrast, there is the Allahabad High Court case of *Akhtar v. State* where Beg J. commenced his judgment by noting the complete absence of any such requirement in the wording of the code provision on provocation.²⁵ He then proceeded to provide an explanation, based on legal history, as to why the English common law imposed such a requirement but not the Code.²⁶ Basically, it was that the requirement was a *"hand over"* of the times when self-defence and provocation were confused in English law. When the Indian code was drafted, this confusion had been removed with the result that the plea of provocation was treated under the Code as separate and distinct from the plea of self-defence. Beg J. also opined that the requirement of reasonable retaliation was contrary to the nature of the plea of provocation since, *"once [an accused's] power of self-control has been lost, it would be futile to expect him to retain such a degree of control over himself"*.²⁷ The correctness of this observation was recently affirmed when the English Law Commission on codification used it to explain the absence of the requirement under its proposed provision on provocation.²⁸ Thus, *Akhtar* represents a model of sound and cautious judicial regard for the plain wording of a code provision and the benefits of undertaking a comparison, contrasting as it might turn out to be, with the common law position.

III. JUDGES SHOULD EXERCISE CAUTIOUS INNOVATION WHERE A CODE PROVISION IS LACKING IN SOME RESPECT

At first reading, this statement seems inconsistent with the primary aim of codification which is to comprehensively and exhaustively pronounce the criminal law. Yet, no matter how thorough the author of a code might be, history has shown that there will be bound to be ambiguities in the wording of code provisions, entire gaps which need to be filled for justice to be done, and practical difficulties in applying the provisions.²⁹ These weaknesses in a code may be the

24 *Mancini v. DPP*, [1942] AC 1 [House of Lords].

25 *Akhtar v. State*, AIR 1964 All 262 [Allahabad High Court] [Hereinafter, "*Akhtar*"] and approved in *Krishnan Nair v. State*, (1965) Kerala LT 50 [Kerala High Court].

26 *Supra* note 25 at 266.

27 *Supra* note 25 at 266.

28 The English Law Commission, No 177, *A Criminal Code for England and Wales*, Vol. 2 (London: HMSO), cl 58 of its draft Criminal Code, (1989).

29 Thus, prompting the High Court of Australia to say in *Boughey v. The Queen*, (1986) 161 CLR 10, 21 [High Court of Australia] that "[h]istory would indicate that the codifier

result of oversight, poor drafting, or because societal values and expectations have altered with the passage of time. Whatever the reason, judges encountering them will be required to clarify or rectify the defective law. In doing so, there is a strong tendency for judges to look to the common law for instruction. While this may be entirely permissible, judges should be careful to ensure that their pronouncements are entirely in keeping with the rest of the code. To achieve this, they should first determine whether associated words and other provisions in the code shed light on the matter. Moving further afield, judges should examine judicial pronouncements on identical or else closely similar provisions contained in another code. Only when they have completed their examination of these code-based sources should judges consider what the common law has to say. Any similarities drawn from the common law will then serve to confirm the judge's finding on the matter whilst any differences could usefully serve as a catalyst for the judge to discover the conflicting principles underpinning the code and the common law.³⁰ Such an enquiry would be bound to greatly increase judicial understanding of the intended nature and operation of the particular code provision in question.

It would be helpful to discuss the cases illustrating this proposition under the following sub-headings: (i) where a code does not define a term; (ii) where an essential requirement is absent from a code provision; (iii) where a code provision is incomprehensible or impractical of application; and (iv) the benefits of including a residual code provision.

A. Where a Code does not Define a Term

The Australian case of *Falconer* is a good example of the proper resolution of such a problem.³¹ The accused had pleaded non-insane automatism to a charge of wilful murder under Section 278 of the *Criminal Code* of Western Australia.

will never achieve the clarity and completeness which would obviate any need for subsequent interpretation and commentary".

30 For a detailed discussion of the application of this proposition to selected areas of Canadian criminal law, see M.A. Stalker, *Self-Defence and Consent: The Use of Common Law Developments in Canadian Criminal Code Analysis*, 32 ALBERTA LAW REVIEW 484 (1994).

31 See *Falconer*. For another good Australian example, see the High Court decision in *Boughley v. The Queen*, (1986) 161 CLR 10 [High Court of Australia]. For a Canadian example, see *R v. Ruzic*, (2001) 153 CCC (3d) 1 [Supreme Court of Canada], interpreting the immediacy and presence requirements of the duress provision in the Canadian Criminal Code. For an Indian example, see the Supreme Court of India decision in *Manney Khan v. State*, AIR 1971 SC 1491 [Supreme Court of India] discussing the meaning of "good faith" appearing in the Indian Penal Code provisions on self-defence.

Consequently, it became necessary for the High Court to interpret Section 23 of the code which provides that “a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will”. The court noted that the word ‘will’ was not defined by the code and capable of several meanings.³² Ultimately, it held that the word “imports a consciousness in the actor of the nature of the act and a choice to do an act of that nature”.³³ It drew support for this definition from previous High Court pronouncements on the notion of ‘will’ in other Australian code jurisdictions.³⁴ Additionally, the court referred to certain common law pronouncements on the notion of will, and justified doing so by observing that Samuel Griffith, the framer of the Code, had not been conscious of any divergence between Section 23 and the common law. Even then, the court felt it necessary to say that: “-[o]f course, that is not conclusive of the meaning of any particular provision in the Codes, but it is an indication that the problem which arises now in a statutory context may be answered in a way which answers the corresponding problems under the common law.”³⁵

After conducting a detailed comparison between various pronouncements on the code provision and at common law, the court concluded that the requirement of a willed act substantially corresponded with the common law requirement that an offender’s act be done ‘voluntarily’.

The above stages of judicial deliberation in *Falconer* are succinctly described in the following comment by Kirby J in the subsequent High Court of Australia case of *R v. Barlow*:

At least in matters of basic principle, where there is an ambiguity and where alternative constructions of a code appear arguable, this Court has said that it will ordinarily favour the meaning which achieves consistency in the interpretation of like language in the codes of other Australian jurisdictions. It will also tend to favour the interpretation which achieves consistency as between such jurisdictions and the expression of general principle in the common law obtaining elsewhere.³⁶

32 *Falconer*, 39 per Mason CJ, Brennan and McHugh JJ.

33 *Supra* note 32.

34 *Vallance v. The Queen*, (1961) 108 CLR 56, 64 [High Court of Australia], *Timbu Kolian v. The Queen*, (1968) 119 CLR 47, 81 [High Court of Australia].

35 *Falconer*, 37 per Mason CJ., Brennan and McHugh JJ.

36 *R v. Barlow*, (1997) 93 A Crim. R 113, 137 [High Court of Australia]. This may be contrasted with a case where a doctrine or principle embodied in a code is clear, as illustrated by the earlier discussion of *Jervis* accompanying footnotes 16 and 17 above.

The reason Kirby J. gave for advocating this line of interpretative construction was the desirability of achieving, wherever possible, uniformity in basic principles of criminal law throughout Australia.³⁷

Another example of a sound judicial approach to interpreting undefined terms in a code is *Stingel v. The Queen*, a decision of the High Court of Australia hearing an appeal from Tasmania against a murder conviction.³⁸ The appellant had relied on the defence of provocation contained in Section 160 of the *Criminal Code* of Tasmania which states in part that the provocation must have been “*of such a nature as to be sufficient to deprive an ordinary person of self-control*”. Since the provision did not elaborate on the concept of the ordinary person, it was necessary for the High Court to search other sources of law for clarification. The court relied heavily on the judgment of Wilson J. in the Supreme Court of Canada case of *R v. Hill* which had a lengthy exposition on the ordinary person test under Section 232 of the *Criminal Code* of Canada.³⁹ The court in *Stingel* did so after noting that the Tasmanian and Canadian codes were the work of the same author, namely, James Fitzjames Stephen, and the wording of the provisions on provocation in both codes was almost identical. The court was well aware that “*in this particular field of criminal law, the common law, the Codes...and judicial decisions about them have tended to interact and to reflect a degree of unity of underlying notions*”.⁴⁰ Yet, the court thought it preferable to keep its focus firmly fixed upon the code provision. Only after it had relied on the code-based decision in *Hill* to draw up a detailed description of the ordinary person, did the court turn to certain common law authorities to further support its pronouncements.⁴¹

37 *Supra* note 36.

38 *Stingel v. The Queen*, (1990) 171 CLR 312 [High Court of Australia]. [Hereinafter, “*Stingel*”] See also the High Court of Australia case of *R v. Callahan*, (1952) 87 CLR 115 [High Court of Australia] which held that the same degree of negligence was required to establish manslaughter under §266 of the Western Australian code as was required at common law.

39 *R v. Hill*, (1986) 25 CCC (3d) 322 [Supreme Court of Canada]. [Hereinafter, “*Hill*”]

40 *Stingel*, 320. Cf. the point accompanying footnote 37 above concerning the desirability of producing uniform basic principles of the criminal law among the various Australian jurisdictions.

41 *Stingel*, 328-329, 331, citing such Australian common law authorities on provocation as *Moffa v. The Queen*, (1977) 138 CLR 601, *R v. Webb*, (1977) 16 SASR 309 and *Romano v. R*, (1984) 36 SASR 283. The Indian code provision on provocation does not expressly specify an ordinary person test, but this has not prevented the Indian courts from reading it into the provision: see the Supreme Court of India decision in *Nanavati v. State*, AIR 1962 SC 605, 630 [Supreme Court of India].

B. Where an essential requirement is absent from a code provision

The general provision on self-defence under Section 34(1) of the *Criminal Code* of Canada is a good example of this. The provision states that self-defence is available to “*everyone who is unlawfully assaulted without having provoked the assault*”. Although the wording of Section 34(1) seems to require an actual occasion of unlawful assault, this would be an unwarranted limitation on the scope of the defence, leading to unjust results. Three kinds of threat occasions are possible for the purpose of self-defence. These are: (i) an actual occasion, (ii) an honestly albeit unreasonably believed occasion and (iii) a reasonably believed one. The first exists as a matter of objectively demonstrable fact. The second, like the third, is the product of the accused’s mind and is accordingly not concerned with whether a threat occasion did actually exist or not. It especially presents itself in cases where the accused has mistakenly believed in the existence of a threat occasion or mistakenly assessed the seriousness of such an occasion. The difference between the second and third kinds of occasions is that the second involves an entirely subjective perception by the accused that he or she is being threatened while the third is limited by an objective test of reasonableness. Restricting the defence to actual assaults would cause it to be denied to a person who, in highly pressured circumstances, took defensive action against someone whom the person mistakenly believed to be attacking her or him. Fortunately, the Canadian courts have read a requirement of reasonable belief into Section 34(1). For instance, in *R v. Baxter*, the Ontario Court of Appeal ruled that the “*doctrine of mistake of fact is applicable to §34(1)*” so that “[a]n accused’s belief that he was in imminent danger from an attack may be reasonable, although he may be mistaken in his belief”.⁴² The court reached this ruling by linking Section 34(1) with Section 34(2) and noting that the latter provision specifies that the defendant must have used force “*under reasonable apprehension of death or grievous bodily harm from the violence*” of the assailant.⁴³ Only when the court had completed its examination of the relevant code provisions did it proceed to cite common law authorities which supported its ruling.⁴⁴ As an aside, the court in *Baxter* could also have referred to the provisions on self-defence in the *Criminal Code* of Tasmania which, as noted earlier, shares the same origins as the Canadian code.

42 *R v. Baxter*, (1975) 27 CCC (2d.) 96, 111 [Ontario Court of Appeal] [Hereinafter, “*Baxter*”] and followed in *R v. Nelson*, (1992) 13 CR (4th) 359, 365 [Ontario Court of Appeal]. See also *R v. Bolyantu*, (1975) 29 CCC (2d) 174, 175-176 [Ontario Court of Appeal].

43 §34(2) is concerned with cases where a person has caused death or grievous bodily harm in repelling an assault.

44 Notably, *Palmer v. The Queen*, [1971] 55 Cr App R 223 [Supreme Court of Canada].

Had it done so, the court would have found that the Tasmanian provisions likewise subscribe to a requirement of reasonable belief concerning the threat occasion.⁴⁵

An example from India is the absence of any specific defence provision covering cases of non-insane automatism such as occurred in the previously discussed Australian case of *Falconer*.⁴⁶ The simple explanation for this absence is that the defence is a recent one which was never in the contemplation of the 19th century English jurists concerned with criminal law.⁴⁷ Had the defence then been present under English common law, it is probable that Macaulay, the principal author of the Code, would have expressly provided for it. Be that as it may, the question remains as to the proper approach to be taken by Indian judges in a case such as *Falconer*. Since there do not appear to be any Indian decisions on the issue, I would suggest the following approach which seeks to obtain a solution within the structure of the Code. It is that Indian judges should regard a plea of non-insane automatism as relating to the *actus reus* of an offence rather than as affecting the *mens rea*.⁴⁸ Under this view, the voluntariness of the accused's conduct should be regarded as an essential constituent of the criminal act, which is part of the *actus reus*. This being the case, once an accused suggests that he or she may have acted automatically, the prosecution is left to discharge the ultimate burden. When non-insane automatism is treated in this manner, it raises the contention that the prosecution has not proved its case. It may then be argued that the Code was meant to be exhaustive only in respect of defences which negate the *mens rea* of an offence. Accordingly, submissions that the prosecution has not proved the *actus reus* of an offence (such as when non-insane automatism is pleaded) have not been ruled out by the Code. Only when possible solutions from the Code itself, such as the one suggested, have all been canvassed should Indian judges be permitted to turn their attention to the common law authorities on the matter. In doing so,

45 The original §§46 and 47 of the Tasmanian Code required accused persons to have acted "*under a reasonable apprehension*" that their assailant will cause death or grievous bodily harm to them. Recent amendments to these provisions have cast the accused's belief in purely subjective terms. See also §271 of the Queensland code and the recent Queensland Court of Appeal case of *R v. Pangilinan*, [2001] 1 Qd R 56 [Queensland Court of Appeal] discussing the nature of the belief specified in the provision.

46 See the main text accompanying footnote 31 et seq.

47 It seems to have been first pleaded in *R v. Harrison-Owen*, [1951] 2 All ER 726 [Court of Appeal].

48 This is the view taken by G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* §§8 & 10 (2nd, 1961).

they would find that the common law likewise recognises a plea of non-insane automatism which has the effect of negating the *actus reus* of the crime charged.⁴⁹

C. Where a code provision is incomprehensible or impractical of application

Some code provisions may be so poorly drafted as to become internally inconsistent, unduly complex or confusing. In such an event, it may be untenable to comply with the standard rules of statutory interpretation calling for strict compliance with the wording of the code and the examination of related provisions for elucidation. The provisions on self-defence contained in the *Criminal Code* of Canada provide a good example of such an unhappy situation. For the purposes of this discussion, it will not be necessary to go into the difficulties created by these provisions.⁵⁰ Suffice to say that for many years, Canadian judges had striven to interpret the four provisions on self-defence as covering separate spheres of application. Thus, Section 34(1) was read as covering cases where the accused did not provoke the assault and, in response to the threat, had not intended to cause death or grievous bodily harm; Section 34(2) dealt with cases where the accused had intended to cause death or grievous bodily harm; §35 applied where the accused was the initial aggressor; and Section 37 was concerned with cases where the accused had used force to prevent an unprovoked assault against herself or himself or anyone under the accused's protection. However, this approach frequently led to insurmountable difficulties of comprehensibility and judicial application. Eventually, it led Lamer CJC of the Supreme Court of Canada to make the following comment in *R v. McIntosh*:-

"Certainly, interpreting statutory provisions in context is a reasonable approach. However, a 'contextual approach' lends no support to the Crown's position. First, the contextual approach takes as its starting-point the intention of the legislature. However, given the confused nature of the Criminal Code provisions related to self-defence, I cannot imagine how one could determine what Parliament's intention was in enacting the provisions. Therefore, it seems to me that in this case one is prevented from embarking on a contextual analysis *ab initio*."⁵¹

49 For example, see *R v. Quick*, [1973] QB 910 [Court of Appeal]; *R v. Radford*, (1985) 42 SASR 266.

50 For academic evaluations of these difficulties, see G. Ferguson, *Self-Defence: Selecting the Applicable Provisions*, 5 CANADIAN CRIMINAL LAW REVIEW 179 (2000); S. Yeo, *Streamlining the Response Element of Self-Defence*, 14 CANADIAN CRIMINAL LAW REVIEW 231 (2010).

51 *R v. McIntosh*, (1995) 36 CR (4th) 171, 188 [Supreme Court of Canada], and speaking for a majority. [Hereinafter, "*McIntosh*"]

In *McIntosh*, the Crown had submitted that a court taking a contextual approach would read into Section 34(2) the words "*without having provoked the assault*" so as to bring it into line with Section 34(1). The Crown argued that this would avoid the "*absurdity*" of both Section 34(2) and Section 35 applying to initial aggressors. In rejecting this submission, Lamer CJC. said that the clear words of Section 34(2) did not preclude it from applying to persons who had been initial aggressors and so the provision should be given that effect. Given the gross inadequacies of the code provisions on self-defence, the stance taken by the learned Chief Justice is entirely supportable, although he was keenly aware that his ruling only slightly improved the law under the Code; hence his call for legislative clarification of the self-defence regime under the Code.⁵²

D. The benefits of including a residual code provision

The preceding discussion has shown that criminal codes can never be perfect in every way so as to provide a ready answer to each and every problem that comes before the courts. It might therefore be prudent for code framers to include a residual clause which retains the common law but in very limited circumstances. One such limitation is to deny judges the power to create new offences on the ground that such a power should be entirely within the domain of the legislature and also because it would otherwise be unfair to accused persons.⁵³ This leaves the matter of common law defences. In keeping with the spirit of codification, judges should be required to ensure that any common law defence they are minded to recognise should not in any way run counter to the provisions of the code. Stephen felt the need for just such a restrictive type of residual clause with the result that one is prescribed in the criminal codes of Canada and Tasmania. Section 8 of both codes provides that:-

"Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament."

It is due to this clause that the Canadian courts have maintained that the common law defences of duress, necessity, due diligence, intoxication, mistake of

⁵² *McIntosh*, 180.

⁵³ See *R v. Amato*, (1982) 69 CCC (2d) 31 at 59-60 per Estey J. quoting the 1879 English Royal Commission Report on this point. See footnote 3.

fact and entrapment exist alongside the Code.⁵⁴ Earlier on, I had considered the absence of any provision for the plea of non-insane automatism under the *Indian Penal Code*.⁵⁵ A residual clause like the one in the Canadian and Tasmanian codes would have greatly assisted the Indian judges to recognise such a common law defence. In fairness to Macaulay he was, like Stephen, well aware that his code could never be a perfect and exhaustive pronouncement of the criminal law. However, rather than having a residual clause which recognised common law defences, Macaulay proposed a different measure.⁵⁶ It was that whenever an appellate court reversed a lower court on a point of law not previously determined or whenever two judges of a higher court disagreed on the interpretation of a provision of the Code, the matter should be referred forthwith to Parliament, which should decide on the point and, if necessary, amend the Code. I shall have more to say about this attractive proposal later on.

IV. COMMON LAW JUDGES SHOULD TAKE A HOLISTIC APPROACH TO CRIMINAL LAW

In this and the next proposition, I consider what judges in common law jurisdictions can gain by studying a criminal code when seeking to resolve a legal problem. Judges at common law are apt to restrict their pronouncements to the particular facts of a case although, occasionally, they might declare a general principle on which a specific pronouncement is based. The doctrine of precedent and the resulting cautiously incremental approach towards legal development are the hallmarks of the common law. While these may be admirable features of the common law, they also create a tendency in judges to unduly restrict both the scope of their deliberations and the effect of their pronouncements. In contrast, the process of codification promotes a holistic development of the law, with the Code framer striving to ensure an internal consistency among all the provisions of the code. To accomplish this, code framers rely much more frequently on general principles to determine specific pronouncements than do the judges at common law. It follows that these judges could benefit greatly from a study of the way a

54 See the Supreme Court of Canada cases of *R v. Ruzic*, (2001) 153 CCC (3d) 1 [Supreme Court of Canada] and *R v. Latimer*, (2001) 150 CCC (3d) 129 [Supreme Court of Canada] for recent examples of the use of the residual defence clause to recognise common law defences. See generally, D. STUART, *CANADIAN CRIMINAL LAW: A TREATISE* (5th edn., 2007), Ch. 7.

55 See the main text accompanying footnote 46.

56 See A. GLEDHILL, *THE PENAL CODES OF NORTHERN NIGERIA AND SUDAN* 19 (1963).

code deals with a particular issue. Some examples will now be given to illustrate this proposition.

In the common law jurisdictions of Australia and England, the fault (or mental) elements for the crimes of murder and involuntary manslaughter have been developed in a poor fashion. These fault elements cannot be defined with maximum certainty nor can they be fairly applied to offenders unless judges invoke a schematic approach when defining these elements.⁵⁷ Such an approach is advanced by taking a holistic view of the criminal law rather than limiting one's inquiry to the narrow confines of the particular issue in question. The scheme to be applied requires judges to first decide on what other types of fault elements, besides the paradigm fault element of an intention to kill, are deserving of the murder label. Only when this decision is made should they proceed to determine what constitutes the appropriate fault elements for involuntary manslaughter. Justice and elementary logic dictate that the fault elements for manslaughter should fall one rung in degree of moral culpability below the fault elements prescribed for murder. This scheme has not generally been applied at common law by Australian and English judges. They have instead dealt with the fault elements for the two offences as quite distinct entities with the result that the definitions of fault elements for murder and manslaughter are often uncertain and the degree of moral culpability is pitched at too low a level to warrant conviction for these very serious offences. The same criticism cannot be leveled against the framers of the Indian Penal Code. By fully embracing the schematic approach, they have achieved maximum certainty in the definitions of the fault elements for the crimes of murder and culpable homicide not amounting to murder (the Code's equivalent of manslaughter) and demanded an appropriately high level of moral culpability for those offences. Australian and English judges would therefore have greatly benefited from an examination of the Indian code provisions (or those of other codes for that matter) when deciding on the fault elements required for murder and manslaughter at common law.

The judges of Australian common law jurisdictions have occasionally drawn upon Australian criminal codes for elucidation. Besides their desire, wherever possible, to devise unified laws for the code and common law jurisdictions of Australia, these judges have been attracted to the codes for their holistic rendition of the criminal law. One instance of this is the minority judgment of Wilson J in the High Court of Australia case of *R v. O'Connor*.⁵⁸ The issue there was whether

57 For a detailed discussion, see generally S. YEO, *FAULT IN HOMICIDE: TOWARDS A SCHEMATIC APPROACH TO THE FAULT ELEMENTS FOR MURDER AND INVOLUNTARY MANSLAUGHTER IN ENGLAND, AUSTRALIA AND INDIA* (1997).

58 *R v. O'Connor*, (1980) 146 CLR 64 [High Court of Australia]. [Hereinafter, "*O'Connor*"]

or not the Australian common law should depart from the English common law rule on self-induced intoxication as pronounced in *DPP v. Majewski*.⁵⁹ Among the reasons given by Wilson J for retaining the rule was the fact that the Queensland, Tasmanian and Western Australian codes subscribed to it, as did the *Indian Penal Code* and the American Law Institute Model Penal Code.⁶⁰ Another instance of the reliance placed on a code occurred in the High Court of Australia case of *Wilson v. The Queen* where the issue was whether or not there is a common law crime of battery manslaughter.⁶¹ In their joint majority judgment, Mason CJ., Toohey, Gaudron and McHugh JJ. arrived at their decision against recognising such an offence on the ground that none of the Australian criminal codes prescribed it.⁶² Likewise, when deciding to expunge the plea of excessive self-defence from the common law,⁶³ the High Court of Australia in *Zecevic v. DPP* gave as a reason the fact that the plea was unavailable in the Australian criminal codes.⁶⁴ Certainly, merely because the codes have taken a certain position should not automatically mean that it is sound law. However, a common law judge's deliberations over which course to take will be greatly enhanced by an examination of the code position. Should a judge have made a decision which turns out to be consistent with the code, the decision is that much stronger for it. Where the judge's decision runs counter to the code position, he or she will feel obliged to explain the reasons for taking a different path. Such an explanation will invariably add to the thinking on the matter. There is absolutely no reason why such a useful practice should be confined to Australian judges alone – surely, their counterparts in other common law jurisdictions would benefit from the same exercise.

V. COMMON LAW JUDGES SHOULD STRIVE FOR SIMPLICITY AND COMPREHENSIBILITY

To have the criminal law simply stated, easily understood and readily accessible to members of the public constitute primary objectives of the codifier. The *Indian Penal Code* appears to have so successfully achieved these objectives

59 *DPP v. Majewski*, [1977] AC 443 [House of Lords].

60 *O'Connor*, 134, 139.

61 *Wilson v. The Queen*, (1992) 174 CLR 313 [High Court of Australia]. [Hereinafter, "*Wilson*"]

62 *Wilson*, 328.

63 It was previously recognised by the High Court of Australia in *Viro v. The Queen*, [1978] 141 CLR 88.

64 *Zecevic v. DPP*, (1987) 162 CLR 645, 663 [High Court of Australia], per Wilson, Dawson and Toohey JJ. [Hereinafter, "*Zecevic*"]

that, James Fitzjames Stephen, after a visit to India, was led to observe that “pocket editions of [the Code] are published, which may be carried about as easily as a pocket Bible; and I doubt whether, even in Scotland, you would find many people who know their Bibles as Indian civilians know their [Code].”⁶⁵ While the common law does not facilitate the bringing together of the criminal law in this manner, judges at common law should aspire towards simplicity and comprehensibility when expounding and declaring the law.

As an illustration of this proposition, reference may be made to the Australian common law plea of self-defence. For many years, the plea was governed by a set of six propositions formulated by Mason J in the High Court of Australia case of *Viro v. The Queen*.⁶⁶ In several subsequent cases, it was revealed that these propositions were hampering rather than assisting jurors in comprehending the law.⁶⁷ Doubts were also expressed whether the propositions were confined in their operation to homicide cases alone since *Viro* involved an appeal against a murder conviction. It took a decade for the High Court to rectify these problems. That transpired in *Zecevic* where Mason J’s set of propositions was reduced to the following:-

*“The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in this form, the question is one of general application and is not limited to cases of homicide.”*⁶⁸

It is noteworthy that the court felt the need, as part of its exercise at simplification, to pronounce the law in terms which made it generally applicable to all cases. The High Court in *Zecevic* could have made its task at simplification easier by drawing ideas from code provisions on self-defence. Had it done so, the court would have found the Australian codes unhelpful since the self-defence provisions contained in those codes are as obscure and complex as their counterparts in Canada.⁶⁹ In their stead, the court could have relied on the self-defence provisions

65 As cited in G O Trevelyan, *The Life and Letters of Lord Macaulay* Vol. 1 (London: Longmans, Green and Co., 1904), 367.

66 *Viro v. The Queen*, (1978) 141 CLR 88 at 146-147 [High Court of Australia]. [Hereinafter, “*Viro*”]

67 For example, see *Morgan v. Coleman*, (1981) 27 SASR 334; *R v. McManus*, (1985) 2 NSWLR 448.

68 *Ibid* at 661.

69 See E. COLVIN, S LINDEN & J McKECHNIE, *CRIMINAL LAW IN QUEENSLAND AND WESTERN AUSTRALIA* 263-266 (4thedn., 2005). For this reason, the Victorian Court of Criminal Appeal in *R v. Osip*, (2000) 116 A Crim R 578 was wise not to follow certain confusing statements by the Supreme Court of Canada in *R v. Tutton*, [1989] 1 SCR 1392 that honest

under the *Indian Penal Code*, the salient portions of which state that:-⁷⁰

Nothing is an offence which is done in the exercise of private defence.⁷¹

Every person has a right to defend his own body, and the body of any other person, against any offence affecting the human body.⁷²

The right of private defence in no case extends to the infliction of more harm than is necessary to inflict for the purpose of defence.⁷³

The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed; and continues as long as such apprehension of danger to the body continues.⁷⁴

These code provisions are clear and succinct in their coverage of matters which have troubled judges in common law jurisdictions worldwide. They include the type of threat occasion, the degree of force permitted to be used in defence, the nature of the accused's belief, and the permissibility of pre-emptive strikes in self-defence.

VI. CONCLUDING REMARKS

The formulation of the criminal law has never been an easy task, not least because it directly concerns principles of fundamental justice affecting the life, liberty and security of persons. Judges have a critical role in devising and developing criminal law rules which reflect these principles and this is so whether those rules are contained in a code or in case authorities. The preceding evaluation of selected decisions and practices of courts in code and common law jurisdictions has shown that judges from both criminal law systems have much to learn from one another. In respect of codified criminal law rules, while judges should follow closely

and reasonable mistake of fact was a defence to a charge of negligent manslaughter under the Canadian code.

70 The Indian Penal Code prescribes separate sections for defence of person and of property, and also for cases of fatal force and of non-fatal force applied in private defence. For a critique of the handling of these provisions by Indian courts, see S. Yeo, *Staying True to the Indian Penal Code: A Case of Judicial Laxity*, 2 NUJS LAW REVIEW (forthcoming) (2010).

71 §96, Indian Penal Code, 1860.

72 §97(1), Indian Penal Code, 1860.

73 §99(4), Indian Penal Code, 1860.

74 §102, Indian Penal Code, 1860.

the clear meaning of a statutory provision, their understanding of the provision could be greatly enhanced by a comparison with the equivalent common law rule. Where the meaning of a provision is uncertain, judges should seek answers from other comparable code sources before considering the common law position. With regard to judges of common law jurisdictions, they have much to gain by examining code provisions for their holistic approach and for their simplicity and comprehensibility.

The preceding discussion has also shown that the criminal law is never static but moves in response to changing community values, expectations and current notions of moral blameworthiness and justice. This is so for both code and common law jurisdictions. As may be expected, experience has shown that code jurisdictions have a much harder time than common law jurisdictions in accommodating these changes. A residual provision recognising common law defences has helped code jurisdictions such as Canada and Tasmania to tackle this task. However, the downside of this measure is that it creates a separate common law jurisprudence alongside a code, thereby diminishing the benefits of simplicity, exhaustiveness and comprehensibility which are the positive attributes of codification. Another measure commonly found in code jurisdictions is a procedure enabling Attorneys' General to refer points of law to the courts for clarification.⁷⁵ Yet another measure comprises adverse judicial rulings which have prompted legislative amendment of perceived defects in a code.⁷⁶ While these measures have occasionally been relied upon to clarify or alter the codified law, they are at best piecemeal in nature. This is because their success depends entirely on the defect coming before a court, followed by the initiative of Attorneys' General or judges to have the defect ratified.

A preferred measure would be the one proposed by Macaulay of legislatively mandating that ambiguous or not previously determined points of law that are unearthed by the courts should be referred forthwith to Parliament which should, if necessary, amend the code.⁷⁷ To assist Parliament, a distinguished body of criminal law experts could be established to provide advice on the best solutions to the problems identified by the courts. In line with the general thrust of this article, such a body should be made to examine the way other code jurisdictions, as well as common law jurisdictions, have resolved the problem. For this measure to work, it would be necessary to legislatively prescribe a certain time frame within which

75 For example, see §388AA, Northern Territory Criminal Code, 1983; §669A, Queensland Criminal Code (Qld), 1899; and §693, Canadian Criminal Code, 1985.

76 For example, see *R v. Van Den Bergh*, (1994) 179 CLR 137 [High Court of Australia]; *R v. Baromage*, [1991] 1 Qd R 1.

77 See footnote 56. To my knowledge, this measure has yet to be legislatively adopted.

Parliament must rectify the ambiguous or unanswered issue in the code. Without such a provision, there is every likelihood that political inertia will cause the whole exercise to fall by the wayside.⁷⁸

Reverting my attention to judges, on one view, the various propositions presented in this article are not novel since they are concerned with well worn principles of statutory interpretation, the reliance on precedent, and standard techniques of lawmaking by common law judges. Yet, the fact that there are and continue to be occasions when judges have ignored these propositions, shows that judges need to be constantly reminded of them. On another view, however, the propositions presented here go beyond the usual ones because they promote an inter-change of ideas between code and common law jurisdictions. Of the jurisdictions studied, the High Court of Australia seems the most willing to engage in this exercise of discovering the symbiotic relationship between a code and the common law. The likely explanation for this is the court's desire, wherever possible, to unify the laws of the various code and common law jurisdictions under its charge. However, even without such an impetus, the huge benefits to be gained from such a comparative exercise make it imperative for judges of other jurisdictions to follow suit. The following comment by Professors Zweigert and Kotz is directed at those judges who are reluctant to take this course:-

"When judges of a superior court are faced with a difficult problem of principle it is surely wrong for them to disregard solutions and arguments which have been proposed or adopted elsewhere just because they happen to emanate from foreign courts and writers [including the authors of codes] ... Taking comparative arguments into account certainly means more work for the judge, but nowadays, thanks to researches of comparatists, there are many areas in which foreign material is much more accessible; ..."⁷⁹

The small but steadily growing literature on comparative criminal law comprising judicial decisions, reports of law reform bodies, books and articles (like this one) and, of course, computer-generated data bases of foreign legal materials, amply validates the closing remark of this comment.

78 For an account of the Canadian experience, see G. Ferguson, *From Jeremy Bentham to Anne McLellan: Lessons on Criminal Law Codification*, in *TOWARDS A CLEAR AND JUST LAW: A CRIMINAL REPORTS FORUM* 192 (Stuart D, Delisle RJ & Manson A eds., 1999). See also P. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 *BUFFALO LAW REVIEW* 225, 226 (1997) for an account of the lack of political will to enact a national criminal code in the United States.

79 K. ZWIEGERT & H. KOTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 20 (3rd edn., 1998).