EXCESSIVE SELF DEFENCE UNDER THE AUSTRALIAN CRIMINAL CODES

by

M. SORNARAJAH *

In the Australian common law, it is now a well settled proposition that a person who exceeds his right of private defence and causes the death of his attacker should be allowed a mitigatory plea to a charge of murder.[1] The availability of this plea, which has been considered an innovation on the common law,[2] under the Australian criminal codes has been considered by Supreme Courts in every state which has a criminal code and their unanimous view is that the plea of excessive self-defence has no operation under the criminal codes.[3] A divergence in the law has resulted in Australia in that whereas the plea is available in the common law jurisdictions, it is not available in the code jurisdictions. The question of availability of the plea has not been conclusively settled in the code jurisdictions as the High Court has not yet had the opportunity of pronouncing on the issue. Besides, the state Supreme Courts may not regard themselves as being bound by the decisions in which the applicability of the plea was excluded.

The issue of the applicability of excessive self-defence under the criminal codes has relevance outside Australia, in other commonwealth jurisdictions which have codes modelled on the English Draft Criminal Code of 1876, the basis of the Australian Criminal Codes. In all these codes, the law on self-defence is stated in similar terms. There is uncertainty in these jurisdictions as to whether the plea is available. In Papua New Guinea, it has been held that the plea is not available under the Code.[4] In Canada, the plea was accepted in decisions earlier than *Howe*[5] but in a recent decision, the court, influenced by the doubts raised by the English courts as to the validity of the plea, has left open

* LL.B. (*Ceylon*), LL.M. (*Lond.* and *Yale*), Ph.D. (*Lond.*), Senior Lecturer in Law, University of Tasmania.

1 *Howe* (1958) 100 C.L.R. 448; *Viro* (1978) 18 A.L.R. 257.

2 In *Hassin,* The Times, Oct. 3, 1963, the plea was described as, 'novel at the present time'. N. Morris and C. Howard, *Studies in Criminal Law* (1964) at p. 113 described it as a 'major contribution to the law of homicide' by the Australian courts. Yet, the Indian Penal Code, which was effectively drafted in 1835, and is 'nothing but a codification of the common law' recognises the plea in exception 2 to s. 300; see further, M. Sornarajah, 'Excessive Self-Defence in Commonwealth Law' (1972) 21 *I.C.L.Q.* 758.

3 In Tasmania, *Masnec* [1962] Tas. S.R. 254; in Queensland, *Johnson* [1964] Qd. R. 1 in Western Australia, *Aleksovski* [1979] W.A.R. 1. Academic opinion has been in agreement with these decisions; *e.g.* R. S. O'Regan, 'Self-Defence in the Griffith Code' (1979) 3 *Cr. L.J.* 336 at p. 349.

4 *Yambiwato and Apibo* [1967-68] P. & N.G.L.R. 222; *Kampangio* [1969-70] P. & N.G.L.R. 218.

5 E.g. *Barilla* (1944) 4 D.L.R. 444; *Oulette* (1950) 98 C.C.C. 153.

the question whether the plea is available under the Canadian Criminal Code.[6] In New Zealand, though the Supreme Court has not yet considered the question, the leading commentary on the code states the opinion that the plea is not available under the Code.[7] In the non-code jurisdictions of the common law world (other than Australia) the matter cannot be regarded as settled, despite the series of decisions rejecting the plea. Though judicial opinion does not favour the recognition of the plea,[8] there is a strong body of academic opinion which has advocated its recognition.[8a]

In the light of these developments, a consideration of the question whether the plea can be accommodated within the structure of the Australian codes would be appropriate. This paper will examine the structure of the code provisions on self-defence in the light of the recent developments in the common law relating to self-defence. It will examine the need for recognizing an intermediate category of self-defence and the theoretical objections against recognising it. It will also deal with the decisions of the state Supreme Courts which have rejected the applicability of the plea under the codes and, finally, it will examine avenues by which the plea could be accommodated within the codes.

I. SELF-DEFENCE UNDER THE CODES

A defect in codification, which Pound among others identified,[9] is that it freezes moral and legal thinking of a given age for posterity. The provisions on self-defence bear testimony to the correctness of that view. But, faced with the need to keep the law in pace with prevailing ideas of justice and morality, judges have often construed code provisions in the light of the contemporary common law developments, despite injunctions against the employment of such a technique.[10] The understanding of the scope of self-defence under the criminal code cannot ignore the state of the present common law rules relating to the plea. For this reason, the law under the codes would be stated in the light of the modern common law.

The codes distinguish between self-defence in the face of an unprovoked assault[11] and self-defence in a situation where the attack had been provoked by the accused.[12] The basis of the distinction, which was

6 *Campbell* (1977) 38 C.C.C. (2d) 6 but see *Linney* (1977) 32 C.C.C. (2d) 294 at p. 299 and p. 302 where the Supreme Court acknowledged the existence of the plea.

7 F. Adams, *Criminal Law and Practice in New Zealand* (1969) p. 260. See also G. F. Orchard, 'Aspects of Intoxication and Self-Defence in Crime' [1978] *N.Z.L.J.* 478.

8 *McInness* [1961] 1 W.L.R. 1600; *Palmer* [1971] A.C. 814; *Edwards* [1973] A.C. 648.

8a But see J. C. Smith and B. Hogan, *Criminal Law* (4th ed. 1978) at p. 330; G. Williams, *A Text-book of Criminal Law* (1978) at pp. 461, 500.

9 R. Pound *Jurisprudence* (vol. 3) at p. 728.

10 H. Calvert, 'The Vitality of Case Law under a Criminal Code' (1962) 22 *M.L.R.* 621.

11 S. 47 of the Tasmanian Code, s. 271 of the Queensland Code, s. 34 of the Canadian Code, s. 48 of the New Zealand Code.

12 S. 46 of the Tas. Code; s. 272 of the Queensland Code; s. 35 of the Canadian Code; s. 49 of the New Zealand Code.

unknown to the common law, was the retreat rule. The common law required any person who is subjected to an assault to retreat until further retreat was made impossible by an impediment. The rule was formulated in violent times when the law sought to deter resort to violence actively.[13] Stephen, who was largely responsible for the English Draft Code, thought it unjust that a person should be required to retreat in the face of an aggressor and hence sought to confine the retreat rule to situations in which the violence had been initiated by the accused himself. In the latter cases, the right of self-defence arose only if the accused had disengaged from the violent situation but had been pressed by the deceased to use violence in his defence. Stephen justified the distinction on the ground that 'if this were not the law, it would follow that any ruffian who chose to assault a quiet person in the street might impose upon him the legal duty of running away, even if he were the stronger of the two'.[14]

In the modern common law, the retreat rule has lost its inflexible character.[15] However appropriate it may have been in times when violence involved close contact, it has become inappropriate in times when guns and revolvers have become the more often used weapons of offence.[16] The American judge, Holmes, regarded the rule as 'an instance of an early statement ossifying by repetition into an absolute principle when rationally it is one of the circumstances to be considered in deciding whether the defendant exceeds the reasonable limits'.[17]

The modern common law accords with the view stated by Holmes. In *McInness*,[18] Edmund-Davies L.J. disagreed with the direction of the trial judge suggesting that a failure to retreat would result in the denial of the plea of self-defence and observed: 'We prefer the view expressed by the High Court of Australia[19] that a failure to retreat is only an element in the consideration on which the reasonableness of an accused's conduct is to be judged' (see *Palmer* v. *Regina*[20]) or, as it is put in Smith and Hogan's *Criminal Law*, '... simply a factor to be taken into account in deciding whether it was necessary to use force and whether the force used was reasonable'.

Retreat is still required by the common law but is subsumed under the rule requiring reasonableness of the self-defence.[21] It is likely that this approach of the common law courts would be followed in the code

13 H. S. Beale, 'Retreat from Murderous Assault' (1902) 16 *Harv. L.R.* 567.

14 J. F. Stephen, *Digest on the Criminal Law* (1887 ed.) at p. 144.

15 *Julien* (1969) 2 All E.R. 856.

16 Stephen said of the rule: '... it is a curious relic of a time when police was lax and brawls frequent, and when every gentleman wore arms and was supposed to be familiar with them. It might, I think, be simplified in the present day with advantage' (*Digest*, at p. 144).

17 *Holmes-Laski Letters* (Vol. 1, p. 335).

18 [1971] 3 All E.R. 295 at p. 300.

19 In *Howe* (1958) 100 C.L.R. 448 at pp. 462, 464, 469.

20 [1971] 1 All E.R. 1077 at p. 1085.

21 See further *Field* [1972] Crim. L.R. 435; Smith and Hogan, *Criminal Law* (4th ed.) at p. 326. Retreat may be required in the case of an unprovoked assault too. Burt J. in *Sekovic* [1973] W.A.R. 85.

jurisdictions. In *Kerr*,[22] the New Zealand Supreme Court, seizing on the fact that the statement of the retreat rule is qualified by the phrase 'as far as practicable'[23] in the code provisions, inclined to the view that the modern common law approach of treating the retreat rule as being subsumed under the requirement of the reasonableness of the force used in self-defence could be adopted under the code. It is likely that a similar view would be followed by other courts in code jurisdictions.

If this view is accepted, much of the confusion surrounding the statement of the law on self-defence in the code jurisdictions would be removed,[23] as the basis of the distinction between the two sections — the retreat rule — would be subsumed under the principle of reasonableness which is applicable to both sections. In the case where the accused had used force in self-defence with an intention to kill or cause grievous bodily harm,[24] under the codes, as well as in the common law, there would be two guiding considerations: proportionality and reasonableness. Both factors seek to limit the violence that could be exercised in pursuance of the right of self-defence in order to protect the aggressor who does not entirely pass beyond the protection of the law.[25] These two principles which form the basis of the law of self-defence, and their relevance to excessive self-defence may now be considered.

Proportionality and Reasonableness

The rule of the common law that the violence used by the accused must be proportionate to the danger caused by the assault is expressed in both sections of the Code. The section on unprovoked assaults requires that the accused must believe, 'on reasonable grounds that he cannot otherwise preserve himself therefrom'. The word 'otherwise' has been interpreted as meaning otherwise than using the force which the accused in fact used.[25a] This would mean that if the accused could have used lesser force than in fact he used to repel the attack and there were no reasonable grounds for the belief that the force he used was necessary

22 [1976] 1 N.Z.L.R. 335 at pp. 342-344; also see Stanley J. in *Johnson* [1954] Qd. R. at p. 13.

23 In *Kerr* [1976] 1 N.Z.L.R. at p. 344, Richmond J. observed: 'We feel sure that many juries must find the varying tests and distinctions laid down by s. 48 (1), s. 48 (2) and s. 49 quite incomprehensible: and, further, that they would in that situation tend to deal with the case in the commonsense way described by Lord Morris' (in *Palmer* [1971] 1 All E.R. (1077).

24 This excludes the provision which deals with the use of force without an intention to kill or grievous bodily harm. If death results accidentally as a result of the use of such violence the homicide would not be culpable. *Matson* [1970] 1 C.C.C. (2d) 374. The other rules in the section on provoked assaults like the rule that a prior intention to kill formed before the provoked assault defeats the plea of self-defence are rules recognised by the common law.

25 A. J. Ashworth, 'Self-Defence and the Right to Life' [1975] *C.L.J.* 282.

25a Gibbs J. in *Muratovic* [1967] Qd. R. 15 approved in *Sekovic* [1973] W.A.R. 85; *Marwey* [1977] Qd. R. 247; (1978) 18 A.L.R. 77. It would also mean that, in appropriate circumstances, there would be a duty to retreat in the face of an unprovoked assault. The Queensland Code goes on to require that the force used is necessary. This is a surplusage.

to repel the attack, the plea of self-defence would fail. In other words, the section states the proportionality rule. The section on unprovoked assaults also contains the rule as it requires the force used to be 'necessary'.

The rule requiring proportionality is based on sound policy considerations. Disproportionate violence may indicate that the occasion of the assault by the deceased was used to cloak an act of revenge. The protection of the life of the aggressor also requires that limits be set on the use of violence and that such violence does not exceed the necessary limit. Proportionality, however, is not measured on objective considerations. Whatever the old common law on this may have been, it is clear from recent common law decisions that it is the accused's belief as to the necessary force that is crucial. This position recognises the fact that in the heat of the moment, the accused could not be expected to weigh the nature of the force necessary with any precision. As Holmes J. put it, 'detached reflection cannot be demanded in the presence of an uplifted knife'.[26] More recently, Edmund-Davies L.J. stated the position as follows: 'If there has been an attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary action.'[26a]

The common law is yet unclear on whether the subjective perception of the amount of force necessary is the criterion of proportionality. As much as there are dicta supporting the view that proportionality must be looked at 'in the light of the circumstances as they reasonably appeared to the accused',[27] one could also find authority for the objective formulation. An instance is the dictum of Lord Simon in *Walker*[28] where he regarded as 'an essential element of the plea of self-defence that the accused should use no more force than a reasonable man, in all circumstances, would have considered reasonably necessary to defend himself, his family or his home'.

Despite this uncertainty in the common law, both sections on self-defence in the codes contain subjective formulations emphasising the accused's belief as to the necessity of self-defence as the criterion.[29] Under the codes, 'the question was the applicant's belief in the necessity'.[30] Yet, the sections do involve an objective element which complicates the situation in that the accused's belief should be based 'on reasonable grounds'.[31] Both under the common law as stated in the dictum of

26 In *Brown* v. *U.S.* (1920) 256 U.S. 335; see for a similar statement, *Sikes* v. *Commonwealth* (1947) Ky. 429.

26a *McInness* [1971] 3 All E.R. at p. 302.

27 *McInness* [1971] 3 All E.R. at p. 301; similar formulations could be found in *Johnson* (1966) 10 W.I.R. 402; *Howe* (1958) 100 C.L.R. 448 (per Menzies J.); *Redman* [1978] V.R. 178.

28 [1974] 1 W.L.R. 1093.

29 *Marwey* [1977] Q.R. 247 at p. 251 (per Stable J.), p. 254 (per Andrews J.).

30 Jacobs J. in *Marwey* (1978) 18 A.L.R. at p. 88. The dictum on the section on unprovoked assaults is equally applicable to the section on provoked assaults.

31 Both sections contain the phrase.

Edmund-Davies L.J. in *McInness*,[32] and under the sections of the code, there is reference to an external standard involved in the assessment of the validity of the accused's belief. In the judgment of Barwick C.J. in *Marwey*,[33] the interchange between the trial judge and the counsel for the accused who was arguing for a purely subjective test as to the force required to repel the attack is reproduced. The approval of the view of the trial judge in *Marwey* is a recognition of the objective element in the code provisions on self-defence and the rejection of the view that they are based on a purely subjective theory.[34] A further objective element in the codes, which is also derived from the common law, is that the accused must have had a reasonable apprehension of death or grievous bodily harm.

Given the presence of the objective elements in the plea of self-defence under the codes, the question arises as to whether an accused who fails to satisfy the external standards would be guilty of murder, despite the fact that he had honestly believed the force he used was necessary for self-preservation. The question relates to the recognition of a plea of excessive self-defence which would result in a conviction for manslaughter on the failure of the plea of self-defence under such circumstances than for murder. It has already been noted that there is a division of opinion in the common law jurisdictions as to the existence of such a plea. The availability of the plea under the codes has been considered in several decisions but, it is the contention advanced in this paper, not sufficiently considered. The mere fact that the plea is not mentioned in the codes is no justification for excluding it. It should be recognised, if the principles on which it is recognised can be fitted into the code provisions. Prior to the examination of the rule as stated in the Australian common law decisions and an examination of the decisions in the code jurisdictions rejecting the rule, the justifications and objections to the rule will be examined.

II. JUSTIFICATIONS AND OBJECTIONS TO THE RULE

The strongest justification for the recognition of the rule was stated by Aickin J. in *Viro*[35] in the following terms:

> In my opinion there is a real distinction in the degree of culpability of an accused who has killed having formed the requisite intention without any mitigating circumstances, and an accused who, in response to a real or apprehended attack, strikes a blow in order to defend himself, but uses force beyond that required by the occasion and thereby kills the attacker. Such a killing is undoubtedly unlawful, but it appears to me to differ significantly from murder.

The moral distinction between other intentional killings and an homi-

32 See *Supra* n. 27.
33 (1978) 18 A.L.R. at pp. 80-81.
34 The subjective theory as the basis of self-defence has been advanced by Murphy J. in *Viro* [1978] 18 A.L.R. 313; also see G. Williams, *Supra* n. 8a.
35 (1978) 18 A.L.R. at p. 330.

cide by a person who causes death as a result of violence which was initially justifiable because it was in response to the aggression of the victim but became unlawful due to a wrongful assessment of the force necessary to repel the aggression is the basis of the plea. As Sir Owen Dixon, referring to the latter type of homicides, put it, '... it seems reasonable to regard such a homicide as reduced to manslaughter'.[36] A further point of distinction is the role the victim played in the killing by initiating the course of violence that led to the homicide.

The major objection to the plea is that it is unnecessary in the context of the development in the law on self-defence which emphasises the subjective appreciation of the force necessary to repel the attack. The objection was formulated by Lord Morris in the following terms:[37]

> If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be the most potent evidence that only reasonable defensive action had been taken.

The dictum gives rise to the impression that the accused has only to say that he believed the force to be necessary for his plea to succeed. That is not the case because an objective element has yet to be satisfied. The assumed uselessness of the defence is not borne out by the experience in the Australian common law jurisdictions.[38]

The dictum of Lord Morris may have greater relevance in the code jurisdictions as the code provisions emphasise the accused's subjective belief as to the necessary force. But, here again, as indicated earlier, the presence of an objective element cannot be ignored. As long as the law on self-defence contains an external standard to be satisfied, the claims for the recognition of an intermediate plea based on subjective factors would seem just. Another argument advanced to support the lack of need for the plea is that, in instances where self-defence fails, the plea of provocation would succeed.[39] This view is based on an incorrect premise. A man who acts under provocation has to show that his act resulted from a loss of self-control whereas a man who acts by way of self-defence performs a cool and deliberate act.[40]

The value of protecting the life of the aggressor after he had ceased to be a danger to the offender may require that the law on self-defence be not relaxed. However, that value is secured by the fact that the offender does not escape liability altogether but is found guilty of manslaughter, an offence which carries an indeterminate sentence. The argument that the plea may provide an easy defence in mitigation can also be dismissed. A plea based on self-defence would not be left to the

36 In *Howe* (1958) 100 C.L.R. 448 at p. 461.

37 *Palmer* [1971] 1 All E.R. at p. 1088; for a similar view, see *De Freitas* (1966) 2 W.I.R. 523.

38 J. A. Lee, 'Self-Defence Provocation and Duress' (1977) 51 *A.L.J.* 437.

39 *Palmer* [1971] 1 All E.R. 1070; *McInness* [1971] 1 W.L.R. 1600. Both state this view.

40 Also see *Dwyer* [1972] I.R. at p. 422, where Walsh J. of the Irish Supreme Court dismisses the argument.

jury unless the judge feels that there is an adequate basis in evidence for the plea.[41]

The theoretical objection, and one of great relevance to the code jurisdictions, to the plea is that, since a person using violence in self-defence acts intentionally, he should be guilty of murder upon the failure of his plea of self-defence as he would have committed an intentional killing. Since this objection is the one which was found insuperable by the courts of the code jurisdictions, it must be considered in detail and consideration of it may be postponed to the stage of the examination of the decisions and the possible ways of accommodating the plea under the codes. Leaving aside the theoretical objection, it could be asserted that sufficient justifications exist for the recognition of the plea of excessive self-defence. Having established this, the precise nature of the rule as stated by the Australian courts may be examined.

III. THE REFINEMENT OF THE RULE IN *HOWE*

In *Howe*, the Australian High Court stated the principle that if an accused had used more force than was reasonably necessary to defend himself and had thereby caused the death of his assailant, the failure of his plea of self-defence on the ground of lack of proportionality should not result in a conviction for murder but a conviction for the lesser offence of manslaughter. A necessary proviso was that the accused must have believed that the amount of force he was using was warranted by the situation. The facts of *Howe*, where the accused killed a person who made a homosexual attack on him, did not provide the ideal setting for propounding the rule. The precise extent of the right of self-defence against threatened sodomy or homosexual attack remains a matter of conjecture.[42] But the rule on excessive self-defence must not be allowed to suffer on that account.

Some of the judgments in *Howe* contain wide formulations of the scope of the plea of excessive self-defence and have been subjected to criticism. Thus, Dixon C.J. suggested that the plea could arise in circumstances where the right to use force arose in response to, 'an attack of a violent and felonious nature, or at least of an unlawful nature... so that the person under attack or threat of attack reasonably feared for his life or the safety of his person from injury, violation or indecent or insulting usage'.[43] This was a wide statement of the law in that the common law justified an initial resort to force only in circumstances where some serious violence was threatened.[44] The rule has been restricted in subsequent decisions to situations in which the right to use force arose as a result of aggression threatening at least serious bodily

41 *Grice* [1975] 1 N.Z.L.R. 760; *Kerr* [1976] 1 N.Z.L.R. 335.

42 In *McClusky* [1959] J.C. 39, a Scottish Court held that the plea of self-defence to a charge of murder is not available where the attack involved an attempt at sodomy and not a threat to life.

43 (1958) 100 C.L.R. at p. 460.

44 Menzies J. in *Howe* confined his views to 'a case of self-defence against serious violence, though not necessarily felonious violence'.

harm, or possibly, some types of sexual molestation.[45] It is the applicability of this restricted rule under the codes that has to be examined.

IV. THE REJECTION OF THE RULE IN THE CODE JURISDICTIONS

The applicability of the rule in *Howe* has been considered in all the Australian code jurisdictions. The general view, so far, has been that the plea has no scope under the code provisions. The reasoning adopted in the decisions in which such a conclusion was reached requires further examination.

R. v. *Johnson*:[46] In *Johnson,* counsel for the defendant argued that the rule in *Howe* was part of the law under the Queensland Code. The argument was rejected on two grounds: (i) that there is no section in the code incorporating the doctrine and the statutory provisions in the code should not, 'be dragged back into the all pervasive atmosphere of a dominant common law',[47] (ii) that the rule in *Howe* was based on the concept that, at common law, 'malice aforethought is an essential ingredient of murder and that malice cannot be imputed to a person who intentionally kills in defending himself but whose plea of self-defence fails only because he used excessive force in defending himself. The concept or requirement of malice aforethought is no part of the law of Queensland'.

The first reason for the rejection of the rule in *Howe* is that paramountcy must be attached to the code provisions. But problems may arise in situations where the code does not provide for a particular situation or where justice may require the adoption of a rule not provided for in the code. Draftsmen usually provide for such an eventuality by including in the code a *casus omisus* provision which permits the application of the common law in case the situation is not covered by the provisions of the code. The English Draft Code contained such a provision. The Tasmanian Code provides for such a situation.[48] But the codes in Queensland and Western Australia do not contain such provisions.

The principles of statutory interpretation require that the courts should not look beyond the words of the statute.[49] But, in the construction of the criminal codes, despite the lip service paid to this rule of statutory interpretation,[50] the common law has been extensively used for several reasons. First, no code can provide exhaustively for all the possible situations that could occur. In such situations, the courts should

45 Mason J. in *Viro* 18 A.L.R. at p. 299. The need for a plea of excessive self-defence after the making of such a restriction has been queried; *e.g.* Gibbs J. in *Viro* 18 A.L.R. at pp. 286-287.

46 [1964] Qd. R. 1.

47 Stanley J. [1964] Qd. R. at p. 10; a similar view is to be found in Adams, *op. cit.* at fn. 7.

48 S. 8 of the Tasmanian Code.

49 *Bank of England* v. *Pagliano Brothers* [1891] A.C. 107.

50 H. Calvert, 'The Vitality of Case Law under the Codes' (1959) 22 *M.L.R.* 621.

have the latitude to extend the principles of the code by a process of reasoning. Second, there would be a natural inclination to look at the law on which the code is based, particularly if the code provisions are not clear. Third, codes freeze the law at a given point of time. Where the law so frozen is not in keeping with the prevailing standards of morality and justice, the courts will change the law. The changes would be more readily made where such changes have already been made in other common law jurisdictions. A relevant example within the context of the law of homicide is the introduction of a mental element into manslaughter in the code jurisdictions based on English decisions.[51] Fourth, there is still a sacerdotal reverence shown to English judgments by judges in the former colonies. An example is the attitude of the courts in code jurisdictions to the reasonable relationship rule in the law of provocation. It was held to be a part of the law under the codes despite the absence of any reference to it in the codes and now that the English courts have found that treating the rule as an inflexible proposition is unsound, the courts in the code jurisdictions can be expected to follow suit.[52]

In the context of these factors, the mere fact that there is no express reference to the principle does not justify the exclusion of it in the code jurisdictions. Given the apathy of the legislature in this field, such an attitude on the part of the courts would mean the administration of a criminal law that is inconsistent with the prevailing notions of justice and morality. If convinced of the justice underlying the rule, courts should not exclude it, provided, of course, it can be fitted into the code provisions. As it will be shown, the rule in *Howe* can be fitted into the provisions of the code in several ways. From the point of view of accommodating *Howe* in the codes, it would be more helpful to treat the plea of excessive self-defence as one that existed in the common law at the time the code was drafted than as an innovation of the Australian High Court. The judges of the High Court, in fact, regarded the rule they were creating as founded on a sound common law basis.[53] If so, it should not be difficult to fit the rule into the codes based on the common law.

The second reasoning for the rejection is that the notion of malice aforethought, on which it was suggested the decision on *Howe* is based, has no place in the codes. The view that malice aforethought is a concept that is not contained in the codes is historically erroneous. Malice aforethought did have a meaning which somewhat corresponds with its ordinary meaning until the nineteenth century. Then, with the rise of positivism in England, two changes, consistent with the prevailing posi-

51 For Tasmania, see *McCallum* [1969] Tas. S.R. 73; for New Zealand, see *Fleeting* [1976] 1 N.Z.L.R. 343.

52 The rule which was stated in *Mancini* [1942] A.C. 1 was adopted in Tasmania, *Hall* (Unreported 85/1968). The new position in English law is stated in *Brown* (1972) 56 Cr. App. R. 564. For New Zealand, see *Noel* [1960] N.Z.L.R. 212.

53 See *e.g.* the judgment of Menzies J. in *Howe* (1958) 100 C.L.R. at p. 472.

tivist philosophy, were attempted. Firstly, in order to facilitate codification, a pet project of Benthamites, malice aforethought was dissected into its component mental states on the basis of the existing common law cases.[54] The first successful effort was that of Lord McCaulay, a principal disciple of Bentham. Stephen does not hide the fact that his inspiration for the similar effort of tabulating the mental states in the English *Draft Code* came from the Indian *Penal Code* (which, incidentally, recognises excessive self-defence as a mitigatory plea to murder). Secondly, consistent with the positivist effort to divorce law from morality, the dissection of malice aforethought was also used as a device to rid the law of homicide of the moral element inherent in malice aforethought.

How far these efforts succeeded remains unclear. But a by-product of the efforts was the confusion in the law of homicide as to the meaning of certain phrases. The phrase 'intention to kill' which the positivists made the centrepiece of the law of homicide came to have two meanings. It had the meaning, which positivist lawyers ascribed it, as involving a desire to cause death coupled with the foresight that death would eventuate from the conduct. The second meaning was that the phrase 'intention to kill' had become synonymous with the phrase 'malice aforethought'.[55] That this meaning survived into the twentieth century is evidenced by the dictum of Viscount Simon in *Holmes*[56] where he suggested that the plea of provocation would succeed only if it can negative an intention to kill. Clearly, in this dictum, intention to kill was used in its second meaning, as it was in the New South Wales Crimes Act which contains a similar proposition.[57] If the statement means that a successful plea of provocation negatives malice aforethought, it would be an accurate statement of the common law on provocation.

It would be consistent with history to argue that the section on culpable homicides which amount to murder contain the common law concept of malice aforethought. If such an argument is accepted, then the concept of malice aforethought advanced by Mason J. in *Viro*[58] that malice aforethought (which is synonymous with the second meaning of an 'intention to kill') may be negatived despite the presence of an inten-

54 For a more detailed analysis of this process, see M. Sornarajah, 'Reckless Murder in Commonwealth Law' (1975) 24 *I.C.L.Q.*; also see Jacobs J. in *La Fontaine* (1976) 11 A.L.R. 507 at p. 535.

55 *E.g.*, the 1849 Report of the Criminal Law Commissioners states: 'All the rules and distinctions properly incident to culpable homicide ... are derivable from *intent to kill* as the great principle of the crime' (1849) XIX Parl. Papers at p. XXX. This would be incorrect unless 'malice aforethought' is substituted in place of 'intention to kill'.

56 [1946] A.C. 588; explained in A.G. for *Ceylon* v. *Perera* [1953] A.C. 200; *Lee Chun Chuen* [1963] A.C. 220.

57 See *Parker* [1964] 111 C.L.R. 665.

58 The importance of Viscount Simon's statement and its reinterpretation in later cases forms the basis of the new concept of malice aforethought advanced by Mason J. in *Viro* (1978) 18 A.L.R. at p. 302.

tion to kill (used in the positivist sense) can be accommodated within the code provisions.[59]

Besides excessive self-defence, there are some situations in the common law where despite the presence of an intention to kill or other requisite mental state of murder, the proper verdict has been recognised to be manslaughter. The first is the situation where excessive force is used by a person exercising parental authority. The situation bears similarity to the position in excessive self-defence in that the initial resort to force is lawful and there is an intention to cause grievous bodily harm.[60] Yet, if a homicide results from excessive correction, it is not murder but manslaughter.[60a] The second situation is where a policeman or soldier has a right to use force in effecting an arrest but exceeds it and causes death. Here again, under the common law, it could be argued that the offence is manslaughter only.[61] A third situation is where a person kills an officer executing an unlawful warrant.[62]

None of these three situations are adequately provided for in the codes. If the argument is accepted that the concept of malice aforethought finds no place in the code and the code treats all culpable intentional homicides as murder is accepted, then, in these three situations, as in the situation of excessive self-defence, the courts in the code jurisdictions would arrive at a situation at variance with the position in the common law. For this reason, it should not be lightly concluded that the concept of malice aforethought is absent from the codes.

R. v. *Masnec*:[62] The Tasmanian Court of Appeal concluded in this decision that the plea of excessive self-defence as stated in *Howe* has no operation under the codes. Besides relying on the fact that the Tasmanian Code made no reference to the plea, Burbury C.J. also pointed out that s. 52 of the Code which dealt with situations where force which was initially legitimate was exceeded, precluded the operation of the rule. S. 52 of the Tasmanian Code reads as follows: 'A person authorised by law to use force is criminally responsible for any excess according to the nature and quality of the act which constitutes such excess.' The provision appears in the other codes as well.[63] Burbury C.J. construed

59 Compare the formulation of the plea of excessive self-defence in the Indian Code which reads: 'Culpable homicide is not murder, if the offender in the exercise in good faith of the private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.'

60 At least in the common law sense of serious harm. *D.P.P. v. Smith, Supra*; it could be argued that under the codes, this situation is not murder as the type of grievous bodily harm that should have been intended is qualified.

60a *Mackie* [1973] Crim. L.R. 54.

61 It could however be suggested that there would not be a conviction for murder in such circumstances under the code as the type of grievous bodily harm that has to be intentionally inflicted is more vigorously defined in the code provisions on murder.

62 [1962] Tas. S.R. 254.

63 To quote Chief Justice Burbury (at p. 263): 'For under the Code the nature of homicide proceeding from excessive force is that it is unlawful and therefore culpable. Its "quality" is determined by the mental element which accompanies it.'

the section as making the excess an unlawful act and if the excess which is unlawful was accompanied by any of the mental states specified in s. 157 which defines murder, a homicide resulting from the use of excessive force would be murder. There would be no scope for a verdict of manslaughter in situations where the excessive use of force was accompanied by an intention to kill or any of the mental states in s. 157.

The interpretation of s. 52 that was adopted in *Masnec* seems to have been dictated by the fact that the section appears in the Tasmanian Code immediately after the provisions on self-defence. The principle that s. 52 was intended to state however, had no relationship with self-defence but with the situation in which a person acts to prevent the commission of a crime either in a public or private capacity. It has reference to public defence rather than self-defence. In the Canadian Code, the section appears immediately after the section which deals with peace officers who use force in the course of their duties.[64] The principle then seeks to impose responsibility on such officers who exceed their powers.[65] The position in which the principle appears in the Queensland Code is, however, open to the inference that it is a principle that has general application.[66] If s. 52 is confined to the situation where persons with legal authority exceed the permissible limits of force, then the conclusion arrived at in *Masnec* could be regarded as erroneous. However, it must be admitted that there would be considerable difficulty in having such a view accepted.

In the light of dicta in *Masnec*, it is possible to argue that that decision does not exclude the possibility of a manslaughter verdict in the circumstances of excessive self-defence altogether. Some dicta of Burbury C.J. is open to the construction that where the dominant purpose of the accused throughout the course of the excessive conduct continued to be self-defence a jury may find that the intention necessary for murder was lacking. The relevant dicta reads as follows:

> The intention required must be inferred as a fact and questions of motive such as hatred, revenge or robbery are material, as also would be a claim that the assailant was acting under the stress of necessity of self-defence. A charge [under s. 157] would no doubt 'still leave open to the jury the question whether the person who killed was defending himself when he did so (per Menzies J. in *R.* v. *Howe*) and it may be... that a direction incorporating so much of *R.* v. *Howe* as refers to the primary or real intention or purpose of the unlawful act would be called for as a matter of caution, and if following such a direction the jury should be in doubt as to the existence of the requisite intention the... their verdict should... be manslaughter...'.[67]

64 S. 26.

65 For a different interpretation of s. 52 see R. W. Baker, 'The Codes and the Judicial Process' (1964) *U.W.A.L.R.* 449 but see the remarks of Professor Edwards on the article in the same issue of the journal.

66 Also see Art. 201 of Stephen's *Digest* which supports the view that the section has general application both to public and private defence.

67 [1962] Tas. S.R. at p. 264.

R. v. *Aleksovski*:[68] The Supreme Court of Western Australia stated the view that if the plea of self-defence failed on the ground that the accused had used excessive force he would be guilty of murder. In the law under the code, 'there is no half-way house'.[69] The court cited and followed the view stated in *Johnson*[70] by the Queensland Supreme Court and was unmoved by the affirmation of *Howe* in *Viro*.[71] Since the court did not resort to any reasoning other than the ones given by the Queensland court in *Johnson*, the criticisms made of *Johnson* are equally applicable to the decision in *Aleksovski*. The decision of the Supreme Court of Papua New Guinea in *Yambiwato*[72] can be similarly dealt with as that court too followed *Johnson*.

V. THE POSSIBLE MODES OF ACCOMMODATION OF *HOWE* UNDER THE CODES

Once it is accepted that the plea recognised in *Howe* forms part of the common law as is based on just and reasonable grounds, then, provided the principles on which the codes are based do not reject the plea, the case for accepting the plea must be recognised. A major step towards accepting the plea under the codes would be to recognise that the plea was not an innovation as suggested by some academics,[73] but did exist in the common law at the time the codes were drafted. So far the courts in the code jurisdictions have proceeded on the premise that the acceptance of excessive self-defence 'as a qualified defence to a charge of murder has been subsequent to the enactment of the code'.[74] Acceptance that the plea was recognised in the nineteenth century common law[75] would pave the way to the acceptance of the view that the plea of excessive self-defence is not inconsistent with the common law principles on which the codes are based. Once it is shown that the basic structure of the codes, based on the common law, is not inimical to the introduction of the plea into the law, there could be a readier acceptance of the ways in which the plea could be accommodated within the code. The possible ways are:

(i) *Dominant and Secondary Intentions*

A major obstacle to the acceptance of the plea of excessive self-defence has been that since a person who kills another in the belief that such an act is necessary for defending himself, kills intentionally, the failure of his plea of self-defence on the ground that he was acting unreasonably must necessarily result in a conviction for murder. The killing was intentional and the justificatory defence had failed, making

68 [1979] W.A.R. 1.
69 Per Burt C.J. [1979] W.A.R. 1 at p. 5.
70 [1964] Qd. R. 1.
71 (1978) 18 A.L.R. 257.
72 [1967-68] P.N.G.L.R. 222.
73 *E.g.* N. Morris and C. Howard, *Studies in Criminal Law* (1964) at p. 113.
74 Burbury C.J. in *Masnec* [1962] Tas. S.R. at p. 261.
75 E.g. *Odgers* (1843) 2 Moo. & Rob. 478; *Scully* (1829) 1 C. & P. 319; *Smith* (1873) 8 C. & P. 160; *Weston* (1879) 14 Cox. C.C. 346.

the homicide culpable. This logical process of reasoning is the basis on which the English courts have rejected the rule in *Howe*.[76] Barwick C.J. and Gibbs J. in *Viro*[77] also found the reasoning persuasive. To a large extent, the rejection of *Howe* in the cases in code jurisdictions (*e.g. Johnson*) is based on similar grounds.

Taylor J. in *Howe* overcame the problem inherent in this reasoning by drawing a distinction between a dominant or primary intention and a secondary intention. Taylor J. suggested that as long as the primary intention of the accused was self-defence, the verdict should be manslaughter in situations where the right of self-defence had been exceeded. The West Indian courts developed this idea further. In *Johnson*[78] the court observed: 'The question the jury should be asked to resolve is whether the prosecution has satisfied them that the prisoner's true or primary intention was to kill or inflict grievous bodily harm. And they should be directed that if at the end of the day they are satisfied that his true intention was to defend himself or to prevent forcible and atrocious crime, or, alternatively, they are not satisfied that he was actuated by malice and intended primarily to kill or inflict grievous bodily harm, they should not convict of murder, but, subject to the due proof of the other constituents, only of manslaughter.' The decision was not followed in *De Freitas*[79] but approved in *Hamilton*.[80] The Privy Council settled the conflict in *Palmer*[81] holding that the plea was not available in the common law.

The significance of the distinction between primary and secondary intention — a distinction which has been adopted in other branches of Australian law[82] — is that it could be introduced into the code provisions on murder. It could be argued that under the code provision, in the situation of a killing in excessive self-defence, the offender should not be found guilty of murder as his primary intention, proceeding from an honestly held belief that the force he was using was necessary, was to defend himself. Since the intention to kill was only secondary, it would not be regarded as a sufficient intention to satisfy the requirements of the code provision on murder.

(ii) *Requirement of a Malicious Intention*

A variation of the above suggestion is to read the code provisions on murder as requiring the element of malice. It has been argued that

76 *McInness* [1971] 1 W.L.R. 1600; *Palmer* [1971] A.C. 814; *Edwards* [1973] A.C. 648.

77 18 A.L.R. at p. 277.

78 (1966) 10 W.I.R. 402.

79 (1960) 2 W.I.R. 523.

80 (1967) 11 W.I.R. 309.

81 [1971] A.C. 814.

82 *E.g.* s. 45D (1) of the *Trade Practices Act*, 1974; see in it, *Nauru Local Government Council* v. *Australian Shipping Officers Association* [1978] A.T.P.R. 40-087; also see *Sorrell* v. *Smith* [1925] A.C. 700 Gibbs J. in *Viro* (1978) 18 A.L.R. at p. 287 regarded the distinction as unsound. It was explained by Mason J. as an effort to exclude the situation where violence was used under the pretext of necessity (18 A.L.R. at p. 299).

historically the code provisions on murder are based on the dissection of the common law concept of malice aforethought.[83] If this view is accepted, the malicious intention to kill would be necessary before a person is convicted of murder. Since the offender in the excessive self-defence situation (except where he acts under the pretence of necessity) kills with the intention of preserving himself, malice cannot attach to his killing. Hence, he would not be guilty of murder. Yet, since the killing would be unlawful because the permissible limits of force had been exceeded, the offender would be guilty of murder.

The attraction of this view is that it would accommodate other situations where the common law has favoured a manslaughter verdict despite the presence of a requisite intention for murder under the code. As pointed out earlier, one such situation is where excessive force is used by a person *in loco parentis* to administer correction. In the common law decisions dealing with homicides caused by excessive correction,[84] the nature of the force used would indicate an intention to cause grievous bodily harm of the type sufficient for conviction for murder under the common law and under the codes.[85] The simple reason for not convicting such offenders of murder is that it would be unjust to do so. One way of achieving the same result in the code jurisdictions, is to require that the intention on the part of the parent is malicious.[86]

(iii) *The Unlawful Act — Manslaughter Rule*

Under the common law, any homicide resulting from an unlawful act which was a misdemeanour was treated as a manslaughter. The rule was adopted in the Codes.[87] In the common law, the rule, which made no reference to any mental state, has undergone a change in that it is now necessary for the prosecution to establish that the unlawful act was one which was likely to cause death or bodily injury.[88] The new developments have been incorporated in the law of the code jurisdictions.[89]

It could be argued that a situation of excessive self-defence involves an act which was initially lawful but became unlawful at the point of the excess and that the resulting homicide should be treated as man-

83 See text at fn 55 — fn. 58.

84 *Hopley* (1860) 2 F. & F. 202 (a beating for two and a half hours with a thick stick); *Griffin* (1869) 11 Cox C.C. 402 (six to twelve strokes with a strap on a two and a half year old child); see also *Miller* [1951] V.L.R. 346; *Terry* [1955] V.L.R. 114.

85 Under the common law the grievous bodily harm necessary is loosely defined as any serious injury whereas the codes require an intention to cause grievous bodily harm 'which the offender knew to be likely to cause death'.

86 The rule as to force in domestic discipline is referred to in s. 280 of the Queensland Code.

87 S. 156 (2) (c) Tas. Code; s. 160 (2) (a) of N.Z. Code. The Qld. Code lacks such a provision.

88 *Church* (1965) 49 Cr. App. R. 206; *Newbury and Jones* [1977] A.C. 500. R. R. Buxton, 'By Any Unlawful Act' (1966) 82 *L.Q.R.* 174.

89 *McCallum* [1969] Tas. S.R. 73; *Fleeting* [1976] 1 N.Z.L.R. 343.

slaughter.[90] But the defect in such an argument is that the killing was the object of the unlawful act and hence the homicide should be treated as murder. A similar objection could be taken to the view that the excess must be treated as negligent and the resulting homicide be regarded as a manslaughter arising from criminal negligence.[91] Manslaughter by criminal negligence is, of course, a recognised category of culpable homicides under the codes.[92]

VI. CONCLUSION

The decision in the code jurisdictions of Australia, which exclude the application of the plea of excessive self-defence, have been arrived at without an adequate examination of the possible bases on which the plea could be fitted into the law under the codes. This paper has explored some of the possible ways. Besides the fact that the plea is based on principles of justice and reasonableness and that it formed a part of the criminal law at the time of the codification, the need for uniformity in the law in the common law jurisdictions and the code jurisdictions requires a further look at the question whether the plea could be accommodated under the codes. If the courts are unwilling to introduce the plea under the codes by interpretation, the codes must be amended to allow the plea.

POSTSCRIPT

Since the above article was written, The Supreme Court of Tasmania has rejected the existence of the plea of excessive self-defence twice. (*Patterson*, Unreported 60/1982; *McCullough*, Unreported 26/1982). The Court preferred to follow its earlier decision in *Masnec*. None of the points raised in the article was considered by the Court. The existence of three decisions against the acceptance of the plea under the Code would remain an obstacle in the way of the plea becoming available in Tasmania, and legislation remains the obvious way for the introduction of the plea.

Though the courts of Australian code jurisdictions have rejected the plea, it is comforting to note that Canadian courts, interpreting a code which is very similar to the Tasmanian Code, have given vigorous support to the plea. (*Fraser* (1981) 55 C.C.C. (2d) 503; *Crothers* (1979) 43 C.C.C. (2d) 27; *Linney* (1977) 32 C.C.C. (2d) 294).

It would be difficult to explain why the Canadian courts are willing to

90 Such a view was in fact taken by the East African Court of Appeal; *Muherwa* [1972] E.A. 466; *Yovan* [1970] E.A. 405; *Jarmo* [1970] H.C.D. (Tanzania) 138. These jurisdictions have codes which refer to manslaughter by unlawful act.

91 For the development of this view, see C. Howard, 'Two Problems in Excessive Defence' (1968) 84 *L.Q.R.* 343. In South African law, the plea of excessive self-defence is allowed on a theory of negligence. *Mokoena* 1976 (4) S.A.L.R. 162; *Ngoman* 1979 (3) S.A.L.R. 589; *Ntuli* 1975 (1) S.A.L.R. 429.

92 *O'Halloran* [1967] Qd. R. 1.

accept the plea but the courts of the Australian code jurisdictions are not, despite the fact that the plea, though not exactly an Australian innovation, was given a theoretical basis by the judgments of Australian common law courts. The only basis of explanation can be that, unlike their Canadian counterparts, the Australian judges are not prepared to adopt a more dynamic approach to the interpretation of the Code in this area. Such an approach, of course has been adopted in the Australian code jurisdictions (*e.g. Burbury C.J.* in *McCallum* [1969] Tas. S.R. 73), but the cases rejecting the plea of excessive self-defence indicate that the Australian courts would prefer to leave alterations in the law to the legislature. But the legislators, unfortunately, have been too slow to bring about reforms in this area of the law.