THE SUDAN LAW OF HOMICIDE WITH COMPARATIVE REFERENCE TO SCOTS AND ENGLISH LAWS.

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Thesis presented in fulfilment of the requirements for the Degree of Doctor of Philosophy, in the Department of Criminal Law and Criminology, Faculty of Law, University of Edinburgh.

May, 1970.

EX BIBL UNIV. EDINBURGEN

A C K N O W L E D G E M E N T S

I wish to express my thankfulness and gratitude to Professor Gerald Gordon, Head of the Department of Criminal Law and Criminology at the University of Edinburgh, for his invaluable assistance and encouragement throughout the past three years. Professor Gordon has alone patiently supervised the whole of this work and frequently made useful suggestions for alteration or addition. Needless to say, for the remaining errors and omissions I hold myself fully responsible.

I am also indebted to Dr. Zaki Mustafa, the previous Dean of the Faculty of Law, University of Khartoum for allowing me access to and providing me with copies of the unreported materials of the Sudan Law Project.

My gratitude is also due to the Sudan members of the Judiciary, the Bar, the Ministry of Justice and some academic lawyers for their co-operation in responding to the Questionnaire.

I am also thankful to Miss Shelagh N. Robertson for undertaking the task of deciphering my handwriting and typing the thesis in its present form.

Finally, I am indebted to the people of the Sudan for their generous financial support during the whole period of my research, without which support this thesis would not have been written.

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LIST OF ABBREVIATIONS

A.I.R.	All India Reporter
A.L.I.	American Law Institute
Alison	Principles and Practice of the Criminal Law of Scotland, 2 vols. (Edinburgh, 1832).
All.	Allahabad
Bom.	Bombay
Bom.L.R.	Bombay Law Reports
B.P.P.	British Parliamentary Papers
Cal.	Calcutta
C.C.C.	Criminal Courts Circular
C.C.P.	Code of Criminal Procedure
C.J.	Chief Justice
C.L.G.P.	Glanville Williams' Criminal Law: The General Part, 2 ed. (London, 1961)
Cr.L.J.	Criminal Law Journal
C.W.N.	Calcutta Weekly Notes
Gledhill	The Penal Codes of Northern Nigeria and the Sudan (London, 1963)
Gordon	The Criminal Law of Scotland (Edinburgh, 1967)
H.C.L.	Stephen's History of the Criminal Law, 3 vols. (London, 1883)
H.C.R.	High Court Reports
Hume	Commentaries on the Law of Scotland Respecting Crimes, 4 ed. (Edinburgh, 1884)

I.C.P.C.	Indian Criminal Procedure Code
I.L.R.	Indian Law Reports
I.P.C.	Indian Penal Code
J.A.L.	Journal of African Law
Lah.	Lahore
L.S.	Legal Secretary
Luck.	Lucknow
Macdonald	A Practical Treatise on the Criminal Law of Scotland, 5 ed. (Edinburgh, 1948)
Mad.	Madras
Maj.ct.	Major Court
M.L.J.	Madras Law Journal
M.W.N.	Madras Weekly Notes
Nag.	Nagpur
Pat.	Patna
P.J.	Province Judge
Ran.	Rangoon
R.C.C.P., 1866	Royal Commission on Capital Punishment, 1866
R.C.C.P., Cmd.8932	Royal Commission on Capital Punishment, 1953.
S.C.	Supreme Court
S.G.	Sudan Government
S.L.J.R.	Sudan Law Journal and Reports
S.L.R.	Sudan Law Reports
S.P.C.	Sudan Penal Code
Unrep.	Unreported
W.R.	Sutherland's Weekly Reporter.

INTRODUCTION

The object of this work is two-fold. It is, first, intended to ascertain what the law of homicide in the Sudan is and to examine critically the attitude of the Sudan Courts in interpreting the homicide provisions of the Sudan Penal Code. It is felt that the main value of this is that, apart from Professor Gledhill's invaluable commentary on the Code, The Penal Codes of Northern Nigeria and the Sudan,[1] no work has been done in this field and the literature on it is extremely scant. This is so despite the fact that it is now more than seventy years since the Code first came into existence. Further, the present writer had the good fortune of having had access to a considerable wealth of unreported criminal cases dating back to the enactment of the Code and throwing significant light on the courts' interpretation of the S.P.C.[2] The significance of these cases may be realised if it is borne in mind that law reporting in the Sudan was started as late as 1956. In addition to the above, and in order to extract more information and to ascertain the opinions of leading contemporary Sudanese lawyers on some controversial matters and some suggested amendments and criticisms of the Sudan law of homicide, a Questionnaire was prepared and distributed among members of the Judiciary, the Ministry of Justice, the Bar and the academic field. Their response on these matters will be referred to in the appropriate places.

In the second place, it is intended to compare and contrast the homicide provisions of the Code with those of other legal systems. The S.P.C. was enacted in 1899 and

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(1) (London, 1963).

(2) The collection of these cases was due to the efforts of the Sudan Law Project of the University of Khartoum Faculty of Law, to which the author remains greatly indebted.

since then has been subjected only once, in 1925, to a general revision. The Sudan Code was based on the Indian Penal Code which had, in turn, been largely taken from nineteenth century English law. Magistrates who applied the S.P.C. in its first fifty-five years were British lawyers and administrators, trained in the common law tradition, and the Sudanese lawyers who took over from them are also largely oriented in the same tradition. This has made it necessary to consider the extent to which the S.P.C. has been interpreted to conform with the socio-political and economic conditions of the country and the extent to which the influence of foreign systems has affected the application of the Code. Again, the comparison and contrast of the Sudan law with those of India and England becomes of great importance in the effort to determine objectively whether the provisions of the S.P.C. are satisfactory and whether there is room for modification and reform. To widen the scope of the contrast it has been thought necessary to include the Scottish law of homicide which has no claim to have influenced the law of the Sudan.

It must, however, be borne in mind that the S.P.C. is taken as the basis of the present work and that reference to the above and other foreign systems will be made whenever it is considered essential for a better understanding of the provisions of the Code or whenever the latter are criticised and the solutions of the other systems are considered to have more merit.

The plan followed in this thesis is as follows: Chapter I gives a brief account of the historical background to the enactment of the S.P.C. and examines some of the general features of the Code and its scheme. It also briefly gives an account of the administration of justice in the Sudan with the emphasis on criminal law. Chapter II deals with some questions of procedure and evidence which are thought to have a special bearing on the law of homicide. It first gives a description of

the machinery of the criminal courts, their powers and constitution, the mode of trial in cases of homicide and the powers of the Confirming Authority in that respect. It then goes on to discuss the law relating to the admissibility of confessions and dying declarations in homicide trials.

In Chapter III questions which are applicable to the law of homicide as a whole, i.e., the actus reus in homicide and the problem of causation are considered.

Chapter IV deals with the question of mens rea in homicide. It begins by distinguishing murder from culpable homicide and proceeds to contrast the definition of murder under the Code with those of other systems in order to determine whether the solutions under the Code are satisfactory.

The law of private defence as a complete justification to homicide is discussed in Chapter V.

Chapter VI deals with the question of voluntary culpable homicide, i.e., those cases which are prima facie murder but have been reduced to the lesser offence of culpable homicide not amounting to murder by virtue of the application of some mitigating circumstance, e.g., provocation.

In Chapter VII are discussed those categories of unlawful homicide falling short of culpable homicide. These are separately provided for under the S.P.C., whereas in England and Scotland they are treated as falling into the same category as other forms of involuntary culpable homicide.

The questions of mental abnormality and drunkenness in relation to homicide are dealt with in Chapter VIII.

Finally, Chapter IX gives a summary of the general differences between the Sudan law and that of the U.K. It also outlines the factors which influence the courts in interpreting the Code and gives a summary of the general conclusions and proposals for modifying the Sudan law of homicide.

The Appendix contains a critical review of the opinions of Sudanese lawyers who responded to the Questionnaire. A copy of the latter is also included in the Appendix.

CHAPTER I

HISTORICAL BACKGROUND AND GENERAL FEATURES OF THE SUDAN PENAL CODE

The Enactment of the Code

The S.P.C. was, with minor modifications, copied from the Indian Penal Code, which was, in turn, based on nineteenth century English law. The I.P.C. has been described as

> "simply the law of England, freed from technicalities and systematically arranged."[1]

and also as

> "the law of England, stripped of technicality and local peculiarities, shortened, simplified, made intelligible and precise."[2]

It is perhaps a paradox that the I.P.C., which has been adopted in several jurisdictions,[3] was based on English law while the latter has, until the present, failed to respond to the considerable efforts to codify it. Before dealing with the background to the S.P.C. it may be opportune to refer briefly to the history of attempts to codify English law and also to examine the background to the enactment of the I.P.C.

The Codification of English Law:

English criminal law consists of a collection of rules based on the old common

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(1) Stephen, J.F., History of the Criminal Law of England, (London, 1883), Vol. III, P. 283.

(2) Stokes, W., Anglo-Indian Codes, (1887), P.71.

(3) Ceylon, Burma, Malaya, Singapore, Aden, Uganda, Nyasaland and Northern Nigeria.

law and modified by the case law. Acts of Parliament have from time to time also been passed to amend these rules and bring them into harmony with modern needs and conditions. Attempts to codify English law may be traced back to Bentham, but particularly during the last century several Commissions were formed with the object of digesting and codifying the criminal law and several private persons, most prominent among whom is Sir James Fitzjames Stephen, made ceaseless efforts in this direction. The movement towards codification resulted in Stephen's Criminal Code Bill[1] and the Report of the Royal Commission on the Draft Code[2] which approved of it with some modifications.

It was at the same time realised that the law of murder in particular was obscure and needed some revision. Thus, in 1874 Stephen drafted a Bill for the codification of the law of homicide. It was referred to a Select Committee which rejected it on the ground that partial codification was unacceptable and that such a limited Bill could not be passed until the whole of the criminal law was consolidated.[3]

In the end, all the above efforts to codify English criminal law were defeated. However, the works of the above Commissions and Committees remain of valuable assistance in ascertaining the law as it then existed and the proposed amendments to it. More recently, the English law of homicide was extensively examined by the R.C.C.P.[4] which made some substantial recommendations. This was followed by recent Acts of Parliament, such as the Homicide Act 1957, the Murder (Abolition of Death Penalty) Acts of 1965 and 1969 and the Criminal Justice Act 1967. These Acts have greatly

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(1) Criminal Code (Indictable Offences) Bill, 1878.
(2) Report of the Royal Commission on The Draft Code, 1878-1879, C.2345.
(3) B.P.P., 1874, vol. 9, P.474.
(4) Cmd. 8932.

modified the English law of homicide and have adopted some of the recommendations of the earlier Commissions. The substance of such modifications will be referred to in appropriate parts of the present work.

The Enactment of the Indian Code:

Before the enactment of the Code India was governed by Islamic law of the Pathan and Moghul Empires which lasted for seven centuries. The Muslim conquerers brought with them their own Sharia law based on the Koran and the Sunna[1] and imposed it on the country, replacing the Hindu law which had been in application before.[2] It is not within the scope of the present work to discuss the content of Islamic law or the manner of its application. It is sufficient to mention that the authority of the Moghul Empire, and consequently the influence of Islamic law, began to decline by the middle of the eighteenth century. The presence of the British in India may be traced to the British East India Company, a group of private merchants who came to India in 1600. By the middle of the seventeenth century they began to acquire political and legal status in the Empire by being granted rights to rent villages.[3] By 1765 they were empowered by the Emperor to collect revenues from some Provinces in the same way as the Sovereign. In 1790 the Company took over the administration of criminal justice in these Provinces. From then onwards the penal law of the Sharia began to undergo some drastic changes and modifications. Changes to the Sharia law were made from time to time through 'Regulations' based on English criminal law. Drastic modifications were proposed during the period of Warren Hastings

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(1) The deeds and sayings of Prophet Mohammed.
(2) For a detailed discussion of this see Nigam, R.C., Law of Crimes in India (1965), P. 19 et. seq. See also Gledhill, Penal Codes of Northern Nigeria and the Sudan, (London, 1963) 15-16.
(3) Banerjee, T.K., Background to Indian Criminal Law, (1963) P.X.

who was appointed Governor of Bengal in 1772.[1] But these modifications were not implemented until Lord Cornwallis was appointed Governor-General of the whole of India in 1786. Lord Cornwallis soon pointed out that

> "the general state of the administration of criminal justice throughout the provinces is exceedingly and notoriously defective."[2]

This can be attributed to gross defects in the Sharia law and to the structure of the courts. He immediately embarked on a plan for the re-organisation of the whole legal system and by 1790 the administration of the criminal law came to be vested in the Company. Several Regulations were passed, culminating in the Cornwallis Code of 1793,[3] which abrogated many of the existing Sharia penal rules. The basis of the new modifications included

> "the law of England, instructions from the Government, general ideas of justice, analogies, in short almost anything which occurred to those by whom the system was administered ...."[4]

The resulting system was far from satisfactory. Despite the numerous alterations and modifications introduced by the Regulations the new system formed an unsatisfactory compromise between the Sharia and the English law. Each Province had its own legislature and each made its own enactments and amendments. The law was consequently rather unsettled and far from uniform. It was described as

> "very much a patchwork made up of pieces, engrafted at all times and seasons on a ground nearly covered and obliterated .... The general result is that all the worst and most serious crimes are satisfactorily provided for by special enactments; but that there is a very great want

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(1) See extracts from Hasting's letters to his Council in Colebrooke, Digest of the Laws of Bengal, vol. II, P. 114.
(2) Rankin, G.C., Background to Indian Law, (Cambridge, 1946) P.170.
(3) Regulation IX of 1793.
(4) Stephen's History, vol. III, Pp. 293-294.

> of definition, accuracy and uniformity as to the miscellaneous offences."[1]

Stephen[2] similarly, referred to it as:

> "a hopelessly confused, feeble, indeterminate system of which no one could make anything at all."

and Nigam[3] stated that the policy of the Regulations had made "confusion worse confounded".

It was thus realised that the above system was unsatisfactory and the need for a more uniform and coherent system of criminal law became manifest. The Charter Act, 1833, as a result, created a central legislative authority by abolishing the Provincial legislatures and enabling the Governor-General to legislate for the whole of India. A Commission was soon set up to examine the conflicting features of the legal system and make proposals for its amendment. Lord Macaulay was appointed first 'law' member of the Governor-General's Council. He assumed his office in June, 1834, with the outlook that "India's salvation lay in her wholesale anglicization."[4] He also became the Chairman of the first Indian Law Commission which consisted of himself and three other British members.[5]

The Commission took English law as the basis of its work for reform. It refused to take any notice of the existing system on the ground that it was

> "in fact Mohamedan Law, which has gradually been distorted to

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(1) Sir George Campbell, Modern India, (1852), P.456.
(2) Stephen's H.C.L., vol. III, P.294.
(3) Nigam, Law of Crimes in India, P.20.
(4) Patra, A.C., "Historical Introduction to the Indian Penal Code", in Essays on the Indian Penal Code, (1962), P.34.
(5) Macleod, J.M., Anderson, G.W., and Millett, F.

> such an extent as to deprive it of all title to the religious veneration of Mohamedans, yet which retains enough of its original peculiarities to perplex and encumber the administration of justice."[1]

After a review of the legal systems applicable in the Presidencies,[2] they concluded:[3]

> "Under these circumstances we have not thought it desirable to take as the groundwork of the Code any of the systems of law now in force in any part of India. We have, indeed, to the best of our ability, compared the Code with all those systems, and we have taken suggestions from all; but we have not adopted a single provision merely because it formed a part of any of those systems. We have also compared our work with the most celebrated systems of Western jurisprudence ... ... We have derived much valuable assistance from the French Code, and from decisions of the French Courts of Justice on questions touching the construction of that Code. We have derived assistance still more valuable from the Code of Louisiana prepared by the late Mr. Livingstone."

The Commissioners submitted the draft Code together with their Report to the Governor-General's Council on May 2, 1937. The draft Code together with the Report were sent by the Governor to a second Commission[4] which was asked to revise it and submit a report on it which would enable the Government to consider its merits. The second Commission revised the draft clause by clause and also compared it with the observations of the English Criminal Law Commissioners in their Seventh Report[5] which had then just been published. It then submitted its recommendations and observations to the Governor-General in two reports submitted in 1846 and 1847 respectively.[6]

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(1) Report of the Indian Law Commissioners (Calcutta) 1837, P.3.
(2) Madras, Bombay and Bengal.
(3) Report of the Indian Law Commissioners, 1837, P.6.
(4) The Indian Criminal Law Commission, 1846-47. The Commission consisted of C.H. Cameron and D. Elliott.
(5) B.P.P., 1843, vol. XIX.
(6) Both these Reports together with the Report of the first Commission were published in The Indian Penal Code as Originally framed in 1837, (Madras, 1888).

The revised edition of the draft Code was then sent to judges and jurists in the three Presidencies for their opinion and comment. By August 1851 it was sent to the Company's Court of Directors in London and the latter referred to Sir Barnes Peacock who reported favourably on it. The draft Code was finally read in the Legislative Council for the first time on December 28, 1856, and the Indian Code Bill was given a second reading on January 3, 1857. The I.P.C. was finally enacted when it received the assent of the Governor-General on October 6, 1860. Thus, finally, the I.P.C. was passed after a long evolutionary process of reform which lasted for almost ninety years. Despite the Commissioners' reference to the several systems which had been considered, the I.P.C. is regarded as a modified reporduction of the then existing English Criminal law.[1] The draftsmanship and precision of the I.P.C. has been greatly commended. Thus, Nigam referred to it as "a model piece of legislation."[2], and "a standing tribute to the genius and learning of Lord Macaulay"[3]. Similarly, Stephen[4] referred to it as "most remarkable" and as "the most lasting monument of its author". Sir Mordaunt Wells observed that it was:

> "the most humane, and at the same time the most just, criminal code in the world, and that the Queen's subjects in India have a far better criminal code than the people of England."[5]

The Code has now been in force for over a hundred years without any significant

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(1) See supra.
(2) Nigam, op.cit., P.23.
(3) Ibid.
(4) Stephen's H.C.L., vol. III, P.229.
(5) The Royal Commission on Capital Punishment, 1866, Minutes of Evidence, B.P.P., 1866, vol. xxi, Q.3645.

changes, an indication that it is accepted as a working success. The Code introduced to India a new system radically different from the pre-existing Islamic penal law which had been so altered and modified by the Regulations as to create a legal vacuum which called for the passing of the Code. For this reason its introduction was widely welcomed and accepted as a new system more suitable, more principled and more organised than the one it had replaced.[1]

The Sudan Penal Code:

The history of the administration of criminal justice in the Sudan prior to the introduction of the Code can only be clearly traced from the Turco-Egyptian occupation of the country in 1820. Before that the Sudan was under no single unified government or system of administration. Different kingdoms had been established in different parts of the country for centuries. However, from as far back as the sixteenth century these dynasties seem to have applied Islamic penal law according to the Maliki school of jurisprudence.[2] As the influence of Islam had not penetrated the southern parts of the country, the three southern provinces remained predominently pagan and continued to apply their tribal customs in penal matters until the enactment of the Code.

The Turco-Egyptian army conquered the Sudan in 1821 to further the economic interests of the Egyptian Sultan in providing slaves for cheap labour and the army, and in exploiting the country's minerals. Conscious of the fact that the law of Sharia had

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(1) Nigam, op. cit., P.24.

(2) For a description of these systems see El Mufti, H.S.A., Development of the Sudan Legal System, (1959), (Arabic). It should be noted that the system applicable in the Sudan during these periods differed in some detail from that which had applied in India before the I.P.C. because the latter followed the Hanafi school, unlike the case of the Sudan, where the Maliki school was preferred.

applied in the Sudan, the conquerors brought with them a number of Ulemma[1] and Qadis[2] who took over the administration of justice. The pre-existing systems of courts was completely superseded in favour of a new system under which a court of appeal, Majlis-al-Ahkam, was set up in Khartoum under the presidency of Qadi-Umum-el Sudan appointed by the Khedive in Egypt. The country was divided into nine provinces or Mudiriyas in each of which a Mudiriya Court was set up with unlimited original civil and criminal jurisdiction. It also heard appeals from District Courts set up in each province to deal with minor cases.[3] A significant modification of the law in application was the fact that the Islamic law introduced by the Egyptians folbwed the Hanafi school which was then predominent in Egypt. Thus, the predominently Maliki Sudanese had to be subjected to a system of law based on the Hanafi school.[4] The Turco-Egyptian rule lasted until 1885 when they were defeated by the Mahdist nationalist movement which took over the country. The Mahdi professed a revival of Islamic faith according to the Koran and Sunna and called for an end to the mal-administration, corruption and bribery which were widespread under the Turco-Egyptian rule. The Mahdi's period was one of continuous wars against the colonial government. He was succeeded by Khalifa Abdullahi who ruled the country from 1885 until its reconquest by the Anglo-Egyptian forces in 1898. The legal system in the Mahdiya was based on the Koran, the Sunna and Manshurat El Mahdi. The latter were directives to provincial rulers and judges drawing their attention to the theological and jurisprudential aspects of Islam. All reference to Islam's schools of jurisprudence

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(1) Religious teachers in Islam.
(2) Islamic judges.
(3) El Mufti, op. cit., P.76; Hill, R., Egypt in the Sudan, (London, 1959), P.42.
(4) Ibid, P.78.

was prohibited. The Mahdi, the divinely inspired, was the sole interpreter of Islam and the supreme judicial officer, although his authority to hear and determine cases was widely delegated to the Qadis and deputies throughout the country.[1] The Khalifa, who inherited the same authority on the Mahdi's death, started a scheme for the reorganisation of the judiciary and strengthening the position of the Qadis. A Main Court was established at Omdurman, presided over by Qadi-al-Islam (the Supreme Judge of Islamic law) and consisted of twenty judges. Decisions in serious cases had to be confirmed by the Khalifa himself.[2] Provincial courts were also set up and were subordinated to the local rulers.[3]

However, despite the Khalifa's efforts to reorganise his judicial system, the administration of justice during the Mahdiya was far from satisfactory. Apart from being the Supreme ruler and head of the Executive, the Khalifa was also the legislature and the Supreme Qadi. Independence of the judiciary was out of the question. The Khalifa had the power to order the execution, imprisonment or confiscation of property of anyone who questioned his authority, without even the formality of a trial. No Qadi dared to return a verdict which he suspected would be unacceptable to the Khalifa. One Qadi-al-Islam was exiled and two others were left to perish in prison merely because their judgements found no favour with the Khalifa or his top-ranking advisers.[4] Thus the Qadis were 'yes men' who tended to please the Ruler rather than reach unbiased decisions based on the merits of a case.

However, being an absolute autocrat, the Khalifa tended to be very firm in the suppres-

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(1) Holt, PM., The Mahdist State in the Sudan, (Oxford, 1958), P.115.
(2) For a more detailed description of the system, see El Fahal, O., "The Administration of Justice During the Mahdiya", (1964) S.L.J.R.167; see also El Mufti, op.cit., Ch. IV.
(3) Ibid., P.168.
(4) ElFahal, op.cit., Pp.168-170.

sion of crime and immorality. The punishment of mutilation for robbery and theft was strictly observed, the sentence of death in homicide was executed in public in the presence of the Khalifa and the Qadis.

Thus, unlike the position in India, in the Sudan Islamic law in its strictest sense continued to apply till the introduction of the Code without being subjected to any modifications or refinements.

The reconquest of the Sudan by the Anglo-Egyptian forces under Kitchener was completed by the fall of Omdurman in 1898. A Condominium status was immediately established under which rights over the governance and administration of the country were vested in Britain and Egypt jointly. Immediately the question arose as to what system of law should be applied. It was at once realised that the system which had been in application before the reconquest must be completely superseded as unsuitable to the needs of a modern society. It has already been shown that piecemeal modifications and alterations had resulted in a confused and chaotic legal system in India. It was perhaps that experience which prompted the new Government to take no notice at all of the pre-existing legal system. Further, being a conqueror, the Government, unlike the Company in India, had a free hand to introduce more radical and abrupt changes in the system.

In considering the type of law to be introduced, Lord Cromer, H.M.'s Consul-General in Egypt, stated that the natives' requirements were very simple and that:

> "A light system of taxation, some very simple forms for the administration of civil and criminal justice, and the appointment of a few carefully selected officials with a somewhat wide discretionary power to deal with local details, are all that for the time being are necessary ...."[1]

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(1) Lord Cromer's Memorandum of November 20, 1898, to the Secretary of State for Foreign Affairs relating to the Anglo-Egyptian Agreement on the Sudan.

The British Government insisted as a matter of deliberate policy in keeping Egypt separate from the Sudan. It was therefore decreed that the Governor-General, the supreme legislative authority, should be British.[1] Further, no Egyptian law, decree or ministerial arrete should be extended to the Sudan unless it was introduced by the Governor-General.[2]

The state of unrest immediately following the reconquest caused British martial law and procedure to be applied at first. It was, however, conceded that:

> "as time goes on, every endeavour shall be made to bring the administration of the law in the Soudan (sic.) into harmony with the generally recognised principles of civil jurisprudence."[3]

Kitchener was appointed first Governor-General and Edgar Bonham Carter and Mohammed Shakir were appointed as Legal Secretary and Grand Qadi to reorganise the civil and Mohammedan law courts respectively. The need for a penal code as well as codes of civil and criminal procedure became manifest. As already mentioned, it was agreed from the beginning that the Sharia law should no longer apply to civil and criminal matters. The reason for this was said to be that:

> "Although for many centuries it has been the only law applied to the people, time has, on account of the failure of those in charge to administer it properly, necessitated the introduction of other codes."[4]

The Sharia was, however, left to continue to apply between Muslim litigants in matters affecting personal status, e.g., marriage, divorce, inheritance, guardianship, gifts, trusts ... etc. The structure and machinery of the Sharia courts is

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(1) Article IV of the Anglo-Egyptian Agreement, 1899.
(2) Article V, ibid.
(3) Lord Cromer's Memorandum, supra.
(4) Report by H.M. Agent and Consul-General on Finances, Administration and Condition of Egypt and the Sudan, 1902.

regulated by the Mohammedan Law Courts Ordinance, 1902.

In relation to the criminal law a law officer of the Egyptian Government, W.E. Brunyate, was sent to the Sudan in the first year of the reconquest to assist Kitchener in legal drafting. Taking the Indian Codes as his model, and making the necessary adaptations and modifications, Brunyate drafted and introduced the Penal Code and the Code of Criminal Procedure.[1] The process did not take long and both Codes came into force in the following year. The reasons for this is that the draftsman of the Sudan Code

> "had ready to hand the achievements of his predecessors in the same field and he took some advantage of their work and the experience of those who had been applying it in the Indian Courts over a period of years."[2]

The S.P.C. was finally enacted on November 2, 1899. It was at first only applicable to the Northern Sudan to the exclusion of the South where tribal customary law continued to apply. By 1907, however, the Code was declared to apply to the whole country. Alongside the Code there are other lesislative enactments defining and punishing certain criminal offences not provided for in the Code, e.g., the Passports and Permits Ordinance, 1922, the Hashish and Opium Ordinance, 1924, the Trade Marks Ordinance, 1931, the Road Traffic Ordinance, 1962, ... etc.

The S.P.C. was revised and re-enacted in 1925, but no significant changes, apart from the law affecting insanity,[3] were brought about by the new Code.

Like the I.P.C., the S.P.C. was much praised by its authors. Thus, in the first year of the Code the Legal Secretary referred to it as having

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(1) Gorman, J.P., The Laws of the Sudan, (1940), preface to vol. I.
(2) Disney, A.W.M., (1959) Sudan Notes and Records, P.123.
(3) Ch. VIII, infra.; see also Ch. VII for the changes in the law of homicide.

> "provided the country with a system of criminal law at once simple, just and well suited to the habits of the people."[1]

Three years later, he said:[2]

> "The system of criminal justice which has been introduced in this country has ... on the whole proved itself well suited to the requirements of the people, and is recognised by them as reasonable."

Having been made in the very first few years of the of the Code such remarks may be considered somewhat premature. Nevertheless, history seems to have proved them right. Both the S.P.C. and the Code of Criminal Procedure have been generally accepted as satisfactory and do not seem to have presented the courts with any serious difficulty in the past seventy years of their application. The reception and acceptance of the Codes will be better appreciated if they are looked upon with a view to their leniency and liberalism in comparison with the confusion and injustice which had prevailed before their introduction. The strict application of the rules of Sharia in a country which was in a continuous state of war, economically bankrupt, socially and politically unstable led to the collapse of the legal system of the Mahdiya and paved the way for a new system of law more suited to the conditions and needs of the people.

In conclusion, one would agree with the observation that

> "during the past fifty-eight years (now seventy) a body of law has been built up which has worked well in giving justice to Muslims as well as non-Muslims. By enforcing the minimum basis of morality, the Penal Code has protected life, liberty and property .... The law applied by the Sudan

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(1) Report by H.M. Agent, 1899.
(2) Ibid, 1902, see also Gorman, op. cit., loc. cit.

Courts is the law of the Sudan. It is the law on which the people have come to rely as giving justice."[1]

The Scheme and General Characteristics of the Sudan Penal Code

Both the S.P.C. and the C.C.P. are included in volume 9 of the Laws of the Sudan.[2] The scheme of the S.P.C. is very simple. Like the I.P.C., it follows the traditional classification of the criminal law. Thus Chapters I to VIII deal with the general explanations and definitions, the elements of criminal responsibility, general defences and the principles of punishment. Chapters IX to XXI define offences against the state, disturbances of the peace, offences against the administration of justice and offences against morality, public health and religion. In Chapter XXII, offences against the human body including homicide, hurt, assault ... etc., are dealt with. Chapter XXIII is concerned with offences against property and kindred offences. The last six Chapters deal respectively with offences relating to documents, criminal breach of contracts, offences relating to marriage and incest, defamation, criminal intimidation and drunkenness, and finally, offences relating to vagabonds.
Apart from the actual sections of the Code defining offences and specifying their punishments, the Code is frequently complemented by the use of Explanations and Illustrations appended to particular sections. The status of these additional provisions requires some comment.

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(1) Guttman, "The Reception of the Common Law in the Sudan", (1957) 6 Int. & Comp. L.Q. 415 at P.416.
(2) The codified parts of the Sudan law are included in eleven volumes known as The Laws of the Sudan.

A. Explanations:

Explanations following some of the sections are either intended to clarify the meaning of some phrases and clauses or to determine the extent of the section as a whole and the scope of its applicability. They do not contain any additions or qualifications to the wording of the section.

> "It is not the function or purpose of an explanation to extend the scope of the section itself or to restrict its operation."[1]

In the Indian case of United Motors (India) Ltd.[2], it was pointed out that an explanation is meant to apply to the whole ambit of the section and throw light on the construction of the words used by the legislature.

B. Illustrations:

Many of the sections of the Code are followed by hypothetical instances or cases attempting to illustrate the meaning of the section. The first Indian Law Commissioners under Lord Macaulay went to great length in trying to justify the use of illustrations as greatly facilitating the understanding of the law.[1] They said:[2]

> "In our definition we have repeatedly found ourselves under the necessity of sacrificing neatness and perspicuity to precision, and of using harsh expressions which would convey our whole meaning, and no more than our whole meaning. Such definitions standing by themselves might repel and perplex the reader, and would perhaps be fully comprehended only by a few students long after (sic.) application. Yet such definitions are found, and must be found, in every system of law which aims at accuracy."

They continued:[3]

> "The illustrations will lead the mind of the student through the same steps by which the minds of those who framed the law proceeded, and may sometimes show him that

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(1) The Indian Law Commission, 1837, Pp. 6-10.
(2) Ibid., P. 6.
(3) Ibid., P.7.

> a phrase which may have struck him as uncouth, or a distinction which he may have thought idle, was deliberately adopted for the purpose of including or excluding a large class of important cases ....
>
> "On the whole, we are inclined to think that the best course is that which we have adopted. We have, in framing our definitions, thought principally of making them precise, and have not shrunk from rugged or intricate phraseology when such phraseology appeared to us to be necessary to precision. If it appeared to us that our language was likely to perplex any reader, we added as many illustrations as we thought necessary for the purpose of explaining it. The definitions and enacting clauses contain the whole law. The illustrations make nothing law which would not be law without them. They only exhibit the law in full action, and shew what its effects will be on the events of common life."[1]

Thus, the Illustrations are only instances describing types of situation in which a particular section may or may not apply. Nor were they meant to be exhaustive, or exclusive of judicial discretion. They are mere clarifications which assist the court in the better understanding of a particular provision. This meaning was accepted by the Second Indian Law Commission which accepted the use of Illustrations as a means "to exemplify the intended action of the enactments contained in the Code."[2], provided the courts do not employ them to "supersede or vary" the rules and that they should be applied in the same way as an English court would apply a decided case upon the construction of a statute.[3]

Although the Illustrations are mere examples of the types of situation to which a

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(1) Emphasis supplied.
(2) The Indian Law Commission, 1846 - 47, paras. 50 - 51, Pp. 201 - 202.
(3) Ibid.

section may apply it would seem that the courts cannot disregard them in interpreting that particular section. This was stated in the Indian case of Ramlal v. King Emperor.[1] Hassan, J., said:[2]

> "... illustrations are part and parcel of the enactment, and it seems to me that when the court is called upon to interpret a piece of an enactment which comprises both the substantive provision and an illustration of the same, the court is not justified in rejecting the illustration as a guide to the interpretation of the substantive proviso."

The use of Illustrations has been criticised on the ground that they are 'fanciful' and that

> "If you do not bring the case within the illustration, it is made a handle of by counsel using it for the purpose of making out that the offence did not come within the provisions of the penal code."[3]

Such arguments do not appear to hold water if it is borne in mind that the Illustrations are not meant to be exhaustive or exclusive, but are mere instances or examples. They are not meant to illustrate the only type of situation in which the section applies. Thus, a case which is not on all fours with the illustration may still be covered by the provisions of the section. The draftsmen of the I.P.C. were aware of this and they expressly stated that no collection of illustrations

> "can be sufficiently extensive to settle every question which may be raised as to the construction of the Code."[4]

Criminal Court Circulars:

Apart from the provisions of the S.P.C. and the C.C.P., the Legal Secretary[5] and

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(1) I.L.R. 3 Luck. 244.
(2) Ibid., at P.249.
(3) Sir Mordaunt Wells before the R.C.C.P., 1866, B.P.P. vol. XXI, Minutes of Evidence, Q.3655-3656; see also the English Criminal Law Commissioners, B.P.P. 1839, vol. XIX, Fourth Report, P. XVI.
(4) The Indian Law Commission, 1837, P.8.
(5) The office of Legal Secretary ceased to exist on independence in 1956.

the Chief Justice have from time to time issued circulars drawing the attention of the criminal courts to some matters, procedural or substantive, which are either not adequately provided for in the Codes or which are provided for but which the courts have ignored or misinterpreted. These directives are of extreme significance in clarifying certain provisions of the Codes and in making the courts familiar with the interpretation which the Chief Justice and superior courts would prefer. Although the Circulars have, in practice, been consistently followed by the courts, the question of whether they are binding on the criminal courts is not conclusively settled. In one civil case,[1] however, it was stated:

> "The principles they (i.e., the Circulars) enunciate have, however, a way of becoming law sooner or later, as the courts are in the habit of following them in their decisions unless any good reason appears to the contrary."

Consequently, although the Circulars are not strictly binding, they are, in practice, followed by the courts as a matter of habit.

The Structure of the Sudan Legal System:

A brief survey of the nature and working of the legal system of the Sudan is necessary for the proper understanding of the functioning of the courts and the circumstances under which the S.P.C. is applied.

The administration of justice during the colonial days was an administrative function of Government vested in the Legal Department headed by the Legal Secretary. When the country became independent in January, 1956, the Transitional Constitution of that year established an independent Judiciary with the Chief Justice as head of

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(1) Derounian v. Receiver in Bankruptcy of S.S. Meli Koff, S.L.R. (Civil) 1900-1921, vol I, P.145.

its Civil (including the Criminal) Branch. The distribution of the courts closely follows the division of the country into nine administrative Provinces. The local head of the judiciary in each Province is a High Court or Province Judge. Within each Province there are criminal courts consisting of: Major Courts, Minor Courts, Courts of Magistrates of the First, Second and Third class, Benches of Magistrates and Native or Chiefs' Courts. Our main concern is with Major Courts because they are the ones where cases of homicide are tried. Their constitution, procedure and powers are discussed subsequently.[1]

Judges and Magistrates who preside over these courts are lawyers generally brought up in the common law tradition in the University of Khartoum. Lawyers trained in the civil Egyptian-French system have also, for a considerable time, been absorbed in different branches of the profession. It might at first sight be thought that the existence of two distinct traditions within one legal system may cause confusion. But this is not so serious in so far as the criminal law is concerned because the latter is comprehensively codified and leaves little scope for judicial discretion and individual notions of justice.[2] Nevertheless, in interpreting the provisions of the Code the courts have from time to time relied on English and Indian decisions and writings. This practice raises the question of the extent to which such foreign systems are regarded as authoritative and also the extent to which decisions of the Sudanese courts themselves are considered binding, i.e., the operation of the doctrine

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(1) Ch. II, infra. The powers of the Confirming Authority in such case is also there discussed.

(2) The problem is more acute in the civil law sphere because it remains largely uncodified and the courts are required, in the absence of specific provisions, to determine cases in accordance with "justice, equity and good conscience.", Section 9, Civil Justice Ordinance, 1929.

of stare decisis.

Taking the second question first, one must say a few words on the state of law reporting upon which the operation of the doctrine of binding precedent greatly depends. Law reporting in the colonial period was simply dismissed as an expensive and unrewarding venture. However, in 1926 a "Digest of the Decisions of the Court of Appeal" was published including cases decided in that Court in the period 1915-1926. A further Digest was introduced in 1954 covering cases decided in the above Court and the High Court during 1953-1954. Finally, in 1956, with the independence of the country and the creation of an independent Judiciary, the need for systematic annual law reports was realised. The Government's willingness to finance the project resulted in the establishment of the Council of the Sudan Law Journal and Reports. The first issue of the Journal reporting civil and criminal cases decided in superior Courts came out in 1956 and has since been published regularly every year.[1]

The publication of these Reports is of great significance in helping to create a uniform Sudanese criminal law. Courts would no longer have to interpret the S.P.C. in the light of foreign decisions. Lack of law reporting encourages decisions per in curiam and "pocket pistol law" because advocates and parties may have their own private collection of unreported cases. It has been rightly pointed out that:

> "Without such publication it would not be possible for lawyers and other members of society to participate in the development of a Sudan legal system."[2]

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(1) Meanwhile the Sudan Law Project of the Law Faculty at the University of Khartoum has started to bridge the gap by the publication of cases decided from 1900 to 1955. These have been collected from court archives all over the country and the present work greatly relies on them. Civil cases have already been published and work on the criminal cases is under way.

(2) Guttman, E., "A Survey of the Sudan Legal System", (1956) S.L.J.R., P.7.

The position of the doctrine of binding precedent in the law of the Sudan is far from clear. In recent years, lower courts have frequently cited and followed decisions of higher courts. What is not clear is whether such decisions are binding on the lower courts 'as a matter of law'. Nor is it certain whether the superior courts are bound by their own decisions.

At any rate, it is submitted that, particularly in the field of homicide and other serious offences[1], this creates no serious difficulties. The reason for this is that cases determined by Major Courts must be sent for confirmation by the Chief Justice.[2] This has, in practice, enabled the latter to apply consistent principles in so far as the provisions relating to homicide and such serious offences are concerned. Consequently, Magistrates sitting on Major Courts, not desirous of being overruled or criticised by the Confirming Authority, have, to a great extent, taken upon themselves the duty of conforming to those principles which the Confirming Authority has applied.

Finally, in relation to the authority or influence of foreign laws in the interpretation of the Code, one may best start with quoting the bold remark made by Owen, J., (who was himself British) in 1926 on the authority of English law in the Sudan. This was in the civil case of Heirs of Ibrahim Khalih v. Abdel Moneim.[3] Owen stated that the courts of the Sudan are "guided but not bound by English common law and statute law."

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(1) i.e., cases decided by Major Courts.
(2) Section 251, C.C.P., see Ch. II, infra.
(3) AC. CP. 6. 1926, Unrep., quoted in Guttman, op. cit., loc., cit.; see also Abu Rannat, C.J., in Bakheita Ibrahim v. Hamad Mahayoub,(1967), S.L.J.R. 25 at P.33.

This observation has turned out to be too optimistic, particularly in the civil law field where the courts have interpreted their power to decide cases according to

"justice, equity and good conscience."[1]

generally as a ground for following English law. It has recently been pointed out that English precedents represent about 90% of the cases cited as authoritative in the Sudan Courts.[2]

In the field of the criminal law this tendency is less marked than in the civil law. Nevertheless, as will be pointed from time to time in the course of this work, the courts have on several occasions referred to and applied English and Indian decisions in interpreting the provisions of the Code.

It is submitted that there is no objection, in principle, to a selective following of foreign cases and writings in interpreting the laws of the Sudan. But the wholesale introduction of the principles of a foreign system is both unfortunate and short-sighted. In the absence of a Sudanese provision or authority on a certain question the court may indeed look for guidance in as many foreign systems as possible, with a view to finding the solution best fitted to the local needs and circumstances of the Sudan.

But the tendency of the courts to confine themselves to one foreign system and blindly import its decisions and incorporate them into the Sudan law is unacceptable. As has been rightly observed, the result of this tendency would be such that

"not only will the bad and the unsuitable be allowed to

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(1) Section 9, Civil Justice Ordinance, 1929.

(2) (1959) S.L.J.R., Editorial, P.98. It must also be pointed out that in the 1956 issue of the Journal, fifty-seven foreign cases were cited, fifty-six of which were English and all were treated as authoritative, compared with only four Sudanese decisions cited, one of which was overruled. Similarly, the 1957 issue cited forty-one foreign cases, all English, thirty-nine of which were followed.

> come in with the good, but also the whole system may be brought into disrepute. A Sudanese judge in deciding a case should be applying or moulding Sudanese, not English, law."[1]

This is particularly so in the criminal law, the application of which cannot be separated from the sociological, political and economic conditions of the inhabitants of the country. This may clearly be illustrated by the concept of the 'reasonable man' in the law relating to provocation.[2] It would be futile for a Sudanese court trying a case of homicide involving provocation to apply the standard of the 'reasonable' Englishman in determining whether or not the accused's reaction fell short of that standard. The economic, social and cultural differences between the average Sudanese and the average Englishman are so extremely marked that the 'reasonable man' in the Sudan must be judged in the light of his local circumstances and environment. Again, the courts will also have to take local conditions and peculiarities into consideration in determining such cases as those involving witchcraft, ghost killings, tribal feuds ... etc.

The tendency to refer to Indian decisions in interpreting the provisions of the Code is not open to the same objections as the tendency to refer to English decisions. The reasons for this are that, first, the Sudan Code is an almost exact reproduction of the I.P.C. and, second, the economic and socio-political structures prevailing in India and the Sudan are very similar. Nevertheless, the courts have to do so with some circumspection, particularly in situations where the provisions of the S.P.C. have been varied from those of the I.P.C. such as, for example, the definition of murder[3] and the law relating to insanity.[4]

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(1) Twining, W.L., "Some Aspects of Reception", (1957) S.L.J.R.229 at P.237.
(2) Ch. VI infra.
(3) Ch. IV infra.
(4) Ch. VIII infra. For a discussion of the differences between the provisions of the I.P.C. and the S.P.C. see Gledhill, A., "The Indian Penal Code in the Sudan and Northern Nigeria", The Year Book of Legal Studies, (Madras) (1960) Pp.7 et seq.

CHAPTER II

SOME QUESTIONS OF PROCEDURE AND EVIDENCE RELATED TO HOMICIDE

The Pre-Trial Procedure

The Preliminary Investigation:

The Sudan Codes make no discrimination between 'crimes' and 'offences' or 'felonies' and 'misdemeanours'. Instead, all violations of the S.P.C. are knows as 'offences' regardless of their degree of magnitude. Some form of classification may, however, be found in Schedule I of the C.C.P. which clearly specifies whether each and every offence is one in which arrests can be made with or without a warrant, the maximum punishment prescribed for such offence under the S.P.C. and the lowest court competant to try it. Schedule II enumerates the offences which can be tried summarily by Magistrates Courts.

Police investigation starts whenever there is information as to the commission, or attempted commission, of an offence. Such information is reduced to writing in the Register of Information and the police proceed to the place of the incident to start the investigation.[1] In cases of homicide and suicide members of the public are under an express legal duty to give information to the police.[2] Failure to do so is punishable under the S.P.C.[3] Any action taken during the course of investig-

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(1) Sections 111 and 112(b), C.C.P.
(2) Section 109, C.C.P.
(3) Section 152, S.P.C.

ation, together with any statement by suspects or potential witnesses and any documentary exhibits (e.g., medical reports, sketches, letters, etc.) must be entered in a file known as the Case Diary.[1] This Diary forms the most important document of the investigation till the commencement of the magisterial inquiry or trial. But its significance does not, as a rule, extend beyond the preliminary investigation because it is not admissible in any subsequent judicial proceedings. This is the effect of section 116(1), C.C.P., which declares that

> "Save in so far as is expressly permitted in this Code such Case Diary shall not be admissible as evidence against any accused person in an inquiry or trial."

However, the same section proceeds to enumerate a number of situations where the Diary can be 'used' or 'referred to' by the Court. But this is merely to help the Court in conducting the inquiry or trial,[2] or in testing the credibility of witnesses.[3] These provisions are not intended as exceptions to the general provision of the section but rather as a means for facilitating an easy and smooth trial of the case. The admissibility of statements and confessions made by an accused person and recorded in the Diary will be considered later.[4]

In cases involving death, the police must make arrangements for sending the body to the nearest hospital to enable its examination by a Medical Officer who should report on the cause of death.[5] The accused must also be sent for examination as to his state of mind, signs of intoxication and physical injuries.[6]

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(1) Section 115, C.C.P.
(2) Section 116(1)(a), C.C.P.
(3) Section 116(1)(b), C.C.P.; paragraph (c) of the same subsection enables a policeman who made an entry in the Diary to refer to it to 'refresh his memory' provided he is called as a witness.
(4) Infra.
(5) Section 112, C.C.P.
(6) Section 119A, C.C.P.

After the conclusion of the investigation the Case Diary must be submitted to a Magistrate competent to take cognizance of the case.[1] The latter will then fix a date for the inquiry or trial as the case may be.[2]

The Magisterial Inquiry:

If it appears to the Magistrate that the case is one which should be tried by a Major or Minor Court[3] he must fix a date for a Magisterial inquiry to commit the accused for trial by such Court.[4] The procedure in Magisterial inquiries is provided in Chapter XVIII, C.C.P. It must be pointed out that all cases of homicide, except Negligent homicide[5], are triable by Major Courts and consequently a Magisterial inquiry is always essential.

The object of the inquiry is to find out whether there is a prima facie case against the accused. If there is such a case, the accused is committed for trial, otherwise he is discharged. The rule is that the accused should be committed whenever there are 'sufficient grounds' that he should stand trial.[6]

> "The words 'sufficient grounds' do not mean sufficient grounds for conviction, but for committing. The magistrates should consider whether conviction is possible and not whether it is probable, and in a case of conflicting and doubtful evidence, he ought to commit it for trial, however unevenly the evidence is balanced; but if the magistrate finds the evidence against the accused totally untrustworthy, and a conviction is impossible, then he is bound to discharge the accused."[7]

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(1) Section 122(1), C.C.P.
(2) Section 122(3), C.C.P.
(3) Under Schedule I to the C.C.P.
(4) Section 156, C.C.P.
(5) Triable by a First Class Magistrate sitting alone, Schedule I, C.C.P.
(6) Section 162(1), C.C.P.
(7) Abu Rannat, C.J., in S.G. v. Abdel Hamid Abu El Gasim, (1961) S.L.J.R. 129; see also S.G. v. Taha Mohammed Hassan, (1963) S.L.J.R. 60.

In practice, the accused is usually committed for trial and it is only in exceptional cases that the inquiry will result in discharge.[1]

A discharge following upon a Magisterial inquiry has no finality and does not count as an acquittal. The accused may subsequently be brought for a further inquiry or for trial on the same or a different charge if this is justified by further investigations.[2] Again, although no appeal lies against a discharge order, the prosecution can apply to the Chief Justice for revision and setting aside of the order.[3] In practice, however, neither of these devices is resorted to and the discharge is generally considered final.

The Trial

The procedure to be followed in cases of homicide is described in Chapter XIX, C.C.P., dealing with trials by Major and Minor Courts. According to section 9(1), C.C.P., a Major Court consists of a Judge of the High Court and two Magistrates or of three Magistrates, one of whom must at least be a Magistrate of the first class. In practice, a Major Court comprises a Magistrate of the first class as President of the Court and two third class Magistrates as members. The latter are normally drawn from 'lay' Magistrates appointed from time to time to sit on Native Courts and Benches of Magistrates. They are usually retired civil servants and officers or notables who have great influence in the locality in question. They lack any professional legal qualifications and training.

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(1) In the author's short experience as a Legal Assistant in the Sudan Judiciary, the bulk of the criminal work consisted of magisterial inquiries. The writer has no recollection of a single case where the accused was discharged.
(2) S.G. v. Zakino Rukuriko, AC.CP.323.1947, Unrep.
(3) Note to section 257, C.C.P.

Like the professionally qualified President, the lay Magistrates are full members of the Court. They do not sit merely as 'assessors' but have a right to vote both in respect of the finding and sentence. Nor are they, like the jury in the U.K. or U.S.A., confined to matters of fact, but are judges both of law and fact. Each member of the Court, including the President, has one vote and decisions on all issues are reached on a majority vote.[1]

The system of lay Magistrates sitting in trials of serious offences such as homicide has several advantages.[2] In the first place, it ensures representation in the Court of public opinion reflecting the general sentiments of the community. This is significant as a measure of seeing justice done and making the accused more familiar with the Court and less inhibited in pleading his case. Secondly, lay Magistrates are in practice a great help to the Court in ascertaining local circumstances, customs and traditions. This is so because they are normally drawn from the locality where the case is being tried. The significance of this can be appreciated more fully if it is borne in mind that the Sudan is a vast country, one million square miles in area, inhabited by fifteen million people divided by different geographical and climatic conditions and belonging to different ethnic, religious and linguistic groups. Lay Magistrates, therefore, become of invaluable assistance to the Court in assessing local conditions. This is particularly so when the Court is trying cases of homicide involving the reaction of the reasonable man in provocation, homicide as a local custom, tribal fights, etc. Thirdly, they are also of assistance

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(1) Sections 187, 188, C.C.P.
(2) Q.2, Part I, A, of the Questionnaire; a copy of the Questionnaire is fully set out in the Appendix.

to the Court in the evaluation of evidence and in assessing the credibility of witnesses,[1] and in determining the appropriate sentence to be passed.

On the other hand, however, the system is open to some serious objections.[2] The power given to lay Magistrates to pronounce on complex legal issues is questionable. Cases of homicide, in particular, involve intricate issues such as the question of causation, the definition of intention and knowledge and the rules relating to provocation and mental abnormality. Such questions continue to perplex professional and academic lawyers throughout the world and it would seem rather ambitious to expect lay members of the public to resolve and determine them to any point of satisfaction. Another disadvantage of the system stems from the fact that the lay magistrates are drawn from the locality in question. They are usually familiar with the crime and its perpetrator and this may introduce an element of bias. In rural areas, homicide generally results from feuds involving different families and tribes, A lay magistrate may thus be prejudiced for or against the accused according to whether the magistrate's personal or tribal interest is favourable to the accused or not. A final objection to the system is that in practice the lay magistrates tend very much to be subservient to the President of the Court and come under his influence to such an extent as may defeat the whole object of the system.[3] The President virtually controls the proceedings. He records the evidence, deals with all questions of admissibility and, when the Court adjourns to consider its findings, explains to the

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(1) S.G. v. Umer Ali, AC. CP. 278, 1941, Unrep.
(2) Q.2, Part I, A, of the Questionnaire.
(3) In S.G. v. Gadalla Mohammed, AC. CP. 159, 1938, Unrep., the Confirming Authority said "... the President should not force his opinion on junior members. But if he holds a view differing from theirs, it is his duty to see that they appreciate fully his reasons. This, when done ... ... not infrequently brings them to his view."

members the applicable provisions of law, analyses the evidence and shows them how it should be applied to the facts. They invariably accept his opinion on the interpretation of the law and on whether the accused should be found guilty or not.[1] This defeats the purpose of the system and renders the Court a one-man Court in effect. Nevertheless, the system appears to be generally acceptable as a necessary measure, at least for the present, until an adequate number of professional lawyers are recruited to replace the lay magistrates.[2] Few, however, would suggest that the system should continue regardless of whether there is an adequate number of legally qualified magistrates.[3] The suggestion that lay magistrates should continue to sit as mere 'assessors' without a right to vote is rejected on the grounds that it is undesirable to try such serious cases as homicide by a single magistrate.[4] Similarly, the introduction of the jury system as an alternative is unacceptable because it presupposes a minimal degree of education and public consciousness which is extremely lacking in the Sudan today.[5]

There are several reasons why the system works in practice. First, the high influence of the President ensures to a great extent that the lay magistrates conform to

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(1) This was almost unanimously conceded by members of the Judiciary who have had a long experience in trials by Major Courts, Q.4, Part I, A, of the Questionnaire.

(2) Of nineteen lawyers who responded to the Questionnaire, thirteen were of the opinion that the system was not acceptable and that it must be abolished immediately after an adequate number of qualified lawyers become available, two suggested that the system could be improved upon and the remaining four thought it should continue as it is. Q. 1 and 6, Part I, A, of the Questionnaire.

(3) Ibid.

(4) Ibid, Q.9.

(5) Ibid, Q.10.

his better judgement. The second and more significant reason relates to the power of the Confirming Authority in relation to Major Court decisions. Any judgement of a Major Court is subject to automatic reference for confirmation by the Chief Justice.[1] This measure is intended as a safeguard to ensure that decisions of the Major Court are subject to automatic review by a higher authority before they become effective. The Confirming Authority is thus given an opportunity to scrutinise and reconsider the judgement to ensure that no miscarriage of justice occurs as a result of having lay members who can outvote the President in the trial court. A dissenting opinion by the President normally carries significant weight with the Confirming Authority and may result in the modification or reversal of the finding and sentence. In one case the accused was convicted of murder, but the Court, the President dissenting, sentenced him to seven year's imprisonment instead of to death or life imprisonment as prescribed in section 251, S.P.C. The Chief Justice, in his note on Confirmation, criticised this as follows:

> "Native members are not to be allowed to act in contravention of the Code. If they are incapable of understanding section 251 they are not fit to be magistrates. I venture to hope that the Governor will bring this forcibly to their notice."[2]

A final reason why the system works satisfactorily in practice is that Province Judges, responsible for the convening of Major Courts, take particular care in excluding from the membership of the Court those Magistrates who are thought to be likely to have a biased opinion of the case due to personal, tribal or other prejudices. Such a measure may be significant in minimising the element of bias in the

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(1) Section 251, C.C.P.
(2) S.G. v. Um Bashair, AC. CR. 209, 1935, Unrep., per Owen, C.J.; see also the several cases of infanticide discussed in Ch. IV, infra.

trial, but it is by no means successful in its complete eradication.

In conclusion, it appears that the above system is acceptable at present as a 'necessary evil' and that, as time goes on and more legally qualified magistrates are recruited, it may completely disappear. Already, cases attracting considerable public attention are tried by courts consisting of three professionally qualified magistrates.[1]

Powers of the Trial Court:

As already mentioned, each Magistrate sitting on a Major Court has one vote and its decisions on all matters are reached by a majority vote. At the conclusion of the proceedings the record of the case, together with any dissenting opinion, is sent to the Chief Justice for Confirmation. The judgement of the trial Court must be confirmed before it becomes effective. Thus, the suggestion that the judgement is "effective subject to confirmation"[2] is not completely correct. The reason for this is that reference for confirmation is an automatic process and, unlike an appeal, does not depend on application by one of the parties. The judgement is, therefore, 'ineffective unless confirmed.'

A Major Court has power to pass any sentence authorised by law.[3] In connection with murder it has a discretion to pass either a sentence of death or one of imprisonment for life.[4] The position is clearly stated in C.C.C. No. 26[6] which provides:

> "(2) The discretion granted to the Court is a judicial discretion and consequently it must be exercised subject to such principles as have been laid down in decided cases on the point in this country.

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(1) S.G. v. Ahmed Ali, AC. CP. 386, 1964, Unrep.; S.G. v. Kamal El Jack, (1965) S.L.J.R. 65.
(2) Guttman "A Survey of the Sudan Legal System" (1956) S.L.J.R. 7 at P.21.
(3) Section 16, C.C.P.
(4) Section 251, S.P.C.
(5) Section 244, C.C.P.
(6) Dated 1.6.1953; This Circular cancels C.C.C. No. 26 of 15.6.1952.

> "(3) The normal sentence to be passed on persons convicted of murder is the death sentence and it is only where good and sufficient reasons exist that the alternative sentence should be passed. It is not possible to define all the circumstances in which it is proper to pass the alternative sentence, but, since the discretion is a judicial and not an absolute one, the individual conscience of members of the Court must not be taken into account in arriving at the proper sentence."

The Circular goes on to specify in its Appendix the types of cases where the alternative sentence of imprisonment for life may be passed. These include cases where the accused is under sixteen years, over seventy-five years, a mother who has killed her newly born child while under the influence of child birth,[1] a deaf mute[2] or a person who is convicted of abetment of murder in a fight in which he took a minor part. These categories are not intended to be exhaustive because it was expressly stipulated that:

> "The Appendix will be added to from time to time as cases warranting the imposition of the alternative sentence by the trial court are confirmed by the Confirming Authority ...."[3]

Although no such additions have been made, the Confirming Authority has come to recognise that a person may be sentenced to life imprisonment if he is suffering from a form of mental abnormality falling short of insanity.[4]

However, where the case is one where it is not appropriate to pass the sentence of life imprisonment the Court may pass the death sentence and make a recommendation to

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(1) See Ch. Iv, infra.
(2) Provided the murder was not accompanied by premeditation, robbery or brigandage, resistance to authority or circumstances of peculiar atrocity, including "Wife-Killings."
(3) Para.5.
(4) See Ch. VIII, infra.

mercy and state its reasons for so doing.[1]

The Post-Trial Stage

As stated above, any judgement of a Major Court must be submitted to the Chief Justice for confirmation.[2] Although this is not an appeal, a convicted person may submit a written 'petition of appeal' indicating why the judgement should not be confirmed.[3] But neither the accused nor the prosecution has the right to appear before the Chief Justice either personally or through an agent.[4] However, the Chief Justice may remit the case for consideration by the Court of Criminal Appeal in which case both parties will be entitled to appear and be heard.[5] The Court of Criminal Appeal has all the powers of the Chief Justice in addition to the power to increase the sentence.[6] The powers of the Confirming Authority are extremely wide in relation both to finding and sentence. It may confirm a finding of guilty and the sentence thereof or confirm the finding and alter the sentence by remission of the punishment in whole or in part.[7] In so doing it may even commute a sentence of death to one of imprisonment for any period or to a mere fine without altering the conviction for murder.[8] As will be explained later,[9] this has enabled the Confirming Authority to reduce death sentences or sentences of imprisonment for life to a term of imprisonment for a few years in

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(1) Section 186, C.C.P.; para. 7 of C.C.C. No.26.
(2) A Supreme Court was set up in 1964 which took over all the powers of the Chief Justice relating to confirmation. However, the system proved unsatisfactory and the Supreme Court was abolished in 1969 and the old system reinstated. It should be pointed out that due to the extreme pressure on the Chief Justice, he frequently delegates his powers of confirmation to a Judge of the High Court.
(3) Section 252, C.C.P.
(4) Section 260, C.C.P.
(5) Section 261A, C.C.P.
(6) Ibid. The section provides that the Court of Criminal Appeal shall consist of the Chief Justice and two Magistrates of the first class of whom at least one should be a Judge of the High Court.
(7) Section 256(1)(a) and (b), C.C.P.
(8) Section 256(1)(b), C.C.P.
(9) Ch. IV, infra.

cases of child killing by mothers under the effect of child birth.

The Confirming Authority may also substitute a finding of not guilty for one of guilty in which case the accused is set free and the matter becomes res judicata even if fresh evidence is subsequently discovered.[1] It may also alter a finding of guilty of one offence to a finding of guilty of another offence, provided that the latter is not punishable with a greater punishment than the former.[2]

Further, it can 'refuse' to confirm a finding whether of guilty or not guilty.[3] In such a case, one of two courses may be followed: first, the case may be sent back, but not more than once, for revision of the finding by the trial court.[4] A finding of not guilty may be sent back for revision with a direction to convict if the acquittal is considered to have been based on a wrong interpretation of the law,[5] or if it is not supported by the weight of evidence.[6] Again, the case may be sent back for revision with a direction to convict of an offence more serious than the one of which the accused was convicted, for example, murder instead of culpable homicide[7] or instead of attempted murder.[8]

When a case is sent back for revision the trial Court may reconsider its finding and asses the sentence accordingly.[9] It may also refuse to revise the finding by main-

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(1) Section 256(1)(f), C.C.P.; see S.G. v. El Sharif Hanouda, AC.CP. 225, 1929, Unrep.

(2) Section 256(1)(c), C.C.P.

(3) Section 256(1)(e), C.C.P.

(4) Section 256(1)(d), C.C.P.

(5) S.G. v. Ismail Ali Shatto, AC.CP. 64, 1943, Unrep.

(6) S.G. v. Mohammed Ali Hassani, AC.CP. 188, 1944, Unrep.

(7) S.G. v. Adam Ibrahim, AC.CP. 72, 1932, Unrep.

(8) S.G. v. Ibrahim Adam, AC.CP. 26, 1940, Unrep.

(9) Section 256(1)(d), C.C.P.; the paragraph further provides that in such a case the Court cannot hear additional evidence unless expressly authorised by the Confirming Authority.

tainingits original one. In the latter case the Confirming Authority must accept the finding even if it considers it "faulty and contradictory."[1]

The second course open to the Confirming Authority is to refuse confirmation without sending the case back for revision. In such a case the proceedings may be annulled and if the finding be one of guilty the accused will be released.[2] But the Confirming Authority may order the re-trial of the case by the same or another court or order the resumption of the original trial for the purpose of hearing fresh evidence and giving fresh judgement.[3] The difference between revision and re-trial is that in the former the record of the case is sent back to the trial court to reconsider the finding or sentence without hearing any evidence, whereas in a re-trial the court is required to retry the case by hearing all the evidence afresh. In one case, the Confirming Authority took the unusual step of ordering a re-trial after it had already confirmed the finding of guilty of murder and the sentence of death.[4] It is submitted that this decision is wrong and finds no support either in the Code or in the practice of the Confirming Authority. Once the finding is confirmed the matter is res judicata and the only course open is to commute the punishment or to grant the accused a pardon through the Prerogative of Mercy.[5]

In respect of sentence, the Confirming Authority has no general power to increase the sentence. If the punishment is deemed inadequate the case may be remitted to the Court of Criminal Appeal which alone has the power to increase the sentence.[6]

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(1) S.G. v. Ajuko Oluwa, AC.CP. 196, 1932, Unrep.
(2) Section 256(1)(e), C.C.P.
(3) Proviso to section 256(1)(e), C.C.P.; see S.G. v. Nasir Azrag, AC.CP. 183, 1941, Unrep.
(4) S.G. v. Abdel Ghafar Ahmed Hamid, AC.CP. 76, 1942, Unrep.; the reason for ordering the re-trial was that evidence tending to show that the accused might have been insane at the time of the act was discovered.
(5) Infra.
(6) Section 261A, C.C.P.

In cases of murder if the trial court passes a sentence of life imprisonment and the Confirming Authority is of opinion that the death sentence should be passed the case will be sent to the Court of Criminal Appeal which will impose the death penalty.[1]

The above powers of the Confirming Authority are extremely wide and, particularly in relation to cases of homicide, are open to serious objections. The objections are:

1. The power of the Confirming Authority to reduce punishment from death or life imprisonment to any sentence of imprisonment or to a fine without altering the finding of guilty of murder[2] is illogical. In the first place, it is not in accord with section 251, S.P.C., which fixes the penalty for murder at death or imprisonment for life. Secondly, it blurs the distinction between different forms of homicide and makes it extremely difficult to determine whether any consistent principles or doctrines have been applied in that branch of the law. As will be explained later, this power has been used to reduce the punishment in cases such as those which would, in the U.K., be treated as cases of Infanticide[3] or of Diminished Responsibility.[4] In so doing the Confirming Authority has only reduced the sentence and left the conviction of murder undisturbed. The result of this has been to make it almost impossible to state with any certainty what the law is in such situations as the above. It is submitted that this is unsatisfactory and that the punishment for murder must be certain. Any forms of homicide which are considered to be less blame-

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(1) C.C.C. No.26, para.(4). This may also be done by sending the case back for revision of sentence under section 256(1)(d), supra.
(2) In less serious forms of homicide this power may be useful in enablisg a proper re-assessment of the sentence in accordance with the different circumstances of each case.
(3) Ch. IV, infra.
(4) Ch. VIII, infra.

worthy, and consequently punishable with less rigour, should either be taken out of the category of murder by separate legislation or should be dealt with by the Executive in its Prerogative of Mercy rather than by a judicial tribunal applying consistent principles of law.

The above criticisms have been suggested to members of the legal profession in the Sudan to find out the extent to which they agree with them.[1] All but four of the respondents agreed with the above observations to a greater or lesser extent and conceded that there was a case for reform.[2] Those who disagreed were of the opinion that the Confirming Authority, being the highest judicial authority, must have the final say in determining the appropriate sentence according to the particular facts and circumstances of each case.[3] They added that the powers of the Confirming Authority in this respect involved a judicial, not an arbitrary, discretion, and that they should neither be abolished nor restricted.[4]

With respect, it is submitted that the latter respondents seem to miss the actual issue. It is conceded that the highest judicial organ must have the last word in determining the appropriate punishment according to the peculiarities of each case. What is in dispute is whether its powers to do so must conform to the specific provisions of the S.P.C. and the general requirement of certainty of the law. Section 251, S.P.C., already allows a degree of discretion by providing that the punishment for murder is either death or imprisonment for life. If the trial court sentences a murderer to death and the Confirming Authority substitutes a sentence of life imprisonment, there will be no objection because the latter sentence would still be in ac-

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(1) Q.I, Part I, B, of the Questionnaire.
(2) Q. 2-5, ibid.
(3) Ibid.
(4) Ibid.

cordance with section 251. But the position is not the same if a sentence of death is reduced to, say, two year's imprisonment, or a sentence of life imprisonment is reduced to a mere fine. A person convicted of murder must be sentenced to the punishment provided for that offence.

It may be conceded that cases of murder differ in their degree of atrocity or cricumstances of their commission to such an extent as to warrant the passing of a less severe sentence than that fixed by law in some cases. But, this, it is submitted, is a question which should be dealt with extra-judicially by the Executive whenever the unusual case calls for more lenient consideration. If, on the other hand, cases calling for the application of a lenient sentence become so regular that one can discern some form of systematic policy or doctrine coming near to a defacto amendment of the Code as, for example, in cases of child murder[1], which are regarded less blameworthy and consequently warranting a less severe punishment than murder, then such cases must be separately provided for and punished. This will help in developing a more consistentand certain system of law.

2. The Confirming Authority's power to order a re-trial or send the case back for revision of finding is repugnant, particularly where the finding is one of acquittal. A person who is competently tried and acquitted by a court having jurisdiction to try him should not be subjected to the ordeal of another trial. This is so in the interests of finality of justice and in the interest of fairness to the accused who should be spared the agony of double jeopardy.

Opinions amongst Sudanese lawyers on this issue are somewhat varied.[2] Of the nine-

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(1) Ch. IV, infra.

(2) Q.1, Part I, C, Questionnaire; on the question of new trials, eleven were of opinion that no change was necessary and that the Confirming Authority must have a general power to order a new trial whenever it thinks fit, four thought that this power should be used restrictively only where fresh evidence is discovered/...

teen respondents to the Questionnaire, fourteen supported the above power on the grounds that the acquittal might have been erroneous due to the trial Court's wrongful interpretation of the law or exclusion or misapplication of the relevant evidence. They argued that, in the absence of such powers, guilty accused may be allowed to escape without punishment. Three others dissented from this view and stated that the trial Court was the best forum for assessment of evidence and determination of the guilt or innocence of the accused and that if he is found not guilty that should be the end of the matter. The remaining two went further and suggested that the procedure of automatic confirmation of Major Court judgements should be abolished and that the decision of the Major Court should be final, provided that, in cases of conviction, the accused should have a right of appeal.

The present writer much prefers the opinion of the minority in rejecting the power to set aside an acquittal and order a re-trial of the case or a revision of its finding by the trial Court. It is also thought that there is much substance in the suggestion that the procedure of automatic reference of judgements of Major Courts for confirmation should be abolished. If the finding is one of acquittal it should be final and there should be no possibility of its reversal. If, on the other hand, the accused is convicted, he should have a right to appeal in which case the Confirming Authority may quash the conviction or, in exceptional cases, send the case back for re-trial or revision of finding.

3. The power of the Court of Criminal Appeal to increase sentence[1] is objectionable

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(contd.) after the trial or where the finding is clearly perverse, the remaining four were opposed to any power to order a new trial: Q.2, Part I, C, Questionnaire.

(1) Section 261, A, C.C.P.

particularly in murder cases where it can substitute a sentence of death for one of imprisonment for life.[1] Whether the Court of Criminal Appeal imposes the sentence of death itself, or whether the case is sent back for revision of sentence by the trial Court with a direction to pass the death penalty, the practice cannot be supported. The reason for this is that basic human values should not allow the imposition of the death penalty on a person who has been competently tried and on whom a sentence of life imprisonment has been passed in open court. It might be true that the discretion to pass the alternative sentence of life imprisonment should be exercised judicially. But if the trial Court errs in so doing and sentences the accused to life it would be immoral and inhuman to set aside that sentence and impose the death penalty.

The Prerogative of Mercy:

Under section 275, C.C.P., the Head of State may at any time grant a free or conditional pardon to any person convicted of an offence. In relation to the death penalty section 277, C.C.P., provides that the Head of State

> "may without the consent of the person sentenced commute a sentence of death into any other sentence allowed by law or a sentence of imprisonment into one of fine."

The usual practice is that whenever the Confirming Authority confirms a conviction of murder and a sentence of death, it sends the case to the Head of State with a re-

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(1) C.C.C. No.26, para (4); twelve of the respondents to the Questionnaire were of the opinion that the Court of Criminal Appeal should have such power, three thought that if the death penalty is to be imposed the case must be sent back to the trial Court for revision of sentence, the rest objected to the practice of imposing the death penalty by either procedure. Q. 4-5, Part, I, C, Questionnaire.

commendation as to whether the death penalty should be executed or not. Any recommendation to mercy which may have been made by the trial court must also be forwarded with the case.[1]

If the Head of State decides to commute the sentence he is required to state his reasons for so doing.[2] Otherwise his discretion is almost absolute because, at least in theory, he may order a reprieve when no recommendation to mercy is made or where the Confirming Authority expressly recommends execution.[3] He may also disregard a recommendation to mercy and order execution.[4] In practice, however, this does not seem to occur and the recommendation of the Confirming Authority is invariable complied with.[5] Finally, one limitation on the discretion of the Head of State is provided by para. (9) of C.C.C.No.26. It expressly states that he will seldom exercise his prerogative of mercy where the murder is accompanied by premeditation, robbery or brigandage, resistance to authority or circumstances of peculiar atrocity, including "Wife-Killings".[6]

Admissibility of Confessions in Homicide Trials

It has already been explained[7] that all information obtained in the preliminary inquiry by the police is entered in the Case Diary. It has also been stated that under section 116(1), C.C.P., the information in the Case Diary shall not be admis-

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(1) C.C.C.No.26, para.(6).
(2) Ibid, para.(8).
(3) Q.1(b) and (c), Part I, D, Questionnaire.
(4) Q.1(a), ibid.
(5) Q.1-2, ibid.
(6) The reason 'Wife-Killings' are included in this category is one of public policy with the purpose of eradicating this type of homicide which is of frequent occurrence.
(7) Supra.

sible as evidence against the accused in any inquiry or trial. However, the above subsection starts by providing "Save in so far as expressly permitted in this Code ..." which indicates that the rule in it is subject to some exceptions, i.e., situations where statements by the accused in the Case Diary may be used in judicial proceedings.[1]

The question of admissibility of incriminating statements and confessions made by accused persons to the police has been the subject of great controversy in several legal systems. On the one hand, it is argued that such statements and confessions should not be admissible in evidence because of the undesirability of requiring a person to incriminate himself by his own words. It is also argued that since the police are in a strong position of authority and power and since their investigations are conducted in private, statements obtained from accused persons should be viewed with some suspicion because of the possibility of abuse of their powers by the police. Thus the Indian Law Commissioners pointed out:[2]

> "A police officer on receiving intimation of the occurrence of a dacoity or other offence of serious character, failing to discover the perpetrator of the offence, often endeavours to secure himself against any charges of supiness or neglect by getting up a case against parties whose circumstances and character are likely to obtain credit for the accusation of the kind against them. This is not infrequently done by extorting or fabricating false confessions; and when this step is once taken, there is, of course, impunity for the real offenders, and a great encouragement to crime."

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(1) See infra.
(2) Quoted in the Report of the Commission of Inquiry into the Administration of Justice in Kenya, Uganda and Tanganyika, 1934, Cmd. 4623, P.32.

Similarly, Cave, J., observed in an English case[1]:

> "For my part, I always suspect these confessions which are supposed to be the offspring of penitence and remorse and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory but when it is not clear and satisfactory the prisoner is not infrequently alleged to have been seized with the desire, born of penitance and remorse to supplement it with a confession, a desire which vanishes as soon as he appears in a court of justice."

The same suspicions were also expressed by the Scots Courts[2] and the U.S. Supreme Court[3] on a number of occasions.

On the other hand, the contrary opinion is held that the admission of confessions taken by the police is the most effective method for the detection of crime and bringing offenders to justice. Advocates of such opinion argue that rules for exclusion of confessions must not be so strict as to render the task of the police a hazardous or impossible one. To them, the object of the law is the protection of the innocent, not the guilty, and it should consequently not lean too much in favour of the accused. Thus, the concept of 'fairness' to the accused is rejected because

> "The most fervent advocate of tenderness for the criminal must admit that all this adds enormously to the already heavy burden resting upon senior police officers investigating crime, and will probably lead to the escape of obviously guilty persons."[4]

Police should not be handicapped in their difficult task and their powers of question-

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(1) R. v. Thompson, (1893) 2Q.B.12 at P.18.
(2) See infra.
(3) Goldberg, J., in Haynes v. Washington, 373, U.S. 513 at P.524; Escobedo v. Illinois, 378 U.S. 977(1964); Miranda v. Arizona, 384 U.S. 694 (1965).
(4) Gibb, A.D., "Fair Play for the Criminal", 1954, Jur. Rev. 199.

ing should not be restrained nor should their hands be fettered under the guise of a "sporting theory of justice."[1]

The problem of choosing between one or the other of the above attitudes becomes clear in serious crimes, particularly homicide where the aggrieved party, the deceased, is not available to give evidence against the accused and where the crime is frequently committed with every precaution for secrecy, and independent reliable evidence is less available and unsatisfactory.

The dilemma is that if serious checks are placed on the police powers of investigation, a risk will be run of letting suspects, who might be guilty, go free and consequently the security of the community is threatened. If, on the other hand, the police are given a free hand in the investigation of crime, the result may be equally, or more, unsatisfactory. They might be tempted to resort to 'third degree' methods of extracting incriminating statements from suspects, i.e., by using violence, threats or promises.

The gist of the problem, therefore, lies in achieving a reasonable balance between the above two extremes, so that a system is devised under which the police are not hampered in their duty to bring criminals to justice and, at the same time, the suspect is protected from unfair methods of police interrogation. Different legal systems have followed different procedures to cope with the problem. It is now intended to examine these procedures separately and to find out which of them offers a satisfactory solution.

1. Scotland:

The interrogation of suspects in Scots law was historically a matter for the sheriff

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(1) Williams, C., "Questioning by the Police", (1960) Crim. L.R. 325 at P.340; see also Smith, J.C., "Questioning by the Police", ibid, P.347 at P.348.

at the 'judicial examination' and the function of the police was confined to bringing the suspect before the sheriff.[1] The purpose of the examination was to ensure that declarations and confessions were voluntarily made before a judicial officer before they could be subsequently accepted as evidence at the trial. However, by 1898, the accused was given the right to testify on his own behalf at the trial[2] and this resulted in a decline in the use of the judicial examination for making declarations. Finally, an Act in 1908 provided that an accused who intimated no desire to emit a declaration should not be required to do so.[3] Since that year there have been very few declarations made under the above procedure. This led the courts to lean more in favour of the suspect in order to protect him from unfair treatment and methods of police interrogation. Several cases clearly demonstrate the courts' hostility to police methods of interrogation and their insistence on protecting the accused. This tendency came to be considered as unsatisfactory as leaning too much in favour of the accused and as going "too far towards hampering the authorities charged with the investigation of crime"[4] and as "hampering unduly the vindication of justice."[5]

In more recent years, however, the tendency of the courts seems to be gradually changing and the emphasis at present would appear to be more on the protection of the public rather than on fairness to the accused. It is not conclusively settled what the actual rules in application are and as has recently been pointed out the law

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(1) For a fuller description of judicial examinations see Gordon, G.H., "Criminal Proceedings in Scotland", (1968) 19 N.I.L.Q., 254-259.
(2) The Criminal Evidence Act, 1898.
(3) The Summary Jurisdiction (Scotland) Act, 1908, section 77.
(4) Gibb, op. cit.
(5) Smith, T.B. A Short Commentary on the Law of Scotland (Edinburgh, 1962), 126.

> "is in a state of flux, but it seems to be moving into a period of greater flexibility, and to be more favourable to the admission of such statements than it was some years ago."[1]

In dealing with the rules as extracted from the cases, three stages in the investigation must be distinguished. The first stage is that of preliminary investigations by the police to discover the nature of the crime and its perpetrator. At this preliminary stage, the police may question any member of the public from whom information could be forthcoming and the latter are under a duty to assist the police and answer all questions put to them.[2] Any statements during this period will not be inadmissible merely because the maker is subsequently put on trial for the offence under investigation.[3] Once a person who is being questioned comes under 'suspicion' the investigation moves into the second stage.

When a person becomes a suspect but has not been formally charged or arrested, the courts have emphasised that such person needed particular protection because he lacked the protection afforded by arrest such as the right to counsel and the right to make a declaration before a magistrate.[4] The leading case on the second stage is Chalmers v. H.M.A.[5] where it was pointed out that although statements obtained by police questioning during the investigation were admissible, there came a time when

> "a police officer, carrying out his duty honestly and conscientiously, ought to be in a position to appreciate that the man whom he is in process of questioning is under serious consideration as the perpetrator of the crime."[6]

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(1) Gordon, op. cit., 259.
(2) Lord Moncreiff in Morrison v. Burrel, 1947 J.C.43 at P.49; Lord Kilbrandon, "Pre-Trial Procedure" in The Accused, ed. Coutts, J.A., (London, 1966) 56 at P.60.
(3) Bell v. H.M.A., 1945 J.C.61; Chalmers v. H.M.A., 1954 J.C.66.
(4) H.M.A. v. Aitken, 1926 J.C.83; H.M.A. v. Rigg, 1946 J.C.1.
(5) 1954 J.C.66.
(6) Lord Justice-Clerk Thomson, at P.82, ibid.

When that stage is reached all questioning must cease and any statement obtained thereafter will only be admissible if it is voluntary. This is particularly so when the accused is 'detained under suspicion.'[1] The underlying principle here is that in the interest of 'fairness' to the accused the law will intervene to safeguard the accused's interests by rendering inadmissible statements obtained as a result of questioning or interrogation by the police.

The more recent cases which appear to show that there is a change in the courts' attitude are Brown v. H.M.A.[2], Miln v. Cullen[3] and Bell v. Hogg.[4] In the first of the three cases, the accused was taken to a police station in connection with the murder of a girl and was cautioned and asked to give an account of his movements. After giving an account to them, the police noticed some discrepancies between his statement and that of other witnesses. They returned to him and told him they were going to question him further. He then broke down and made a full confession. The confession was admitted in evidence and the accused convicted of murder. The case was distinguished from Chalmers[5] on the basis that in the latter, unlike the present case, the stage had been reached when questioning should have stopped and the suspect should have been cautioned and charged. But in the present case, the accused was not the only suspect and the police were still in the process of investigating the crime.[6] It was further added that nothing in the present case showed that the

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(1) It has been suggested that there is strictly no such thing as 'detention under suspicion' and that it merely applies to cases where a person is 'voluntarily' at a police station 'assisting with enquiries': Gordon, op.cit., 260; see also Smith, T.B., The British Commonwealth Series, U.K. vol.,(London, 1965), P.759.

(2) 1966 S.L.T. 105.

(3) 1967 J.C.21.

(4) 1967 S.L.T. 290.

(5) Supra.

(6) In the subsequent case of H.M.A. v. McPhee, 1966 S.L.T. (notes) 83, Lord Cameron described Brown as showing that the fact that the accused had come under suspicion was not be itself sufficient to require that further investigation or inter/...

statement was not voluntary or was extracted by unfair methods.

> "The basis of the question is fairness to the accused. In the circumstances of this case I can find nothing unfair to the accused .... Had there been any suggestion of force, duress or unfair means applied to the appellant which preceded this statement of guilt it would have been inadmissible."[1]

The principle of fairness to the accused

> "should always be invoked to protect him from improper pressures and inducements or bullying in order to extract incriminating evidence or confessions of crime, but at the same time in obvious public interest it is undesirable to hamper unduly police officers legitimately engaged in the investigation and detection of crime."[2]

The confession was also held to be admissible in Miln v. Cullen[3] on the grounds that there was no evidence of undue pressure, cajoling or bullying on the part of the police. Lord Justice-Clerk Grant added[4]

> "It is well to keep in mind that, in applying the test of fairness, one must not look solely and in isolation at the situation of suspect or accused: one must also have regard to the public interest in the ascertainment of truth and in the detection and suppression of crime."

Again, as in Brown[5], Chalmers[6] was distinguished on the grounds that in the present case the facts fell short of the suspicion stage which had been reached in Chalmers.[6]

The case further demonstrates that

> "the mere fact that a suspected person is asked a question before being cautioned is not in itself unfairness."

(contd.) rogation should be preceded by a formal caution.

(1) 1966 S.L.T.105, Lord Migdale at P.108.
(2) Ibid, Lord Cameron at P.110.
(3) 1967 J.C.21.
(4) Ibid, at P.26.
(5) Supra.
(6) Supra.

Lord Wheatley pointed out that

> "even at the stage of routine investigations when much greater latitude is allowed, fairness is still the test, and that is always a question of circumstances. It is conceivable even at that stage a question might be asked or some action might be perpetrated which produced an admission of guilt from the person being interviewed and yet the evidence might be disallowed because the circumstances disclosed unfairness to that person. At the other end of the scale, it is wrong to assume that after a person had been cautioned and charged, questioning of that person is no longer admissible."[1]

Finally, in Bell v. Hogg,[2] a case dealing with search rather than confessions, it was emphasised that there would be no 'unfairness' to the accused if there were no allegations of compulsion, bullying or trickery on the part of the police.

It would thus appear from the above recent cases that the Scots Courts may very well have abandoned their earlier attitude of leniency towards the accused. Statements to the police by a person who has not been arrested may in future be admitted in evidence even if they are made in response to questioning,

> "provided the questioning was fair, the answers were given voluntarily and without inducement, and that it does not appear that the police were deliberately trying to extract a confession."[3]

The third and final stage in the investigations is where the accused is arrested, cautioned and informed of the charge against him. The police are then prohibited from interrogating or questioning the accused. The latter must also be informed of his right to consult a law agent or to 'emit a judicial declaration'.[4] But if

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(1) 1967 J.C.21 at P.30.
(2) 1967 S.L.T.290.
(3) Gordon, op. cit., 261-262, referring to Lord MacDermott's address to the Bentham Club, The Times, February 21, 1968.
(4) Starke and Smith v. H.M.A., 1938 J.C.170; Wade v. Robertson, 1948 J.C.117.

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the suspect freely volunteered to make a statement the police may take it from him and it will subsequently be admissible in evidence.[1]

The recent tendency of the Scots Courts towards the admission of statements by persons not formally charged may be contrasted with that of the U.S. Courts which appear to be going in the other direction. Historically, the rules for exclusion of statements in the U.S.A. were based on the common law notion of 'voluntariness' tested by whether it resulted from inducements, threats or promises.[2] This attitude has for some time been reversed by the U.S. Supreme Court which has come to base the rules of exclusion on the provisions of the U.S. Constitution rather than on the common law rules.[3] This is adequately demonstrated by the Court's decisions in Escobedo v. Illinois[4] and Miranda v. Arizona.[5] In the former, the accused was convicted of murder on the basis of a confession made to the police by the accused before he was indicted and informed of his right to remain silent. His request to consult an attorney had also been denied. The Supreme Court quashed the conviction on the grounds that since suspicion had already 'focused' on the accused he was entitled to be informed of his right to remain silent and his right to counsel. Failure to do so deprived him of his rights under the Sixth and Fourteenth Amendments of the Constitution and rendered his confession inadmissible.

A confession was similarly held inadmissible in Miranda[5] on the grounds that the accused was not informed of his constitutional rights to counsel and against self-incrimination.

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(1) H.M.A. v. Cunningham, 1939 J.C.61; Manuel v. H.M.A., 1958 J.C.41; Lord Wheatley in Miln v. Cullen, 1967 J.C.21 at P. 30.
(2) Hopt. v. Utah, 110 U.S.574 (1884); Wilson v. U.S., 162 U.S.532 (1879).
(3) Bram v. U.S., 168 U.S.532 (1897).
(4) 378 U.S.977 (1964).
(5) 384 U.S.694 (1965).

2. England:

The admissibility of an incriminating statement in English law depends on its being made voluntarily without threat or promise held out by a person in authority. Apart from this common law principle the position is regulated by the Judges Rules formulated in 1912-1918 and revised in 1964.

As in Scots law, under the Rules the police are free at the initial stage of the investigation to question any person from whom information may be obtained so long as such person is not charged with an offence or informed that he may be prosecuted. However, once the police have evidence which "affords reasonable grounds for suspecting" that a person has committed an offence, the latter must be cautioned and informed that he need not say anything before he may be asked any questions relating to the charge.[1] Under the old Rules, the caution need not be administered until such time as the police officer "has made up his mind" to charge the accused.[2] The new formula dispenses with this subjective requirement and replaces it by the objective criterion of whether there are 'grounds' for reasonable suspicion.

When a person has been charged no questions may be put to him except in 'exceptional circumstances', i.e., when necessary for the protection of others or for clarifying ambiguity in a previous answer or statement.[3]

The Courts have wide discretion in excluding any evidence which is prejudicial to the

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(1) Rule II of the new (1964) Judges Rules.
(2) Rule 2 of the old Rules.
(3) Rule III of the new Rules; under the old Rules a person 'in custody' could not be questioned whereas the present Rules prevent questioning 'after the charge'. This may create the impression that a person in custody, who has not been charged, may be questioned. This is not the case in practice, because a person in custody must immediately be informed of the charge against him.

accused or his chances of a fair trial. The prime consideration is that of voluntariness and the tendency is to exclude statements obtained by fear, threat or promise, and to allow statements regarded as voluntary even if they were obtained in violation of the Rules. Thus, in Ibrahim v. R.[1] a person under arrest on an indictment for murder replied 'Without a doubt I killed him' when asked by the police why he had done 'this senseless thing'. His reply was held to be admissible. Again, in R. v. Voisin,[2] the suspect was being questioned by the police in relation to a charge of murder. The police had already found the victim's body and beside it a piece of paper on which was written 'Bladie Belgiam'. Without caution, the accused was asked to write 'Bloody Belgian' which he wrote as 'Bladie Belgiam'. This was admitted in evidence and he was convicted of murder. Referring to the authority of the Rules, the Court stated:[3]

> "These rules have not the force of law; they are administrative directions the observance of which the police should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules, may be rejected as evidence by the judge presiding at the trial."

Thus, the discretion of the Courts is very wide and they may or may not exclude statements obtained in violation of the Rules.[4] The latter are mere administrative regulations

> "forming part of the police code with which police officers are expected to conform, just as they are with any other of their regulations."[5]

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(1) (1914) A.C.599.
(2) (1918) 1 K.B.537.
(3) Ibid, at P.539.
(4) For a criticism of the practice of accepting confessions obtained in contravention of the Rules see Williams G., "Questioning by the Police", supra, P.332.
(5) Devlin, The Criminal Prosecution in England, (London, 1960), P.35.

The attitude of the English Courts in allowing statements obtained in violation of the Rules is comparable to the recent tendency of the Scots Courts to give a different interpretation to the concept of 'fairness'. It appears that under both systems the prime consideration at present is that of 'voluntariness' and a confession may only be excluded if there is evidence of violence, undue pressure, threats or promises by the police. The two systems are in marked contrast to that pertaining in the U.S.A.

3. India and the Sudan

The Sudan rules relating to the admissibility of confessions were copied from the Indian Evidence Act, 1872, and the Indian Criminal Procedure Code. As is the case in the U.K., in India and the Sudan the police are empowered to question any person in the initial stage of the investigations, and a person so questioned is required to answer all questions put to him except those which are likely to incriminate him.[1] Failure[2] to answer any questions or giving false answers to them[3] is punishable under the Penal Codes.

The provisions regulating police interrogation and admissibility of confessions are stated in sections 118 and 119, C.C.P. Section 118 (1) provides:

> "No policeman or person in authority shall make use of any threat or of any promise of an advantage towards any person in an investigation ... in order to influence the evidence he may give."[4]

Section 118 (2) states that no policeman or person in authority shall by any 'caution or otherwise' prevent any person from making in the course of an investigation any

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(1) Section 117, C.C.P.; section 175, I.C.P.C.
(2) Section 156, S.P.C. and section 179, I.P.C.
(3) Section 153, S.P.C. and section 193, I.P.C.
(4) Section 24 of the Indian Evidence Act provides that a confession resulting from such inducement, threat or promise will be inadmissible in criminal proceedings.

statement which 'of his own free will' he may be disposed to make.

Subsection (1) is thus concerned with the voluntariness of the statement in its providing that no threat or promise should be held out to influence the evidence a prisoner might give. But the provision in subsection (2) that the police should not administer any caution to the prisoner appears to be somewhat unsatisfactory. It may be argued that the subsection only applies when the prisoner is 'of his own free will' disposed to make a statement. Such an argument, however, tends to overlook the fact that although a prisoner may, in fact, be disposed to make a statement, he might not be so disposed had he known that he had a legal right to remain silent. It would be unrealistic to assume that the average member of the public is conversant with his legal rights in a country like the Sudan where there is a substantial degree of illiteracy and poverty, where legal aid is virtually non-existent and where legal representation is open only to a privileged few who can afford it. In such circumstances it would appear to be manifestly unfair to provide that an accused person should not be cautioned or informed of his rights.

The harshness of the above rule is greatly mitigated when it is noted that statements to the police are not 'directly' admissible in evidence. This is the effect of section 119, C.C.P., which provides[1]:

> "(1) If any person in the course of an investigation ... or at any time after the close of the investigation but before the commencement of any inquiry or trial confesses to the commission of an offence in connection with the subject matter of the investigation he may and when the confession is in respect of a serious offence or one which is triable by a Major or Minor Court shall be taken before a Magistrate when available for his statement to be recorded by such Magistrate in the Case Diary.

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(1) Similar provisions are included in sections 25 and 26 of the Indian Evidence Act, 1872.

"(2) When a Magistrate records such confession in a Case Diary he shall do so in detail in his own handwriting in the presence of the person making the same and after reading over to him such record the Magistrate shall sign the same.

"(3) No Magistrate shall record any such confession unless after questioning the person making it he is satisfied it is made voluntarily.

"(4) No oath shall be administered to any person making a confession.

"(5) The record of such confession in the Case Diary if made by a Magistrate in manner aforesaid shall be admissible as evidence against the person making the same and if so admitted shall be read out in Court by the Magistrate conducting the inquiry or trial and it shall not be necessary to call as a witness the Magistrate who recorded the same provided that the Magistrate holding the inquiry or the Court trying the case may if he or the Court thinks fit either on the application of the accused or of its own motion call the Magistrate who recorded the confession as a witness to the contents and to prove the circumstances in which it was recorded."

The effect of subsection (1) above is that in all cases of homicide except Negligent homicide[1] a confession of guilt must be taken before a Magistrate before it can be admitted in any subsequent inquiry or trial. But the subsection qualifies the rule by stating that the confession should be recorded by a Magistrate 'when available'. In remote rural areas, Magistrates are hardly available and it would appear that the confession may, in such circumstances, be admitted even where it was not recorded before a Magistrate. This becomes less significant in practice as more courts are continually being established in remote areas.

Apart from that, the provisions of section 119 are clear and unambiguous. No confession of guilt made to the police will become admissible unless it is recorded

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(1) Since under Schedule I, C.C.P. all cases of homicide are triable by Major Courts, Negligent homicide is triable by a Magistrate of the first class.

before a Magistrate. This measure is intended as a safeguard against the abuse of their powers by the police and to ensure that the confession was made voluntarily.[1] The Magistrate is required to question the prisoner and to ensure that the confession is being made voluntarily before he can record it. If he is satisfied that it is voluntary, he should proceed to record it and the confession will subsequently be admitted in evidence.

The Sudan Courts, particularly in cases of homicide, have been somewhat reluctant to convict a person on the uncorroborated evidence of a confession. Thus Abu Rannat, C.J., said in S.G. v. Mariaka Bere[2] that:

> "A confession, if proved satisfactorily to be voluntary and genuine, is legal and sufficient proof of the guilt of the accused without corroboration, but ordinarily the practice is to require some support for a confession, some corroboration from facts established outside the confession, and reasonable consistency of the surrounding circumstances of which there is no doubt."

The same Chief Justice quashed a conviction of murder based on the accused's confession in S.G. v. Hussein Osman Murad,[3] and went on to say:

> "Confessions may lead to conviction, but in murder cases unless there is evidence that the confession is consistent with other corroborative evidence, we usually give the accused the benefit of the doubt."

It is also established in Scots law that a conviction cannot be brought on an uncorroborated confession.[4]

The question then arises as to whether facts discovered as a result of an inadmissible confession will be admissible in evidence. The question came for consideration in

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(1) Bodilly, J., In S.G. v. Fadl El Mula Fazari, AC.CP.187, 1952, Unrep.
(2) (1961) S.L.J.R. 23 at P.24.
(3) AC.CP.158, 1955, Unrep.
(4) Connolly v. H.M.A., 1958, S.L.T.79, Lord Justice-Clerk Thomson at P.80.

S.G. v. Atturingya Abiri[1] The accused, after being promised that he would be cleared of the charge, confessed to killing the deceased and led the police to the place of the incident where remains of the victim's body and some of his belongings were discovered. The trial court acquitted the accused on the grounds that the unlawful inducement rendered the confession inadmissible and consequently evidence discovered as a result of the confession was also inadmissible. But on reference for confirmation, Creed, C.J., rejected the court's finding and held that the evidence was admissible despite the fact that the confession was itself inadmissible because of the inducement. The case was sent back to the trial court for revision of finding.[2] The above case is not dissimilar from the Scottish case of Chalmers,[3] already referred to. The accused, a boy of sixteen, was questioned by the police on two occasions as to his movements at the time of the murder under investigation. Further information by other witnesses cast doubt on the truth of the accused's statement and he was brought to the police station and then cautioned and cross-examined on his earlier statements for about five minutes until he was reduced to tears. After being cautioned again he made a statement, having refused the offer of the presence of his father or a solicitor. He was then questioned as to the whereabouts of the deceased's purse and he took the police to a cornfield where the purse was found. The trial judge held that the accused's interrogation was improper because, while in the police station, the accused was a suspect. However, evidence of the visit to the cornfield was admissible.

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(1) AC.CP.117.1940, Unrep.
(2) The significance of the case is greatly reduced due to the fact that the revision order was subsequently cancelled on extra-judicial grounds.
(3) Supra.

On appeal, it was held that the evidence of the visit to the cornfield was inadmissible because it was

> "part and parcel of the same transaction as the interrogation, and, if the interrogation and the 'statement' which emerged from it are inadmissible as 'unfair' this same criticism must attach to the conducted visit to the cornfield."[1]

The rule, therefore, appears to be that facts discovered as a result of a confession will be admissible in evidence if the whole of the confession was admissible. But where the confession is itself inadmissible, facts discovered as a result of it will be inadmissible. However, the police may produce that evidence in court without putting the confession itself before the court. But this would not be of great help unless they could link up the accused with that evidence, i.e., the finding of the purse in Chalmers.[2] But the situation will be different where the whereabouts of the property are in themselves incriminating the accused, such as, for example, the finding of the crime weapon or the deceased's belongings in the accused's bedroom.

However, S.G. v. Atturingya Abiri,[3] does not seem to make such qualifications and it would appear to be the rule in the Sudan that facts discovered as a result of the confession may be admissible even if the confession is itself excluded.

Finally, the Sudan Courts have also held that a confession duly recorded under section 119 and admitted in evidence must be taken 'as a whole', i.e., facts tending to incriminate the accused as well as those which are favourable to him. Thus, in S.G. v. Omer Saad Hamid,[4] the accused, who had confessed to killing the deceased for having

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(1) Lord Cooper at P.76, ibid.
(2) Supra, see Lord Cooper at P.76.
(3) Supra.
(4) (1961) S.L.J.R.120.

found him in a compromising situation with his (the accused's) wife, was convicted of murder. The trial Court took no notice of the accused's explanation as to the situation in which he found his wife and the deceased. The finding was altered on reference for confirmation to one of culpable homicide not amounting to murder. M.I. El Nur, Acting C.J., pointed out that the circumstances of the killing as shown in the confession must be taken into accout for

> "It is an established rule of evidence that a confession be received as a whole or rejected as a whole."[1]

The same rule seems to apply in Scots law.[2]

Evaluation:

A comparison between the system applicable in India and the Sudan, on the one hand, and Scotland and England on the other, will show that the former offers a more satisfactory solution to the problem of interrogation and admissibility of confessions. It gives the police a very wide scope in the detection of crime by allowing them to question accused persons and obtain statements from them. At the same time, it safeguards the interests of the accused by preventing statements obtained by the police from being 'directly' admissible in evidence. The intermediate stage requiring the confession to be recorded by a Magistrate after the latter is satisfied of its voluntariness is a significant improvement on the systems in the U.K. The police are not hampered in the effective investigation of crime, nor are the interests of the accused prejudiced. The Magistrate who records the confession acts as a cordon sanitaire protecting the accused from unfair police methods.

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(1) Ibid, at P.121; see also Abu Rannat, C.J., in S.G. v. El Amin Karama El Hag, (1961) S.L.J.R.95 at P.96.
(2) Owens v. H.M.A., 1946 J.C.119.

It is thus not surprising that the requirement of recording statements before a judicial officer appeals to many in both England and Scotland. In the latter a return to the nineteenth century system of judicial examination is advocated by many,[1] and in the former the procedure is regarded as essential "as a safeguard against illegality."[2] The adoption of the system in Scotland would relieve the trial court from dwelling upon the question of 'fairness' to the accused in each case and would enable them to accept confessions in evidence with more confidence and without any protracted inquiry into the voluntariness of the statement. In England, the system will also allow the courts to receive confessions without exposing themselves to the present criticism that they should not admit a statement in evidence whenever it was obtained in violation of the Judges Rules. The English Committee of Justice has recently criticized the system and recommended that a person's right to remain silent before the trial should be abolished, and at the same time he should be protected from overzealous police officers by requiring that his confession of guilt

> "shall not be admissible in evidence against him unless it is made and recorded before a magistrate."[3]

In conclusion, one may quote a statment by an ex-C.J. of Uganda on the matter. He said:[4]

> "I have the experience of both systems. Zanzibar with the Indian Evidence Act and the Gold Coast with English law. I prefer the Indian Evidence Act. I think you must have a general feeling of security - rightly or wrongly. Admission of confessions to the police is unwise."

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(1) Smith, T.B., The British Commonwealth Series, op. cit., P.761; see also his Short Commentary, op. cit., P.216; Lord Kilbrandon, op. cit., P.65.
(2) Williams, G., "Questioning by the Police", supra, at P.344.
(3) Justice "The Interrogation of Suspects", June, 1967.
(4) Quoted in the Report of the Commission of Inquiry into the Administration of Justice in Kenya, Uganda and Tanganyika, 1934, Cmd. 4623, P.33.

Evidence of Dying Declarations

The admissibility of a statement made by a deceased person shortly before his death relating to the circumstances of the crime committed against him is accepted in most legal systems as necessary for the detection of crime and the protection of society. Cases involving death are normally committed in circumstances of secrecy and a statement by the deceased may be the only, or the most significant, piece of evidence against the suspect. To exclude such statements from evidence may be tantamount to holding out a premium for the commission of such serious crimes.

The basis of including such declarations in evidence is the presumption that the sense of impending death produces in a man's mind the same disposition to tell the truth as that of a conscientious witness under oath. Nema moriturus praesumuntur mentiri. In an early English case[1] it was stated that

> "the general principle on which this species of evidence is admitted is, that they are declarations made in extremity when the party is at the point of death, and when every hope in this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to tell the turth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice."

Thus, a person who has lost all hope of life is in extremis and has no motive to misrepresent. Again, the declarant, having died, could not be brought to testify in court, nor be cross-examined. The actual rules relating to the admissibility of dying declarations vary in different legal systems. English law admits the statement only when, at the time of making it, the declarant was in a settled expectation of death and had abandoned all hope of recovery.[2] But though he must be satisfied

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(1) R. v. Woodcock (1789) 1 Leach 500, per Eyre, C.B.
(2) R. v. Woodcock, ibid; R. v. Jenkins (1869) L.R. 1 C.C.R.187.

that death is imminent, he need not expect to die immediately following the declaration.[1]

This is not the case in Scots law where the declaration may be admissible even though the person making it did not believe himself to be dying or had entertained some hope of recovery.[2] This is also the position in the Sudan where the Courts have preferred to follow the Indian law rule that the statement would be admissible despite the fact that, at the time of making it, the declarant was not in a settled expectation of death. Thus, Creed, C.J., declared in S.G. v. Suliman Mohammed Musa[3]

> "For a dying declaration to be admissible in England it must be made under a sense of impending death. This rule has not been followed in the Sudan. We have favoured the Indian rule."

The same opinion had earlier been expressed by Owen, C.J., in S.G. v. Mamur Guda.[4]

The practice has finally been codified in C.C.C. No.14[5] which provides:

> "Such statements are relevant whether the person who made them was or was not, at the time when they were made, under the expectation of death and whatever may be the nature of the proceedings in which the cause of death comes into question."

This provision is a verbatim reproduction of section 32(1) of the Indian Evidence Act, 1872.

The difference between the English law and the laws of Scotland, India and the Sudan becomes marked only where the declarant was not in a settled expectation of death. If he was, the declaration will be admissible in all systems and there is no difference. Further, there will be no difference between these systems if the declarant

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(1) R. v. Perry (1909) 2 K.B.697.
(2) H.M.A. v. James Bell (1835) 13 Shaw 1179; H.M.A. v. Brodie, (1846) Ark.45.
(3) AC.CP. 249, 1936, Unrep.
(4) AC.CP. 184, 1935, Unrep.
(5) Dated 15.6.1952.

(whether he was or was not in a settled expectation of death) survives because he can then be called to give evidence personally and the declaration is rendered inadmissible. It is only where the victim dies, and he was not in a settled expectation of death at the time of making the statement that there is disagreement. The statement would be excluded under English law and would be accepted in Scotland, India and the Sudan.

It would appear that the English rule is the one which is more in accord with the basis and rationale behind the admission of such declarations. The reason is that if the sense of impending death and the solemnity of the occasion which is the primary consideration, then it is only logical to require that the declarant must have been in a condition of impending death. On the other hand, however, the rule in Scots, Indian and Sudanese laws may lead to a practically more satisfactory solution. The situation may occur where the declarant, not in hopeless expectation of death, makes a genuine and true statement as to the circumstances of his injury, and subsequently dies due to unforeseen complications. In such a case the exclusion of the statement may result in unsatisfactory consequences because the declarant is dead and the declaration may be the only, or the best, evidence available.[1]

With regard to the mode or procedure of taking down the declaration it must be pointed out that Scots law makes a distinction between 'dying declarations' and 'dying depositions'; the latter are declarations made on oath and the former are not.[2] If the declarant is seriously injured and there is no time to arrange for a formal 'deposition', the statement can be taken down as a 'declaration' by any credible person.

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(1) Lord Mackenzie in H.M.A. v. Bell, supra, at P.1179.
(2) Renton and Brown, Criminal Procedure (Edinburgh, 1956) Pp.85-86.

Depositions are taken before a sheriff-substitute or a Justice of the Peace or Burgh Magistrate.[1] But the distinction is only one of form because in practice both will be admitted in evidence, although a deposition carries more weight than a declaration. The rule governing the admissibility of depositions or declarations in Scots law is based on the fact that it is an exception to the rule against hearsay - the declarant having died, there is no other way of proving his statement.

The distinction between depositions and declarations is unknown to the other systems under consideration, although the requirement of taking the statement on oath before a law officer is generally preferred.[2] Thus, C.C.C.No.14 goes on to provide:

> "Whenever possible such statements should be taken by a Magistrate on oath in the presence of the accused who should be given an opportunity to cross-examine, but statements made in the absence of the accused may be proved by calling as witnesses the persons to whom they were made."

The effect of this provision is that the fact that the statement was not taken by a Magistrate or in the presence of the accused does not ipso facto render it inadmissible.. The operative part of the above paragraph is the phrase "Whenever possible" which renders the rule one of convenience rather than one of strict legality. In practice, dying declarations were admitted in evidence by the Sudan Courts despite the fact that the declaration was taken by a Chief's Court,[3] a policeman[4] and a local administrator.[5] In one of these cases, Creed, C.J., said:

> "It is of course unfortunate that the statement of the deceased was not taken on oath by a magistrate in the presence of the accused, but the Court is incorrect in regarding the evidence concerning the deceased's statement as inadmissible."[6]

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(1) Ibid.
(2) R. v. Woodcock, supra; R. v. Jenkins, supra.
(3) S.G. v. Yngara Ngarge, AC.CP.92, 1941, Unrep.
(4) S.G. v. Mamur Guda, supra.
(5) S.G. v. Suliman Mohammed Musa, supra.
(6) Ibid.

More recently, in S.C. v. Charles Kirman,[1] the defence appealed against the admission of a statement by the deceased made to a policeman and repeated before a Magistrate in the absence of the accused. In rejecting the appeal, Abu Rannat, C.J. stated that if the declaration can be made before a Magistrate in the presence of the accused this would be well and good

> "but as it was not possible,[2] this does not render the dying declaration inadmissible."

The decision whether a declaration should be admitted in evidence and the weight which should be placed upon it are matters decided exclusively by the court's discretion. The Court must consider all the circumstances surrounding the declaration particularly the state of mind of the deceased and whether he was fit to make the declaration.[3] Several other considerations make it incumbent upon the Court to exercise great caution in admitting the declaration. First, a declaration is normally made shortly after the injury and, frequently, the accused may not yet have been apprehended and may not be present to cross-examine the injured person and help in the discovery of the truth. Secondly, the declarant, like a perjured witness, might be motivated to conceal the truth to obscure mischief on his own part or to satisfy an overwhelming fit of revenge or anger. Finally, he may have been influenced by what relatives or friends told him after the injury.[4] Stephen[5] pointed out that the rule relating to admissibility of declarations in India had in the last century been abused by people mortally wounded making declarations implicating all their hereditary enemies.

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(1) (1956) S.L.J.R.35.
(2) Ibid, at P.36.
(3) Kenton and Brown, op. cit., 86; C.C.C.No.14.
(4) See the Indian case of Munwa v. The State (1957) A.I.R.466.
(5) H.C.L., vol.I, P.448.

Thus, the Courts will have to be extremely careful in determining the authenticity of the declaration.[1] In the recent Sudanese case of S.G. v. Sabeila Kambo,[2] Salah Hassan, J., said:

> "In cases of serious crimes, it is essential that dying declarations must be corroborated by independent evidence, as a matter of prudence not of law."

It is thought that particularly in cases where the declaration is the only evidence against the accused the courts should insist on independent corroborative evidence before the accused may be convicted.

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(1) B. Awadalla, J., in S.G. v. Mohammed Adam Onour (1963) S.L.J.R. 157 at P.158.
(2) AC.CP. 62, 1966, Unrep.

C H A P T E R III

GENERAL PRINCIPLES OF UNLAWFUL HOMICIDE

This Chapter is intended to deal with those basic elements which are of general application to all forms of unlawful homicide. Such elements concern the nature of the criminal act which causes death, the victim of the homicide, the problem of causation and other related questions. Under the S.P.C. these rules are largely included in section 246.[1] It provides:

> "Whoever causes death by doing an act
> (a) with the intention of causing death or such bodily injury as is intended to cause death, or
> (b) with the knowledge that he is likely by such act to cause death,
> commits the offence of culpable homicide."

Although the above section deals only with 'culpable homicide' as distinct from other forms of homicide[2] separately provided for in the Code, the following considerations relating to actus reus and causation apply equally to all forms of homicide.

I. The Actus Reus

The Victim of Homicide: "A Human Being":

Most legal systems provide that for the offence of homicide to be complete there must

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(1) Section 299, I.P.C.
(2) Unintentional homicide, Negligent homicide and causing death with the intention of causing hurt defined under sections 255, 256 and 254, respectively, of the S.P.C., see Ch. VII, infra.

be a destruction of a creature in rerum natura,[1] a self-existent human being.[2] The determination of the concept of 'human being' for the purposes of homicide is not as simple as it might appear to be. The difficulties presented by it will now be considered.

A. Child Killing:

Any discussion of the question of child killing must distinguish two types of situation: firstly, the killing of a fully-born child, and, secondly, the destruction of a foetus during the period of gestation from conception to birth. The former falls within the law of homicide and the latter may form the subject of one or other of several less serious offences discussed below. The question of child murder has for a long time confronted Legislatures and Courts with intricate problems. The reasons for this are, first, the difficulties involved in determining the precise stage at which a child becomes a 'person' capable of being the subject of the offence of homicide. Secondly, the reluctance of the Courts to convict of murder persons charged with child killing, due to the severity of the punishment which would have to be inflicted. Thus, it was pointed out in relation to English law that

> "The widespread dislike of the application of the law of murder in all its severity to cases of infanticide by mothers led to such a divorce between law and public opinion that prisoners, witnesses, counsel, juries and even many of H.M.'s judges, conspired to defeat the law."[3]

The basic question in this context is: when is livebirth? As Stephen pointed out[4]

> "... the line must obviously be drawn either at the point

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(1) Coke, 3 Inst.47.
(2) Section 32 S.P.C.; see also Macdonald, Criminal Law of Scotland, (Edinburgh, 1948) P.87.
(3) Seaborne Davies, "Child Killing in English Law", 1 M.L.R.,203.
(4) Stephen, H.C.L., vol. III, P.2.

> at which the child begins to live, or at the point at which it begins to have a life independent of its mother's life, or at the point when it has completely proceeded into the world from its mother's body."

As far as pre-natal injuries are concerned, however, it is well settled in the laws of the Sudan,[1] India,[2] Scotland,[3] and England[4] that the killing of a child in its mother's womb is not homicide because at that stage it is not a 'human being' but a mere pars vicerum matris.[5]

If the child is born alive and then dies as a result of an injury inflicted upon it when it was in the womb, this is homicide in English law because once a child is born alive it becomes a creature in rerum natura.[6] This was accepted by the Commissioners on English Criminal Law in their Reports of 1839[7] and 1846.[8] Hale,[9] however, rejected this view on the grounds of difficulty of proof. The same reasoning was stated by Hume[10] and Scots law does not recognise the above situation as falling within the law of homicide.[11] This is also the position under the S.P.C. which deals with the case as a separate offence under section 266.[12]

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(1) Explanation 3, section 246, S.P.C.
(2) Explanation 3, section 299, I.P.C.
(3) Hume, Baron, Commentaries on the Law of Scotland Respecting Crimes, 4 ed. (Edinburgh, 1884), vol i, P.186.
(4) Hale, I., Pleas of the Crown, P.433.
(5) Hume, i, P.186.
(6) Coke, P.50; see also R. v. Senior (1833) 1 Moo, C.C.R.346.
(7) B.P.P., 1839, vol. XIX, Fourth Report, Article 8 of the Digest, P.xxxii.
(8) B.P.P., 1846, vol. XXIV, Second Report, Article 2 of the Digest, P.21.
(9) Hale, i, 432.
(10) Hume, i, 187.
(11) Gordon, G.H., Criminal Law (Edinburgh, 1967), 675.
(12) It provides: "Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth and does by such act prevent that child from being born alive or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment for a term which may extend to ten years or with fine or with both."

Livebirth:

In relation to the question of livebirth English law has favoured the third of the alternatives laid down by Stephen, i.e., to be regarded as a 'human being' the child must have completely proceeded into the world from its mother's womb. Two issues are involved here: a) proof that the child was in fact born; b) proof that it was born alive. As regards (a) the English rule is that the time of birth is the instant

> "when the last part of the body of the foetus is wholly excluded from the body of the mother."[1]

Thus

> "being born must mean that the whole body is brought into the world, and it is not sufficient that the child respires in the progress of birth."[2]

In contrast with English law, the S.P.C.[3] provides that it is homicide

> "to cause the death of a living child, if <u>any part of that child has been brought forth, though the child may not have breathed or been completely born.</u>"

The rule is thus wider than that of English law because under the Code it is sufficient for the purposes of homicide if 'any part' of the child is born; complete separation from the mother's body is not necessary. However, it is essential under the Code that the child should have reached the stage where it may be described as a 'living' child; it will not be homicide to destroy a mere live foetus.[4] The position in Scots law does not appear to be conclusively settled. In one case[5] the jury was directed that the child must be born alive and that:

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(1) Atkinson, S.G., "Life, Birth and Livebirth", (1904) 20 L.Q.R.134, 139.
(2) Littledale, J., in <u>R. v. Poulton</u> (1832) 5 C. & P. 329; see also Parke, B., in <u>R. v. Elliza Brain</u> (1834) 6 C.&P. 349; Erskine J., in <u>R. v. Trolle</u> (1842) 2 Moo. 260.
(3) Explanation 3, section 246, S.P.C., emphasis supplied.
(4) Gour, <u>Penal Law of India</u>, 8 ed., (Allahabad, 1966), vol. 2, P.1803.
(5) <u>H.M.A. v. Jean M'Allum</u> (1858) 3 Irv.187.

> "A child that is not fully born has no separate existence from the mother, and it is not, in the eye of the law, a living human being. It is in a state of transition from a feotus in utero to a living human being, and it does not become a living human being until it is fully born and has a separate existence of its own."[1]

On the other hand, in the later case of H.M.A. v. Elizabeth Scott,[2] Lord Young directed the jury that:[3]

> "It does not matter in the least so far as the criminality of the accused is concerned, if the injuries were inflicted when the child was partly in the mother's body."

The latter view is in accordance with the Sudan law and it appears to be the preferred one.[4] This is a justifiable attitude because once it can be proved that the child was in fact alive there should be no distinction, as far as the guilt of the accused is concerned, whether the child was fully born or whether part of it was still in the mother's body. The English rule thus adopts "a distinction that appears to be without a difference."[5]

It is further submitted that the English rule is rather inconsistent and illogical in treating as homicide the killing of a child which dies after birth due to injuries caused before its birth, and at the same time excluding from homicide the killing of a live child if 'any' part of it is still in the mother's body, i.e,, where the injuries are inflicted during birth.

Turning now to (b) above, it should first be mentioned that there is so far no accepted definition of what 'livebirth' is. It has frequently been stated that livebirth means

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(1) Lord Justice-Clerk Inglis at Pp.199-200, ibid.
(2) (1892) 2 White 240.
(3) Ibid, at P.244.
(4) Gordon, 674.
(5) Ibid.

a separate 'existence' or 'circulation' independent of that of the mother,[1] but the factors for determining such existence or circulation are far from settled. Live-birth may be proved by medical evidence or by testimony of eye witnesses who attended the birth. It is for the prosecution to show that the child was born alive and had a separate existence.[2] Despite the difficulty of proof, it seems to be settled that a child may be regarded as having a separate existence before the umbilical cord is severed[3] or the afterbirth is expelled from the mother.[4] The tests applied in practice to prove livebirth include breathing, heartbeating, muscular contraction, pulsation and cries after birth. Breathing and crying after birth appear to be adequate proof of livebirth in Scots law.[5] Under the S.P.C. it is merely provided that the child must be a 'living child' whether or not it has breathed.[6] But the Code does not define the term 'living' nor do the cases give any guidance. Some English cases have accepted breathing as adequate proof[7] whereas other have not.[8]

Thus no single criterion has been accepted to determine the stage at which a child becomes a person in rerum natura. The question remains one for the courts to decide in accordance with medical and other evidence. In their reluctance to convict of homicide persons charged with child killing, the courts have sought refuge in the difficulty of defining livebirth and have convicted such persons of one or the other of the several offences relating to injuries to feotuses and children.

It is now intended to deal briefly with the nature of these offences and to consider in which manner they differ from homicide. The offence of 'infanticide' which falls

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(1) R. v. Enoch Pulley (1832) 5 C.&P.539; R. v. Triolle, supra; Atkinson, op. cit., Pp.143-145; Gordon, 675.
(2) S.G. v. Sitt ElNifour, Major Court, 1947, Unrep.; Atkinson, op.cit., 146.
(3) S.G. v. Dai ElNur Isagha, AC.CP.11.1942, Unrep.; Gordon, 675.
(4) Atkinson, op.cit., 142.
(5) Macdonald, op.cit., 87.
(6) Explanation 3, section 246, S.P.C.
(7) R. v. Emma Handley (1874) 13 Cox 79.
(8) R. v. Elliza Brain, supra; R. v. Poulton, supra.; see also the opinion of the English Criminal Law Commission on the Draft Code, 1878-1879, Cmd. 2345, P.253.

within the categories of homicide, will be discussed in Chapter IV.

1. Abortion

The offence of causing miscarriage or procuring abortion is distinct from homicide in motive, act and intent. It concerns the attempt to procure the miscarriage of a pregnant woman by destroying the foetus in the womb. The offence is defined in section 262[1] of the S.P.C. and in section 58[2] of the English Offences against the Person Act, 1861. In Scotland the offence is a common law crime.[3] The effect of the Abortion Act, 1967, on the latter two systems will be discussed subsequently. For the moment, it suffices to mention that the underlying difference between the law of England, Scotland and the Sudan is that whereas under the three systems the mother can only be convicted of the offence if she was, in fact, pregnant, in England other persons may be convicted whether or not the mother was pregnant,[4] but in the Sudan[5] and Scotland[6] there can be no conviction of anyone at all unless the mother

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(1) It provides: "Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment for a term which may extend to three years or with fine or with both; and if the woman be quick with child, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine."
Explanation: "A woman who causes herself to miscarry is within the meaning of this section."

(2) "Every woman, being with child, who with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other mean whatsoever with the like intent, shall be guilty of felony ... and liable to life imprisonment."

(3) Hume, i, 186-187.

(4) See note (2) above.

(5) S.G. v. Spiro Popajoannidis, AC.CR.2.1940, Unrep.

(6) H.M.A. v. Anderson, 1928 J.C.1 at P.3; H.M.A. v. Semple, 1937 J.C.41.

was pregnant. In practice, however, the mother is very rarely charged because of the difficulty of convicting the abortionist without the mother's evidence.[1] Another difference is that under the S.P.C. a heavier sentence is imposed if the mother be 'quick with child'.[2] The distinction is not known in English or Scots laws and it is of little practical significance in the light of modern scientific knowledge.[3]

2. Child Destruction:

The offence of child destruction relates to the killing before birth of a child which is so developed that it may be capable of being born alive. It is a half-way house between the offences of abortion and homicide. Section 266, S.P.C.[4], punishes persons who intentionally commit an act preventing a child from being born alive. In England the offence is dealt with in section I of the Infant Life Preservation Act,[5] 1929, which requires that the child must be 'capable of being bornalive' and goes

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(1) Gordon, 758; Williams, G., The Sanctity of Life and the Criminal Law, (London, 1958), P.146.

(2) 'Quickening' is the term used to describe the child's kicking or movement in the womb. It usually happens when the mother is 4-5 months pregnant, Atkinson, op.cit.136.

(3) Gledhill, 502.

(4) "Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causes it to die after its birth and does by such act prevent that child from being born alive or causes it to die after its birth, shall, if such act be not done in good faith for the purpose of saving the life of the mother, be punished with imprisonment for a term which may extend to ten years or with fine or with both."

(5) "(1) Subject as hereinafter in this section provided, any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to imprisonment for life: Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death was done in good faith for the purpose of preserving the life of the mother.
"(2) For the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at the time pregnant of a child capable of being born alive."

on to state that the fact that the mother had been pregnant for twenty-eight weeks is prima facie evidence that the child was capable of being born alive. Section 266, S.P.C., makes no reference to 'capable of being born alive' nor does it show what stage of pregnancy should have been reached. However, since the offence under the section is intended to be more serious than the offence of abortion,[1] it is implicit that the child should have developed beyond the stage necessary for the latter offence. Further, since the offence of child destruction relates to preventing a child from being born alive, the presumption is that, had it not been for the prisoner's act, the child would have been born alive. Consequently, the phrase 'capable of being born alive' may be read into section 266, S.P.C., as a matter of necessary implication. A period of seven months pregnancy seems to be accepted in medical knowledge as the stage where the child may be considered as capable of being born alive.[2]

The difference between English and Sudanese laws on the offence of child destruction is that in the Sudan the offence applies only until the extrusion of 'any' part of the child from the mother's body (any subsequent injury which causes the child's death falls within the law of homicide). In England, however, the offence continues to be one of child destruction until the 'whole' body of the child is separated from that of the mother.[3]

The crime of child destruction is unknown to Scots law. The killing of a child at any time from conception to birth falls within the crime of abortion, whether the mother is only a few weeks or eight months pregnant. However, as has been pointed out,[4] the gap between abortion and the killing of a live child may be shortened by the

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(1) The maximum punishment for 'abortion' and 'child destruction' are three (seven if the woman be quick with child) and ten year's imprisonment respectively, Sections 262, 266, S.P.C.

(2) Smith, S., Forensic Medicine, 10 ed., (London, 1955), 335.

(3) Supra.

(4) Gordon, 674.

adoption of Lord Young's view in Elizabeth Scott.[1] One advantage of Scots law over that of the Sudan and England is that it avoids the difficulty of overlapping of the offences of child destruction and abortion which may result from the difficulty of determining the exact stage at which a child may be regarded as capable of being born.

Therapeutic Abortion and Child Destruction:

Sections 262 and 266, S.P.C., provide that it is a complete defence to a charge of causing miscarriage or of child destruction if the act was done "in good faith for the purpose of saving the life of the mother." Similarly, the proviso to section 1(1) of the English Infant Life Preservation Act[2] stated that it was a defence if the destruction of the child was made "in good faith for the purpose of preserving the life of the mother." No similar provision was included in the 1861 Act dealing with the offence of abortion.[3] But the defence was extended to cover abortion in the case of R. v. Bourne[4] where Macnaghten, J., directed the jury that the word 'unlawfully' in the 1861 Act implied that some forms of abortion might be lawful and that the defence of necessity included in the 1929 Act should be read into the 1861 Act by necessary implication. He concluded that if a doctor, on reasonable grounds, was of opinion that the continuance of pregnancy would make the mother 'a physical or mental wreck' the jury should acquit him.[5]

It should be pointed out that in the Sudan the defence applies where the act is for "saving" the life of the mother whereas under the 1929 Act it is sufficient if the

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(1) Supra.
(2) Supra.
(3) Supra. It has been stated that the reason for this ommission is that abortion "was regarded as dangerous only twenty years ago, while in 1861 it would have been ridiculous to call it therapy.", Williams, G., Sanctity, P.150.
(4) (1939) 1 K.B.687.
(5) Ibid, at Pp.693-694.

act was for "preserving" the life of the mother. This indicates that the S.P.C. provision is narrower because it implies that the defence will only succeed when the life of the mother is imperilled. Bourne[1] did not make it conclusively clear whether, in relation to abortion, the defence applied only where the mother's life was in danger or whether it extended to cover cases where the mother's physical and mental health was in jeopardy.[2]

This controversy has finally been settled by the Abortion Act, 1967, which applies both to England and Scotland.[3] Section 1(1) of the Act provides a complete defence when pregnancy is terminated by a registered medical practitioner if two registered general practitioners form the opinion in good faith that:

> "(a) the continuance of pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or
> (b) there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."

Thus, abortion in the U.K. would at present be considered lawful not only where the mother's life is imperilled but also where there is a risk of injury, physical or mental, to her health or where there is a risk of injury to her existing children or to the child in the womb. These liberal provisions go far beyond the scope of the

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(1) Supra.

(2) The reason for this is that before stating the possibility of pregnancy making the girl 'a physical or mental wreck' Macnaghten, J., spoke of the girl's health being so depressed that her 'life' may be shortened. (Supra, at Pp. 692-693.).

(3) Cases which would at present be justifiable under the new Act had not in practice been prosecuted in Scotland; Gordon, 758. Lord Kilbrandon has recently stated that the 1967 Act should not have been applied to Scotland. He added: "It is in the view of many scottish lawyers quite unnecesaary to enlarge this law by bringing in law reform which might have been required by England but which was not required in Scotland.", The Scotsman, December 1, 1969; see also Davis, B., "The Legalisation of Therapeutic Abortion", 1968 S.L.T. (News) 205.

S.P.C. and the limits of therapeutic abortion in the Sudan may soon call for revision.

3. Concealment of Pregnancy and of Birth:

The offence of concealment of pregnancy (Scotland) or concealment of birth (England and the Sudan) was also employed by the Courts to dispose of cases which would otherwise fall within homicide, the reason being that under the above offence, unlike homicide, it is not necessary to prove livebirth.

In Scotland before 1809 the jury was required to convict of murder any woman who concealed her pregnancy if the child was subsequently found dead or was missihg, the presumption being that the mother had murdered the child.[1] This proved unsatisfactory and the Concealment of Birth (Scotland) Act, 1809, was passed.[2] It repealed the presumption of murder and substituted a punishment of two year's imprisonment instead of the death sentence. Under the Act, the mother must be proved to have been pregnant and the child dead or missing. The child must have reached the stage where it could have been born alive, though it need not be proved that it was, in fact, born alive.[3] The concealment must continue for the whole period of pregnancy and must last to the time of death or disappearance of the child.[4] Disclosure of the pregnancy to one person will relieve the mother from liability even if she persistently concealed it from others.[5] Finally, the mother must have failed to call for and make use of

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(1) The Child Murder Act, 1690.
(2) "If... any woman in Scotland shall conceal her being with child during the whole period of her pregnancy and shall not call for and make use of help or assistance in the birth, and if the child be found dead or be missing, the mother ... shall be imprisoned for a period not exceeding two years."
(3) Hume, i, 297; Alison, Principles and Practice of the Criminal Law of Scotland, (Edinburgh, 1832), vol. i, P.154.
(4) Hume, i, 296; Alison, i, 155.
(5) In H.M.A. v. Anne Gall (1856) 2 Irv.366, disclosure by the panel to the father of the child was held sufficient.

assistance at birth.

In England[1] and the Sudan[2] the emphasis is on the concealment of 'birth' rather than of 'pregnancy'. The essence of the offence of concealment of birth is the secret disposal of the 'dead' body of the child after birth. It makes no difference whether the child died before, during or after birth, provided that it is dead at the time of disposal. If it is alive at that stage the offence may amount to one of homicide. As in Scotland, the child must have so developed that it could be born alive.[3] In England concealment must be from all persons generally and not from a particular individual;[4] disclosure to a person pledged to secrecy may still be regarded as concealment.[5] In the Sudan it was held that disclosure to a certified midwife was sufficient to exclude liability even if the birth was concealed from all other people.[6] Finally, whereas in Scotland[7] the offence may only be committed by the mother, in England and the Sudan any person may be convicted of it. In all three systems the maximum punish-

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(1) Section 60, Offences against the Person Act, 1861, provides: "If any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at or after its birth, endeavour to conceal the birth thereof shall be guilty of a misdemeanour, ..." and shall be imprisoned for any term not exceeding two years. This provision, in effect, implemented the recommendation of the Criminal Law Commission, 1846, to create a distinct offence of 'concealment' to bring English law into line with Scots law; B.P.P., 1846, vol. XXIV, P.148.

(2) Section 270, S.P.C., provides: "Whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child dies before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment for a term which may extend to two years or with fine or with both."

(3) Erle, J., in R. v. Beriman (1854) 6 Cox 388; see also Ratenlal, The Law of Crimes, 21 ed., (Bombay, 1966), 860.

(4) Turner, Kenny's Outlines of Criminal Law, 18 ed., (Cambridge, 1964), 188.

(5) Ibid, 188-189.

(6) S.C. v. Sitt ElNifour, Maj. ct., 1947, Unrep.

(7) Hume, i, 299; Macdonald, 112.

ment for the offence is two year's imprisonment.

These then are the offences of child killing falling short of homicide. As already mentioned, the difficulty of proving the corpus delicti in homicide and the reluctance of the courts to convict of the latter offence persons accused of child murder, has led the courts to convict of one or the other of the above offences. The offence of concealment was the one most frequently resorted to because it required no proof of livebirth. The position was regarded as unsatisfactory in England and several attempts were made to create a separate offence of child murder. This culminated in the passing of the Infanticide Act, 1938,. The Act does not apply to Scotland nor is there a similar provision in the S.P.C. The provisions of the Act and the position in Scotland and the Sudan as to child murderis subsequently examined.[1]

B. Persons Other than Children

The law of homicide makes no distinction between persons who are killed. It is equally homicide to cause the death of a person in the most robust health or a very sick ageing man, an imbecile, a leper or an insane person.

> "There is the same law for it whether the deceased was of sound intellect or insane; a native subject or an alien; a christian or a Jew or an infidel; a true man or a known criminal; one at peace with the church or an excommunicated person."[2]

It is thus unlawful homicide to kill a sick seventy year old man whose chances of recovery are very meagre,[3] or to execute a condemned man if done by a person other than a lawfully authorised officer,[4] or to kill another in accordance with tribal custom.[5]

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(1) Ch. IV, infra.
(2) Hume, i, 187; Cf. Turner, Russel on Crime, 12 ed. (London 1964), vol. i, 400.
(3) S.G. v. Ahmed Ali Omer, AC.CR.163.1939, Unrep.; Lord Cooper in Robertson and Donoghue, Edinburgh High Court, Aug. 1945, Unrep., see Gordon, 677 n.31; William Bird v. H.M.A.1952 J.C.23, Lord Jamieson at P.25.
(4) Hale, i, 433.
(5) S.G. v. Awapakol Longama, AC.CP.7.1932, Unrep.

However, the law may sometimes single out some individuals engaged in public offices and provide that the killing of such individuals is punishable with more severity than the killing of other persons.[1]

It is also no defence to a charge of homicide that the victim had suffered from a fatal disease and that the prisoner intended to relieve him of his agony. Thus, a person who killed his five year old brother who was a leper, and who was avoided by the whole community, was convicted of murder, although the prisoner's intention was to relieve his brother of physical and mental suffering.[2]

The law relating to mercy killings is dealt with in Chapter VI.

C. The Unintended Victim:

Section 250 S.P.C., provides:

> "If a person by doing anything which he intends or knows to be likely to cause death commits culpable homicide by causing the death of any person whose death he neither intends or knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."

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(1) Under section 5 of the Homicide Act, 1957, it was 'capital murder' to kill a police officer or a person assisting him in the execution of his duty or the killing of a prison officer by a prisoner. Similarly, C.C.C.No.26 in the Sudan provides that the prerogative of mercy should seldom be exercised in cases of 'resistance to authority' or cases of 'Wife killing'. Such measures are justifiable on grounds of public policy to protect persons dealing with the prevention of crime or to prevent certain types of homicide which are of frequent occurrence.

(2) S.G. v. Sabah ElKheir Gubara, AC.CP.360.1927, Unrep.; on reference for confirmation the sentence was reduced from life to two year's imprisonment on the grounds that the victim was a 'hopeless leper'. But in the more recent case of S.G. v. Bomfa Shoma, AC.CP.282.1941, Unrep., the Confirming Authority described the killing of a leper as a 'particularly revolting crime' and confirmed the sentence of life imprisonment. It is submitted that this is the preferable attitude and the one more in accord with the Code and the moral and religious convictions of the people of the Sudan.

The section incorporates in a limited form the doctrine of transferred malice or transferred intent the basis of which is that where an accused, with the mens rea of a particular crime, commits an act which amounts to the actus reus of that crime, he will be held liable even though the ensuing result might not have been intended by him. The error may either relate to the identity of the victim - error in objecto (for example, where A, intending to kill B, shoots at someone who turns out to be C.) or the error may be aberratio ictus (for example, where A, aims and shoots at B, but misses him and kills C.).

In relation to error in objecto it is well established that mistake in the identity of the victim will not affect the guilt of the accused.[1] As Lord Coleridge pointed out in Latimer's case:[2]

> "It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act."

More recently, the English Law Commission recommended that:

> "It is immaterial whether the intent to kill is an intent to kill the person in fact killed or any particular person, so long as it is an intent to kill someone other than himself;"[3]

As to aberratio ictus the error will also be treated as irrelevant. Thus Hume[4] stated:

> "If John makes a thrust at James, meaning to kill, and George, throwing himself between, receive the thrust and die, who doubts that John shall answer for it, as if his mortal purpose had taken place on James?"

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(1) Hume, i, 22; Hale, i, 466; Coke, 50; S.G. v. Nasr Diab, AC.CP.48.1943, Unrep.; S.G. v. Abdulla Mustafa, AC.CP.311.1947, Unrep.; S.G. v. Sayed Ahmed Sadig, AC.CP.309, 1952, Unrep; S.G. v. Odia Muduari (1961) S.L.J.R.9; S.G. v. ElAmin Adama (1961), S.L.J.R.87.

(2) (1886) 17 Q.B.D. 359 at P.361.

(3) Cmd.95320, 1967, Appendix, Clause 2 (3).

(4) Hume, i, 22, see also Gordon, 289.

The same rule applies in English law as appears from Latimer[1] where A aimed a blow at B with a belt, but the belt bounced off and struck P, a by-stander. Although the jury was of the opinion that P's injury was accidental they convicted A of malicious wounding.

But cases of aberratio ictus have given rise to some controversy over whether the accused should be held liable whenever a third party, P, is killed as a result of the accused's act in intending to kill B, or whether the rule should be restricted only to cases where the accused should have foreseen the likelihood of injury to or the death of P, or was negligent in not taking adequate precuations to prevent it. In the Indian case of The Public Prosecutor v. Suryarayanamoorty[2] A intended to kill one, B, on whose life, and unknown to B, A had effected a substantial insurance policy. A gave B some poisoned sweets of which B ate some and threw the rest away. B recovered, but two children who picked up and ate the sweets died. A was convicted of attempted murder of B but was acquitted of murdering the children. The prosecution appealed and A was convicted of murdering the children under section 301, I.P.C., which includes the exact provisions of section 250, S.P.C. Benson, J., pointed out the type of homicide committed depended

> "on the intention or knowledge which the offender had in regard to the person intended or known to be likely to be killed, and not with reference to his intention or knowledge with reference to the person actually killed."[3]

In a dissenting opinion, however, Aiyar, J., stated that section 301 was confined to cases where the death of the person who actually died had been foreseen by the

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(1) Supra.
(2) (1912) M.W.N. 136.
(3) Ibid, at P.139.

accused as 'likely' to occur. He refused to extend the section to cases where the ensuing death could not have been contemplated by the accused because

> "the general theory of the criminal law is that the doer of an act is responsible only for the consequences intended or known to be likely to ensue; for otherwise he could not be said to have caused the effect 'voluntarily' and a person is not responsible for the involuntary effects of his acts."[1]

Aiyar's opinion is supported by Professor Glanville Williams in England and by Professor Gordon in Scotland. Professor Williams states that the doctrine of transferred malice is an "arbitrary exception to normal principles" based on 'emotional' reasons. He is of opinion that it should only apply to cases "where the consequence was brought about by negligence in relation to the actual victim."[3], i.e., where the risk of injury to the victim ought to have been foreseen by the accused. He goes on:[4]

> "Although the result in the sense of a killing was intended, the result in the sense of the killing of P. was not intended. After all, the accused is not indicted for killing in the abstract; he is indicted for killing P., and it should, therefore, on a strict view, be necessary to establish mens rea in relation to the killing of P."

Along similar lines, Professor Gordon describes the doctrine as 'objectionable' because it may lead to the conviction of a person for murdering "someone of whose existence he was unaware."[5] He concludes that the conviction should be for culpable homicide and that only provided the accused "was sufficiently negligent quoad C."[6]

The above views are clearly contrary to the decision in Latimer[7] where the accused was convicted despite an express finding that he was not negligent in injuring P. It

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(1) Ibid, at P.149.
(2) Williams, G., Criminal Law: The General Part, 2ed., (London, 1961) 134.
(3) Ibid, at P.133.
(4) Ibid, at P.135.
(5) Gordon, 290.
(6) Ibid.
(7) Supra.

is further submitted that the insistence on the proof of mens rea in relation to the actual victim in cases of aberratio ictus while at the same time accepting the accused's conviction without proof of mens rea towards the actual victim in error in objecto is somewhat illogical. The reason for this is that there is no difference between the two cases and the killing in each case is, in Gordon's words, "in some sort an accident."[1] If Professor Williams's reasoning is applied to error in objecto, one may also argue that "the mens rea in relation to the killing of P." has not been established because the accused in fact intends to kill B and has no intention of killing P at all.

Finally, it is also submitted that the views of Williams and Gordon cannot be easily reconciled with the rule that "the actus reus in murder is the killing of a human being - any human being ... ... and his identity is irrelevant."[2] Once the requisite mens rea is established and any person is killed, the offence should be complete.

> "... if intending to shoot or poison one man, the offender by accident shot or poisoned another, the criminal intention as well as the injury to the deceased, and the loss to society would be the same. He intended to kill and he did kill; whether, therefore, the crime be estimated by the intention or the result, its magnitude cannot be affected by the consideration that the mischief did not light where it was intended."[3]

As Turner puts it:[4]

> "It will make no difference whether A thought it probable that he would hit C, or thought it improbable, or did not even know that C was there; for A had the intention to kill (mens rea) and he has actually killed (actus reus)."

At any rate, however, neither of the above views nor the judgement of Aiyar, J., seems

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(1) Gordon, 291.
(2) Smith and Hogan, Criminal Law, (London, 1965), 43.
(3) The Criminal Law Commissioners, 1839, vol. XIX, Fourth Report, 236; see also their Seventh Report, B.P.P., 1843, vol. XIX, Pp.26-27.
(4) Turner, Kenny, op.cit., 19 ed., P.151.

to be reconcilable with the explicit provisions of section 250, S.P.C., which holds the offender liable for the killing of a person whose death "he neither intends nor knows himself to be likely to cause ...."[1] This provision makes it clear that the operation of the section does not depend on whether the death of the actual victim was foreseen by the accused, or on whether the latter was negligent.

A final word on section 250 is that it expressly states that the homicide committed by the accused would be of the same description as if the accused had in fact killed his intended victim. It follows from this that any defence which would have been available to the accused had he killed the intended victim will be open to him in the killing of the actual victim. This also appears to be the law in England[2] and Scotland.[3] Thus, if B gives grave and sudden provocation[4] to A, and A shoots at B but misses him and kills P, A would be convicted of culpable homicide only, not of murder, as though the provocation was given by P.[5] This is clearly stated in Illustration (b) to section 249(1), S.P.C. It says:

> "Y gives grave and sudden provocation to A. A on this provocation fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him but out of sight. A kills Z. Here A has not committed murder but culpable homicide not amounting to murder."

D. Proof of the Corpus Delicti:

The discovery of the victim's body in cases of homicide is of great assistance to the trial court in establishing that the offence was committed and in determining the cause of death. It may also help the court in deciding the question of mens rea

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(1) Emphasis added.
(2) Turner, Kenny, op.cit., P.145; R. v. Gross (1913) 23 Cox 455.
(3) Gordon, 290.
(4) Ch. VI, infra.
(5) S.G. v. Sayed Ahmed Sadig, AC.CP.309.1952, Unrep.; S.G. v. Ismail Ahmed Gargara (1962) S.L.J.R.148.

from the seriousness of the injuries and their locality.

However, if the victim's body cannot be found it does not necessarily follow that the accused will be acquitted. The death of the victim may be proved by credible circumstantial evidence.[1] To hold otherwise

> "would afford ample immunity and certain escape to those murderers who are cunning or clever enough to make away with or destroy the bodies of their victims."[2]

The court must be satisfied beyond reasonable doubt that the alleged victim is dead and that it was the accused who killed him.[3] In the New Zealand case of R. v. Horry[4] the Court of Appeal observed:

> "At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body nor any trace of the body has been found and that the accused has made no confession of any participation in the crime. Before he can be convicted, the fact of death should be proved by such circumstances as to render the commission of the crime morally certain and leave no ground for reasonable doubt.
>
> "The circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."

Where there is a very slight shadow of doubt but the accused is convicted of murder it has been held unwise to sentence the accused to death because irreparable damage would occur if the victim were to reappear after the accused's execution.[5]

However, where the dead body is found, strong proof is also needed to show that it was the body of the alleged victim. This is done by calling as witnesses persons

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(1) Hale, ii, 290, says: "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead."; see also Gledhill, 468-469.
(2) Ratenlal, op.cit., 801.
(3) S.G. v. ElSharif Hanouda, AC.CP.255.1929, Unrep.
(4) (1952) N.Z.L.R.111; followed in R. v. Onuferjczyk (1955) Crim. L.R.188.
(5) Creed, C.J., in S.G. v. Gamar ElDin Mohammed Zein AC.CP.197.1937, Unrep.

who saw and could identify the corpse.[1] In S.G. v. Yoele Lowiya[2] the alleged deceased, a young girl, disappeared from the village one night after a dance. A search party went out to look for her and found some remnants of a human being, a skull and scattered bones, which nobody could identify. A necklace made of beads which the alleged deceased was seen wearing before her disappearance was also found. The accused who had some grievance towards the deceased was charged and convicted of murder. On reference for confirmation the conviction was quashed. The reasons given were that the skull and bones could have belonged to any other person as they were not identified to be the missing girl's. Further, necklaces were used by other girls in the vicinity. The

> "identity of the body found could not be established and the evidence adduced only arouses suspicion but does not lead to certainty."[3]

Causing Death by Doing an "Act"

The word 'act' in homicide includes almost every mode by which human life can be taken, such as shooting, stabbing, poisoning, drowning ... etc.[4] It is also an 'act' to prepare a pit into which someone falls and is killed,[5] or where A, intending to kill B who, unknown to Z, is standing behind a bush, induces Z to shoot at the bush and B dies as a result.[6]

But situations may arise where the relationship between the act and the injury is not so manifest. The rule here is that the act must be proved to have resulted in death

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(1) C.C. C. No.22 para.(5), dated 15.6.1952.
(2) (1959) S.L.J.R.69; see also S.G. v. Siddig Abdulla (1963) S.L.J.R.108.
(3) Lutfi, J., at P.71, ibid.
(4) Hume, i, 189-190; Hale, i, 432.
(5) Illustration (a), section 246, S.P.C.
(6) Illustration (b), ibid.

"plainly and palpably" and not by mere conjecture or suspicion.[1] As Stephen puts it:[2]

> "the connection must be direct and distinct, and though not necessarily immediate it must not be too remote."

The difficulty arises where the accused frightens the deceased or utters some words which result in the deceased's distress and eventually lead to his death. In the words of Hale:[3]

> "If a man either by working on the fancy of another or possibly by harsh or unkind usage, puts another into some passion of grief or fear that the party either dies suddenly or contracts some disease whereof he dies, though as the circumstances of the case may be, this may be murder or manslaughter in the sight of God, yet in foro humano it cannot come under the judgement of felony because no external act of violence was offered, whereof the common law can take notice and secret things belong to God ...."

The English Criminal Law Commissioners similarly stated that:[4]

> "unless death results from bodily injury, caused by some act or omission, as contradistinguished from death occasioned from any influence on the mind."

the case will not be one of homicide.[5]

However, it may amount to an 'act' if A, with the necessary state of mind, tells D, who is seriously ill or who has a weak heart, some shocking news which causes his death or frightens him to death.[6] In R. v. Hayward,[7] the accused threatened his wife violently and chased her into the streets where she fell dead. Medical evidence established that her death resulted from exertion, fright and strong emotion. Ridley, J.,

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(1) Hume, i, 187-188.
(2) Stephen, H.C.L., vol. III, P.3.
(3) Hale, i, 429; see also Hume, i, 189.
(4) B.P.P., 1846, vol XXIV, P.120; the Commissioners adopted the views and reasoning of the Indian Law Commission, 1837, Note M, Pp.57-58.
(5) Cf. R. v. Towers (1874) 12 Cox 530.
(6) The Indian Law Commission, 1837, Note M., P.58; Gledhill, 469; see also section 167 of the Draft Code, 1879, Cmd.2345.
(7) (1908) 21 Cox 692.

directed the jury that proof of actual physical violence was unnecessary and that "death from fright alone caused by an illegal act, such as threats of violence would be sufficient."[1] Turner also states that "there seems to be no reason why one who frightened another to death should not be held legally to have caused his death."[2] Macdonald,[3] however, insists that the injury must be 'real' and excludes death caused by frightening. He cites in support the case of Duff of Braco[4] where a woman in child-bed died as a result of fever caused by fright from thieves breaking into the house, and the charge was dismissed as irrelevant. But this view does not find much support in other Scottish authorities. In referring to Duff of Braco,[4] Hume[5] emphasised that the difficulty consisted in proving whether it was the fright or the disease (i.e. the fever) which in fact caused the death. Two subsequent cases[6] also confirm the view that the accused may be convicted of homicide where he causes the death of the victim by fright or shock. In the more recent of the two cases, Lord Jamieson directed the jury in terms similar to those of Ridley, J., in Hayward.[7] He said:[8]

> "It is not necessary that the death should result from physical injuries. If the result of the treatment that the deceased person has received has been to cause shock and that person dies of shock, then the crime has been committed."

This seems to be accepted as representing the Scottish law and it is added that whenever a person's death is caused, "provided it was caused by the accused it does not matter how it was caused."[9]

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(1) Ibid, at P.693.
(2) Turner, Russel, op.cit., 413-414.
(3) Macdonald, op.cit.,87.
(4) (1770) Hume, i, 182-183.
(5) Hume, i, 182-183; see also Alison, i, 146.
(6) H.M.A. v. William Brown, (1879) 4 Couper 225; Lord Young at P.226; William Bird v. H.M.A., 1952 J.C.23.
(7) Supra.
(8) 1952 J.C.23 at P.25.
(9) Gordon, 676.

In discussing the question of whether words could be regarded as an act for the purposes of homicide, Lord Macaulay's Commission observed:[1]

> "The reasonable course, in our opinion, is to consider speaking as an act, and to treat A as guilty of ... culpable homicide, if by speaking he has voluntarily caused Z's death, whether his words operated circuitously by inducing Z to swallow poison or directly by throwing Z into convulsions."

They went on to say:[2]

> "... we are unable to perceive any distinction between the case of him who voluntarily causes death in this manner, and the case of him who voluntarily causes death by means of a pistol, or a sword."

The difficulty of proof in such situations must also be kept in mind. This difficulty is well illustrated by the Sudanese case of S.G. v. Mohammed Abdulla.[3] The accused and deceased lived in the same house. The accused had the reputation of being a Kugur (i.e., a person engaged in witchcraft) using roots of trees as tools of his craft. One day, after an altercation between the two, the deceased was taken to hospital complaining of 'fire in his belly' and alleging that the accused had 'smitten him with roots'. No signs of physical injury or disease were found but his condition continued to deteriorate until he died. The accused was charged and convicted of murder. The Confirming Authority ordered a re-trial but the accused was again convicted on the ground that he caused the deceased's death "by inducing such cumulative fear in the deceased that he died of it". On the second reference for confirmation, Hamilton-Grierson, J., quashed the conviction and rejected the view that the "causing of fear or illness by suggestion or by direct magic is an 'act' within the sense of the Criminal Code". He continued:

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(1) The Indian Law Commission, 1837, Note M, P.57.
(2) Ibid, Pp.57-58.
(3) AC.CP.190.1927, Unrep.

> "... the only possible argument to support the finding is that death was caused by self-suggestion by a very ignorant and believing native, who thought that the Kugur had used his magic against him and that the Kugur had in fact exercised or directed his magical or suggestive powers to the end that the deceased should accept the suggestion that he should feel violently ill and die."

In agreeing with this opinion, the Legal Secretary added:

> "if such a finding could ever be confirmed, it must be based on the clearest of definite acts or actions by the accused in putting a spell or pretending to put a spell on the deceased."

The above case tends to show that the Sudan courts may recognise that death can be caused by suggestion although very strong evidence is required to support it. There does not, however, appear to be any decided case where this rule was upheld.

Causing Death by Omissions

In the same way as homicide may result from the commission of an act, it may also result from an omission to perform a certain act.

> "Death may result not only from an act but also from an omission to act. An omission may be accompanied by the same states of mind that may accompany an act, and the consequences of an omission are susceptible to the same analytical treatment as those of an act."[1]

Section 25, S.P.C., provides that reference in the Code to "acts done", as a rule, "extends to illegal omissions."[2] Lord Macaulay's Commission examined at great length the question as to which omissions should be regarded criminal. They were of opinion that some omissions such as, for example, where a jailor voluntarily causes the death of a prisoner by withholding food from him or a nurse declines to save a child under

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(1) Michael and Wechsler, "A Rationale of the Law of Homicide"(1937) 37 Co.L.R. 701 at Pp.724-725.

(2) Section 32 of the original Draft I.P.C., in its definition of homicide, provided: "Whoever does any act or omits what he is legally bound to do ...."

her care from danger, should be punishable.[1] On the other hand, it should not be punishable for a man to refuse to give food to a beggar, even if he knows that the death of the beggar would result therefrom, or for a surgeon to travel from one part of the country to another to save a person's life. They therefore concluded that a 'middle course' must be taken.

> "But it is not easy to determine what that middle course ought to be. The absurdity of the two extremes is obvious. But there are innumerable intermediate points; and wherever the line of demarcation may be drawn it will, we fear, include some cases which we might wish to exempt, and will exclude some which we might wish to include."[3]

In the end, the Commission adopted the following formula:

> "that where acts are made punishable on the ground that they have caused, or have been intended to cause, or have been known to be likely to cause a certain evil effect, omissions which have caused, which have been intended to cause, or which have been known to be likely to cause the same effect shall be punishable in the same manner; provided that such omissions were, on other grounds illegal. An omission is illegal if it be an offence, if it be a breach of some direction of law, or if it be such a wrong as would be a good ground for a civil action."[4]

The present provisions of the I.P.C.[5] and the S.P.C.[6] define the word 'illegal' as "Everything which is prohibited by law or which is an offence or which furnishes ground for a civil action ...". Thus, under the combined effect of these provisions and the observations of the above Commission, the law is that an omission is illegal

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(1) The Indian Law Commission, 1837, Note M., P.53.
(2) Ibid.
(3) Ibid, at P.54.
(4) Ibid, at Pp.54-55; these provisions were accepted as "perfectly plain and intelligible" by the second Indian Law Commission, First Report, 1846, para. 241, P.246. They were also approved by the English Criminal Law Commissioners, B.P.P. 1846, vol. XXIV, Second Report, P.112.
(5) Section 43, I.P.C.
(6) Section 30, S.P.C.

only where there is a duty enforceable by law.[1] It is not enough if the accused was under a mere moral obligation to do the act. Further, the necessary state of mind required for the offence must also be present. In S.G. v. Yamoi Bilamoi[2] the accused, a policeman in charge of a police station in Southern Sudan at the time of the mutiny of the Southern troops, was convicted of murder for failure to report to the authorities his knowledge of the intention of the rebel troops to kill Northern merchants in the town. Soni, J., quashed the conviction because

> "The omission of the accused to give timely information must be actively associated or correlated to a criminal knowledge that he was of purpose facilitating the happening."

and that no offence was committed if the omission was due to "stupidity or cowardice, or helplessness or being afraid to be put to death himself."

The following illustrations were cited by the Indian Law Commission[3] and they are of some help in determining what types of omissions are criminal:

(a) Where A omits to give food to Z thereby voluntarily causing his death: It is murder if A was Z's jailor directed by law to furnish him with food,[4] or if Z is A's infant son whom the latter is bound to feed or if Z was a bedridden invalid and A is a nurse hired to feed him. But it is not murder if Z was a beggar who has no other claim over A except that of humanity.

(b) Where A omits to tell Z that a river is swollen so high that Z cannot safely attempt to ford it and by this omission causes Z's death: It is murder if A was appointed officially to warn travellers from attempting to ford the river; or if A was a guide

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(1) Cf. Stephen, H.C.L., vol. III, 10; Williams, G., L.L.G.P., 4; Gordon, 74; R.v. Edwards (1838) 8 C. & P.611.
(2) AC.CP.399.1955, Unrep.
(3) The Indian Law Commission, 1837, Note M., P.55.
(4) Illustration (C), section 80, S.P.C. provides that such omission by a jailor amounts to murder.

who contracted to conduct Z. But it is not murder if A is merely a by-stander and Z has no claim on him except that of humanity.

(c) Where a savage dog fastens on Z and A omits to call off the dog knowing that Z might be killed and Z is, in fact, killed. This is murder if the dog belongs to A, but not if A is a mere passer-by.

It follows that illegal omissions must be distinguished from mere humanitarian or moral obligations. As the above Commission observed:

> "... the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion and to teachers of morality and religion the office of furnishing men with motives for doing positive good .... We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which makes them out as peculiarly fit objects of penal legislation."[1]

It is not possible to lay down with any certainty which types of omissions are criminal and which are not. The question remains one to be determined by the Courts according to the nature of the relationship between the parties, their respective obligations and their mental state at the time of the omission. Apart from the above illustrations some guidance may also be found in some situations where different legal systems have held an omission to be criminal:

(1) Where there is a duty to provide necessaries by someone who has charge over another and is obliged to provide for him, failure to do so constitutes an illegal omission. In R. v. Senior,[2] a father, who, in accordance with his religious convictions, declined to provide medical attention for his sick child, was convicted of man-

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(1) The Indian Law Commission, 1837, Note M., P.56; for a discussion of the enforcement of moral obligations see Gordon, 80-82; see also R. v. Instan, infra.
(2) (1889) 1 Q.B.283.

slaughter for causing the child's death. Again in R. v. Instan,[1] the accused, who lived with her invalid aunt refused to give her food or call for medical aid, causing her death, was convicted of manslaughter.

(2) Persons who are under a contractual obligation or undertaking towards a particular individual or class of persons to do some act may be convicted of homicide if they fail to honour their obligation and this results in the death of that particular individual or any member of that class of person.[2]

Causation in Homicide

Before a person may be convicted of homicide it must be positively established that his act had in fact 'caused' the deceased's death. The problem of causation is a complex one and involves several medico-legal questions. In dealing with it the courts have frequently emphasised that they are concerned with questions of commonsense rather than scientific principles and philosophical questions.[3] But the complexity of the causal factors involved has often led the courts to discuss these theories and principles in order to distinguish 'causes' from 'occasions' or 'mere conditions'. The latter two are usually excluded on the grounds that they do not 'make the difference' between the occurrence or non-occurrence of the result,[4] i.e., they do not 'break the chain of causation'.

The inquiry into discovering the cause of a particular event continues until another event or human action intervenes, to break the causal chain and form a new series, this latter event or action is the novus actus interveniens. In the words of Hart

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(1) (1893) 1 Q.B.450; see also the Australian case of R. v. Russel (1932) Argus L.R. 76; Professor Gordon is of opinion that the rule in Scotland is the same: "Suicide Pacts", 1958 S.L.T. (News), 209.

(2) Gordon, 78; section 164 of the Draft Code, 1879; section 305 Nigerian Criminal Code.

(3) Lord Justice-Clerk Thompson in Blaikie v. British Transport Commission, 1961 S.C. 44 at P.49; Lord Reid in Stapley v. Gypsum Mines (1953), AC.663 at P.681.

(4) Hart and Honore, Causation in the Law, (Oxford, 1959), 32.

and Honore:[1]

> "A deliberate human act is therefore most often a barrier and a goal in tracing back causes in such inquiries; it is something through which we do not trace the cause of a later event and something to which we do trace the cause through intervening causes of other kinds."

The concept of causation involves issues both of law and fact. The question whether the accused's act is the sine qua non of an event (i.e. without which the event would not occur) is a matter of factual causation; but whether such sine qua non is also the 'cause' of that event is a question of law.[2]

In relation to homicide the rule is that the act of the accused must be 'the proximate cause' of the deceased's death and not a mere sine qua non of it. As Alison[3] put it:

> "it is indispensable that the death be connected with the violence, not merely by a concatenation of causes and effects, but by such direct influence as, without the intervention of any considerable circumstances, produced that effect."

The courts have in practice resolved the issue of causation by reference to such tests as remoteness, directness and foreseeability according to the different circumstances of each case. The S.P.C. has laid down some broad guiding principles and left to the courts the duty of applying the appropriate rules to the particular cases. The attitudes of the courts, together with the rules will now be examined.

A. Pre-existing Conditions:

Explanation I, section 246, S.P.C., provides:

> "A person who causes bodily injury to another who is labouring under a disorder, disease or

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(1) Ibid, at P.41.
(2) Smith and Hogan, op.cit., 169; Camps and Havard, "Causation in Law", (1957) Crim. L.R.582.
(3) Alison, i, 147.

> bodily infirmity and thereby accelerates the death of that other, shall be deemed to have caused his death."

Thus, it is no defence to a charge of homicide to allege that the deceased had been suffering from a mortal disease or a weak heart and that he was about to die in any case[1] such abnormalities being "ranked as part of the circumstances in which the cause operates."[2] The over-riding principle is that you should "take you victim as you find him."[3] Thus, in H.M.A. v. Rutherford[3], Lord Cooper said:

> "it is no answer for an assailant who causes death by violence to say that his victim had a weak heart or was excitable or emotional or anything of that kind. He must take his victim as he finds her. It is just as criminal to kill an invalid as it is to kill a hale and hearty man in the prime of life."[4]

The same principle applies in English law.[5]

The accused would still be regarded as having caused the deceased's death even if he had no knowledge of the deceased's infirmity or even if the injury which caused the death was a minor one. In S.G. v. Imole Imatong[6] the accused gave the deceased a blow in the abdomen. Unknown to the former, the latter had an enlarged liver and spleen and the blow ruptured the spleen and caused his death. The accused was convicted for causing death with the intention of causing hurt under section 254, S.P.C. A detailed discussion of section 254 is found in Chapter VII. Suffice it here to mention that it is intended to punish cases where although the accused is proved to have caused death, his mental condition fails to satisfy the requirement of mens rea

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(1) S.G. v. Sabah ElKeir Gubara, supra; S.G. v. Bomfa Shama, supra.
(2) Hart and Honore, op.cit., 75.
(3) 1947 JC.I.
(4) Ibid, at P.3; see also S.G. v. Ahmed Ali Omer, supra; Hume, i, 183; Alison, i, 149; Macdonald, 87.
(5) Byles, J., in R. v. Murton (1862) 3 F. & F.492 at P.501; Parke, J., in R. v. Martin (1832) 5 C. & P.128 at P.130; R. v. Dyson (1908) 2 K.B.454; Devlin, J., in the case of John Bodkin Adams (1957) Crim.L.R.365.
(6) AC.CP.222.1955; Unrep.

for culpable homicide.[1] In India there is no equivalent provision to section 254 and the offender will be convicted merely of causing hurt or grievous hurt.[2] It is submitted that this is illogical because it is contrary to Explanation I, section 299, I.P.C. (Explanation I, section 246, S.P.C.). The latter expressly declares that the fact that the deceased suffered from disease or infirmity would not relieve the accused from having caused the death by accelerating it. Further, the Explanation does not refer to knowledge (or lack of it) by the accused of the deceased's constitutional infirmity and the accused should in any case be held to have caused death. Knowledge of the deceased's infirmity becomes relevant at the subsequent inquiry when the court considers the type of homicide for which the accused is liable.[3] It is, therefore, inconsistent on the part of the Indian law to state that the accused had caused death and, nevertheless, to convict him of hurt or grievous hurt. Section 254, S.P.C. fills in a gap which in India remains unbridged.

To go back to Explanation I, it should finally be noted that whether or not the accused's act has caused death is a question of evidence. The court must be reasonably satisfied that it is not the infirmity or disease which alone causes the death. If the injury by the offender has 'accelerated' the deceased's death it matters not that the infirmity has also contributed to it.[4] But if the injury is so trivial that it could not have accelerated death,[5] or if it is only a remote cause of it, the accused can not be held to have caused the death. In the recent case of S.G. v. Said Hamza Saeed,[6] A hit D on the head with a stick. D was admitted to hospital and ap-

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(1) See Ch.IV infra.
(2) Bharat Singh (1932) A.I.R. (0)279; Megha Meehan (1865) 2 W.R. (Cr.)39; for a further discussion, see Ch.VII, infra.
(3) See Illustration (b), section 248, S.P.C. for the distinction between the two situations.
(4) Abu Rannat, C.J., in S.G. v. Galil Shashati, (1962) S.L.J.R.243 at P.247; Lord Alverstone in R. v. Dyson (1908) 2 K.B.454 at P.457.
(5) Hume, i, 182.
(6) AC.CP.660.1966, Unrep.

peared to be in good condition, but, three days later, he suddenly died. A post-mortem examination showed that he died of an unknown fever. The trial court held that A's act could not have caused D's death. This was upheld on confirmation because

> "The accused's act must be the proximate cause of death, not a remote cause connected to it by a chain of events."[1]

B. Supervening Events:

1. Subsequent Intentional Acts:

Macdonald[2] and Alison[3] state that the deceased's death must result 'directly' from the act of the accused and that, if after the accused's act, a third party injures the victim causing his death, the accused would not be held to have caused the latter's death. Hart and Honore agree that this is so if the third party's act was intentional or reckless.[4] The test applied in the case law shows that this rule depends on whether the accused's initial act was sufficient to cause death or not. If the accused's act was not mortal and death was not a foreseeable result of it, then a subsequent intentional act which causes death would relieve the accused of liability.[5] The position becomes rather difficult where the accused inflicts a deadly wound on the deceased and then a third party inflicts further injuries which 'finish him off'. The authorities are rather varied on this. Thus, Williams is of opinion that:[6]

> "Where legal responsibility would attach to one act, if it stood alone as a cause, the consequences not being too remote, it is immaterial that the consequence is in part caused by another factor in respect of which the accused is under

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(1) Per Salah Hassan, J., applying the Indian case of Nga Moe v. King (1941) Ran.L.R.
(2) Macdonald, 87.
(3) Alison, i, 147.
(4) Hart and Honore, op.cit., 292.
(5) See the U.S. case State v. Preslar (1885), cited in Hart and Honore, op.cit., 283; see also the Rhodesian case of R. v. Nbakwa, (1956) 2 S.A.L.R.557; in both cases the accused was acquitted because it was the deceased's subsequent acts which caused death.
(6) Williams, G., "Causation in Homicide" (1957) Crim. L.R.426 at P.436.

> no responsibility. For example if D and E independently stab P and the wound inflicted by each is enough to cause the death of P each is guilty of murder if P dies as a result of the weakness induced by the two wounds. D is not excused of responsibility merely because E's act was later in time, his own act having contributed to the death at the time when it occurred."

He goes on:[1]

> "... if the second act would not have killed apart from the first wound, and has the effect of accelerating the effect of the first wound, both culprits have in fact contributed to the death, and there is no reason why both should not be regarded as having caused it for the purpose of criminal law."

This principle was followed in the American case of People v. Lewis,[2] where A shot D in the abdomen and D subsequently cut his own throat with a knife and died. A was convicted of manslaughter because if his act contributed to the death then:

> "although other independent causes also contributed, the causal relation between the unlawful acts of the defendant and the death has been made out."[3]

On the other hand, however, Hall is of opinion that the accused's liability:

> "should be determined by what actually happened, not by what would have been caused, and by the legal significance of the intervening actor's liability for the homicide."[4]

He criticises the decision in Lewis[2] on the ground that even if the original wound was fatal, and D was dying, D was still a living human being and A should only have been convicted of inflicting a fatal wound. He concludes:[5]

> "At bottom, there is a conflict between the notion that killing a dying man is a new, sufficient, autonomous cause of his death, and the notion of the continued efficacy of the first fatal wound. But ... ... the legal principles and the liability

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(1) Ibid.
(2) (1889) 124 Cal.551, cited in Sayre, Cases on Criminal Law, (N.Y., 1927), 189.
(3) Temple, J., at P.191, Sayre, ibid.
(4) Hall, J., General Principles of Criminal Law, 2 ed., (Indianapolis, 1960), 262.
(5) Ibid.

> of the subsequent actor should prevail over the physical cause of death in determining the issue of legal causation."

Hall's view is supported by another American case[1] where the Court said:[2]

> "If one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an independent act, we cannot imagine how the first act can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice."

The latter attitude appears to be the more logical of the two. It is in accord with Macdonald's[3] view and it is favoured by the Sudan Courts. Thus, in S.G. v. Naburi Netto[4] A inflicted a mortal injury on D with the intention of killing him. B then inflicted further injuries on D which caused his death. On reference for confirmation of A's conviction of attempted murder, Bennet, C.J., confirmed the finding on the ground that it was in accordance with the S.P.C. but went on (obiter) to state that the Code should be amended so that such persons should be convicted of murder "provided it were proved that the accused's act would necessarily have resulted in death ...". But this argument was rejected, rightly it is thought, by Creed, the Legal Secretary, who said:

> "I am more than doubtful if the Code should be amended in this manner. I know of no Code which treats this as murder, but there may not (sic) be one. It seems to me that to be guilty of murder the first essential must always be to have caused the death of someone."

Further support for Creed's opinion is found in the more recent case of S.G. v. Ahmed Mohamed Zein.[5] In a fight following a drunken brawl A stabbed his brother, D, caus-

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(1) State v. Scates, (1858), Sayre, 181.
(2) Battle, J., at P.182, ibid; see also State v. Angelina (1913) 73W.Va.146.
(3) Supra.
(4) AC.CP.196.1944, Unrep.
(5) (1963) S.L.J.R.112.

ing an incised wound in the stomach. Medical evidence showed that the cause of death was a haemorrhage resulting from an injured spleen as well as the stab in the abdomen. Both wounds were described as 'fatal' and there was no evidence that the injury to the spleen was caused by A. On reference for confirmation A's conviction of culpable homicide was set aside and a conviction of attempted culpable homicide substituted on the ground that it was not proved that A had caused D's death. In perusing the medical evidence, Awadalla, J., said:[1]

> "To describe both injuries as fatal does not per se imply that the incised wound was partly responsible for the death. The first ingredient in a homicide charge is the 'causing of death', and there is a great difference between describing an injury as fatal and alleging that such injury was the cause of death.
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> "An injury may be fatal but may not have resulted in death because it was accompanied by a more fatal injury.... So in this case, (the) mysterious injury to the spleen, of which the cause is unknown, may have been the exclusive cause of death. This may be so despite the fact that the doctor describes the abdominal stab as fatal, because perhaps the mortal effects of this wound had no time to materialize, being intercepted by the quicker and more effective action of the spleen injury."

Thus, the Sudan Courts would not hold the accused liable for causing death even if the injury was fatal and could have resulted in the death of the victim. This is an acceptable attitude because "the intervention of a second actor with the same intention initiates a process which neutralizes that started by the first actor though it culminates in the intended harm."[2]

2. Subsequent Unintentional Acts:

The majority of cases under this heading relate to improper or negligent treatment

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(1) Ibid, at Pp.113-114.
(2) Hart and Honore, op.cit., 296.

of injuries and are separately examined below.[1] However, other situations may be dealt with here. Thus, where the deceased, in order to avoid some threatened violence on the part of the accused, does an act which results in his (the deceased's) death, the causal connection is not broken and, provided that the deceased's act was reasonable in the circumstances, the accused would be deemed to have caused the death.[2] This may be so even where the deceased was negligent. Thus a plate-layer who misread the train time-table, ordered the rails to be removed. A signalman sent to warn any train that might be coming negligently omitted to do so and the train driver negligently failed to avoid the accident. The plate-layer was convicted of manslaughter because his negligence was the 'substantial cause' of the accident.[3] Similarly, it was stated in another case that if the accused's acts contributed to the deceased's death, it mattered not that the deceased was "deaf or drunk or negligent or in fact contributed to his own death."[4]

3. Subsequent Acts of the Accused:

In some cases the accused may inflict an injury on the victim and then do an act or cause another injury which results in the deceased's death. Thus, the accused may cause the injury and then prevent his victim from seeking medical help. In such a case the accused will be deemed to have caused the death.[5]

An interesting problem arises where the accused strikes his victim, intending to kill him and the latter faints, and then, the accused, believing him to be dead, disposes of his 'body' by throwing it into a river or burning it to avoid detection. The

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(1) Infra.
(2) R. v. Pitt (1842) 174 E.R.509; see also Article 62, Stephen's Digest.
(3) R. v. Benge (1865) 4 F. & F.,504.
(4) Pollock, C.B., in Swindall and Osborne (1846) 2 C. & K. 230.
(5) S.G. v. Omer Bakheit, AC.CP.148.1943, Unrep.; S.G. v. Ohag Saidna, AC.CP.309, 1944, Unrep.; S.G. v. Nyelo Musa, AC.CP.15.1947, Unrep.

authorities are by no means agreed on the rules applicable in this situation. The difficulty springs from the fact that the situation involves issues both of mens rea and causation: when the accused caused the initial injury he did not in fact cause death, although he intended to do so; and in disposing of the body he caused death but did not intend to because he thought it was a corpse he was disposing of. In Thabo Meli v. R.,[1] the accused, intended to kill the deceased and to roll him down a cliff to give the appearance of an accident. They struck him with a heavy instrument and, believing him to be dead, rolled him down the cliff. Medical evidence showed that the cause of death was exposure to the cold at the edge of the cliff rather than the original injury. The accused were convicted of murder. Their appeal to the Privy Council was based on the argument that while the original blows were accompanied by the requisite mens rea, they had not caused death, and that the second act, which in fact caused the death, was not accompanied by mens rea. The appeal was dismissed on the ground that

> "... it was impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as part of their plan; and it is too much refined a ground of judgement to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law."[2]

Turner[3] disagreed with the above decision and maintained that the accused should have been convicted only of attempt because their subsequent acts were actuated solely by the intention to escape detection and not to commit murder. Ratenlal,[4] on the other

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(1) (1954) 1 W.L.R. 228; see also the U.S. case of Jackson v. Commonwealth (1896), Sayre, op.cit. 313.
(2) Lord Reid at Pp.230-231, ibid.
(3) Turner, in Russell, op.cit., 55-60.
(4) Ratenlal, op.cit., 749.

hand, maintains that:

> "If a person intends to cause the death of another and does an act in furtherance of that intention which act does not in fact cause the death intended and in belief that the said act has caused death he does another act for the purpose of hiding the traces of the crime and such act results in death, the offender can be convicted of murder."

Different legal systems have taken different attitudes in relation to this problem. Thus in the Indian case of Khandu[1] the accused struck the deceased intending to kill him. Believing him to be dead, he set fire to the hut where the 'body' lay. Medical evidence established that the deceased died from burning, not from the blow. Sargent, C.J., held that the conviction should be for attempted murder for

> "although the accused undoubtedly believed that he had killed his victim, there would be a difficulty in regarding what occurred from first to last as one continuous act done with the intention of killing the deceased."[2]

The same principle was followed in Palani Goudan[3] in India and is accepted by Gour.[4] Again, in the Rhodesian case of R. v. Chiswibo,[5] A hit D on the head with an axe, and, believing him to be dead, buried his body in an ant-bear hole. It was held that as the death might have resulted from the interrment the accused was only guilty of attempted homicide. The Supreme Court, following an earlier decision,[6] upheld the finding. It distinguished Meli[7] on the grounds that in that case, unlike the present one, there was a planned transaction or continuing intention. Brett, F.J., added that the intention to 'fake an accident' was 'the central fact' of Meli[7] and that Turner's critisism fails to take account of this.[8] More recently, Meli[7] was also

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(1) (1890) I.L.R.15 Bom.194.
(2) Ibid, at P.201.
(3) (1919) I.L.R.42 Mad.547.
(4) Gour, op.cit., vol II, 1824.
(5) (1961) 2 S.A.L.R.714.
(6) R. v. Shorty (1950) S.R.280.
(7) Supra.
(8) (1961) 2 S.A.L.R. 714 at P.717; Turner disagrees with this and maintains that/...

distinguished in the New Zealand case of The Queen v. Ramsay.[1] The accused struck the deceased a severe blow causing her to fall unconscious. He then inserted a gag in her mouth causing her to die of asphyxia. His conviction of murder was quashed on appeal on the grounds that Meli[2] depended on a "preconceived plan to kill" which was not the position in the present case. It was further pointed out that the intention or knowledge required for a conviction of murder must exist at the time of causing the bodily injury which results in death.[3] They agreed that to view the accused's conduct as a whole may be useful to ascertain a dominant 'intention' running throughout a series of acts but this could not be done in relation to knowledge.

> "A course of conduct doubtless sometimes reveals a persisting intention sufficiently plainly to enable one to say without doubt that every part of that conduct was directed by that intention; but we doubt whether one can ever determine from the overall character of a sequence of actions what knowledge there was in the mind of the actor of the likely consequences of a particular act. To ascertain that knowledge one should look at the act as an individual act, though not in isolation from the surrounding facts, including, naturally, prior conduct of the accused ....the knowledge to be ascertained is always the knowledge at the time when the act causing death is committed. The mens rea prescribed .... must exist at that point of time."[4]

On the other hand, several cases have preferred to follow the decision in Meli.[2] Thus, in a third Indian case, Kalippa Gourdan,[5] the accused strangled a woman with the intention of killing her. Believing her to be dead he dragged her body to a railway line where she was killed by an on-coming train. He was held guilty of murder because

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(contd.) the 'central' fact of Meli (supra) was not the faking of the accident but whether or not the accused, at the time of the second act, believed the deceased to be dead.

(1) (1967) N.Z.L.R.1005.
(2) Supra.
(3) Ibid, McCarthy, J., at P.1014.
(4) Ibid, at P.1015.
(5) (1933) I.L.R.57 Mad.158.

the two acts, one following immediately upon the other, were so intimately connected to each other that they formed a single transaction. In the Sudanese case of S.G. v. Mohammed Hamid Ali[1], the accused hit his brother with a heavy stick, rendering him unconscious. Failing to revive him, and thinking he was dead, he threw his 'body' into a well. It was not conclusively established whether death resulted from the blow or the fall into the well, but the Court was satisfied from the circumstances that it resulted from the blow and convicted the accused of murder. The Court added that it would have convicted the accused of murder even if the death resulted from the fall into the well. Relying on an American decision[2] and Professor William's[3] view on the matter, Mudawi, P.J., said[4]:

> "It seems to me that it all depends on the first act that created the situation leading to the mistaken belief in death. If the first act - in this case the blow - would probably cause death, then subsequent death based on mistake would be murder. If the first act was likely to cause death then the case would be culpable homicide not amounting to murder."

Though no reference was made to Meli's case[5], it seems implicit in the above statement that if the accused's original act was intended to cause death the transaction will be taken as a whole and the accused will be convicted of murder despite the fact that he had no such intention when he committed the second act.[6] However, the significance of the above statement is greatly reduced by the fact that the Court was in fact of opinion that the death had been caused by the blow. It is therefore a mere obiter

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(1) (1959) S.L.J.R.66.
(2) Jackson v. Commonwealth, supra.
(3) See infra.
(4) (1959) S.L.J.R.66 at P.67; emphasis on the words 'probably' and 'likely' in the above statement is added. As will be seen in Chapter IV the distinction between murder and culpable homicide in the Code is based on the distinction between 'likely' and 'probable'.
(5) Supra.
(6) See Torpin, C.C., "Manslaughter", (1965) C.L.J.170, at P.173.

dictum.

The question has been more directly considered in the recent case of S.G. v. Khidir Abdulla ElHussein.[1] After an exchange of abuse between deceased and accused, the latter hit the former two mighty blows on the head with a hoe. Believing he was dead, the accused dragged the deceased to the river where the latter died of suffocation. Applying the dictum in Hamid's[2] case, the trial court convicted the accused of culpable homicide not amounting to murder.[3] On reference for confirmation, Imam, J., was of opinion that the conviction should be merely for attempt because, like Turner,[4] he thought that "the pivoting of the case is the knowledge of the accused" regarding the victim:[5] if he believed the body to be living the offence would be murder, but if he thought it was dead then a conviction of murder may only be sustained "when an intention to kill, whether premedidated or not, is directly proved"[6] or where it is arrived at

> "by way of influence from the nature of the first act that caused the death, provided that in both these incidents the continuation of such an intention should be inferred from the chain of acts that followed the first one leading to the last that actually caused the death and from all the above circumstances of the case in such a way as to form one transaction, and that inspite of the accused's mistaken belief that he was dealing with a dead body when he committed the last act that caused death."[7]

The rule would not apply if no initial intention could be proved or if it could not be shown that such an intention continued to the last. He rejected the dictum in Hamid's[2] case on the grounds that the accused's attempt to revive the deceased in

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(1) (1966) S.L.J.R.110.
(2) Supra.
(3) The reason for not convicting him or murder was the acceptance of the defence of provocation.
(4) Supra.
(5) (1966) S.L.J.R. at P.112.
(6) Ibid, at P.121.
(7) Ibid.

that case cannot be reconciled with an intent to cause death.

Finally, Imam, J., held that since the rule was one of 'assumptive responsibility' it should be very strictly applied. It should not apply where there is no intent to kill or where that intent is not proved to be a continuous one because "here the assumption of an intent to repent should weigh against an assumed intent to kill ...."[1] He held that the rule should also be excluded where there is a mitigating factor such as suddenness or provocation which "should be irreconcilable neither (sic) with a murderous intent nor with its continuity."[2] He therefore concluded that the accused should only be found guilty of attempted culpable homicide because he was acting under provocation.[3]

It thus appears from Meli,[4] Kalippa Goundan[5] and from the dictum of Mudawi, J., in Hamid[6] that the whole question depends on the accused's state of mind when he committed the first act. If that act is done with the intention of causing death or if death is the probable result of that act, the offence will be murder regardless of the accused's mistaken belief (that the deceased is already dead) at the time of the second act.

On the other hand, Khandu,[7] Palani Goundan,[8] Chiswibo[9] and Imam, J., in ElHussein,[10] emphasise that whether or not the accused should be convicted of murder depends on the proof of an original intent to kill which is also proved to have continued until the end of the whole transaction. The New Zealand case of Ramsay[11] stands alone in dis-

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(1) (1966) S.L.J.R.110 at P.123.
(2) Ibid.
(3) However, the accused was eventually acquitted on grounds of insanity.
(4) Supra.
(5) Supra.
(6) Supra.
(7) Supra.
(8) Supra.
(9) Supra.
(10) Supra.
(11) Supra.

tinguishing between intention and knowledge. It states that the circumstances of a case might allow the continuance of an 'intention' to kill until the end of the transaction; but if the test of 'knowledge' is to apply it must be specifically proved that the accused 'knew' that the act would cause death.

It is submitted that the first of the above views is the better one. A person who forms an intention to kill and does an act with that intention or who commits an act which would probably cause death should not be allowed to escape conviction of murder simply because he wrongly believed the victim to have died before he in fact did. As Professor Williams puts it:[1]

> "the accused intends to kill and does kill; his only mistake is as to the precise moment of death and as to the precise acts that affect that death. Ordinary ideas of justice require that such a case should be treated as murder."

Finally, the opinion of Imam, J., in ElHussein[2] that the rule should only apply to cases of murder and should be excluded whenever there are mitigating factors, such as provocation, does not appear to be convincing. If it is accepted that the offender should be convicted of murder when the continuance of the requisite mens rea until the end of the transaction is proved, there is no reason why he should not be convicted of culpable homicide not amounting to murder if the mens rea for that offence is likewise proved. It should also be remembered that although provocation may reduce the offence to culpable homicide, the offence is prima facie murder under mitigating circumstances. Convictions for manslaughter were brought in similar situations in the cases of R. v. Shoukatallie[3] and R. v. Church.[4] In both cases the accused

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(1) Williams, G., C.L.G.P.,174.
(2) Supra.
(3) (1962) A.C.81, see Lord Denning at P.86.
(4) (1966) 1 Q.B.59.

thought that death resulted from the original act but medical evidence proved that it resulted from the act of disposal, throwing the body into the river.

4. Intervening Diseases and Events:

Explanation 2, section 246, S.P.C., states:

> "When death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented."

The effect of the above provision is that the accused is prevented from contending that the deceased could have lived had he taken better care of himself or had he sought skilful medical treatment. The difficulty which arises in this connection is that an injured person catches a disease or neglects to treat his injuries and subsequently dies, the question is whether it was the injury, the disease or the neglect of treatment which caused his death.

The rule to be applied here is one of remoteness, i.e., whether the intervening disease or injury could be treated as a novus actus interveniens in the sense that the injury caused by the accused has spent its effect and the subsequent disease is deemed to be the substantial cause. The most common type of situation is where an injured man catches pneumonia or where tetanus or gangrene sets in on the injury and causes the deceased's death. In S.C. v. Leben Bamando[1] the accused inflicted several stab wounds on the deceased's cheek and shoulder. The latter was released from hospital seven days later as cured. Three days later he was readmitted and died in hospital as a result of tetanus. The accused was held to have caused his death. Abu Rannat C.J., said:[2]

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(1) (1963) S.L.J.R.168.
(2) Ibid, at P.170.

> "... although the trauma resulting from the stab wound would not have caused death had it not been for the presence of the tetanus spores, the fact is that like a poisoned arrow the knife stab did introduce the lethal agent into the body .... The tetanus in all probability was a direct result of the wounds. Since the wound caused the fatal disease by introducing the tetanus spores, the accused shall be said in law to have caused the death of the deceased."

Again, in S.G. v. Ibrahim Adam[1] where the stab wounds resulted in pneumonia which caused the death of the victim, the trial Court held the accused to be guilty only of attempted murder because the cause of death was pneumonia, not the injury. On reference for confirmation Creed, C.J., sent the case back for reconsideration of finding, pointing out that it was

> "a matter of common knowledge that the pneumonocous is present in a fair proportion of human beings, and that it requires a lower power of resistance or other favouring condition for the production of an attack of pneumonia."

He then approved of the statement in the judgement of Lord Halsbury in the English civil case of Brinton v. Turvey[2] that:

> "... when some affection of our physical frame is induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase 'accident causing injury', because the injury inflicted by an accident sets up a condition of things which medical men describe as disease .... An injury to the head has been known to set up septic pneumonia, and many years ago ... when the incident had in fact ocurred, it was thought to excuse the person who inflicted the blow on the head from the consequences of his crime, because the victim had died of pneumonia and not, as it was contended, of the blow on the head. It does not appear to me that by calling consequences of an accidental injury a disease, one alters the nature and the consequential results of the injury that has been inflicted."

Creed, C.J., went on to say that though the above judgement related to accidental

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(1) AC.CP.26.1940, Unrep.
(2) (1905) A.C.230 at P.233.

injuries it was "equally applicable to a case of intentional injury, in deciding whether an act caused death.". He then formulated the following principles:

> "... either the deceased was on the verge of an attack of pneumonia at the time of the injury, in which case the accused undoubtedly accelerated his death, or the pneumonia supervened on the injury, in which case it appears that it is an almost irresistible inference ... that the injury ... and the pneumonia were so closely linked that the accused caused the death of the deceased."

The same principle was followed in cases where gangrene or septicaemia sets in on an injury and causes death[1], or where the injury results in a ruptured spleen of which the victim dies[2].

The same principle applies in Scots law[3]. In H.M.A. v. James Wilson[4], Lord Cockburn said[5]:

> "Suppose a man to die of apoplexy, but apoplexy to have been produced by a blow. It will not, surely, do for the prisoner, in that case, to say - I gave you a blow but I did not give you apoplexy. Death seldom flows directly from a blow, or even a wound. Some supervening disease is generally the immediate cause ... the rule is, that provided the disease, from which death follows, be not altogether new, but a natural consequence of the injury, the law holds that injury to be the cause of death."

On the other hand, when the disease is 'altogether new' death will be regarded as too remote a consequence of the injury and the latter becomes a mere sine qua non[6].

In the case of James Wilson[4], the accused caused injuries to the deceased's head. The

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(1) S.G. v. Khalid ElRabie Ali, KTM. Maj.ct.2.1953, Unrep.; S.G. v. ElShafie Abdel Rahman, AC.CP.216.1952, Unrep.
(2) S.G. v. Mbelinga Sudani, AC.CP.130.1934, Unrep.
(3) Alison, i, 149; H.M.A. v. Joseph and Mary Norris (1886) 1 White 292.
(4) (1838) 2 Swin 16.
(5) Ibid, at Pp.18-19.
(6) Hume, i, 182; Alison, i, 147; Macdonald, 88; see the case of Christian Patterson, Alison, i, 147.

latter died in hospital five days later after an infection of erysiplas. Another patient in the same ward near the deceased's bed was suffering from erysiplas. Lord Cockburn directed the jury that they should acquit the accused if they were "satisfied that the disease was an entirely new disease - not produced by wounds, but by infection or some other external cause."[1] The charge was found not proven.

No Sudanese case directly applying the above principle can be traced, but Creed, C.J., in Ibrahim Adam[2] stated that the facts of that case should be distinguished from cases in which "an injured man being placed in hospital, where a highly contagious disease was rampant, contracting a disease and dying therefrom."

In relation to intervening 'events' there does not appear to be much guidance in the cases, but the rule is that a subsequent event will not be regarded as a novus actus interveniens if that event is "foreseeable and the whole course of events follows naturally"[3] on the accused's actings. Thus, if the accused's act exposes the deceased to bad weather which kills him the accused will be deemed to have caused the death, provided that such event is "normal or usual in the circumstances."[4] The accused will not be held to have caused the death if, for example, he knocks the deceased unconscious and leaves him on the floor of a building and the latter dies as a result of a collapse of the building due to an earthquake. But he will be held responsible if he leaves the victim unconscious on a seashore and the latter is drowned by the incoming tide.[5]

5. Acts of the Deceased:

If death results due to an act on the part of the deceased the rule is that the causal

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(1) (1838) 2 Swin.16 at P.19; see also Lord Craighill in Joseph & Mary Norris, supra, at Pp.295-296.
(2) Supra.
(3) Gordon, 112.
(4) Hart and Honore, op.cit., 304-305.
(5) Perkins (1946) 36 J.Cr.L. & Cr.393.

connection is not negatived if such act is normal.[1] The effect of Explanation 2, section 246, S.P.C., quoted above, is that the accused would still be held to have caused the death of the deceased even where the latter refuses to submit to proper or skilful medical treatment of his injuries and the courts in the Sudan have consistently upheld this principle.[2] The rule is also applicable in English[3] and Scots[4] laws. The operation of this rule in the Sudan may be illustrated by S.G. v. Abboudi ElTeleib.[5] The deceased developed gangrene as a result of a wound in his arm caused by the accused. The deceased's father refused to have the arm amputated and the deceased died. The trial court held that the accused was guilty merely of hurt because the refusal of amputation had relieved him of responsibility for causing death. This was rejected by Owen, C.J., on reference for confirmation, who pointed out that:

> "the refusal to allow amputation does not destroy the causal sequence between the act and the death and he (i.e., the accused) was responsible for the death."

Again, in S.G. v. Kamal ElJack,[6] A shot D in the thigh and the latter's colleagues refused to take him to hospital and he bled to death. Rejecting the defence conten-

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(1) Hart and Honore, op.cit., 312; Hume, i, 184; Alison, i, 149; Hale, i, 428.
(2) S.G. v. Tom Logoric, Maj.ct. - 1945, Unrep.; S.G. v. Kafi Khalil, AC.CP.377, 1952, Unrep. In the latter case, Abu Rannat, C.J., said: "Explanation 2 is unqualified, and the fact that there are intervening circumstances does not alter the situation that death was traceable to the original blow delivered by the accused."
(3) R. v. Holland (1841) 2 Moo. & R.351; R. v. Wall, (1802) St.Tr.51.
(4) Gordon, 113-114. In the recent civil case of McKew v. Holland, 1970 S.L.T. 68, a worker was injured in an accident due to his employer's negligence, which left him with a weak leg. Three weeks later he had another accident, when, because of his weak leg, he jumped down a flight of stairs, which resulted in a further injury. His action for damages against the employer was rejected on the ground that his unreasonable conduct in jumping down the stairs was a novus actus interveniens which broke the chain of causation.
(5) AC.CP.189.1939, Unrep.; see also S.G. v. Nyelo Musa, AC.CP.15.1947, Unrep.
(6) (1965) S.L.J.R.65.

tion that the deceased's chances of recovery would have been very high had he sought medical help, Mudawi, P.J., said[1]: "Lack of medical care cannot break the chain of causation if death can be connected with the injury".

It is, perhaps, not surprising that cases of this type are more common in the Sudan than in the U.K. The reason for this is the fact that the average member of the public in the Sudan is, to the present day, predominantly illiterate, poor and superstitious. Incidence of disease and infection is very high and availability of medical services is minimal.[2] This is particularly so in the more remote tribal communities. The general attitude of the people to medical attention is very poor and resort to native medicines and primitive doctors is very common. The nearest medical centre might be miles away and resort to it is usually made only in extremely serious cases. Against such a background it is quite feasible to find that in a number of cases the injury caused by the accused has resulted in death because of the deceased's apathy in treating it or because of his application of unscientific medicines. The Indian Law Commissioners rejected a provision in the Louisiana Code excluding from the definition of homicide the case of someone who dies of a slight injury which proved mortal due to the deceased's neglect or the application of improper remedies. In doing so they pointed out that[3]:

> "... this provision of the Code of Louisiana appears to us to be ill suited to a country in which, we have reason to fear, neglect and bad treatment are far more common than good treatment."

Similarly, in S.G. v. Kamal ElJack[4], after pointing out that lack of medical care did

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(1) Ibid, at P.69.
(2) See the note on the condition of medical services, infra.
(3) The Indian Law Commission, 1837, Note M, P.58.
(4) Supra.

not break the causal chain, Mudawi, J., observed that the same rule applied in English law and continued:[1]

> "If this rule of law is desirable in England it is even more so in a country like ours where ignorance and superstition are the general rule and where communications and medical services are subjected to great limitations. The man who causes the injury is presumed to have known all these factors and to have taken them into consideration."

However, where the injury is extremely slight and the victim, through obstinacy, apathy or rashness allows it to become mortal, death may be regarded too remote a consequence of the injury. There does not appear to be a Sudanese case on the matter but this is the view of Hume[2] and it was followed in the Scottish case of H.M.A. v. Joseph and Mary Norris.[3] Guidance may also be found in the Indian case of Nga Moe v. King,[4] where the deceased, who had been injured on the head by the accused, left hospital against medical advice. He contracted malaria which weakened his resistance and an abscess in the brain caused his death. It was held that the accused was not responsible for causing his death. Dunkley, J., said:[5]

> "In order that the accused may be held to have caused the death of the deceased, the injury inflicted must be a proximate cause of death, and not a remote cause connected with the death by a chain of intervening events."

Roberts, C.J., agreed that the accused could not be held to have caused the death because the deceased was "unwilling to exercise common prudence or to abide by the proper remedies and skilful treatment available to him."[6]

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(1) Supra, at P.69.
(2) Hume, i, 182; see also Alison, i, 147.
(3) (1886) 1 White 292.
(4) (1941) I.L.R.Ran.138.
(5) Ibid, at P.142.
(6) Ibid.

6. Abnormal Medical Treatment:

As already stated, Explanation 2, Section 246, S.P.C., provides that the accused would still be responsible for causing death if "by resorting to proper remedies and skilful medical treatment" the deceased's death could have been avoided. It is only logical that the accused should be held responsible for having caused death if the deceased seeks medical treatment, which turns out to be defective, if, as has been pointed out, we are ready to hold him responsible if the deceased does not resort to medical help at all. The reason for this is that, in Hume's words, where the deceased seeks medical aid he "has done nothing to aggravate and everything in his power to relieve."[1]

Before dealing with the rules applicable in such situations, it must be re-emphasised that in the Sudan medical services are extremely lacking[2] and what may be regarded as 'proper' or 'skilful' medical treatment in the present circumstances in the Sudan may, in the U.K., be regarded as improper or negligent. The Sudan Courts are, therefore, expected to apply the provisions of Explanation 2 in the light of the availability and location of hospitals, dispensaries, medical staff, equipment and facilities and pressure of work which such institutions have to cope with.[3]

Returning now to the rules, the issue in such cases depends on several factors, such

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(1) Hume, i, 182.

(2) The Sudan is a vast country inhabited by fifteen million people. According to the Report of Medical Services, Ministry of Health, 1963-1964, P.43, there are sixty-nine hospitals, five hundred and twenty-nine dispensaries ans six hundred and nine dressing stations in the whole country. According to the same Report, there are two hundred and forty-four doctors, eighteen surgeons and seventy-two other specialists in the country.

(3) In S.G. v. Khalafalla Idris, Maj.ct., 1967, Unrep., the accused hit the deceased on the head with a stick. At the hospital the fact that the deceased was suffering from a haemorrhage could not be detected due to lack of X-ray equipment. It was held that the accused was still responsible for causing the death; see also S.G. v. Roar Gai Seis AC.CP.217.1955, Unrep.

as whether the injury was fatal or not, whether the treatment was negligent, reasonable or grossly improper, and whether or not death was a foreseeable consequence of the treatment. Firstly, if the medical treatment results in the creation of a completely new injury which results in death, the causal connection will be broken because such new eventuality could not have been foreseen as a possible consequence of the treatment. In an American civil case[1] the surgeon mistook the deceased for another patient and operated on the wrong side of his body. The deceased had been injured in a railway accident. In an action against the railway company for damages it was held that the latter were not responsible for causing the deceased's death because they could not have foreseen the surgeon's error.

But where no new injury is caused and the death results from aggravating the original injury through the treatment, the general rule is that negligent medical treatment does not break the chain of causation.[2] In practice, a distinction is drawn between cases where the original wound is foreseeably fatal and those where it is not. If it is, then the subsequent aggravation by the medical treatment is irrelevant because the wound is deemed to have 'caused' the death and the treatment merely to have 'accelerated' it.[3] If, on the other hand, the original wound was not fatal, and the subsequent medical treatment is so negligent or abnormal that it could have caused the death independently of the wound, the treatment will be a novus actus interveniens.[4] These rules are emphasised in James Wilson,[5] where Lord Justice-Clerk Inglis said:[6]

> "If a person receives a wound from the hands of another which is not fatal in itself - it may be a simple and easily cured

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(1) Purchase v. Seelye (1918) A.L.R.503; see also the Scots case of Hugh and Euphemia M'Millan (1887) Syme 288.
(2) Hume, i, 184.
(3) Hart and Honore, op.cit., 314; Gordon, 108; Mathew, J., in R. v. Davis (1883) 15 Cox 174 at P.179.
(4) Hale, i, 428; see also the view of the English Law Commissioners, B.P.P.1839, vol. xix, P.235.
(5) (1886) 5 Irv.326.
(6) Ibid, at P.328; see also the English decision of R.v.McIntyre (1847) 2 Cox 379.

> wound - and then afterwards by unskilful and injudicious treatment this wound assumes a more serious aspect and finally terminates in death, it is possible to say, and to say with perfect truth, that the wound inflicted by the hand of the prisoner is not the cause of death, because it would not by itself have caused death but for the bad treatment which followed on it. But it will never do, on the other hand, if a wound calculated to prove mortal in itself is afterwards followed by death, to say that every criticism that can be made on the treatment of the patient ... is to furnish a ground for acquitting the person who inflicted the wound."

The above rule should, however, be considered in the light of the recent English decision in R. v. Jordan.[1] The accused was convicted of murder of the deceased by stabbing, the cause of death being bronchio-pneumonia from the abdominal injury. The Court of Criminal Appeal admitted fresh evidence showing that the cause of death was not the stab wound but the treatment of the deceased by terramycim after he had shown intolerance to it, and also the introduction of abnormal quantities of liquid into the deceased's body. The conviction was therefore set aside on the grounds that the treatment was abnormal.

Thus, the emphasis in Jordan[1] was on whether or not the treatment was 'normal' rather than whether or not the injury caused by the accused was fatal as had hitherto been the case. The test introduced in Jordan[1] was welcomed as a better formula because it was not the foreseeability of the original wound but of the events subsequent to it, proving fatal, that was the proper causal approach.[2]

However, three years after Jordan,[1] R. v. Smith[3] came to be decided. The accused stabbed a fellow-soldier with a bayonet. When the latter was taken for treatment a wound in the back piercing his lung was not discovered and consequently his treatment with oxygen might have affected his chances of recovery. Further, there were

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(1) (1956) 40 Cr.App.R.152.
(2) Williams, G., "Causation in Homicide", (1957) Crim.L.R.429 and 510; Hall Williams, "Developments in the Law of Homicide", (1964) Crim.L.R.84.
(3) (1959) 2 Q.B.35.

no facilities for blood transfusion which would have given him the best treatment. The victim consequently died. In his trial for murder the accused, relying on Jordan[1], maintained that the 'abnormal' medical treatment had broken the chain of causation. This contention was rejected and the accused was convicted of murder. It was pointed out that the rule is that if at the time of death the original wound is still the 'operating' or 'substantial' cause, death may properly be deemed to be caused by that wound even if some other cause of death is also operating.[2] Jordan[1] was distinguished as "a very particular case depending on its exact facts." The decision in Smith[3] was criticised on the ground that it was "profoundly disappointing" and that it "appears to have taken us back to square one."[4]

> "... the courts will be called upon to look again at the whole situation and re-state the law .... It is a melancholy reflection that we cannot say with any assurance in relation to criminal cases what the English doctrine of causation is at present."[5]

The rules applicable in the Sudan law on the interpretation of Explanation 2 are not very clear. In the rather early case of S.G. v. Mohana Kuku[6], the accused fired a shot at the deceased. An operation was performed on the latter which subsequently turned out to have been unnecessary. A hernia developed as a result of the operation and another operation to treat it was performed. The deceased died during the second operation as a result of chloroform poisoning. On reference for confirmation the accused's conviction of murder was set aside on the grounds that the shot wound had spent its effect and that the medical treatment was a novus actus interveniens. Creed, C.J., said:

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(1) Supra.
(2) Ibid, Lord Parker at Pp.42-43.
(3) Supra.
(4) Hall Williams "Developments in the Law of Homicide", (1964) Crim.L.R.84 at P.94.
(5) Ibid.
(6) AC.CP.324.1945, Unrep.

> "When a man puts his victim's life in peril he cannot escape liability for death supervening, if steps taken to save that person's life in fact through no negligence but by 'inevitable accident' cause his death. But where the dangerous effects of the original bodily injury are spent, different considerations apply. So if the first operation had resulted in the death of the deceased it seems to me that the accused would have been liable for the death even though the operation in the event proved to have been unnecessary.... In the case of the second operation ... the patient had recovered from the bodily injury and from the first operation ... He cannot ... be held responsible for subsequent acts and events in which he played no part whatsoever."

It thus appears that, as in Smith[1], the emphasis is not on the abnormal treatment, but on whether the effect of the original injury is still the 'substantial' cause of death. The above statement appears to be in line with what Lord Parker said in Smith[1]:

> "Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound ...., only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that death does not flow from the wound."

It is submitted that in the prevailing conditions in the Sudan and the state of medical services there the adoption of the test in Jordan[3] may open the door in the majority of cases for the accused to allege that the death was caused by negligent or 'abnormal' medical treatment. In the words of Mathew, J.[4], to allow this would be "to raise a collateral issue in every case as to the degree of skill which medical men possessed.".

It is therefore concluded that the best approach to the problem in relation to the Sudan would be to adopt Stephen's[5] view that whenever an injury requires surgical or medical treatment

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(1) Supra.
(2) Supra, Lord Parker at Pp.42-43.
(3) Supra.
(4) R. v. Davis (1883) 15 Cox 174 at P.179.
(5) Article 262 of his Digest of the Criminal Law; see also section 197 of the 1955 Criminal Code of Canada.

> "it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill, but the person inflicting the injury is not deemed to have caused death if the treatment which was its immediate cause was not employed in good faith, or was employed without common knowledge or skill."

The determination of 'common knowledge and skill' would be in accordance with the availability or otherwise of medical staff, equipment and facilities in order to avoid frivolous defences and protracted inquiries into the treatment of victims of homicidal assaults.

C. Length of Time:

It is a rule of English law that for a charge of homicide to be brought against the accused, the deceased must have died within 'a year and a day' from the date of the injury. This rule is an old arbitrary one based on the difficulty of determining the causal connection if a long period of time elapses between the injury and the death. The English Criminal Law Commissioners observed:[1]

> "... although it cannot (sic) be regarded as some sacrifice, in point of principle, to allow a murderer to escape merely because the deceased, from natural strength of constitution, or from accidental circumstance connected with the injury, happened to linger for more than a year, we have not considered ourselves to be justified in suggesting any alteration to this rule."

Stephen made no reference to the rule in his Code Bill of 1878 but the Commissioners who reported on the Draft Code inserted it in the Code,[2] and Stephen himself subsequently accepted it.[3] The rule is now firmly established in English law,[4] but has no

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(1) B.P.P., 1839, vol. xix, P.245; the Commissioners of 1846 omitted the rule from their Digest because they thought that even if the deceased lived for more than a year "it may often be expedient for public justice that the party injuring should be indicted for it.", B.P.P.1846, vol. xxiv, 119, note (a) to Article 3.
(2) Cmd.2345, P.189, Article 169 of the Draft Code.
(3) Stephen, H.C.L., vol III, 8.
(4) R. v. Dyson (1908) 2 K.B.454.

place in the laws of Scotland[1] or the Sudan.

In the Sudanese case of S.G. v. Ahmed Adam Ali[2], where the deceased died nearly thirteen months after the injury, the Court held that the accused could not be convicted of murder because the victim died after more than a year and a day, Hayes, J., said:

> "In England, of course, it would be an irrebuttable presumption of law that the death was attributable to some other cause .... The English rule is not necessarily the law of the Sudan, but the sound commonsense at the back of it does not lose its value and validity by export. The chances of human life are such that new factors are more likely than not to intervene in a period of twelve months, and this is probably more true in Tegali[3] than in Middlesex."

Although the reasoning behind the above statement may be sound, it is submitted that the decision is wrong. The Court was trying to introduce into the Sudan law a rule which is not provided for in the Code and which was not recognised by the courts before or after the above case. Indeed, the Indian Law Commissioners considered the rule and rejected its introduction into the I.P.C. They said[4]:

> "We are decidedly of opinion that it is not advisable to follow the English law in admitting a limitation which is confessedly objectionable in principle, and which would be new in India ...."

The rule is thus not part of the law of the Sudan nor is there any reason for its adoption. It is an archaic rule which was formulated in the old days due to the limitations of medical science. Modern advances in the detection of crime and in scientific medicine render the rule obsolete. However, this is by no means to say that the length of time is wholly immaterial. As Hume[5] pointed out, the duration of time

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(1) Hume, i, 186; Alison, i, 151.
(2) AC.CP.340.1952, Unrep.
(3) A small village in Western Sudan.
(4) The Indian Law Commission, 1846, P.269, para. 330.
(5) Supra.

for which the victim lived before his eventual death may be taken into consideration by the court to determine the whole question of causation in the light of all the relevant circumstances.

CHAPTER IV

MURDER AND INVOLUNTARY CULPABLE HOMICIDE

Culpable Homicide Generally:

Under the provisions of the S.P.C., culpable homicide is either 'culpable homicide amounting to murder' or 'culpable homicide not amounting to murder'.[1] Culpable homicide not amounting to murder is generally equivalent to 'culpable homicide' in Scotland and to 'manslaughter' in England. But the latter terms must be distinguished from 'culpable homicide' in the Code which is a generic term including both murder and culpable homicide falling short of murder. For the sake of brevity, however, 'culpable homicide not amounting to murder' under the S.P.C. is hereinafter referred to simply as 'culpable homicide' except where this may lead to confusion.

Further, it should be noted that the S.P.C. makes no distinction between 'voluntary' and 'involuntary' culpable homicide, but refers to them both as 'culpable homicide not amounting to murder'. The distinction in terms of 'voluntary' and 'involuntary' is here used because it is found convenient to differentiate between culpable homicide falling short of murder under the general definition (involuntary) and culpable homicide which is *prima facie* murder reduced to the lesser offence by mitigating circumstances (voluntary). The latter is dealt with by section 249 of the Code which provides that murder is reduced to culpable when it is done under provocation, in excess of the right of private defence, when death is caused by a public servant exceeding his lawful authority, in a sudden fight, and by consent of the victim. This

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(1) Section 247, S.P.C.

form of homicide is discussed in Chapter VI.

Apart from murder and culpable homicide not amounting to murder, the Code recognises three further categories of homicide which are considered less serious than culpable homicide and are separately provided for. These include:

a. Causing death with the intention of causing hurt or grievous hurt under section 254.
b. Causing death unintentionally in the commission of an unlawful act or offence under section 255.
c. Causing death by a rash or negligent act under section 256.

The above three categories of homicide are discussed in Chapter VII. It should here be pointed out neither in Scotland nor in England is any of the above categories singled out as a distinct offence; all forms of homicide are grouped together as murder or culpable homicide (manslaughter in England[1]). India recognises only 'negligent homicide'[2] as an additional category. A few words will shortly be said of the above offences for the purpose of distinguishing them from culpable homicide. To go back to culpable homicide, it should first be pointed out that the S.P.C., like the I.P.C., begins by defining culpable homicide generally and then proceeds to carve out of it the circumstances under which it amounts to murder. What remains of the definition, after the category of murder is carved out, is culpable homicide not amounting to murder, i.e., involuntary culpable homicide. Section 246, S.P.C., which is almost identical to section 299, I.P.C., provides:

"Whoever causes death by doing an act,
(a) with the intention of causing death or such bodily injury as is likely to cause death,
(b) with the knowledge that he is likely by such act to cause death,
commits the offence of culpable homicide."

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(1) Except for the offence of infanticide in England, see infra.
(2) Section 304A I.P.C.

Thus, the minimum requisite to constitute culpable homicide is either an 'intention' to cause bodily injury which is likely to cause death, or 'knowledge' that the act is likely to cause death. The mental element is one of intention or knowledge, but while the former relates to causing death or bodily injury likely to cause death, the latter is confined to the causing of death. The mental elements involved are discussed subsequently in examining the specific offences of murder and involuntary culpable homicide.

For the moment, it need only be emphasised that any act of killing which fails to satisfy the requirements of section 246 will not amount to culpable homicide. It is thus not culpable homicide if the intention of the offender was merely to cause hurt or grievous hurt, such as, for example, where death results from a hand-blow or a kick in a non-vitalpart of the body. In S.G. v. Galil Shashati,[1] the accused struck the deceased a slight blow on the abdomen and the latter died due to physical exertion and nervous stimulation. The accused was acquitted of culpable homicide because he had no intention of causing death and "he is not a doctor who knows that a light kick on the abdomen which leaves no sign would cause death."[2]

However, it may amount to culpable homicide to cause death by several minor injuries, even if directed at a non-vital part of the body because the cumulative effect of the injuries may lead to the inference that the accused knew or 'should have known'[3] that death would be a 'likely' consequence.[4]

It is similarly not culpable homicide if the deceased dies as a result of the effect of a minor injury on a pre-existing disease or physical infirmity of which the accused

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(1) (1962) S.L.J.R.
(2) Abu Rannat, C.J., at P.243, ibid.
(3) See infra.
(4) S.G. v. Mohamed Adam Onour (1963) S.L.J.R.157; Mudawi, P.J., in S.G. v. Kamal ElJack (1965) S.L.J.R.65 at P.71; see also Tek Chand, J., in Waryam Mohammed v. Emperor, A.I.R.(1938) Lah.834 at P.835.

had no knowledge. The reason is that death would not be regarded as a 'likely' consequence of such an injury, unless the accused is proved to have had special knowledge of the deceased's physical peculiarity or infirmity.[1]

Where the offence falls short of culpable homicide in the above situations, the accused will be liable for the offence of causing death with the intention of causing hurt or grievous hurt, as the case may be, under section 254, S.P.C.

Further, it is also not culpable homicide to cause death by a rash or negligent act because, again, there is no intention to cause death, nor would the accused be deemed to have known death to be a 'likely' consequence of his negligent act. The case is separately provided for in section 256.

Finally, it is not culpable homicide to cause death unintentionally in the course of doing an unlawful act or committing an offence, unless the act or offence is per se regarded as 'likely' to cause death. Otherwise the case will fall within section 255 of the Code.

Culpable Homicide: When it Amounts to Murder:

Section 248, S.P.C., enumerates the circumstances under which culpable homicide within section 246 amounts to murder. It provides:

> "Except in the circumstances mentioned in section 249[2] culpable homicide is murder
>
> (a) if the act by which the death is caused is done with the intention of causing death, or
> (b) if the doer of the act knew that death would be the probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause."

Unlike section 246, which reproduces the definition of culpable homicide in section 299, I.P.C., section 248, S.P.C., marks a significant departure from the definition

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(1) Illustration (b), section 248, S.P.C.
(2) See Ch. VI, infra.

of murder in section 300 of the Indian Code. The latter provides:

> "Except in the cases hereinafter excepted, culpable homicide is murder if the act by which the death is caused is done with the intention of causing death, or
>
> "Secondly- if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or
>
> "Thirdly- if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or
>
> "Fourthly- if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such an act without any excuse for incurring the risk of causing death or such injury as aforesaid."

The above definition was itself a departure from that of Lord Macaulay in the original draft of the Indian Code. According to Macaulay, killing by an act done with the intention of causing death or with the knowledge that the act was likely to cause death was 'voluntary culpable homicide'.[1] If the act was done on grave and sudden provocation, it was 'manslaughter';[2] if the deceased, being over twelve, suffered death or took the risk of death by his own consent, it was 'voluntary culpable homicide by consent';[3] if death was caused by exceeding, in good faith, the right of private defence, it was 'voluntary culpable homicide in defence';[4] in all other cases 'voluntary culpable homicide' was murder.[5]

But when the Code was enacted, Macaulay's simple formula was rejected and the definition in section 300, above, was preferred. The reason for these changes, according

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(1) Section 294 of the draft Indian Penal Code, 1837.
(2) Section 297, ibid.
(3) Section 298, ibid.
(4) Section 299, ibid.
(5) Section 295, ibid.

to Professor Gledhill, is that the legislature,

> "having regard to the ignorance of the rustic of the effect of violence on the human body, was over-anxious to draw finer distinctions between culpable homicide punishable with death and culpable homicide not so punishable."[1]

When the S.P.C. was being drafted, it was thought that the definition of murder under section 300, I.P.C., was too complex in its provision for the requisite mental element. The simpler definition in section 248 was consequently adopted in the Sudan. The difficulty with the definition of murder in India is that it makes the distinction between culpable homicide (in the general sense[2]) and murder a hazardous task. Stephen, one of the great admirers of the I.P.C., described the definitions of murder and culpable homicide as "the weakest part of the Code"[3] because "culpable homicide, the genus, and murder, the species, are defined in terms so closely resembling each other that it is difficult to distinguish them."[4] The Royal Commission on Capital Punishment was also of opinion that the difference between murder and culpable homicide in the I.P.C. "rests on a distinction far too subtle and refined to constitute a just criterion of liability to suffer capital punishment."[5] In giving evidence before the Commission, Sir John Beaumont suggested that the definition of culpable homicide under section 299, I.P.C., would of itself be an adequate definition of murder and that:

> "It is quite unnecessary to put that further description of culpable homicide in section 300. It always seems to me that culpable homicide is murder unless it comes within the exceptions to section 300. I myself told juries that was

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(1) Gledhill, "The Indian Penal Code in the Sudan ...", op.cit., P.14.
(2) i.e., as defined in section 299, I.P.C.
(3) Stephen, H.C.L., vol. III, 313.
(4) Ibid, P.314; Stephen had himself earlier recommended to the Royal Commission on Capital Punishment, 1866, the definition of murder in the I.P.C., see B.P.P. 1866, vol. xxi, Minutes of Evidence, Q.2111 - 2113.
(5) Cmd. 8932, para. 511.

> what I thought in substance the thing came to. Many judges have spent a great deal of time and ingenuity in considering differences between an act which is likely to cause death and one which is sufficient in the ordinary course of nature to cause death."[1]

Although many Indian decisions appear to support the view that there is no distinction between the definitions in sections 299 and 300[2], the generality of cases favour the opposite view. The locus classicus on the distinction between the two sections is the judgement of Melvill, J., in R. v. Govinda.[3] The accused was convicted of the murder of his wife by knocking her down, putting his knee on her chest and striking her in the face, causing an extravasation of the blood in the brain. His conviction of murder was set aside and a conviction of culpable homicide not amounting to murder substituted on the grounds that the requirements of intention and knowledge under section 300 were not satisfied. Melvill, J., stated the distinction between sections 299 and 300 as follows:[4]

"Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done
(a) with the intention of causing death;	(1) with the intention of causing death;
	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
(b) with the intention of causing such bodily injury as is likely to cause death;	(3) with the intention of causing

(1) Cmd. 8932, Minutes of Evidence, Q.8778; see also Sir Reginald Craddock before the Select Committee on Capital Punishment, B.P.P., 1930-1931, vol VI, Minutes of Evidence, Q.3844.
(2) Ramlal v. Emperor, I.L.R. 3 Luck.244; The King v. Aung Nyun (1940) Ran.441.
(3) I.L.R. (1876) 1 Bom. 342.
(4) Ibid, at Pp.344-346.

	bodily injury to any person, and the bodily injury is <u>sufficient in the ordinary course of nature</u> to cause death;
(c) with the knowledge that the act is <u>likely</u> to cause death;	(4) with the knowledge that the act is <u>so imminently dangerous that it must in all probability cause death</u>; or such bodily injury as is likely to cause death."

He continued:[1]

> "... I have underlined the words which appear to me to mark the difference between the two offences. (a) and (1) show that when there is an intention to kill the offence is always murder.
>
> "(c) and (4) appear to me to apply to cases in which there is no intention to cause death or bodily injury. Furious driving, firing at a mark near a public road, would be cases of this description. Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result it is culpable homicide, if it is the most probable result it is murder.
>
> "The essence of (2) appears to me to be found in the words which I have underlined. The offence is murder if the offender knows that the particular person injured is likely either from peculiarity of constitution, or immature age, or other special circumstances to be killed by an injury which would not ordinarily cause death ....
>
> "There remains to be considered (b) and (3), and it is on a comparison of these two clauses that the decision of doubtful cases ... ... must generally depend. The offence is culpable homicide, if the injury intended to be inflicted is likely to cause death; it is murder if such injury is sufficient in the ordinary course of nature to cause death. The distinction is fine but appreciable. It is much the same distinction between (c) and (4) already noticed. It is a question of degree of probability. Practically, I think it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist or a stick on a

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(1) Ibid.

> vital part is likely to cause death; a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death."

The above interpretation has been accepted in several cases[1] and is believed to be the prevailing one in India today.[2] Further, the scheme of the Code was laid down by Agarwala, J., in Behari and Others v. The State[3] as follows:

> "Section 299 defines culpable homicide. Culpable homicide is of two kinds, culpable homicide amounting to murder and culpable homicide not amounting to murder. It is strange that in some cases section 299 has been taken to be the definition of culpable homicide not amounting to murder, although the section clearly speaks of culpable homicide simpliciter. The scheme of the Penal Code is that first 'culpable homicide' is defined and then murder, which is a species of culpable homicide, is defined. What is left out of culpable homicide after the special characteristics of murder have been taken away from it, is culpable homicide not amounting to murder. For this reason the Code contains no definition of culpable homicide not amounting to murder."[4]

The latter analysis will also be applicable in distinguishing sections 246 and 248, SP.C. But as already mentioned, section 248 provides a simpler definition of murder than the one in the Indian Code. Sudanese decisions do not show an exposition of the sections defining culpable homicide and murder, equivalent to that of Melvill, J., in Govinda.[5] An attempt to do so will probably lead to the following result:

Section 246	Section 248
Culpable homicide is committed if the act by which death is caused is done	Subject to the exceptions in section 249, culpable homicide is murder if the act by which

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(1) The Queen v. Sheikh Bazu (1867) 8 W.R. (Cr.) 47; Inder Signh v. The Crown (1928) I.L.R. 10 Lah.477; Willie Slanley v. State of Madhya Pradesh (1956) S.C.110.
(2) Gledhill, "The Indian Penal Code in the Sudan ..." op.cit., 16.
(3) A.I.R. (1953) All.203 at P.205.
(4) Emphasis supplied.
(5) Supra.

	death is caused is done
(a) with the intention of causing death;	(1) with the intention of causing death;
(b) with the intention of causing such bodily injury as is <u>likely</u> to cause death;	(2) with the intention of causing such bodily injury as the offender <u>knows would probably</u> cause death;
(c) with the knowledge that the act is <u>likely</u> to cause death.	(3) with the knowledge that the act would <u>probably</u> cause death.

(a) and (1) show that the case is always murder whenever there is an intention to cause death.

(b) and (2) relate to cases where there is an 'intended bodily injury'. The distinction between them rests on the knowledge of the degree of risk involved. If the intended bodily injury is 'likely' to cause death the offence is culpable homicide not amounting to murder; it is not essential that the accused should 'know' the injury to be likely to cause death.[1] But if death is known to be 'the probable' result of the injury the offence is murder. (2) above covers cases falling under both (2) and (3) of section 300, I.P.C., i.e., cases where the accused has special knowledge of the physical peculiarity of the victim,[2] and cases where there is a general knowledge that the injury would in the ordinary course of nature result in death. Finally, (c) and (3) are also distinguishable on the basis of the knowledge of the degree of likelihood or probability involved. The difference between (b) and (2), on the one hand, and (c) and (3) on the other, is that the former apply only to death resulting from an 'intended bodily injury', whereas the latter apply when the 'act' is so dangerous that it may result in death. Such an act need not be intended to

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(1) Gledhill, 491-492.
(2) Illustration (b) section 248, S.P.C.

to cause bodily injury to any particular person. For example, it would still be murder if A fires into a crowd and kills someone.[1] (c) and (3) generally correspond to (c) and (4) of the table set out by Melvill, J.

It is thus clear that murder is a species of culpable homicide and that all cases of murder must first satisfy the requirements of culpable homicide. The opposite is not necessarily true. As was pointed out in an Indian case "all cases falling within section 300 must ex necessitate fall within section 299, but all cases falling within section 299 do not necessarily fall within section 300".[2]

Finally, like the I.P.C., the S.P.C. gives no definition of involuntary culpable homicide not amounting to murder. It is a residual offence of which a person may be convicted when the mental elements defined in section 246 are satisfied but those in section 248 are not. These mental elements will now be examined.

The Mens Rea in Murder

I. Intention to Cause Death

As explained above, section 248(a), S.P.C., and the first paragraph of section 300, I.P.C., states that it is always murder if the killing results from an intention to cause death. The rule is also clearly the same in Scotland[3] and England.[4]

Intention to kill does not necessarily have to be a premeditated intention. Cumings, C.J., explained this in S.G. v. Ahmed Adam Asholai,[5] as follows:

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(1) Illustration (c), section 248, S.P.C.
(2) Daliph Singh, J., in Inder Singh v. The Crown (1928) I.L.R.10 Lah.447, at P.431.
(3) Macdonald, 89; Lord Jamieson in H.M.A. v. Kizilevicius, 1938 J.C.60 at Pp. 61-62.
(4) Kenny, op.cit., 143-145; Smith and Hogan, op.cit., 180.
(5) AC.CP.132.1940, Unrep.; see also Bell, C.J., in S.G. v. Gessingairi Chongo AC.CP.198.1931, Unrep.; Creed, C.J., in S.G. v. Abdelgalil Abdelmageed, AC.CP.13.1937, Unrep.

> "The words 'intention' and 'intend' do not imply premeditation, which combines two elements, first a considered intention, formed before the action which results in the crime, secondly, that at the time of forming the intention the offender is in a sufficiently cool and collected condition to realize the nature and probable consequences of his act. Intention in the Sudan Penal Code is intention at the very moment of his act ...."

In the Scottish case of Charles Macdonald,[1] the jury convicted the accused of murder and recommended him to mercy because of lack of premeditation. They were sent back with a direction that if there was no premeditation the conviction should be for culpable homicide. However, they were further directed that mere 'recklessness' was adequate mens rea for murder. The latter part of the direction has been interpreted to mean that 'premeditation' in the above sense meant no more than mere 'intention'.[2] In fact, although the case does not expressly exclude premeditation, the direction as to recklessness may indicate that proof of premeditation is unnecessary, this is also Macdonald's[3] interpretation of the case.

Intention and Motive:

Motive is, as a rule, irrelevant to the determination of intention in murder.[4]

> "Whatever the motive may be, or whether or not any motive be discoverable, the sole point for inquiry is, whether the person inflicting the injury did so with the intention or knowledge specified in the section."[5]

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(1) (1867) 5 Irv.525.
(2) Gordon, 678-679.
(3) Macdonald, 89.
(4) Hume, i, 25; Hume's opinion was approved by the English Criminal Law Commissioners, 1843, who added: "To allow a man to substitute his own notions of right would be in effect to subvert the law. To investigate the real motive in each case would be impracticable, and even if it could be done, a man's private opinion could not possibly be allowed to weigh against the authority of the law." B.P.P.1843, vol. xix, 29; see also Lord Cooper in H.M.A. v. Rutherford, 1947 J.C.1 at P.6.
(5) Ratanlal, op.cit., 745.

It is equally murder to kill a relative to spare him the agony of a mortal disease[1] as it is to kill an ageing grandmother to benefit under her will.

However, where direct evidence of intention is lacking, motive may be taken into account to assess intention. Thus it was stated in S.G. v. Abbakar Adam Mohammed[2] that:

> "Though motive is utterly different from intention, it may nevertheless be evidence of intention; ... the court was right to examine whether the accused had any motive for killing the deceased, and if it found that he had it, should then have considered to what extent, if any, the existence of such motive was proof of intention."

It was also pointed out that to assume that if there was no motive there could be no intention was completely non-sequitur because:

> "absence of motive amounts to no more than that the particular evidence of intention does not exist, and it leaves it open to establish the necessary intention by direct evidence or by statutory evidence of knowledge of probable consequence."

Motive, however, may be extremely significant in the assessment of the appropriate punishment.[3]

Proof of Intention:

Intention being a state of mind, it is rather difficult to prove that the accused intended a particular result. The simplest way of proving intention is by direct proof that the offender had expressed a prior declaration of his intention to commit the act or by a subsequent confession on the part of the offender that his intention was to cause death.

But in practice such direct evidence is rarely forthcoming and intention must be proved as a matter of inference from the particular circumstances of each case. In murder cases intention is determined by inquiring into such factors as the nature of the in-

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(1) S.G. v. Bomfa Shoma, AC.CP.282.1941, Unrep.; Ch. III, supra.
(2) AC.CP.21.1950, Unrep.
(3) Gordon, 204; Smith and Hogan, 44; S.G. v. Sabah ElKheir Gubara, AC.CP.360. 1927, Unrep.

juries and their location, the weapon used for the killing, the force applied, the physical condition of the victim, etc. The accused will be deemed to have acted intentionally if "his actions make sense when regarded as directed towards a particular result";[1] and if the circumstances of the case are such that the only reasonable explanation of his behaviour "is that he intended to kill, either in the sense of desiring to do so, or in the sense that he must have known that death was a necessary consequence of his conduct."[2]

Thus, if A plunges a knife into D's heart or stomach, or shoots him with a gun in the head, A cannot be heard to say that he did not intend to cause death.[3] Section 41, SP.C., provides that, unless the contrary is proved, a man is presumed "to have knowledge of any material fact if such fact is a matter of common knowledge.". Consequently, a person will be convicted of murder if he shoots another with a gun causing his instant death,[4] or if he stabs another in the chest or stomach,[5] or strikes him with a heavy stick on the head using considerable force.[6] The reason for this is that in all such cases the accused is presumed to know that a serious injury in such a vital part of the body will lead to death. In S.G. v. Mukhtar Hag ElAmin,[7] Cummings, C.J., confirmed the accused's conviction of murder, for having stabbed the deceased in the back, piercing a kidney and breaking a rib, and went on to say:

> "How can a man say that he did that to another and yet did not intend to kill him? It is to say that he expected the laws of nature to be suspended for his benefit."

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(1) Gordon, 204; Cf. Lord Guthrie in Cawthorne v. H.M.A., 1968 J.C.32 at P.37.
(2) Ibid; see also Gledhill, 470; Ratenlal, op.cit., 749.
(3) S.G. v. Awad Adam Omer (1961) S.L.J.R.61.
(4) S.G. v. Saeed Ahmed (1961) S.L.J.R.54.
(5) S.G. v. Ibrahim Ahmed ElFeki (1961) S.L.J.R.11.
(6) S.G. v. Mohamed Ahmed Gadir (1961) S.L.J.R.46.
(7) AC.CP.200.1946, Unrep.; see also S.G. v. Abdel Nebi Hassan Bedairi AC.CP.62. 1942, Unrep.

Thus, although the determination of intention is subjective in the sense that 'the accused' must have intended to cause death, the inquiry by which intention is ascertained proceeds on objective external factors.

The Presumption of Intention:

The difficulty of proof of intention resulted in the development of a rule whereby a person would be deemed to have intended (or contemplated) what may be regarded as 'the natural and probable consequences' of his acts.[1] The 1839 English Criminal Law Commissioners stated the principle in the following terms:

> "... it appears to us that it ought to make no difference in point of legal distinction whether death results from a direct intention to kill, or from wilfully doing an act of which death is the probable consequence. According to the well established judicial rule everyone must be presumed to contemplate the probable consequence of his own act."[2]

The rule has recently led to some controversy in English law as a result of the House of Lord's decision in D.P.P. v. Smith,[3] the effect of which has now been repealed by the Criminal Justice Act 1967. In that case the accused had been stopped in his car by a policeman and had then driven off with the policeman hanging on to the car. He bumped the policeman against three other cars and then shook him off in front of a fourth car which killed him. His conviction of murder which had been set aside by the Court of Criminal Appeal was restored by the House of Lords. The Lord Chancellor, Viscound Kilmur, held that the only question for the jury was whether Smith's act was of such a kind that grievous bodily harm was its natural and probable result, and that it did not matter what the accused had in fact contemplated as the probable result of his actions or whether he ever contemplated at all.[4] In referring to the

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(1) Holmes, The Common Law, 37 ed. (Boston, 1945).
(2) B.P.P., 1839, vol. xix, P.xx.
(3) (1961) A.C. 290.
(4) Ibid, at P.327.

presumption of intention, he said:[1]

> "Provided the presumption is applied, once the accused's knowledge of the circumstances and nature of his acts has been ascertained, the only thing that could rebut the presumption would be proof of incapacity to form an intent,insanity or diminished responsibility."

Criticism to the presumption of intention may indeed be traced back long before the decision in Smith.[2] Stephen thought that it was a rule of mere 'commonsense' not of law, because:

> "The only possible way of discovering a man's intentions is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct."[3]

Salmond thought the presumption was much too wide and that it tended to:

> "eliminate from the law the distinction between intentional and negligent wrong doing, merging all negligence into constructive wrongful intent."[4]

The decision in Smith[2] provoked even more severe criticism by several writers[5] and in Australia the rule in Smith[2] was rejected in Parker v. The Queen,[6] Glanville Williams stated that the effect of the rule would be "to destroy the subjective definition of intention and efface the line between intention and negligence."[7] Similarly, Gordon,[8] like Salmond, said:

> "The statement that a man is presumed to intend the natural and probable consequences of his act is so obviously nonsensical that its continued use is a striking tribute to

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(1) Ibid, at P.300.
(2) Supra.
(3) Stephen, H.C.L., vol. II, P.111; See also Lord Denning in Hosegood v. Hosegood (1950) T.L.R.735 at P.738; Lord Goddard in R. v. Steane (1947) K.B.997 at P. 1004.
(4) Salmond, Jurisprudence, 11 ed. (London, 1957), 410.
(5) Cross, R., "The Need for a Re-definition of Murder", (1960) Crim. L.R.728; Williams, G., "Constructive Malice Revived", (1960) 23 M.L.R.605.
(6) (1963) 111 C.L.R.610; see also the American case of Morisette v. U.S. 342 U.S. 246 (1952).
(7) Williams, G., C.L.G.P., para. 35.
(8) Gordon, G., "The Mens Rea of Murder", 1967 S.L.T.89.

> the loyalty which lawyers pay to statements which have fallen in the past from authoritative lips. For if this were a general rule of law there would be no distinction between intention and negligence. Yet lawyers who would not dream of suggesting that murder can be committed negligently are capable of saying, for example, that 'if the degree of violence was such that death was within the range of the natural and probable consequences of the blow, then it becomes murder.'"

Finally, the rule was examined by the English Law Commission[1] which rejected it on the grounds that it created an irrebuttable presumption that a man intended all the probable consequences of his acts. To them this was unacceptable because of "the undesirability of satisfying as a matter of law the requirement of intent in murder by reference to factors which may be at variance with the actual mental state of the accused."[2] The Commission recommended that, in ascertaining intent in murder, a finding that death or grievous bodily harm was the natural and probable consequence of the accused's act may justify, but should not require in law, the inference that he intended to kill or inflict grievous bodily harm, i.e., such inference should be 'permissable' not mandatory.[3]

The above part of the Commission's recommendations has been implemented in section 8 of the Criminal Justice Act, 1967. It provides:

> "A court or jury in determining whether a person has committed an offence, -
>
> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

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(1) The Law Commission, "Imputed Criminal Intent", H.M.S.O., 1967.
(2) Ibid, para. 6.
(3) Ibid, para. 8.

The Act thus purports to abolish altogether the objective test of intention as laid down in Smith.[1] The application of the rule under the section is illustrated by R. v. Wallet.[2] The accused was convicted of murder on the judge's direction that

> "... if you did find this man intended either to kill ... or ... really to do serious bodily harm ... knowing quite well at the time he was doing something any ordinary person like himself would know it was doing her really serious bodily harm."

The Court of Appeal (Criminal Division) substituted a conviction of manslaughter on the ground that the above direction included traces of the law before the Act.

In India the Code makes no reference to the presumption of intention and in one case the presumption was rejected as

> "a rule of English Criminal Law which was originally but (sic) a rule of evidence has now acquired the dignity of a legal axiom, but which it is not always easy to apply to Indian Criminal Law in view of the distinction that the Indian Penal Code makes between intention and knowledge."[3]

In the Sudan the original Code made no reference to the presumption, but when the Code was re-enacted in 1925, section 43 of the new Code provided that a man is presumed to intend the natural and probable consequences of his acts. But it would appear that the section was applied more liberally than the attitude of the House of Lords in Smith.[1] This is indicated by a statement in S.G. v. Siddig Alim,[4] where the accused hit the deceased on the head with a stick, cracking his skull and causing his death. Relying on section 43, the trial court convicted him of murder. On reference for

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(1) Supra; similar provisions have also been included in section 4 of the Criminal Justice (Northern Ireland) Act, 1966, for a discussion of the latter see Hogget, J., "M'Naghten, Smith and Northern Ireland", (1967) Crim.L.R. 209.

(2) (1968) 2 All.E.R.296.

(3) Cuming, J., in Hazart Gul Khan v. Emperor (1927) 32 C.W.N.345 at P.349; Cf. Agarwala, J., in Behari v. The State A.I.R. (1953) All, 203, at P.206; Gour, op.cit., vol. III, 1915; for a contrary opinion see Ratenlal, op.cit, 730.

(4) AC.CP.319.1945, Unrep.

confirmation, a conviction of culpable homicide was substituted.[1] Creed, L.S., pointed out that the Court had failed to appreciate that:

> "the presumption that a man intends the natural and probable consequences of his acts has never been treated in the Sudan courts as an irrebuttable presumption. Man is prima facie a rational being and his body naturally follows the dictates of his mind; the effect of section 43 Sudan Penal Code is to throw the onus on the accused of showing that he did not intend the natural and probable consequences of his acts, and its purpose is not to state an irrebuttable presumption."

Despite the above approach, section 43 was deleted by an amendment of the Code in 1950.[2] The reasons for its deletion are nowhere stated nor do the courts appear to have discussed the matter. It is submitted that the legislature might have rightly felt that the embodiment of the presumption in the Code might lead the Courts to the wrongful conclusion that the presumption was one of law, the application of which was mandatory.

Nevertheless, the repeal of the above section without any indication as to what the object of the legislature was, and without any direction to the courts as to when, if at all, the presumption might be applied, appears to have left some vacuum and the judges are by no means clear what the present position is.[3] A few recent cases show that the presumption is at present being treated as an absolute presumption of law upon which a conviction of murder may be based.[4] It would appear that the law calls

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(1) The reason for this, however, was the fact that the accused was entitled to the protection of section 249(2) and (4), see Ch. VI, infra.

(2) Order No.20 of 1950.

(3) In response to the Questionnaire, eleven lawyers (including eight judges) were of opinion that the presumption was applicable and that the courts were bound to apply it as a matter of law; six (including four judges) thought that the presumption was rebuttable and that the courts were not bound to apply it; only one thought it was inapplicable; Q.1, Part II, A, the Questionnaire.

(4) S.G. v. Mohammed Ali Ahmed, Maj.ct., B.N.P.1967, Unrep.; S.G. v. Ramadan Gali Koka, Maj.ct., B.N.P.1967, Unrep.; S.G. v. Mansour Ali, Maj.ct., B.N.P., 1967, Unrep.; these cases are only available in Arabic.

for some clarification by a judicial circular or legislative enactment along the lines of section 8 of the Criminal Justice Act.

Finally, in relation to Scotland, it has been suggested that the presumption does not apply to murder.[1] Macdonald defines murder as:[2]

> "... any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences."

This definition clearly covers cases where the accused realised the possibility of death, and also cases where such possibility was not contemplated at all. This is indeed the interpretation given to the definition in the unreported case of Miller and Denovan,[3] where Lord Wheatley approved of Macdonald's definition and went on to say:

> "... it is no answer to a charge of murder to say 'I hit the deceased in such a reckless manner that I had no regard for the consequences, but I had no idea that he would die.' If the degree of violence was such that death was within the range of the natural and probable consequences of the blow, then it becomes murder."[4]

However, in Scots law the emphasis is more on the inference of wicked recklessness displaying disregard of the consequences to human life, as ascertained from the offender's conduct, than on the presumption of intention. At any rate, it would appear that the Criminal Justice Act, 1967, has created a distinction between English and Scots laws and it remains to be seen whether the Scottish Courts will in future adopt the new approach provided by the Act.

Constructive Malice and the Law of Murder:

Before the Homicide Act, 1957, it was a rule of English Criminal law that a person

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(1) Gordon, 679; Cf. his opinion in "The Mens Rea of Murder", op.cit., loc.cit.
(2) Macdonald, 89.
(3) Glasgow High Court, Nov. 1960, Unrep.; cited in Gordon, 688.
(4) Ibid.

could be convicted of murder even where he had not the requisite mens rea for that offence. This was when death occurred: a. - in the course or furtherance of committing a felony[1] such as rape, abortion or robbery; and b. - as a result of injuring an officer of justice in the lawful exercise of his duty.[2]

It was not necessary to prove that the death was intended or foreseeable so long as it occurred in either of the above circumstances, even if it was unintentional or accidental. This doctrine of constructive malice was severely criticised as unjust, illogical and repugnant to the established rule actus non facit reum, nisi mens sit rea.[3]

The same criticisms were reiterated by the English Criminal Law Commissioners in 1839[4] and 1846[5] and by the Royal Commission on Capital Punishment of 1866.[6] Towards the end of the nineteenth century the courts were endeavouring to reduce the rigour of the rule by restricting it to cases where death could have been foreseen as likely to result from the commission of a felony.[7] However, this tendency was checked in 1920 by the House of Lords decision in D.P.P. v. Beard.[8] The accused had been convicted of murder of a thirteen year old girl by placing his hand on her mouth and his thumb over her throat in an attempt to rape her, and thereby causing her death by suffocation. In upholding the conviction of murder based on constructive malice it was pointed out in the House of Lords that "No attempt has been made ... to displace this view of the

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(1) Coke, 3 inst. 52; Hale, i, 454.
(2) Ibid; see also R. v. Porter (1873) 12 Cox 444; R. v. Appleby (1940) 28 Cr. App.R.1.
(3) Stephen, H.C.L., vol. III, Pp.57-58.
(4) B.P.P., 1839, vol. xix, Fourth Report, P.xxviii.
(5) B.P.P., 1846, vol. xxiv, Second Report, P.18.
(6) B.P.P., 1866, vol. xxi, para.6; note that neither the Homicide Bill, 1872, nor the Draft Code, 1879, included constructive malice in the definition of murder.
(7) Stephen, J., in R. v. Serne and Goldfinch (1887) 16 Cox, 311 at P.313; Bigham J., in R. v. Whitmarsh (1898) 62 J.P.711.
(8) (1920) A.C.479.

the law and there can be no doubt as to its soundness."[1]

The rule was subsequently followed in a number of cases.[2] The Royal Commission on Capital Punishment[3] examined the doctrine of constructive malice in great detail. The witnesses who gave evidence before the Commission were divided on whether the doctrine should be abolished altogether, whether it should be restricted to 'felonies involving violence', or whether it should be retained unaltered.[4] The Commission was opposed to the retention of the doctrine in a limited form because of the failure of the courts to give a satisfactory definition of 'felonies involving violence'.[5] They added that the distinction between these and other felonies was only one of degree, not of principle, and that the 'crucial question' was "whether it is right that a man should be convicted of murder for causing a death which he neither intended nor foresaw that he was likely to cuase, solely because he was at the time engaged in committing a crime."[6] They concluded that the only solution was to retain the doctrine in its existing form or abolish it altogether.[7] They preferred to recommend its abolition.[8]

This was eventually implemented by the Homicide Act, 1957, section I of which provides:

> "(1) Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice, aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of theft.

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(1) Ibid.
(2) R. v. Betts and Ridley (1930) 22 Cr. App.R.148; R. v. Stone (1937) 53 T.L.R. 1046; R. v. Jarmain (1945) 31 Cr. App.R.39.
(3) 1949-1953, Cmd. 8932, paras. 72-122.
(4) Ibid, paras. 99-111.
(5) Ibid, paras. 100-102, 111.
(6) Ibid, para. 97.
(7) Ibid, para 111.
(8) Ibid, para. 121 and recommendation 4.

> "(2) For the purpose of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, shall be treated as killing in the course or furtherance of an offence."

The felony-murder rule does not appear to apply in Scots law. Macdonald's[1] definition of murder makes no reference to it and Hume[2] described it as:

> "a strained and artificial sort of principle, which conjoins things in their own nature different, and makes out the crime by coupling a purpose of lucre to an act which is only then criminal when it is done of malice and with a purpose to destroy: a disposition which the man has not shown, and which cannot reasonably be inferred against him, as one who might probably be capable of such wickedness."

The Scots witnesses who gave evidence before the Royal Commission on Capital Punishment confirmed that the doctrine did not apply in Scots law[3] and Lord Cooper went as far as to say[4] "in Scotland we have practically reached the position where only intentional killing is murder.". The Commission itself concluded[5]:

> "The crucial difference between the law of murder in Scotland and the law of murder in England is that the law of Scotland does not recognize any doctrine of constructive malice or anything akin to it."

Before examining the attitude of the Scottish courts in particular cases it is intended to deal with the position under the S.P.C.

The authors of the I.P.C. were strongly against incorporating the doctrine into the Code. They stated their objections as follows[6]:

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(1) Supra.
(2) Hume, i, 24.
(3) Minutes of Evidence, Lord Keith, Q.5119; Lord Cooper, Q.5415.
(4) Ibid, Q.5417.
(5) Cmd. 8932, para. 92.
(6) The Indian Law Commission, 1837, Note M, Pp.64-65.

> "To punish as a murderer every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life. No man can so conduct himself as to make it absolutely certain that he shall not be so unfortunate as to cause the death of a fellow-creature. The utmost that he can do is to abstain from everything which is at all likely to cause death. No fear of punishment can make him do more than this; and, therefore, to punish a man who has done this can add nothing to the security of human life. The only good effect which such punishment can produce will be to deter people from committing any of those offences which turn into murders what are in themselves mere accidents. It is in fact an addition to the punishment of those offences, and it is an addition made in the very worst way .... Surely the worst mode of increasing the punishment of an offence is to provide that, besides the ordinary punishment, every offender shall run an exceedingly small risk of being hanged."

The doctrine was consequently excluded from the Code and the S.P.C. in turn made no reference to it. Illustration (c), section 246, S.P.C., states that if A shoots at a fowl with intent to steal it and accidentally kills B, although A is doing an unlawful act he will not be guilty of culpable homicide because he neither intends to cause death nor does he know that his act is likely to do so. Such a case will fall within the definition of unintentional homicide under section 255, S.P.C. It is doubtful whether causing death unintentionally in the commission of an 'unlawful act' would be considered as culpable homicide in the U.K. today unless there is a direct relationship between the unlawful act and the death.[1]

It is now intended to discuss what has been said of Scots and Sudanese laws in the light of the rules applied by the courts in particular situations.

i. - Abortion

Hume,[2] Alison[3] and Macdonald[4] are all of opinion that it is murder to cause death in

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(1) Cf. Buxton, R.J., "By Any Unlawful Act", (1966) 82 L.Q.R.174; for a further discussion of the question, see Ch. VII, infra.
(2) Hume, i, 264.
(3) Alison, i, 52.
(4) Macdonald, 91.

the commission of the offence of abortion, but they give no authority for this. In H.M.A. v. Charles Rae[1] the jury was directed that to constitute murder in the procuration of abortion, the instrument used must be dangerous or must be used with intention to destroy life; otherwise the offence would be culpable homicide.[2] In practice, death resulting from abortion is charged as culpable homicide, and Professor Gordon is of opinion that "it is unlikely that a murder charge would ever now be brought in an abortion case."[3]

Under the S.P.C., death resulting from abortion is a distinct offence under section 264. It provides:

> "Whoever with intent to cause the miscarriage of a woman with child does an act which causes the death of such woman, shall be punished with imprisonment for a term which may extend to ten years and shall also be liable to fine ..."

The section is followed by an Explanation that "It is not essential to this offence that the offender should know that the act is likely to cause death.". It is submitted that the Explanation is tautologous because if the offender knew that the act was 'likely' to cause death, the offence will be within the definition of culpable homicide under section 246, S.P.C.

ii. Fire-Raising

According to Hume[4], Burnett[5] and Macdonald, it is murder wilfully to raise fire and cause someone to be burnt to death. But, again, this does not seem to find support in the case law and the current opinion[7] is that it will not amount to murder unless

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(1) (1888) 2 White 62.
(2) Ibid, at P.69; see also Willis v. H.M.A. 1941 J.C.1.
(3) Gordon, 691; see also Smith T.B., British Justice: The Scottish Contribution, (Hamlyn Lectures, 1961), 115.
(4) Hume, i, 24.
(5) Burnett, Criminal Law, (London, 1911), 6.
(6) Macdonald, 91.
(7) Gordon, 692.

the fire is started with intent to kill or with such wicked recklessness as to be regardless of the consequences.

The position is the same in the Sudan. Thus, in S.G. v. Gumaa Gasm ElSid[1] A was charged with the murder of D by having set fire to a grass hut in which the latter was sleeping. Flaxman, C.J., stated that to convict of murder, the court must answer in the affirmative the question: "in firing the hut did the accused intend or had reason to know that death was the probable consequence of his act?" i.e., in accordance with the definition of murder under section 248, S.P.C.

iii. Rape

Relying on the English decision in Beard[2], Macdonald[3] states that homicide in the course of rape is murder. But neither Lord Cooper nor Lord Keith held such an opinion before the R.C.C.P.[4] However, they were both of opinion that if "extraneous violence" was used and the woman died as a result, the offence will be murder.[5] The case law offers no guidance but it would appear that Macdonald's view is incorrect and the case will only amount to murder if the violence used indicates wicked recklessness as to the consequences.[6]

No guidance is found in the Sudanese cases either. It is, however, submitted that by analogy of the law in Scotland, the offence will only amount to murder if it satisfies the requirements of section 248, S.P.C.

iv. Robbery

Robbery seems to occupy a special position in relation to the operation of the doctrine

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(1) AC.CP.83.1943, Unrep.
(2) (1920) A.C.479, see supra.
(3) Macdonald, 91-92.
(4) Minutes of Evidence, Q.5416, Q.5127.
(5) Ibid, Q.5415, Q.5127.
(6) Gordon, 691.

of constructive malice in Scots law. Hume[1] was of opinion that it was murder if a robber attacked someone on the highway and the latter died in the struggle; and Macdonald[2] thought it was murder if, in a struggle with the robber, the victim died as a result of having his head dashed against the wall. In H.M.A. v. Fraser and Rollins[3] the jury was directed that killing in the perpetration of robbery was murder unless the death was a 'sort of mischance'.[4] Professor Gordon cites a number of unreported cases[5] where death in the commission of robbery was regarded as murder, even although there was no intent to kill or cause injury. The position has more recently been dealt with in the unreported case of Miller and Denovan.[6] The accused, two youths, committed a series of robberies in a public park where they used to lure their victims. On one particular occasion they struck the victim on the head with a three-foot long piece of wood which fractured his skull and caused his death. In his direction to the jury Lord Wheatley said:[7]

> ... the fact that the blow might not have resulted in death, although in point of fact it did, is in itself no answer to the charge of murder if the blow displayed such wicked recklessness as to imply a disposition depraved enough as to be regardless of the consequences. In that situation it is murder. If Miller hit Cremin over the head with this large piece of wood to overcome his resistance in order to rob him, was that not such wicked recklessness as to imply a disposition depraved enough as to be regardless of the consequences? If in perpetrating this crime of robbery a person uses serious and reckless violence which may cause death without considering what the result may be, he is

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(1) Hume, i, 24; see also Alison, i, 51.
(2) Maddonald, 91-92.
(3) 1920, J.C.60.
(4) Lord Sands at P.63, Ibid.
(5) William and Helen Harkness, Glasgow High Court, Jan, 1922; McCudden and Cameron, Glasgow High Court, April, 1932; James Cunningham, Ayr High Court, April 1939; Charles Templaman Brown, Glasgow High Court, Dec. 1946; quoted in Gordon, 687.
(6) Unrep., Gordon 688-689.
(7) Ibid.

> guilty of murder if the violence results in death although he had no intention to kill ....
>
> "... if in a struggle with a robber the victim is dashed against the wall, or to the ground, and has his skull fractured - and ... if he is hit over the head with a heavy weighty object such as a plank of wood of this nature - and he dies, the crime is murder."

It has been suggested[1] that the above decision indicates that killing in the perpetration of a robbery is murder in Scots law and that, contrary to the conclusion of the R.C.C.P.,[2] there is "certainly something very akin" to the doctrine of constructive malice in Scotland. It is submitted, with respect, that this view is too wide an interpretation of Lord Wheatley's direction. Lord Wheatley appears to have been more concerned with the degree of violence, the nature of the injuries caused and the instrument used than with the fact that it was a case of 'robbery resulting in death'. He was concerned with those factors because they were indicative of such 'wicked recklessness as to be regardless of the consequences', i.e., the requisite mens rea for murder. It is doubtful whether his opinion would have been the same had the death resulted 'accidentally' in the accused's attempt to escape. The most that can be read into the above direction is that it may recognise the doctrine of constructive malice when death results in the commission of a 'felony involving violence' which is reminiscent of the attitude of some of the witnesses before the R.C.C.P.[3]

The causing of death in the perpetration of robbery has not received any different treatment in the Sudan and the case will not amount to murder unless the requirements of section 248, S.P.C. are satisfied. In the case of S.G. v. Salih Allagabo,[4] the accused put extracts of dhatura (wild poisonous weed) in the deceased's food with

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(1) Gordon, 692.
(2) Supra.
(3) Supra.
(4) AC.CP.276.1941, Unrep.

intent to stupefy and rob them. His conviction of murder was set aside and a conviction of culpable homicide substituted. Flaxman, C.J., pointed out:

> "To justify a finding of guilty on a charge of murder in the Sudan the prosecution must satisfy the Court that the accused's act was done with the intention of causing death, or that he knew or had reason to know that death would be 'the probable' and not only a 'likely' consequence of the act."

The question in such cases will depend on the dangerous nature of the act, the risk to the life of the victim and the accused's awareness of such risk. If the act is 'likely' to cause death, the offence is one of culpable homicide (murder if death is 'the probable' consequence of the act), if the risk is less than that the offence will fall within section 255, S.P.C.[2]

v. Resisting Lawful Authority

Homicide occurring in the course of resisting arrest or escaping from lawful custody does not of itself amount to murder under the S.P.C. In S.G. v. Ebeid Kwetti[3] Creed, C.J., referred to a statement in Archbold[4] to the effect that it was murder to kill an officer of justice in the lawful exercise of his duty, and continued:

> "But this is not the law of India or the Sudan. In order to be murder in the Sudan, either the act by which death is caused must have been done with the intention of causing death or the doer of the act must have known or had reason to know that death would be the probable, and not only a likely consequence of his act. Unless one of these two conditions is fulfilled the act is not murder."

However, if murder is otherwise proved the killing of an officer of justice has been treated as an 'aggravated' form of murder calling for a severe sentence.[5]

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(1) S.G. v. Shaltout Shigeifat, AC.CP.103.1952, Unrep.
(2) Ch. VII, infra.
(3) AC.CP.5.1942, Unrep.
(4) Archbold, Criminal Pleadings, 30 ed., 910.
(5) S.G. v. Ahmed Saleh Yahia AC.CP.267.1942, Unrep.; S.G. v. Musay Hassan Bannat AC.CP.146.1943, Unrep.; S.G. v. Ahmed Adam Asholai AC.CP.322.1944, Unrep.

In relation to Scots law it has been suggested[1] that an assault by an escaping robber or housebreaker is not an assault in the perpetration of robbery or housebreaking, and that it should be left to the jury to determine in each case whether killing in an endeavour to escape was done with such wicked recklessness as to amount to murder. In conclusion, it may be said that the S.P.C. does not recognise any form of constructive malice. Killings resulting from the perpetration of robbery, rape, fire-raising or resisting lawful authority, will not amount to murder or to culpable homicide unless the requisite mens rea for either of these two offences is satisfied. Homicide in the procuration of abortion is an offence separately dealt with. The same principles would seem to apply in Scots law, although the latter does not provide separately for death in the procuration of abortion. Further, the judgement in Miller and Denovan[2] may be taken as authority for the view that death resulting from robbery 'involving violence' may amount to murder. But this is not conclusively so and the position remains to be clarified.

II. Knowledge that Death would be 'the Probable' Result of Bodily Injury

It is generally accepted that it is not only intentional killings which amount to murder. In the words of the English Criminal Law Commissioners[3]:

> "... it ought to make no difference in point of legal distinction whether death results from a direct intention to kill, or from wilfully doing an act of which death is the probable consequence ... ... Neither is there any difference between a direct intention to kill and the intention to do some great bodily harm short of death ... as no one can wilfully do great bodily harm

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(1) Gordon, 689.
(2) Supra.
(3) B.P.P., 1839, vol. xix, Fourth Report, P.xx.

without placing life in jeopardy."

Similarly, the Commissioners on the Criminal Code Bill[1] saw no distinction

> "between a man who shoots another through the head expressly meaning to kill him, a man who strikes another a violent blow with a sword, careless whether he dies of it or not, and a man who, intending for some object of his own, to stop the passage of a railway train, contrives an explosion of gunpowder or dynamite under the engine, hoping indeed that death may not be caused, but determined to effect his purpose whether it is so caused or not."

In the Sudan such cases of unintended killing may amount to murder under paragraph (b) of section 248, S.P.C., which states that it is murder if the doer of the act knew that death would be the probable and not only a likely consequence of the act or bodily injury. In Scotland it is murder if the act is done with "such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences."[2]; and in England it is murder if death results from an act done with the intention of causing 'grievous bodily harm'.[3]

Knowledge of Probability: Subjective or Objective

The S.P.C. of 1899 provided in section 227 that it was murder if the act was done with the intention of causing death or:

> "if the doer of the act knew or had reason to know that death would be the probable consequence of the act, or of any bodily injury which the act was intended to cause."

The provision for 'or had reason to know' made it easier for the courts to determine the extent of the accused's knowledge from the external factors of the case by applying a purely objective test. The determination of whether or not death was 'the probable' result of the act is discussed below. Once, however, the court has deter-

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(1) C.2345, 1878-1879, P.24; see also paras.470-472 of the R.C.C.P. report, Cmd.8932.
(2) Macdonald, 89.
(3) Stephen's Digest, Article 223; R. v. Grey (1666) Kel.164; R. v. Errington (1838) 2 Lew.217; Smith and Hogan, op.cit., 181-182.

mined that death was 'the probable' consequence, it could proceed to presume that the accused must have known or had reason to know the probability of death occurring. Several cases may be cited where the courts held that due to the nature of the injury or the weapon used the accused must be presumed to have had such knowledge,[1] that:

> "Every man must know that the blow of a knife in the region of the lower abdomen must endanger life to such an extent death must be (known to be) the probable consequence."[2]
>
> "a man who stabs at the trunk of a man's body has reason to know that death is the probable consequence ...."[3]
>
> "In view of the nature of the weapon and the size of the wound, he must be deemed to have known ...."[4]

and that from the circumstances of the case "it was not possible for any magistrate to come to the conclusion that the accused did not know ...".[5]

The provision 'or had reason to know' was left unchanged when the Code was re-enacted in 1925. But an amendment in 1950[6] omitted that phrase leaving the present section 248(b) which requires proof that the accused '<u>knew</u>' that death was the probable consequence of the act. The section purports to lay down a purely subjective test requiring the accused's knowledge to be proved as a fact and not to be presumed from external factors. However, knowledge, like intention, being a state of mind, it becomes extremely difficult to prove on completely subjective grounds without reference to objective or external factors. Thus, despite the provisions of section 248(b) the courts found themselves applying objective criteria for inferring knowledge. This attitude is illustrated by two recent cases. In <u>S.G. v. Akec Magol</u>,[7] where the ac-

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(1) <u>S.G. v. Amin Karama</u>, AC.CP.39.1934, Unrep.
(2) <u>S.G. v. Covert Duffy</u>, AC.CP.166.1942, Unrep.
(3) <u>S.G. v. Khamis Suleiman Gumaa</u>, AC.CP.225.1944, Unrep.
(4) <u>S.G. v. Omer Eisa Abdullahi</u>, AC.CP.133.1943, Unrep.
(5) <u>S.G. v. Saad Mohamed ElNur</u>, AC.CP.39.1937, Unrep.
(6) Order No.20 of 1950.
(7) (1961) S.L.J.R.20.

cused hit the deceased on the head with a heavy stick causing his death, Abu Rannat, C.J., disagreed with the trial court's finding that the accused was guilty of culpable homicide because: "To strike a man with such a formidable weapon the accused must have at least known that death was a likely consequence".[1] Similarly, in S.G. v. Kamal ElJack,[2] Mudawi, P.J., stated that in applying a deadly weapon to a vital part of the body "the perpetrator is bound to know that death would be the probable consequence".[3] The above attitude is apparently contrary to the provisions of section 248(b) which requires knowledge to be positively proved and not presumed from external factors. The courts are, in fact, confusing the issue of determining whether death is 'the probable' (or 'likely') result of an act with the issue of proof of knowledge. Death may very well be the probable (or likely) result of an injury, but the question whether the accused 'knew' or was aware of such probability is quite a different one. It may be conceded that in most cases where death results from a serious injury caused with a lethal weapon the accused would know that death is the probable result. But it does not necessarily follow that in every case where death is deemed to be the probable result of an act the accused should be 'presumed' to have had knowledge of the risk involved. Section 248(b) requires such knowledge to be independently and subjectively proved.

The courts have attempted to justify their present attitude by reference to the concept of 'common knowledge' and the attitude of the 'reasonable man'. In relation to 'common knowledge' section 41 of the Code provides:

> "A person is presumed, unless the contrary is proved, to have knowledge of

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(1) Ibid, at P.21; emphasis supplied.
(2) (1965) S.L.J.R.65.
(3) Ibid, at P.70; emphasis supplied.

> any material fact if such fact is a matter of common knowledge."

This presumption has been used together with the concept of the reasonable man to determine the knowledge of the accused along a largely objective basis.

The Test of the Reasonable Man

In practice, the courts have determined a person's liability under section 248(b) by deciding whether a reasonable man in the place of the accused would have known that death would be the probable or likely result of an act, and then impute such knowledge to the accused.

In English law the question whether the test of criminal responsibility should be objective or subjective has for a long time been a subject of great controversy. The English Criminal Law Commissioners were of opinion that the proper test of guilt was

> "knowledge and consciousness on the part of the malefactor that hurt or damage is likely to result or will probably result ... his criminality consists in the wilfully incurring the risk of causing loss or suffering to others."[1]

In an earlier Report they said:[2]

> "... in all cases it is essential to the criminality of the act, both in law and morals, not only that the act should in its own nature under the circumstances be attended with peril to life, but that the offender should be aware of such peril ....
>
> "The degree of probability that death will ensue from the act is susceptible of every variety from moral certainty to the remotest possibility ... . And such varieties ... are not merely in proportion to the risk, but depend also on the knowledge and consciousness of the risk to life. These elements are obviously matters of fact, to be decided as facts; they are beyond the reach of definition, and when probability of loss of life from doing the act, the knowledge of that probability on the part of the offender, and his criminal

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(1) B.P.P., 1843, vol. xix, Seventh Report, P.23.
(2) B.P.P., 1839, vol. xix, Fourth Report, P.xxiv.

> intention to occasion the risk have been determined in fact, the principle of law applies."

Such was also the opinion of the Criminal Code Bill Commission[1] and the principle was followed in a number of cases.[2]

On the other hand, the objective approach was preferred in several decisions, and it was held that the case should be murder if the accused should have foreseen the risk of death. In R. v. Lumley[3], Avory, J., directed the jury to ask themselves whether the accused

> "did... contemplate, or must he, as a reasonable man have contemplated, that death was a likely result .... If, in your opinion, he must as a reasonable man have contemplated"

those consequences the offence was murder.[4] Similar directions were also given in R. v. Craig and Bentley[5], R. v. Rymell[6] and R. v. Ward.[7] In the latter, the accused, a man of subnormal intelligence suffering from stomach ulcers, was charged with murdering an eighteen month old child. He had been so distrubed by the child's crying that he picked her up and shook her to death. Following a direction similar to that in Lumley[3], the accused was convicted of murder. The accused's appeal on the grounds that the jury should have been directed in subjective terms in order to take his peculiar mentality into account was rejected by the Court of Criminal Appeal. The latter went on to say:[8]

> "Of course the test must be applied to all alike, and the only measure that can be brought to bear in these matters is what a reasonable man would or would not contemplate.

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(1) C.2345, 1878-1879, P.24.
(2) R. v. Horsey (1862) 3 F. & F.287; R. v. Vamplew (1862) 3 F. & F.520; R. v. Lenchitsky (1954) Crim.L.R.216.
(3) (1911) 22 Cox 635.
(4) Ibid, at P.636.
(5) The Times, December 12, 1952.
(6) (1954) Crim.L.R.60.
(7) (1956) 1 Q.B.351.
(8) Ibid, at P.356, per Lord Goddard.

> If the act is one as to which the jury would find that a reasonable man would say 'It would never occur to me that death would result or grievous bodily harm would result' the jury can find him guilty of manslaughter; but if the jury come to the conclusion that any reasonable person, that is to say a person who cannot set up a plea of insanity, must have known that what he was doing would at least cause grievous bodily harm, then that amounts to murder in law ...."

The above test was also applied by the trial court and upheld by the House of Lords in D.P.P. v. Smith,[1] reference to which has already been made. Viscount Kilmur stated that once the accused was proved to have done an unlawful and voluntary act "it matters not what the accused in fact contemplated as the probable result, or whether he ever contemplated at all ...",[2] and that "the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result."[3]

The above judgement confirmed the view that the test of liability for murder is a purely objective one determined by the knowledge of the reasonable man, and the question whether the accused himself had such knowledge is irrelevant. The objective approach finds support in the writings of Holmes who maintains that the test of criminal responsibility should be external and independent of the accused's actual intention or knowledge, so as to protect society against robbers and murderers.[4] He goes on:[5]

> "If the known present state of things is such that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act, know-

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(1) (1961) A.C.290.
(2) Ibid, at P.327.
(3) Ibid.
(4) Holmes, op.cit., 48.
(5) Ibid, at P.53.

> ing the present state of things, is guilty of murder and the law will not inquire whether he did actually foresee the state of things or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen."

But at present the objective approach is rejected by most legal writers. Thus, Holme's view has been described as an "unfortunate aberration"[1], "quite out of date, and ... of no value as a guide in any practical discussion of the criminal law in the present era ...."[2]. Similarly, the tests applied in Ward[3] and Smith[4] have been subjected to severe criticisms[5]. It has been pointed out that the proper criterion is not what the reasonable man foresaw as likely to result, but what the accused person himself foresaw as likely. It is also maintained that although the accused may be presumed to know matters which are of common knowledge, he should not be credited with the knowledge of someone other than himself.

> "If judges do not mean foresight to be an element in crime, that is to say foresight of the accused, let them say so - not require foresight and then deem it to be fictitiously present."[6]

In an attempt to mitigate the harshness of the rule in Smith[4], Lord Denning[7], one of the law Lords who participated in the decision of that case, stated that the rule was partly subjective and partly objective because, he argued, the question was not whether the reasonable man would have known that death or grievous harm would result, but "Did

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(1) Williams, G., "Constructive Malice Revived", (1960) 23 M.L.R.605 at P.612.
(2) Turner, in Russel, op.cit., 509.
(3) Supra.
(4) Supra.
(5) Prevezer, S., "Murder by Mistake", (1956) Crim.L.R.375; Williams, G., op.cit., loc.cit.; Cross, R., "The Need for a Redefinition of Murder", (1960) Crim.L.R. 728; Hart, H.L.A., The Times, Nov. 12, 1960; Lord MacDermott, Presidential Address to the Holdsworth Club, University of Birmingham, 1963, P.8.
(6) Williams, G., op.cit., P.613.
(7) Denning, Responsibility before the Law, (Jerusalem, 1961); see also Hardy v. Motor Insurance Bureau (1964) 2 Q.B.745 at Pp.758-759.

this man know it?"; and "in answering that question the jury are entitled to go by the objective test. 'Would any reasonable man in his place have known it?' If any reasonable man would have known it, then the jury may infer that this man knew it, though they are not bound to do so."[1]

Such interpretation is evidently incompatible with Viscount Kilmur's statement that "it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all."[2], which clearly excludes all reference to the contemplation of the accused. It was thus rightly pointed out that Lord Denning's view was "a rather unconvincing attempt to defend the indefensible. It might have been better to have dissented at the time than to have regrets afterwards."[3] The rule in Smith[4] was also found unsatisfactory by some courts which continued to direct juries in the subjective test.[5] This tendency was observed by the Law Commissioners[6] who rejected the objective test and recommended that where intent or foresight was required it must be subjectively proved by inquiring into the 'actual' state of mind of the accused.[7] This resulted in the passing of section 8 of the Criminal Justice Act, already quoted,[8] which has abolished the objective test of liability in respect of both intention and foresight.

To return to the Sudan law, it would appear, against the above background, that the tendency of the courts in interpreting section 248(b), S.P.C., by imputing to the accused the knowledge of the reasonable man, is unsatisfactory. The courts in fact

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(1) Ibid, at P.29.
(2) Supra.
(3) Hall Williams, (1962) 25 M.L.R.754 at P.755.
(4) Supra.
(5) For a discussion of these cases see Buxton, R.J., "The Retreat from Smith", (1966) Crim.L.R.195.
(6) The Law Commission, "Imputed Criminal Intent", H.M.S.O., 1967.
(7) Ibid, paras. 9-10.
(8) Supra.

apply their own notions of what they consider the reasonable man would have contemplated. Such approach becomes more objectionable in a country like the Sudan where ignorance, illiteracy, supersittion and primitive beliefs are widespread. Further, the standards of values and common knowledge of the average individual vary considerably from those of the magistrates trying him, especially the professional President of the trial court who exercises substantial authority and influence on the lay members of the court.[1] In such circumstances the court applies its own standards of what is or is not a matter of common knowledge, and falsely attributes such knowledge to the accused. This is not in accordance with section 248(b) which requires proof that the accused 'knew' that death would be the probable consequence of the act. The difficulty in connection with the courts' present attitude may be summarised in Professor Gledhill's words:[2]

> "... how much does the reasonable man know about the human body and the effects of violence to it? He is only endowed with general knowledge; he has not the specialized knowledge of a medical practitioner. No doubt he knows that death is the natural and normal effect of cutting off a man's head, throttling a man, or shooting or stabbing him to the heart or liver; he also knows that a blow on the head with a sharp or heavy weapon or a stab in the abdomen or cutting off of a substantial portion of a limb is likely to cause death but does he know that cutting off a foot is a 'probable' cause of death? Is the reasonable man deemed to be trained in first aid? If not, it would seem that such knowledge as is sufficient to justify a capital sentence can only be imputed when death from the injury is obvious."

The courts should thus only impute to the accused the knowledge of the reasonable man when it is blatantly obvious that the accused should have foreseen the possibility of death. But where this is not so the court must proceed to inquire into the circumstances of the case so as to determine the accused's actual state of mind. This may be

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(1) See Ch. II, supra.
(2) Gledhill, "The Indian Penal Code in the Sudan ....", op.cit., Pp.20-21.

illustrated with reference to the case of S.G. v. Suliman Hassan.[1] A offered D some roots to chew, alleging that they would protect D against injuries. D agreed to buy the roots if A would satisfy him as to their efficacy. Both chewed the root and then A took a knife and pretended to stab himself in the belly but merely pierced his shirt and scratched his skin. He then plunged the knife into D's chest causing his instant death. A was convicted of murder on the basis that "Any man who stabs another with a knive over the heart must be presumed to know that death is not only probable but certain.". In the course of its judgement, the court observed that the accused was "very young and very undeveloped mentally", and that belief in the efficacy of roots was very common in that part of the country.

It is submitted that in the light of the latter remarks the court should not have contented itself with presuming common knowledge and imputing it to the accused, but should have inquired into the latter's state of mind to determine whether in fact he 'knew' or was aware of the risk of death. The case may be contrasted with the South African decision of S. v. Mini,[2] where A stabbed D in the upper part of the body causing his death. He was convicted of murder on the grounds that the use of a murderous weapon in a vital part of the body showed that A knew that his act may result in death. On appeal, a conviction of culpable homicide was substituted because, in determining the accused's guilt, the court should try "mentally to project" itself into the position of the accused. The court was wrong in concluding that A, "an ignorant Bantu" must necessarily have known the possibility of death.[3] It may be pointed out that neither in Mini,[2] nor in Suliman Hassan[1] did the accused give any explanation or make

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(1) AC.CP.212.1942, Unrep.
(2) 1963 (3) S.A.L.R.188.
(3) Williamson, J.A., at P.196, ibid.

a statement on his behalf. It is remarkable that the murder conviction in the latter was nevertheless confirmed despite the observation of Flaxman, C.J., that:

> "The matter might have been a little clearer if the court had taken the trouble to examine the accused ... or recorded his statement in defence."

and the Legal Secretary's remark that:

> "It is just possible that the accused half persuaded himself that the roots were efficacious."

However, two Sudanese cases may illustrate a tendency to prefer the subjective test. Thus, in S.G. v. Mohammed Hussein Khatir,[1] the facts of which are almost identical to those of Suliman Hassan,[2] the accused's conviction of culpable homicide was rejected on the grounds that if the accused genuinely believed in the efficacy of charms he could neither be convicted of murder nor of culpable homicide because 'knowledge' of the probability or likelihood of death occurring would have been disproved altogether, Again, in S.G. v. Kurundu,[3] A, a witchdoctor, used to treat D for a chest complaint by rubbing his chest with herbs and oil and placing the point of a 'magic' spear through the herbs. On the present occasion, he applied more force and the spear pierced D causing her death. A was convicted of culpable homicide on the basis that a reasonable man in his place would have known that death would be a 'likely' consequence of the act. On confirmation, Lindsay, C.J., substituted a conviction of negligent homicide. He pointed out that the court had imputed knowledge to the accused "on the presumption that he had reason so to know". But this presumption, he went on to say, was rebuttable and the accused could not, in the circumstances of the case, be

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(1) AC.CP.305.1951, Unrep.
(2) Supra.
(3) AC.CP.375.1952, Unrep.

presumed to have had the requisite knowledge.

In conclusion, it may be said that the courts are incorrect in determining the accused's knowledge by reference to the presumed knowledge of the reasonable man which is then attributed to the accused. Professor Gordon calls this attitude "the principle of disfacilitation"[1] and proceeds to criticise it on the grounds that its effect

> "is to use the reasonable man as a standard and not as a test, and it is tantamount to saying that whether or not a particular accused is believed when he says that his mental state was not what the mental state of the reasonable man would have been, he is nonetheless to be treated as if his mental state had been the same as that of the reasonable man. Whether or not the accused foresaw the risk he is regarded as reckless because the reasonable man would have foreseen it."[2]

Similarly, Hall[3] points out that the concept of the reasonable man must be used as a "method of inquiry" rather than a conclusive standard. Such criticisms would apply to the present attitude[4] of the Sudan courts which is inconsistent with the express provisions of section 248(b), S.P.C., requiring knowledge to be specifically proved from the circumstances of each case.

The Risk of Bodily Injury: Probability and Likelihood

In rejecting the distinction in the I.P.C. between an injury 'likely' to cause death and an injury 'sufficient in the ordinary course of nature' to cause death, section 248(b) S.P.C., preferred to distinguish between injury 'likely' to cause death (culpable homicide) and injuries from which death is 'the probable' consequence (murder).

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(1) Gordon, 216.
(2) Ibid.
(3) Hall, J., op.cit., P.155.
(4) In response to the Questionnaire, almost all respondents were of opinion that the test of liability under section 248(b) was objective and that the courts should determine the knowledge of the accused by reference to that of the reasonable man. Q.2, Part II, A, Questionnaire.

The words 'probable' and 'likely', which are synonymous in ordinary speech, acquire a technical meaning in the Code. Section 20A, S.P.C., defines 'likely' as follows:

> "An act is said to be 'likely' to have a certain consequence or to cause a certain effect if the occurrence of that consequence or effect would cause no surprise to a reasonable man."

'Probable' is nowhere defined in the Code but section 19 of the Northern Nigerian Penal Code which was based on the Sudan Code[1] defines it thus:

> "... an effect is said to be a 'probable' consequence of an act if the occurrence of that consequence would be considered by a reasonable man to be the natural and normal effect of the act."

The distinction between the two words is of great significance because upon it rests the distinction between murder and involuntary culpable homicide. Although it is expressly stated in the Code that whether death is 'the probable' or a 'likely' consequence is a question of fact,[2] in practice the distinction between the two terms is rather difficult. The Sudan courts do not appear to have taken notice of the definition of 'probable' in the Nigerian Code nor has the definition of 'likely' in section 20A, S.P.C., resolved the difficulty involved in the distinction. In practice, the question whether death would be a probable or likely result of an act is arbitrarily determined by the courts applying their own notions of what they think will or will not cause 'surprise' to the reasonable man.

In the early days of the Code, the courts do not appear to have even grasped the reason behind the distinction between 'likely' and 'probable'. In S.G. v. Sulta Gador[3]

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(1) A panel of jurists under the chairmanship of Abu Rannat, the then Chief Justice of the Sudan, recommended the introduction of the Sudan Code in Northern Nigeria, and this was implemented in 1959; see Gledhill, 18-19.

(2) See the Explanation to section 248, S.P.C.

(3) AC.CP.117.1925, Unrep.; in the subsequent case of S.G. v. ElMubarak Ahmed/...

the accused caused the deceased's death by hitting him on the forehead with a heavy stick. He was convicted of murder on the grounds that death was a 'likely' consequence of the act. On confirmation, the case was sent back to the trial court with a direction that it should either have found death to be 'the probable' result of the injury or convicted the accused of involuntary culpable homicide. The President of the trial court replied to the Chief Justice, saying:

> "I have always found great difficulty, where intention to cause death is not proved, in satisfying myself as to the meaning of the term 'the probable consequence' and I must admit that my wording in this case was a deliberate attempt to overcome this difficulty. The only small dictionary I have defines 'probable' as 'likely', 'credible', which does not help matters. Obviously from the context of the Code 'probable' conveys a greater sense of death than 'likely', but to what degree? In colloquial English I should be inclined to surmize that probable conveyed the meaning of a greater chance than fifty per cent...."

In subsequent cases[1] the Confirming Authority continued to emphasise that the question was one of fact to be determined by the trial court from the circumstances of each case, and that it was not possible to lay down any criterion for the distinction. The trial courts then proceeded to distinguish between 'likely' and 'probable' in the light of such considerations as the nature and location of the injuries, the weapon used, the force applied ... etc. It was realised that 'probable' indicated a greater degree of risk of the occurrence of death. This is apparent from the fact that the subsection refers to 'the probable' and 'a likely'. Nevertheless, no hard and fast rule as to the distinction appears to have been formulated and the question varies according to the particular circumstances of each case. Thus, where A knocks D down

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(contd.) AC.CP.122.1939, Unrep., the accused was convicted of involuntary culpable homicide although the court had found that death was 'the probable' consequence of the injury.

(1) S.G. v. Mimbanga Musa, AC.CP.137.1931, Unrep.; S.G. v. Saad Mohamed ElNur, AC.CP.39.1937, Unrep.; S.G. v. Mohammed Mehagir, AC.CP.66.1941, Unrep.

and stamps several times on his stomach causing his death,[1] where A throws a spear at D's leg, tearing the veins and tendons which results in the latter's death,[2] where A kills D by a stab wound in the thigh[3] or elbow,[4] the case is one of culpable homicide, not murder, because death is considered only a 'likely' result of such an injury. "If a man stabs another in the face, neck or trunk, he knows he will probably cause death, but hardly if he stabs him in the arm."[5], or other non-vital part of the body or with a non-lethal weapon.

On the other hand, the offence may amount to murder if the injury was caused to a vital part of the body with great force or with a lethal weapon, the reason being that death will be considered 'the probable' result of such injury. Thus, in S.G. v. Khamis Suliman Gumaa,[6] the accused was convicted of culpable homicide for causing the deceased's death by a knife stab in the stomach. On confirmation, the case was sent back for reconsideration of finding because "a man who stabs at the trunk of a man's body has reason to know that death is the probable consequence of the act".

In recent years, several attempts have been made to formulate a more coherent test for the distinction. In S.G. v. Abdel Razig Ahmed ElSunni[7] the accused was convicted of murdering the deceased by hitting him on the head with a heavy stick fracturing his skull. On confirmation, a conviction of culpable homicide was substituted by Lindsay,

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(1) S.G. v. Mbelinga Sudani, AC.CP.130.1934, Unrep.
(2) S.G. v. Danjaga Dazyuvu, AC.CP.214.1937, Unrep.
(3) S.G. v. ElEbeid Ali Ahmed, AC.CP.88.1941, Unrep.
(4) S.G. v. Ramadam Abbakar, AC.CP.235.1942, Unrep.
(5) Ibid, per Flaxman, C.J.; see also S.G. v. Mohamed Mehagir, AC.CP.66.1941, Unrep.
(6) AC.CP.225.1944, Unrep.; see also S.G. v. Saad Mohamed ElNur, AC.CP.39.1937, Unrep.; S.G. v. Said Mohamed Suliman, AC.CP.11.1937, Unrep.; S.G. v. Covert Duffy, AC.CP.166.1942, Unrep.; S.G. v. Omer Eisa Abdullahi, AC.CP.133.1943, Unrep.
(7) AC.CP.269.1951, Unrep.

C.J., who went on to say:

> "... the crux is whether the accused as he delivered the blow knew (must have known and therefore knew) that the deceased's death was not only a likely consequence but the probable consequence of his act. The test is whether a reasonably minded by-stander would have exclaimed 'Heavens with a blow like that the man is bound to die, and the accused from the way he acted must have known it' (probable), or 'that was a nasty crack of the head - the man may die, but I would not be surprised if he gets over it' (likely). The line between 'likely' and 'probable' is often very difficult to decide, and when there is any reasonable doubt about the matter it is resolved in favour of the accused."[1]

More recently, Abu Rannat, C.J., restated the test in S.G. v. Kenyi Jelo[2] which may be regarded as the locus classicus on the matter. The facts of the case were very similar to the previous one and the accused was also convicted for murder. In substituting a conviction of culpable homicide, Abu Rannat said:[3]

> "The difference between 'probable' and 'likely' is only one of degree of chance - in 'probable' the odds are more in favour of death occurring than in 'likely'. When a reasonable man says that a certain consequence is 'probable' he will be surprised if it does not happen. But if he says that a certain consequence is 'likely' he is not surprised if it does happen and not surprised if it does not happen."

The 'surprise test' is now accepted as authoritative and is frequently referred to by the courts.[4] It is submitted that the above test is far from satisfactory. It is an arbitrary formula using the fictitious image of the 'reasonably minded by-stander' or reasonable man as a cover for what is in fact the opinion of the trial court, or more particularly, the presiding Magistrate, on what is considered to be the accused's opinion on whether a certain consequence is likely or probable. This has resulted in

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(1) Emphasis supplied.
(2) (1960) S.L.J.R.65.
(3) Ibid, at Pp.60-61; emphasis supplied.
(4) S.G. v. Leben Bamando (1963) S.L.J.R.168; S.G. v. Kamal ElJack (1965) S.L.J.R. 65.

several inconsistent decisions applying the test. The inconsistency may be illustrated by comparing the two last mentioned cases with two others. In S.G. v. Saad Mohamed ElNur[1] A struck D on the head with a stick 1½" in diameter smashing his skull and causing his death. On confirmation, A's conviction of culpable homicide was described as 'perverse' and the case sent back for revision of finding. Creed, C.J., said:

> "I do not understand how it is possible for any magistrate to come to the conclusion that the accused did not know that death was the probable result of his act."

Similarly, in the subsequent case of S.G. v. Akec Magol[2], the facts of which were the same, Abu Rannat, C.J., sent the case back for reconsideration of finding stating that:[3]

> "To strike a man with such a formidable weapon on the head, the accused must have at least known that death was a likely consequence of such a blow."

A comparison between the cases of Abdel Razig[4] and Kenyi Jelo[5], on one hand, and Saad Mohamed[1] and Akec Magol[2] on the other, shows that in the former the accused used a heavy stick and struck the deceased on a vital part of the body, the head in the first case and the stomach in the second. In the latter cases the accused used a heavy stick and the blow was in each case directed to the head. Nevertheless, the trial court convicted the accused in the former cases of murder on the grounds that death was the 'probable' consequence of the blow, but in the latter cases the conviction was for culpable homicide and grievous hurt respectively. When the cases came for confirmation the Confirming Authority was no less confusing. It rejected the conviction of murder in the former cases on the grounds that death was only a 'likely' consequence of the injury

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(1) AC.CP.39.1937, Unrep.; Cf. the Scottish case of Miller and Denovan, infra.
(2) (1961) S.L.J.R.
(3) Ibid, at P.21; emphasis supplied.
(4) Supra.
(5) Supra.

but the culpable homicide conviction in Saad Mohamed[1] was considered 'perverse' because death must be deemed to be the 'probable' consequence of the injury, and in Akec Magol[2] a blow on the head with a heavy stick was said to be 'at least likely' to cause death. In view of the obvious similarity of the facts of the four cases it is thought that neither the trial courts nor the Confirming Authority can claim to have applied any consistent principle or test.

The 'surprise test' has recently been more thoroughtly considered in S.G. v. Kamal El Jack.[3] The accused shot the deceased with a rifle above the knee and the latter bled to death. Mudawi, P.J., referred to the 'surprise test' in Kenyi Jelo[4] and continued:[5]

> "In order to apply the test one should consider all the circumstances attending the act: the weapons used, the part of the body injured, the seriousness of the injury inflicted and a host of other things. When a deadly weapon such as a knife, dagger or gun, is applied to a vital part of the body the perpetrator is bound to know that death would be the probable consequence of his act. The vital parts of the body are the head, the chest and the abdomen. However, when the same weapon is applied to a non-vital part of the body such as the forearm or the knee, the chances of death are lessened and the accused may not be taken to know that death was the probable and not only a likely consequence of his act."

Applying the test to the facts of the case, the court admitted the difficulty of determining whether the risk involved was one of likelihood or probability. Mudawi, P.J. went on:[6]

> "Will a reasonable man be surprised if a man hit by a bullet above the knee dies? Will he be surprised if the man survives? To borrow the phrase of Oliver Wendell Holmes ... even this legal 'litmus paper' was of no avail. So we had to decide that the

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(1) Supra.
(2) Supra.
(3) (1965) S.L.J.R.65.
(4) Supra.
(5) Supra, at P.70.
(6) Ibid, at P.72.

> facts of the case put it on the fence, on the border line between the realm of 'the probable' and 'the likely', on the thin line that divides the two offences, murder and culpable homicide not amounting to murder."

Thus, seventy years after the enactment of the Code the courts are still unable to formulate a consistent criterion for distinguishing between 'likely' and 'probable', and consequently between murder and involuntary culpable homicide. It is agreed with Gledhill[1] that the distinction between probable and likely

> "gets no nearer drawing a clear boundary between the degree of probability of an injury proving fatal which involves liability to a capital sentence and that which does not."

The courts continue to face the difficulty at the present time and no effort is being made to resolve it. The problem becomes more acute in borderline cases, the decision of which depends on the attitude of the particular court and the Confirming Authority of the day.

Involuntary Murder in Scots Law

Macondald's[2] definition of murder shows that it is committed when death results from an assault or injury done with such 'wicked recklessness' indicating a depraved disposition indifferent of the consequences to human life. Hume[3], similarly, states that it is murder if the accused shows "utter contempt of the safety and life of his neighbour, and if not a determination to kill him, at least an absolute indifference whether he live or die.". The courts have generally followed Macdonald's definition requiring wicked recklessness regardless of the consequences.[4] Professor Gordon defines the term 'wicked recklessness' as "recklessness so gross that it indicates a state of mind

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(1) Gledhill, "The Indian Penal Code in the Sudan ...", op.cit., P.20.
(2) Macdonald, 89.
(3) Hume, i, 257.
(4) H.M.A. v. Kizileviczius, 1938 J.C.60; Miller and Denovan, 1960, Unrep., supra; Cawthorne v. H.M.A., 1968 J.C.32.

which is as wicked as the state of mind of the deliberate killer."[1] In practice, that state of mind is determined from the nature of the assault and the violence used in causing the bodily injury. Thus, in H.M.A. v. Kizilevicxius[2] the accused hit his father a blow on the head and face with a flat iron causing his death. Lord Jamieson directed the jury that[3] "if... these blows were administered with complete callousness and with an utter reckless disregard of the consequences, and in a spirit of hatred" the offence was murder. Account is also taken of the nature of the weapon used, the number and nature of the injuries and the part of the body injured. In H.M.A. v. M'Guiness,[4] A was charged with the murder of D by beating him, striking him with a bottle and stabbing him on the head and body. Aitchison, Lord Justice-Clerk, said:[5]

> "People who use knives and pokers and hatchets against a fellow citizen are not entitled to say 'we did not mean to kill', if death results. If people resort to the use of deadly weapons of this kind, they are guilty of murder whether or not they intend to kill."

Similarly, in Kennedy v. H.M.A.[6] the jury was directed:[7]

> "It is no use your considering whether or not the wound was a sort of mischance, if a person uses a lethal weapon and it has resulted in death."

In several cases in the past a conviction of murder was brought where the weapon used was not a lethal one, but death resulted from the accused's indifference to the life and safety of the deceased.[8] Whether such cases will at present fall within murder depends on whether the jury infer the requisite wickedness from the act of the accused.

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(1) Gordon, 683.
(2) 1938 J.C.60.
(3) Ibid, at P.63.
(4) 1937 J.C.37.
(5) Ibid, at P.40.
(6) 1944 J.C.171.
(7) Ibid, at P.174, per Lord Carmont; see also H.M.A. v. Marshall (1897) 4 S.L.T. 217.
(8) Cf. Tolin Telfer, Hume, i, 260; Hugh Sommerville, ibid, 257; Patrick Deanes ibid, 261.

The law of involuntary murder in Scotland is difficult to formulate in precise technical rules, because the tendency is to leave the question to the jury to determine from the whole of the evidence whether the case is one of murder.[1] Unlike the position in section 248(b), S.P.C., Scots law has preferred the more flexible moral approach which is primarily concerned with whether the crime is serious enough to allow the accused to be convicted of murder. It is not essential for 'wicked recklessness' to prove that the accused had in fact foreseen the possibility of death. It is enough if the accused's act shows a "grossly wicked lack of foresight",[2] or if the act is so dangerous that in fact it results in death.[3] The whole question is one for the jury to determine what inferences may be drawn from the accused's conduct as to his state of mind.[4] Further, Scots law is more concerned with whether the accused's conduct indicates 'wicked recklessness' rather than with mathematical calculation of the degrees of probability and likelihood. It thus avoids the illogical 'surprise test' and the unsatisfactory use of the concept of the reasonable man as a standard by which the accused's guilt may be measured. As Lord Clyde stated in Cawthorne,[5] the reason for the alternative mens rea of wicked recklessness in Scots law is that:

> "in many cases it may not be possible to prove what was in the accused's mind at the time, but the degree of recklessness in his actings, as proved by what he did, may be sufficient to establish proof of the wilful act on his part which caused the loss of life."

The main advantage of Scots law in this respect

> "is that it recognises that when it comes to a choice between murder and culpable

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(1) Lord Cooper, Minutes of Evidence, R.C.C.P., Q.5457-5458.
(2) Gordon, 683.
(3) Lord Wheatley in Miller and Denovan, Unrep., see Gordon, 688.
(4) Gordon, "The Burden of Proof on the Accused", 1968 S.L.T. (News) 37 at P.38.
(5) 1968 J.C.32 at Pp.35-36.

> homicide the result does not depend on mathematical assessments of probability measured against the standard of reasonable foreseeability, but depends on a moral judgement which ... could be summed up in the question 'Does A deserve hanging?'"[1]

More will be said on this presently.

Grievous Bodily Harm

A few cases in Scotland have indicated that it is murder if the accused causes death with the intention of causing 'grievous bodily harm'.[2] But although 'grievous bodily harm' may be significant in determining whether there is 'wicked recklessness', the authorities have generally refrained from referring to it as essential to a conviction of murder. The reason for this is that:

> "If A in fact assaults B with great violence the absence of any intention to do serious injury will not necessarily save him from a conviction for murder - he might indeed be so wicked and reckless as to have no fixed intention at all and yet be convicted of murder."[3]

On the other hand, in English law intention to do 'grievous bodily harm' is an essential mens rea in murder.[4] But the term has not been defined by statute and it continues to cause some difficulty because of the uncertainty of the requisite degree of harm.[5] In one case 'grievous bodily harm' was interpreted as meaning "Some harm which is sufficiently serious to interfere with the victim's health or comfort".[6] But in

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(1) Gordon, 683.
(2) Lord Young in H.M.A. v. Marshall, (1897) 4 S.L.T.217; Lord Wheatley in Patrick M'Carron, Perth, Feb.1964, Unrep.; Lord Guthrie in Cawthorne v. H.M.A. 1968 J.C.32 at P.37.
(3) Gordon, 684.
(4) Article 223, Stephen's Digest; R. v. Vickers (1957) 2 Q.B.664; D.P.P. v. Smith (1961) A.C.290.
(5) The term 'grievous bodily harm' is used in the Offences against the Person Act, 1861, and the Homicide Act, 1957, but neither Act gives any definition of it. The Homicide Bill, 1872, suggested that the harm must amount to 'deadly injury', B.P.P., 1872, vol. II, Art.15(2); Stephen went further by providing that the harm must be 'bodily injury which is known to the offender to be likely to cause death', Stephen, H.C.L., vol. III, 84.
(6) Wilkes, J., in R. v. Ashman (1858) 1 F. & F.88; Hinchcliffe, J., in R. v. Vickers, (1957) 2 Q.B.664.

D.P.P. v. Smith[1] the House of Lords held that there was:

> "no warrant for giving the words 'grievous bodily harm' a meaning other than that which the words convey in their ordinary and natural meaning. 'Bodily harm' needs no explanation, and grievous means no more and no less than 'really serious'."[2]

The R.C.C.P. stated that the requirement of 'grievous bodily harm' was too wide a criterion to support a charge of murder because it did not necessarily involve 'wilful exposure of life to peril'.[3] They preferred to limit murder cases to where the act which caused death "is intended to kill or endanger life or is known to be likely to kill or endanger life".[4] However, the Commission did not find it necessary to recommend such a change because it was of opinion that in practice the courts would not convict of murder unless the injury was such as to put life in jeopardy.[5]

The decision in Smith[1] that it was murder if the accused unlawfully and voluntarily did something of which grievous bodily harm was the natural and probable result, and the refusal of the House of Lords to qualify 'grievous bodily harm' or to add that the injury must be 'dangerous to life', proved the above optimism of the R.C.C.P. to be wholly unfounded. Since Smith[1] several suggestions have been made to the effect that the rule should be changed and that a conviction for murder should not be brought unless the injury was 'likely' to result in death because it was only then that the seriousness of the harm could preclude the offender from denying that he intended to cause death or was reckless as to the likelihood of its occurring.[6] Finally, the ques-

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(1) (1961) A.C.290.
(2) Viscount Kilmur at P.334, ibid; in the subsequent case of R. v. Metharam (1961) 3 All.E.R.200, it was held that as a result of the decision in Smith it was incorrect to direct the jury according to the old formula in Ashman.
(3) Cmd.8932, para.472.
(4) Ibid.
(5) Ibid.
(6) Williams, G., The Times, October 12, 1960; "Constructive Malice Revived", (1960) 23 M.L.R.605 at P.607; Turner in Kenny, op.cit., 146-147; Cross, R., "The Need for a Redefinition of Murder", (1960) Crim.L.R.728 at P.741; see also Hall Williams, "Grievous Bodily Harm and Implied Malice in Murder" (1957), 20 M.L.R., 633.

tion was considered by the Law Commission which admitted that the law was unsatisfactory and that:[1]

> "There is much to be said for the replacement of the intent to inflict grievous bodily harm in murder by an intent to inflict bodily harm which the accused knows is likely to endanger life."

However, like the R.C.C.P., they declined to make a recommendation to this effect, but for somewhat different reasons. They thought that a change in the law to the above effect would create practical difficulties confronting the jury with the determination of the likelihood of the act causing death and whether the accused knew that the act was 'likely' to endanger life.[2] Further, they thought that such a solution would be deficient in principle because it would define murder by reference to likelihood rather than 'willingness to kill'.[3] In conclusion they said that a person should only be convicted of murder if he had an 'intent to kill', and he would be deemed to have such intent "if he means his actions to kill, or if he is willing for his actions, though meant for another purpose, to kill in accomplishing that purpose."[4]
This part of the Commission's recommendations has not been implemented by the Criminal Justice Act, 1967. It therefore still remains the case in English law that an intent to do 'grievous bodily harm' is an adequate mens rea in murder. In this respect Smith[5] will continue to be authoritative and under it a person may be convicted of murder if the jury is satisfied that he intended to do something unlawful to someone, foreseeing that death or grievous bodily harm was the natural and probable result.[6]

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(1) The Law Commission, "Imputed Criminal Intent", op.cit., para. 18(b).
(2) Ibid.
(3) Ibid.
(4) Ibid; also clause 2 of the Draft Clauses; for criticism of this part of the Report, see Gordon, "The Mens Rea of Murder", 1967 S.L.T.89; Smith and Hogan, 2 ed., 204.
(5) Supra.
(6) Smith and Hogan, op.cit., 199.

It must finally be mentioned that the several recommendations and suggestions made to change the English law in this respect would bring it nearer to the law of the Sudan. As has already been mentioned[1], under the S.P.C. the offence will not amount to murder unless the injury is such that death would be 'the probable' consequence of it, and would be culpable homicide if death is only a 'likely' consequence. The offence will not amount to murder or even to culpable homicide if the offender's intent was only to cause bodily injury, however serious that injury might be. Causing death with the intention of causing hurt or grievous hurt is a distinct offence under section 254, S.P.C., which is subsequently death with.[2]

Section 248(b), S.P.C., and Section 300(3), I.P.C.

As previously stated, clause (3) of section 300, I.P.C., provides that it is murder if the bodily injury is 'sufficient in the ordinary course of nature to cause death'. The question arises here whether the accused should 'know' that the injury he intends to cause is sufficient in the ordinary course of nature to cause death, or whether the intention is subjective and the nature of the injury is objective. Some cases have preferred the former view[3], while others have stated that once it is proved that the intended injury was sufficient in the ordinary course of nature to cause death, the accused's knowledge of the consequences is irrelevant.[4] The latter view finds support in the Supreme Court decision in Virsa Singh v. The State of Punjab[5], where it rejected the defence contention that the accused must intend both to cause the bodily injury and intend it to be sufficient in the ordinary course of nature to cause death. The

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(1) Supra.
(2) Ch. VII, infra.
(3) The King v. Abor Ahmed, A.I.R. (1937) Ran.396; Nga Khwet v. The King, A.I.R. (1941) Ran.319; Mahandi Reddi in re, (1960) 1 W.R.313.
(4) Thanno v. State, A.I.R. (1959) All431; Public Prosecutor v. Veeraiah, (1962) 1 W.R.84.
(5) A.I.R. (1958) S.C.465.

court held that such a contention would render clause 3 of section 300 superfluous because the case would then be one of intentional killing falling under clause (1) of that section.[1] Once intention to cause the injury is established the inquiry proceeds along 'purely objective' grounds to determine whether the injury was sufficient in the ordinary course of nature to cause death, regardless of whether the offender knew or intended it to have this effect.[2]

The term 'sufficient in the ordinary course of nature' is nowhere defined in the Code but it appears to imply a very high degree of risk or probability of death.[3] Whether the probability is so high or not is determined objectively from the nature and location of the injuries, the weapon used, etc.[4]

It appears from the above that clause (3) of section 300, I.P.C., differs from section 248(b), S.P.C., in so far as the latter requires a subjective proof of 'knowledge', whereas the former determines guilt objectively from the seriousness of the injury. Under clause (3), section 300 the case is one of murder when the degree of probability is very great

> "whether the culprit intended death or not or even did not know that death would result. Each case has to be judged in the light of the degree of probability of death and not in the light of the intelligence or knowledge of the culprit ...."[5]

Thus, under the I.P.C., knowledge or contemplation becomes irrelevant once a high risk or probability of death is proved. But under the S.P.C., at least in theory if not in the actual practice of the courts, there will be no conviction of murder unless knowledge or foresight of the probability of death on the part of the offender is

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(1) Bose, J., at P.466, ibid.
(2) Ibid, at P.468.
(3) Ratenlal, op.cit., 757; Gour, op.cit., vol. 3, 1924.
(4) Inder Singh v. The Crown (1928) I.L.R.10 Lah.110; The King v. Abor Ahmed, A.I.R. (1937) Ran. 396; Public Prosecutor v. Ramaswami (1940) 2 M.L.J.92.
(5) Ramlal, J., in Rahman v. Emperor, 1939 I.L.R.Lah.245 at P.253; see also Argwalla, J., in Behari v. The State, A.I.R. (1953) All 203 at P.205; Gour op.cit., vol. 3 P.1923.

proved. From this viewpoint clause (3) differs from English law only in degree because an injury 'sufficient in the ordinary course of nature to cause death' may indicate a much more serious likelihood of death than 'grievous bodily harm'. Clause (3) also differs from Scots law in so far as the latter puts more emphasis on 'wicked recklessness' than on the nature of the injury. However, in the final analysis, death resulting from an injury 'sufficient in the ordinary course of nature to cause death' in India, would in Scotland most probably be treated as indicating the requisite 'wicked recklessness'.

The Problem of Definition and the Moral Approach

The definition of murder in section 248(b) is far from satisfactory due to the practical difficulty of fixing the precise degree of likelihood or probability in a given factual situation. As the English Criminal Law Commissioners pointed out:[1]

> "The degrees of likelihood or probability being in truth infinite, it is clear that no assigned degree of likelihood or probability that an injurious consequence can result from any act can serve as a test of criminal responsibility. Such a degree of likelihood or probability admits of no legal mode of ascertainment, and it would, if capable of being ascertained, afford no proper test of guilt."

The words 'likely' and 'probable' are so vague and variable in their degree of strength that it becomes very difficult, if not impossible, to expect a distinction between them to be made so satisfactorily as to allow the distinction between murder and culpable homicide to be based upon it. The difficulty is illustrated by Glanville Williams as follows:[2]

> "The word 'probable' is generally taken to include something beyond bare possibility and less than certainty. I think that most people would say that it implies at least a fifty percent

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(1) B.P.P., 1843, vol. xix, Seventh Report, P.23.
(2) Williams, G., The Mental Element in Crime, (Jerusalem, 1965), 29; see also Lowe, J.T., "Murder and the Reasonable Man", (1958) Crim.L.R.374.

> chance. What does 'likely' imply? Some feel that it is a stronger word than probable, implying, say, a sixty-six per cent chance. Others feel it is not so strong, and that it may be satisfied by a thrity-three percent chance. If the word is used in a legal rule to refer to the degree of probability, then surely we need to have some agreement upon the degree, at least upon its order of magnitude."

It has already been explained that until the present no such satisfactory agreement has been reached by the Sudan courts to resolve the difficulty. It was pointed out that it was this same difficulty which prevented the Law Commissioners from recommending a change in English law to make the conviction for murder depend on whether the injury was 'likely' to kill or endanger life. A suggestion has been made that the definition of murder in section 248(b) of the Sudan Code may be improved upon by the addition of an explanation to the effect that death should be considered a 'probable' consequence whenever it resulted from an attack with a lethal weapon.[1] It is submitted that the enactment of such a provision would not make much improvement in the section. It has been seen that in practice the courts take the nature of the weapon used, inter alia, in attempting to determine the degree of probability. To provide expressly that death is a 'probable' result whenever a lethal weapon is used may give the false impression that murder may only be committed with a lethal weapon, which is not in fact the case. Conversely, such a provision may be interpreted to mean that whenever a lethal weapon is used death is a 'probable' consequence, which is also not the case. A further difficulty might arise in determining which weapons are 'lethal' and which are not for the operation of the suggested provision.

Another problem in relation to section 248(b) is the fact that the section requires proof that the accused 'knew' death was the probable consequence of his act. This

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(1) Fitzgerald, "The Reform of the Law of Murder", (1949) C.L.P.27.

has proved to be extremely difficult and the courts have generally determined the question of knowledge objectively by reference to what the 'reasonable man' might have contemplated. Although this may not be consistent with the wording of the section, it cannot be visualised how else the courts can decide the question of knowledge. As Michael and Wechsler[1] have put it, knowledge that the act would probably cause death generally applies to cases of:

> "extremely gross recklessness resulting in death, to be distinguished from negligent homicide ... by the relatively great danger of the act and the consequently greater indifference to the safety of others ...."

They go on to point out that the cleavage between whether actual knowledge on the part of the accused should be proved or not is wider in theory than in practice.

> "Inferences as to the particular man's knowledge must usually proceed from propositions about the knowledge that men like the actor would generally have, if they should act as he did under like circumstances. If the danger was very great, most men would perceive it, and therefore, if the actor was both sober and sane, it is highly likely that he did too."[2]

In conclusion, one may doubt whether there is any wisdom in insisting that the mens rea for murder should be subjective. It does not seem to make any difference in the actual trial of a case whether the law lays down a subjective or an objective test. The case always seems to boil down to the more simple question of whether the accused is guilty and should be punished as a murderer. The inquiry is less concerned with the subjective guilt of the accused than with the prevention of crime and the protection of society against murder, assault and the like. From this viewpoint the moral and more pragmatic Scottish approach to the problem appears to be the most satisfactory of all the systems under consideration. The formulation of definitions and technical rules is futile if it becomes incapable of proper application. Scots

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(1) Michael and Wechsler, op.cit., 709.
(2) Ibid, at Pp.710-711.

law, as we have seen, is not concerned with the knowledge of the degree of probability or likelihood, nor with whether the offender intended to cause 'grievous bodily harm' or injury 'sufficient in the ordinary course of nature to cause death'. It is only concerned with the 'wicked recklessness' as manifested in the offender's utter disregard and indifference to the life of others as ascertained from the circumstances of each particular case. It is this total lack of respect for human life, rather than any other consideration, which is the decisive factor in involuntary murder. The emphasis is thus more on the protection of society and the prevention of such crimes than on the formulation of definitions with the object of inquiring into the offender's guilt. It may be mentioned here that a similar tendency may be traced in the Criminal Law (Scotland) Act, 1829, which punishes with life imprisonment[1] such crimes as shooting, stabbing or cutting with intent to murder, throwing sulphuric acid or any corrosive substance with the above intent, which causes maiming, disfiguration or disability. Finally, one would agree with Professor Gordon that[2]

> "It may be quite fitting that a murder conviction should in the end of the day depend on this kind of moral consideration rather than on the application of a legal definition of mens rea. It makes for greater flexibility and makes it possible for both the Court and the Crown to substitute culpable homicide for murder in cases where the stricter letter of the law would not allow this were murder to be defined without reference to wickedness .... The absence of any academically satisfactory definition of murder is, however, perhaps but a small price to pay for the advantage of flexibility."

III. Special Knowledge that the Act or Injury would Probably Result in Death

If death results from an act or injury which would not have killed a person in normal

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(1) Until the Homicide Act, 1957, the penalty was death although this was rarely enforced in practice.

(2) Gordon, 683.

health, because the victim is suffering from a disease or physical peculiarity, the offence will only amount to murder if it is specifically proved that the accused had 'special knowledge' of the victim's disease or physical peculiarity. Such knowledge cannot be inferred from the circumstances of the case as in the proof of the general knowledge of probability discussed above.

Once it is established that the offender was aware of the deceased's peculiarity, the inquiry further proceeds to determine whether death was known to be the probable result of the injury or not. The rule is not embodied expressly in section 248, S.P.C., but is included in Illustration (b) to that section.[1] The same rules apply in Scots law.[2] The difference between the latter and the S.P.C. is that in Scotland if it could not be proved that the offender had special knowledge of the deceased's peculiarity, the conviction will be for culpable homicide, whereas under the Code, the conviction will be under section 254[3] unless death was a 'likely' consequence of the injury.[4]

In India such a case is separately provided for in Clause (2), section 300, I.P.C., which deals with the intention to cause bodily injury known to be 'likely' to cause the death of the person to whom the harm is caused. Some cases have stated that this provision is wide enough to include even those situations where the victim is in normal

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(1) The Illustration states: "A, knowing that Z is labouring under such a disease that a blow would probably cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not ordinarily kill a person in a sound state of health, here A is not guilty of murder unless he intended to cause death or such bodily injury as would probably cause death; and if the blow was not likely to cause death he would not be guilty of culpable homicide at all but might be punishable under section 254."

(2) Gordon, 685-686; Edward Evans and Another (1873) 2 Coup.410.

(3) Ch. VII, infra.

(4) Illustration (b), section 248, S.P.C.

health.[1] Others have confined the application of the clause to cases where the victim was suffering from some abnormality.[2] The latter appears to be the better view because the clause seems to lay more emphasis on "the person to whom the harm is caused". Again, Illustration (b), section 300, I.P.C., like Illustration (b), section 248, S.P.C., expressly speaks of a victim 'labouring under some disease'. This is also the view of Professor Gledhill[3] and Gour.[4] The latter says:[5]

> "Where it is not shown that any constitutional or other peculiarity existed in the case of the deceased which would have made it likely that injuries, which ordinarily would not cause death, would be fatal in his case, and where it has not been shown that his assailants were aware of any such defect, the case cannot be said to fall under cl.2."

If this interpretation of clause (2) is accepted, it would appear that the clause is wider than section 248(b), S.P.C. The reason for this is that the former requires the injury to be 'likely' to cause death, whereas the latter requires death to be 'the probable' (and not a 'likely') consequence of the injury. This seems illogical because, once the knowledge of the physical peculiarity is proved, there is no reason why a lesser degree of the risk of death should be considered adequate for a conviction of murder in the case of a person with some physical peculiarity than in the case of a person in normal health.[6] No such discrimination is made under section 248(b), S.P.C., under which, in both cases, death must be 'the probable' result of the injury; but under the I.P.C. the injury must be 'likely' to cause death in the case of an abnormal person (clause (2)), and 'sufficient in the ordinary course of nature to cause

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(1) Daliph Singh, J., in Inder Singh v. The Crown, (1928) I.L.R.10 Lah.477 at P.480; Emperor v. Ratan, A.I.R. (1932) Oudh 186; Sobeel Mah v. Emperor, 5 W.R.32; see also Ratenlal, op.cit., 753.

(2) Ramlal, J., in Rahman v. Emperor (1939) I.L.R. Lah.245 at P.252; Aung Nyun v. R., A.I.R. (1940) Ran.259; Behari v. State, A.I.R. (1953) All.203.

(3) Gledhill, "The Indian Penal Code in the Sudan ...", op.cit., P.17.

(4) Gour, op.cit., vol. 3, P.1919.

(5) Ibid.

(6) Gledhill, op.cit., loc.cit.

death' in the case of a person in normal health.

However, the difference between the I.P.C. and the S.P.C. in this respect should not be over-emphasised, the reason being that the former, unlike the latter, does not distinguish between 'likely' and 'probable'. On the contrary, in India the tendency is to equate the two words and distinguish both of them from 'sufficient in the ordinary course of nature to cause death'. The distinction was put as follows:[1]

> "The word 'likely' means 'probably'. It is distinguished from 'possibly'. When the chances of a thing happening are even with or greater than its not happening, we say that the thing will 'probably' happen. When the chances of its happening are very high, we say that it will 'most probably' happen. An 'injury sufficient in the ordinary course of nature to cause death' merely means that death will be the 'most probable' result of the injury having regard to the ordinary course of nature."

Special Categories of Murder in the Law of the Sudan

1. Ghost Killing, Witchcraft and the Supernatural

Cases have occurred and continue to occur in the Sudan where the mind of the accused is greatly influenced by superstitious beliefs in the existence of ghosts, witchcraft and evil spirits. This is particularly so in the remote tribal communities of Southern and Western Sudan where poverty, ignorance and illiteracy are prevalent. Such cases face the courts with a dilemma as to whether people who commit homicide under such primitive beliefs should or should not suffer the full pains of the law. On the one hand, such persons act with no wickedness or criminal intention but in accordance with widely recognised and accepted customs. On the other hand, the law must be allowed to take its course without taking any account of such archaic and

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(1) Agwalla, J., in Behari v. The State, A.I.R. (1953) All.203 at P.205.

primitive beliefs. Two types of situation may be distinguished:

a. - Where A kills B in the genuine belief that he is a ghost or a supernatural creature, but not a human being.

b. - Where A kills D knowing that he is a human being but believing him to have supernatural powers such as witchcraft or evil spirit.

(a) Where the accused genuinely believes that he is killing a ghost or an apparition, and the latter subsequently turns out to have been a human being, the position is governed by the law of mistake of fact and the accused is guilty of no offence because the mistake negatives the mens rea.[1] The accused has neither the intention nor the desire to kill a human being nor could he be said to have foreseen the latter's death.

> "It is impossible to assert that a crime requiring intention or recklessness can be committed although the accused laboured under a mistake of fact negativing the requisite intention or recklessness."[2]

Under the S.P.C. the case falls within section 44, which provides:

> "No act is an offence which is done by a person who is or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be bound by law to do it or justified by law in doing it."

The term 'good faith' is defined in section 37, S.P.C., as

> "Nothing is said to be done or believed in good faith which is done or believed without due care and attention."

This definition is somewhat too wide because 'good faith' normally means no more than 'honestly'. The provision in section 37 that an act is believed in good faith if it

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(1) Williams, G., C.L.G.P., para. 65; Gordon, 286; Gledhill, 474-475.
(2) Williams, ibid, at p.173.

is done 'with due care and attention' gives the courts very wide scope to convict a person who may have acted honestly but failed to exercise the requisite degree of care. The usual requirement is that the mistake must be 'reasonable' and this is a question of fact to be determined from the particular circumstances of each case. Belief which is regarded as 'obsolete superstition' will not be treated as a mistake of fact reasonable enough to justify crime in a country like the U.K.[1] But the stage of development, customs, beliefs and education are in such contrast in the Sudan and the U.K. that what is 'obsolete superstition' in the latter is not necessarily so in the former. The reasonableness or otherwise of the mistake to a great extent depends on the above factors in relation to the country concerned. The Sudan courts have generally been very careful in taking into account all the relevant considerations. In S.G. v. Mirgham ElTahir,[2] A and D were herding sheep in a valley believed to be haunted. While A was sleeping, he was awakened by a figure which fell upon him. Genuinely believing it to be a ghost he stabbed it three times and ran to the village to tell the story. The 'ghost' was none but his friend D. Relying on section 44 and on an Indian decision,[3] the accused was acquitted of any offence. Soni, J., said on confirmation:

> "A genuine belief in the existence of facts which if they existed would constitute a defence, is itself a sufficient defence."[4]

Again, in S.G. v. Abdulla Mukhtar ElNur,[5] the accused rode his donkey at night in search of a cow in a valley commonly believed to be inhabited by a ghost. On his way he met

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(1) Kenny, op.cit., 54.
(2) AC.CP.271.1955, Unrep.; see also S.G. v. Abdel Rahman Yacoub, AC.CP.165.1951, Unrep.
(3) Waryam Singh, A.I.R. (1926) Lah.554.
(4) This statement was taken from Lord Atkin in Thorne v. Motor Trade Association (1937) A.C.797 at P.809.
(5) (1959) S.L.J.R.1.

a figure dressed in black walking towards him. He spoke to it but received no reply, whereupon he became very frightened, taking the figure to be the ghost. He beat it with his stick till it fell motionless and ran to the village to tell the news that he had killed the 'ghost' which turned out to be an old woman from a neighbouring village. Relying on the Indian cases Waryam Singh[1] and Chirangee[2], the court found the mistake to be reasonable and acquitted the accused. In Chirangee[2] the accused was acquitted of the murder of his son in a moment of delusion, thinking he was a tiger, and in Waryam Singh[1] the accused was acquitted of killing a figure at night in a graveyard, taking the figure to be a ghost.

However, unlike Waryam Singh[1] and Abdulla Mukhtar[3] the accused in Chirangee[2] was acquitted on the basis of 'insane delusion' not mistake of fact. It has, therefore, been rightly pointed out[4] that Chirangee[2] was a doubtful authority for the decision in Abdulla Mukhtar[3]. The decision in Chirangee[2] is comparable to the Scottish case of Simon Fraser[5], where the accused, in a state of somnambulism, killed his daughter, believing that she was a wild beast attacking him. He was acquitted of the charge on the basis of the state of somnambulism and the question of mistake of fact was not raised. Chirangee[2] and Simon Fraser[5] must be distinguished from those of mistake of fact in the above sense.

Miraghani ElTahir[6] and Abdulla Mukhtar[3] should be contrasted with the earlier case of S.G. v. Mohamed Ahmed Mohammedain[7], the facts of which were almost identical to those of Abdulla Mukhtar[3], but the accused was convicted of murder because it was found that

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(1) A.I.R.(1926) Lah.554.
(2) A.I.R.(1952) Nagpur 282.
(3) Supra.
(4) Vasdev, K., "Ghosts, Evil Spirits, Witches and the Law of Homicide in the Sudan", (1961) S.L.J.R.238 at P.239.
(5) (1878) 4 Coup.70.
(6) Supra.
(7) AC.CP.17.1946, Unrep.

he had first formed the belief that the figure was a human being and subsequently thought it was a ghost without taking reasonable steps to verify his suspicions. MacLagan, C.J., said:

> "... the law cannot allow an accused to kill first, and then discover that the victim was not a ghost after all."

It is submitted that this decision was incorrect. Both the trial court and the Confirming Authority agreed that though the accused had first thought the figure to be a human being, at the time of the killing he was "thoroughly frightened, and thinking the figure might be a ba'ati (i.e. apparition) killed it," and Maclagan, C.J., added "I do not doubt that the accused's story is genuine enough.". In the light of such remarks it cannot be understood how a conviction of murder was sustained. So long as the accused believed the figure to be a ghost at the time of the killing, which is the crucial time for mens rea, he was entitled to an acquittal. If he did form such a belief at that particular time, what he had believed a few minutes earlier is irrelevant.

At any rate, even if the accused's subsequent change of mind was unreasonable, in the sense that he failed to exercise due care and attention, it would appear that the conviction should have been for negligent homicide, not for murder.[1] This view finds support in S.G. v. Ngok Kheir,[2] where the deceased was cutting millet heads in a field and the accused, mistaking him for a marauding monkey, threw a spear at him, causing his death. On confirmation, the conviction for culpable homicide was changed to one for negligent homicide. Lindsay, C.J., said:

"It was the accused's rash-

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(1) Gledhill, 475.
(2) AC.CP.108.1953, Unrep.; Cf., S.G. v. Mejei Mbele (1961) S.L.J.R.29, the facts of which were similar but where the accused was acquitted on the basis that the mistake was a reasonable one.

> ness and his lack of circumspection before he acted which closed his eyes to knowing that he was as or more likely to injure a human being than to injure a monkey. He did not know what was the possible, likely or probable consequence of his act for he did not know the nature of his hidden target."

Finally, if the mistake is found to be completely groundless or unreasonable the accused may be convicted of murder. In S.G. v. Abdulla Gar ElNebi,[1] A hit D in the face with a bottle causing her death, and claimed that he thought she was a ba'atia (female apparition). A, D and a third person were drinking at night in a deserted part of the town. The third party had sexual intercourse with D and left. A claimed that when he was about to have sexual intercourse with D her condition completely changed - her hair locks were twisted upwards, her colour turned grey and her language became incomprehensible. A's conviction of murder was upheld by Abu Rannat, C.J., who observed:[2]

> "Mistake of fact is only a defence if the mistake is one which a reasonable man might have made in the circumstances, and if no liability would have attached if the supposed circumstances had been real. It is also necessary that the mistake should have been made in good faith, i.e., despite due care and attention."

(b) Where the victim is known to be a human being but is believed to be possessed of supernatural powers or evil spirit the question is different. Cases frequently occur in tribal areas where A kills D believing him to have caused the death or sickness of one of his (A's) close relatives by witchcraft or evil eye. The tendency in such cases has been to convict the accused of murder or culpable homicide, as the case may be, the reason being that here, unlike in (a), the accused knows that the victim is a human being. However, the fact that the accused's belief in the victim's super-

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(1) (1965) S.L.J.R.140.
(2) Ibid, at P.44.

natural powers is genuine and the fact that such belief is normally shared by the generality of the population of the locality, has generally been considered a ground for passing a less severe sentence.

The practice in the past was to reduce the offence from murder to culpable homicide to enable the court to inflict lenient punishment. This tendency was considered unsatisfactory and was brought to an end. In S.G. v. Adam Ibrahim[1], A was convicted of culpable homicide for killing D, believing him to be a witchdoctor who had deliberately failed to cure a third party. On confirmation, Owen, C.J., disapproved of the finding and sent the case back for revision with a direction to convict of murder. He said:

> "The evidence is such that no other finding than that of murder was possible under the Penal Code, and a most dangerous precedent would be created if we permitted our Courts to go outside its provisions merely because the people concerned were primitive and held strange beliefs.
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> "Cases of witchcraft are not rare in this country and it would be impossible for the Confirming Authority to pursue a distinct policy with regard to them if our Courts created laws to deal with each of them on the merits .... it is better to apply the letter and spirit of our own Code so far as the finding is concerned, and leave it to the Confirming Authority to decide, having regard to the circumstances of the case, the recommendation of the Court ... what term of imprisonment should be exacted to indicate the Governments disapprobation of the act and the need for deterrence and example."

Thereafter the courts tended to convict of murder and pass the alternative sentence of life imprisonment[2], or impose death sentence with a strong recommendation to mercy[3]. It was realised that the death penalty was too severe to be executed in such cases. As the Legal Secretary pointed out in S.G. v. Killo Butti[4]:

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(1) AC.CP.72.1932, Unrep.
(2) S.G. v. Ngerabya Jellab, AC.CP.253.1936, Unrep.
(3) S.G. v. Tia Muni, AC.CP.95.1939, Unrep.
(4) AC.CP.224.1928, Unrep.

> "Backward people are, of course, in deadly fear of wizardry and .... it is impossible to apply Penal Code standards where that fear plays so great a part, or to educate or deter people by means of severe punishment."

It may be argued that in such cases, as in ghost killings, the accused acts in an honest and genuine belief commonly held in the community, and should therefore not be held criminally responsible. Such argument may be accepted on moral or sociological grounds but has no legal basis. In witchcraft cases, unlike ghost killings, the accused has no misconception about the fact that the victim is a human being. The law is willing to recognise honest and genuine mistakes but it does not accept fanciful delusions and outdated beliefs to excuse a person of criminal responsibility. The suggestion that cases of superstitious beliefs should be treated as insane delusions under the law of insanity[1] is also unacceptable because in such cases the accused in "really sane but educationally backward."[2]

Finally, if the belief was neither genuine nor reasonable nor shared by other members of the community, the courts will apply the full rigour of the law by passing the extreme sentence.[3] This attitude is well illustrated in S.G. v. Bath Met[4] where A, a Nilotic Southerner, killed D with a stab in the stomach. A alleged that he was possessed of a malign influence and thought that he could break the influence by killing D. He was convicted of murder and sentenced to death. In forwarding the proceedings for confirmation, Davies, the Province Governor, appended the following note:

> "There is nevertheless an undercurrent of influence on the mind of the killer of the activities of a 'spirit' or 'witchcraft' of some sort. It is vague. It seems to lead nowhere but it

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(1) Kenny, op.cit., 55.
(2) Williams, G., C.L.G.P., 176.
(3) S.G. v. Amin Karama, AC.CR.39.1934, Unrep.; S.G. v. Muyang Lohuyuk (1961) S.L.J.R.122.
(4) AC.CP.275.1943, Unrep.

> is there. Can one say that, with these superstition-held people, its influence was sufficiently active and real to justify the modification of the age old law of a life for a life?
>
> "... There are cases where some definite act or occurrence supplies a reason which would be accepted by the local populace generally as 'proof' that a spirit or witchcraft was exercising a powerful influence, and therefore some drastic action to combat such influence is justifiable. In such a case where killing resulted, I would not hesitate to enter a very strong recommendation to mercy.
>
> "But there are others, and the present case appears to me to be one of them, where the malign influence is shadowy and unreal. It is not recognized by the generality but seems to cast its shadow over the mind of one individual only .... I feel that in these cases the man has allowed himself through weakness, more than anything else, to become a killer and murderer. He should therefore be held fully responsible for the consequences."

Both the finding and death sentence were confirmed.

2. Killing as a Tribal Custom

In the same tribal communities mentioned above, a killing may be dictated by a custom commonly acknowledged within the tribe. In some parts of the Nuba Mountains a man is required to 'blood' himself by killing another person so as to establish his manhood within the community.[1] This custom, known as Sibr ElQatl, appears to be dying out as it has not arisen in the more recent cases.

In such cases, both trial courts and Confirming Authority have been very firm in convicting the accused of murder and inflicting the death penalty. Thus, in S.G. v. El Feki Kuti[2] the accused was convicted of murder and sentenced to death for having killed in accordance to Sibr ElQatl. Creed, C.J., recommended the execution of the death penalty, describing the crime as a "cold blooded and deliberate murder, in deference

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(1) S.G. v. Koko Atouton, AC.CP.210.1930, Unrep.; S.G. v. ElFeki Kuti, AC.CP.154.1944, Unrep.

(2) AC.CP.154.1944, Unrep.; see also S.G. v. Koko Atouton, supra; S.G. v. Bomfa Shoma, AC.CP.282.1941, Unrep.

to a custom which requires ruthless extripation.". Again, in S.G. v. Kaburi Toto[1], the father of a three year old blind Nuba child believed that if his blind son lived, none of his other children would live, or, if they did, they would go blind too. He therefore buried the child alive in accordance with Nuba custom. He was convicted of murder and sentenced to life imprisonment, the Court stating that "such cases form a class of their own and should not be treated as cases of premeditation or in circumstances of peculiar atrocity.". On confirmation, however, Creed, C.J., pointed out that:

> "It is not a precedent, and if further cases of this nature occur in the same locality I see no reason why the sentence of death should not be imposed."

In the more recent case of S.G. v. Iteng Lado[2] a Southerner succumbed to the pressure of the community and killed her ten year old son who had a 'notoriously deformed testicle' which was considered a 'bad omen' and terrified the community. She was convicted of murder and sentenced to death.

It is submitted that the above attitude is correct in so far as it enables the deterrent effect of the law to eradicate such superstitious and outdated customs. Education and economic development may eventually eradicate such customs, but in the meantime the law should play its role in social upheaval and guidance of public opinion. Leniency on the part of the courts will only perpetuate superstition and unduly prolong the time for its elimination.

3. Child Killing and the Law of Murder Under the S.P.C.

The difficulties involved in determining whether a child in the process of birth or who is newly born is a 'human being' for the purposes of homicide were discussed in

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(1) AC.CP.389.1953, Unrep.
(2) (1964) S.L.J.R.157.

the foregoing chapter. It has also been seen that in England, before the passing of the Infanticide Acts, 1922 and 1938, the courts were reluctant to convict of murder mothers charged with the killing of their newly born children, because of the undesirability of sentencing them to death. In so doing the courts took advantage of the difficulty of proving live birth and acquitted the mother or convicted her of less serious offences, such as concealment of pregnancy.[1] Even where the mother was convicted of murder and the court had to pass the death penalty everyone, except perhaps the mother, knew that it would not be carried out.

This practice was considered unsatisfactory in so far as it made a mockery of the law and the need for separate legislation for child killing was realised. The 1866 R.C.C.P.[2] dealt with the problem at great length. The witnesses before it pointed out that the killing of newly born children was less heinous than other murders,[3] that the loss of a child was not the same as the loss of an adult,[4] that the type of killing caused no public alarm or threat to security, and that the mother deserved sympathy because of her abnormal state of health.[5] The Commission concluded that it was necessary to pass an Act making it an offence:

> "unlawfully and maliciously to inflict grievous bodily harm or serious injury upon a child during its birth, or within seven days afterwards, in case such child has subsequently died. No proof that the child was completely born alive should be required."[6]

Several other attempts were subsequently made through private and public Bills to implement the above recommendations.[7] Nothing was, however, done until 1922 when the

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(1) See Ch. III, supra.
(2) B.P.P., 1866, vol. xxi.
(3) Ibid, Minutes of Evidence, Stephen, Q.2193; Lord Cranworth, Q.5-8; Walpole, Q.409-410.
(4) Ibid.
(5) Ibid.
(6) Para. 15 of the Commissioners' Report.
(7) For a detailed description of these attempts, see Seaborne Davies, op.cit.

Infanticide Act was introduced. The Act made child killing a distinct offence under which the mother would be punished in the same way as if she had been convicted of manslaughter. But the Act contained no definition of 'newly born' and a case came before the Court of Criminal Appeal in which a mother who killed her thirty-five day old child was convicted of murder on the grounds that the child was not 'newly born' within the meaning of the Act.[1] This led to some controversy[2] and the position was finally remedied by the Infanticide Act, 1938, section 1(1) of which provides:

> "Where a woman by any wilful act or omission causes the death her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child."

The Act has been working satisfactorily in practice. A mother who kills her child who is under twelve months is normally charged under it if there is evidence from which it can be inferred that her mental condition was disturbed. Mothers convicted under the Act are usually bound over with or without supervision.[3]

The Act does not apply to Scotland but in practice a woman who kills her newly born child, in circumstances which in England would fall under the Act, will in Scotland be charged with culpable homicide instead of murder.[4]

As to the Sudan, however, the S.P.C. makes no separate provision for the offence of child murder and, strictly, the case is one of murder and is normally charged as such

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(1) R. v. O'Donoghue, (1927) 20 Cr.App.R.132.
(2) Seaborne Davies, op.cit., at P.285; The Times, July 23, 1936.
(3) R.C.C.P. Cmd.8932, para. 160.
(4) Ibid, Minutes of Evidence, The Crown Agent, Q.1948; Lord Cooper, Q.5430-5431.

Two factors have, however, helped to save the Sudan from the predicament of English law before 1922. In the first place, on a conviction for murder under the S.P.C. the court has a discretion to pass either a sentence of death or one of imprisonment for life.[1] The case of a mother who kills "her newly born child while still under the influence of the effects of child birth" is expressly mentioned in C.C.C. No.26 as a situation where the alternative sentence of life imprisonment may be passed. The second factor is that the Confirming Authority has power to reduce a sentence of death or life imprisonment to any term of imprisonment or fine without altering the conviction for murder.[2] It has been the effect of these two factors which enabled the courts and the Confirming Authority to deal with child killing with less difficulty than in pre-1922 England. Thus, in S.G. v. Dai ElNur Isagha,[3] Flaxman, C.J., pointed out that it was wrong to assume that the trial court was bound to pass the death penalty in cases of child murder. He continued:

> "It was to give the Sudan Courts freedom from the abhorrent duty which formerly fell on English Judges to pass sentence of death in this and other cases in which it is repellent to pass the death sentence that the English law was deliberately not followed in the Sudan in 1899, and it has been possible ever since that date for the court to pass sentence of imprisonment for life. Not only so, but the Confirming Authority has consistently taken the line that the sentence of death should not be passed in infanticide cases, and in confirmation proceedings it has been the practice to take a very generous view in reducing sentence for life passed on such woman."

It is submitted that the justification for such a lenient attitude is not restricted to the mental condition of the mother. The offence must be viewed in the light of its implications in a society which is very conservative and conventional. Giving

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(1) Section 251, S.P.C.; see Ch.II, supra.
(2) Ch. II, supra.
(3) AC.CP.11.1942, Unrep.

birth to an illegitimate child is an unforgivable social evil. The mothers are in great danger of losing their lives for having brought shame and disgrace to the family. The family is branded with shame and the mother's chances of being allowed to continue to live with the family become minimal, her chances of getting married nonexistent. Hence the temptation to get rid of the child. The position is well described in two early cases. In S.G. v. Asha Mohamed ElGoda[1], Owen, C.J., said:

> "In native eyes the birth of an illegitimate child is a grave disgrace both to the mother and her family. Opinion and judgement is harsh and uncompromising in such cases and it is easy to understand the temptation these women were subjected to ...."

In the second case, S.G. v. Fatma Mohamed Ali[2], the President said the following of the attitude of the two lay magistrates sitting with him at the trial:

> "(They) admit that if their own daughter bore an illegitimate child, the family would arrange its death automatically, and no report would be made to the Merkaz (i.e., the authorities). The child, if it lives, is a source of continual disgrace to the rest of the family; and the disposal of such a child is not so much a concealment of crime, as the removal of a source of reproach."

These considerations, coupled with the mental condition of the mother, lead to the adoption of a lenient attitude. However, the absence of any provision for child killing has resulted in a rather confused and inconsistent practice. At one time or another, the courts have followed different ways of dealing with the problem. These ways included the following:

(a) The mother was acquitted of murder and convicted of culpable homicide on the grounds that she had acted under grave and sudden provocation. Thus in S.G. v. Dahia

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(1) AC.CP.256.1931, Unrep.
(2) AC.CP.235.1931, Unrep.

bint Murganawi,[1] the mother was convicted of culpable homicide because:

> "being alone, being under the fear of disgrace to her family her mental condition must have been such that she was suddonly and gravely provoked by the appearance of the child to such an extent as to deprive her of the power of self-control ...."

The conviction was upheld on confirmation and the sentence reduced to one year's imprisonment.

(b) The mother was similarly convicted of culpable homicide on the basis that her mental state was 'abnormal' or that she was 'mentally deficient',[2] or without giving the reason for such conviction.[3]

(c) Sometimes the mother was convicted of murder but nevertheless sentenced to a short term of imprisonment,[4] in contravention of section 251, S.P.C.

However, at present none of the above three methods is resorted to. It is submitted that this is correctly so because (a) unduly extends the defence of provocation under the Code[5] since it could hardly be maintained that the mere birth of the child was an 'act' of provocation. Even if it was provocation, it would be self-induced by the mother for having voluntarily engaged in a sexual relationship. As to (b), mental abnormality or deficiency is nowhere recognised in the Code as a ground for reducing murder to culpable homicide. Diminished responsibility is not part of the law of the Sudan.[6] (c) is clearly unacceptable because once a person is convicted of murder there

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(1) AC.CP.190.1929, Unrep.
(2) S.G. v. Zeinab bint Abdel Sid, AC.CP.21.1930, Unrep.
(3) S.G. v. Nabiha Hassan Abdulla, AC.CP.259.1929, Unrep.; S.G. v. Husna bint Abdelmajid, AC.CP.3.1930, Unrep.; S.G. v. Makka Ali Saeed, (1962) S.L.J.R.92.
(4) S.G. v. Umbashir bint Bushara, AC.CP.209.1935; Unrep.; S.G. v. Zahra Abdulla Mohamed (1963) S.L.J.R.167. In both cases the conviction was for murder, but in the first case the accused was sentenced to seven years and in the second to one year.
(5) Under section 249(1), S.P.C., see Ch.VI, infra.
(6) Ch.VIII, infra.

is no alternative but to sentence him to death or life imprisonment.

The Present Practice

The most common practice followed in the general run of cases is that the trial court convicts the mother of murder and sentences her to imprisonment for life with a recommendation to mercy. When the case comes for confirmation the Confirming Authority reduces the sentence to a few year's imprisonment. In the past the sentence varied between one and ten years,[1] but in recent years the practice is to impose one to two year's sentence.[2]

Criticism of the Practice

The existing practice is not based on any definite principles and is open to some criticisms. In the first place, the term 'newly born' under C.C.C.No.26 is nowhere defined and this may lead to illogical results. Thus, in one case[3] the practice was followed where the murdered child was three weeks old, but in another[4] it was not followed because the child was only twenty-four days old. It is thought that a fixed age limit must be set for the sake of consistency. The reason behind passing the English Infanticide Act, 1938, to remedy the 1922 Act is relevant here. Secondly, the requisite mental condition of the mother is not defined. The absence of such definition makes it difficult for the courts to determine easily whether the mother should be leniently dealt with or not, and will lead to a confusion between cases of infanticide and cases of murder.

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(1) S.G. v. ElGaz bint Abdulla, AC.CP.147.1927, Unrep.; S.G. v. Fatma Ibrahim, AC.CP.199.1927, Unrep.; S.G. v. Fatma bint Abu Zeid, AC.CP.170.1928, Unrep.; S.G. v. Amna bint Ali, AC.CP.101.1930, Unrep.; S.G. v. Zeinab bint Mohamed Suleiman, AC.CP.114.1930, Unrep.

(2) S.G. v. Makka Ali Saeed, (1962) S.L.J.R.92; S.G. v. ElFaigha Sabir (1963) S.L.J.R.172; S.G. v. Saeeda Hassan Manzoul, (1966) S.L.J.R.6.

(3) S.G. v. Zeinab bint Mohamed Suleiman, AC.CP.114.1930, Unrep.

(4) S.G. v. Fatma bint Abu Zeid, AC.CP.170.1928, Unrep.

Thirdly, the practice does not appear to be well established and there is still some inconsistency illustrated by very recent cases where the mother was sentenced to death instead of life imprisonment.[1] The inconsistency and confusion cannot be better demonstrated than by the recent decision of the Supreme Court in S.G. v. Fatma Mohamed Arman.[2] The accused killer her newly born child soon after birth and was convicted of murder and sentenced to death with a recommendation that the sentence be reduced to two years' imprisonment. Delivering the opinion of the Supreme Court, Lutfi, J., said:

> "In England this type of offence is not treated as murder. It is specifically provided for by statute and is known as INFANTICIDE. In the Sudan we have no such offence but we follow the English law - which is of course more advanced in this respect - in assessing the appropriate sentence."

However, instead of reducing the sentence to two years' imprisonment, which the Supreme Court had power to do and which had been the practice hitherto, the Court took the unprecedented step (in so far as child murder is concerned) of referring the sentence of death to the Head of State with a recommendation to commute it to two years' imprisonment in his prerogative of mercy. Being a course taken by the Supreme Court, this appears to have upset what was an almost established practice by waiving the power of the Court to reduce the sentence in its judicial discretion and leaving the matter to be dealt with through the discretion of the Executive.

Another aspect of the case is that the Supreme Court made no reference to the fact that the trial court had sentenced the mother to death instead of the usual life imprisonment. In omitting to do so the Supreme Court has also disturbed the pre-existing practice.

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(1) S.G. v. Zaila Fadl ElMula, (1961) S.L.J.R.146; S.G. v. ElFaigha Sabir (1963) S.L.J.R.172.

(2) AC.CP.607.1967, Unrep.

It now remains to be seen whether the Confirming Authority will restore the previous practice or follow the above case. The latter is indeed a sad prospect. To pass the sentence of death knowing that it will be subsequently commuted to a few years' imprisonment, is to expose the mother to unnecessary, inhuman and immoral degredation. This is particularly so if it is borne in mind that the process of confirmation is a rather lengthy one. For example, in the last mentioned case, the accused was sentenced to death on 2.2.67 and it was not until 10.12.67 that the sentence was commuted. The mother was left for more than ten months facing the shadow of death in a solitary cell. This was so when in fact it was known generally that the sentence was certainly not going to be executed. This is clearly objectionable because

> "To have to sentence people to death when you know you are going to recommend that they shall not be executed is to go through what is really a mockery, because it is a very grave thing to sentence a man to death knowing full well that you are going to write presently and say that on no account shall he be executed."[1]

Again, as Fitzgerald pointed out:[2]

> "... no judge should be required to go through the grisly formality of pronouncing the death sentence in cases in which it would revolt his conscience if it were carried into effect."

Finally, even the practice of passing a sentence of life imprisonment at the trial and reducing it to one or two years on confirmation has nothing to commend it. It also involves a mockery of the law as there is no justification for sentencing a person to life when it is known in advance that the sentence will be reduced to one or two year's imprisonment.[3] To quote Fitzgerald[4] again:

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(1) Sir James Craddock before R.C.C.P., 1866, Minutes of Evidence, Z.3810.
(2) Fitzgerald, op.cit., at P.31.
(3) See R.C.C.P., Cmd.8932, para. 699.
(4) Fitzgerald, op.cit., loc.cit.

> "Is the dignity of justice really upheld by pronouncing with the maximum dramatic effect a sentence which everybody in Court - except perhaps the poor creature in the dock - knows will never be carried out?"

Proposals for Reform

It appears from the above that the Sudan law in this respect is unsatisfactory and that there is an urgent need for reform. This need was indeed felt over twenty years ago when Flaxman, C.J., after outlining the practice followed in child murder, said:

> "Although the line referred to above has consistently been taken by the Confirming Authority in cases of infanticide, it may now be advisable to consider making special provision for such cases in the Code."[1]

The creation of a separate offence of infanticide will clarify the principles to be followed in relation to the requisite mental condition of the mother, the age limit of the child killed and the appropriate sentence to be passed. The mother will not be subjected to the ordeal of hearing the death penalty and the dignity of the law will be preserved. Finally, the new offence will help clear the boundary between genuine cases of infanticide and other cases of murder where a mother kills her child in cold blood. The latter are murderers deserving no leniency and must be dealt with as such.

Contemporary Opinions Towards Reform

An attempt has been made in the Questionnaire to ascertain the views of Sudanese lawyers on the suggested change in the law. After criticising briefly the present practice it was proposed that a new offence should be created under the Code along the lines of the provisions of the English Infanticide Act, 1938. Most of the respondents agreed that the present law is unsatisfactory and that new legislation is needed.[2] As to the actual content of the suggested offence, there was general agreement that

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(1) S.G. v. Dai ElNur Isagha, AC.CP.11.1942, Unrep.
(2) Q.1-4, Part II, B, the Questionnaire.

it should be along the lines of the English Act, particularly in so far as the definition of the mother's mental condition was concerned.[1] Minor variations were, however, suggested on questions of detail such as the child's age limit, the maximum punishment to be imposed and whether the child is illegitimate or not.[2]

However, three respondents opposed the creation of a new offence and preferred the present way of dealing with the matter. One of them argued that the present law was flexible enough to deal with child murder, another was of the opinion that the final word should always remain with the Confirming Authority, and the third gave no reason.

With due respect, the writer disagrees with the latter because, as has already been shown, the present law is neither flexible nor satisfactory enough to cope with the matter, but is rather confused and inconsistent. The view that the final decision must rest with the Confirming Authority is not convincing and does not appear to have any rational basis.

In conclusion, it is felt there is great need for the creation of a new offence of infanticide in the Sudan. The English Infanticide Act may be taken as a basis for the proposed offence, but details of its content should be left to the legislature to determine in the manner it deems best suited to the needs and circumstances of the country.

Involuntary Culpable Homicide

As has already been explained,[3] the offence of involuntary culpable homicide (or culp-

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(1) Q.5-6, ibid.

(2) Seven thought that in all matters the position should be the same as in the English Act; four thought the child's age should be fixed at less than twelve months - their suggestions varied from 'the moment of delivery', 'a few days' to 'three months after birth', Q.6(ii), ibid. Three thought that the offence should apply only if the child was illegitimate, Q.6(iii), ibid. On punishment: two thought that the maximum should be ten years; two preferred seven years; and one five years; only one thought that the mother needed treatment not punishment, Q.6(iv), ibid.

(3) Supra.

able homicide not amounting to murder) is a residual offence resulting from the operation of section 246 and 248 of the Code. If the case falls within the definition of culpable homicide simpliciter under section 246 but falls short of the definition of murder in section 248 it will be involuntary culpable homicide. More specifically, the distinction between the two offences lies in the distinction between the 'probability' or 'likelihood' of the act causing death. The offence covers two types of situation:

A. - Where there is an intention to cause bodily injury 'likely' to cause death: if the offenders intends to cause bodily injury and that bodily injury is deemed to be 'likely' to cause death, the offence will amount to involuntary culpable homicide. It is not essential to prove that the offender 'knew' that the act was likely to result in death, and it is sufficient if the act is in fact likely to cause death.[1] Thus, a person will be convicted of the offence if he intends to cause bodily injury and the injury is such that a reasonable man would not be 'surprised' if death results from it. Intention is usually inferred from the circumstances of the case such as the seriousness and location of the injuries, the instrument used and the force applied. Thus, the accused is convicted of culpable homicide where he strikes D on the head with a stick causing his death;[2] where he stabs him with a lethal weapon on a non-vital part of the body such as the arm[3] or the leg;[4] or shoots him with a rifle above the knee.[5] If the injury is directed at a vital part of the body or if several injuries are inflicted or considerable force is applied, death will be deemed 'the

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(1) Gledhill, 491.
(2) S.G. v. Abdel Razig Ahmed ElSunni, AC.CP.269.1951, Unrep.; S.G. v. Kenyi Jello (1960) S.L.J.R.60; S.G. v. Akec Magol, (1961) S.L.J.R.20.
(3) S.G. v. Ramadan Abbakar, AC.CP.235.1942, Unrep.
(4) S.G. v. Danjaza Dazauvu, AC.CP.214.1937, Unrep.
(5) S.G. v. Kamal ElJack, (1965) S.L.J.R.65.

probable' result of the act and the conviction will be for murder under section 248(b).

B. - Knowledge that the act is likely to cause death: the accused may still be convicted of involuntary culpable homicide if he has no intention to cause bodily injury but if the circumstances of the case make it clear that he 'knew' death would be a 'likely' result of his act. If he knew that death would be 'the probable' result of the act the offence will be murder. As in the case of intention, knowledge of likelihood is inferred from the circumstances of the case. Thus a blow which may be unlikely to cause the death of a normal person may be quite likely to cause the death of a frail person in poor physical condition, or a very old man, or a young child.[1] If the accused causes the death of such person by striking him a blow, he would be presumed to have known that death was likely to result.[2]

It should be noted that in both (A) and (B) where the case is a borderline one, and it cannot be conclusively determined whether death is a likely or probable result of the act, the accused is given the benefit of the doubt and is convicted of culpable homicide instead of murder.[3]

Finally, it must be emphasised that involuntary culpable homicide in the Sudan is much narrower than its counterpart in English and Scots laws. The reason for this is that under the S.P.C. separate provision is made for negligent homicide, unintention homicide and causing death with the intention of causing hurt. The latter offences are in Scotland and England included in involuntary culpable homicide. The content of these offences together with their distinction from involuntary culpable homicide is discussed in Chapter VII.

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(1) Gledhill, 491-492.
(2) Cf. S.G. v. Mukhtar Muhammed Ahmed Abu Rasein, 1946, Unrep, cited in Gledhill, 493
(3) S.G. v. Sulta Gador, AC.CP.117.1925, Unrep.; S.G. v. Mohamed Mehagir, AC.CP.66. 1941, Unrep.; S.G. v. ElEbeid Ali Ahmed, AC.CP.88.1941, Unrep.; S.G. v. Abdel Razig Ahmed ElSunni, AC.CP.269.1951, Unrep.; S.G. v. Kamal ElJack (1965) S.L.J.R. 65.

CHAPTER V

PRIVATE DEFENCE AS A JUSTIFICATION OF HOMICIDE

Although the conditions of liability for murder or culpable homicide are fulfilled, the existence of a further fact may render the homicide justifiable and the person who causes the death will have a complete defence. Such cases include the following:

a. - Killing in the execution of public justice, the clearest example of which is the carrying out of the death sentence in pursuance of a sentence passed by a lawful court.[1]

b. - Killing in the furtherance of public justice: Generally speaking, a person may be justified in causing the death of another if he does so in an attempt to prevent that other from committing a serious crime or to effect his arrest after its commission, provided that it was both reasonable and necessary in the in the circumstances to use the force applied.[2]

c. - Killing in exercise of the right of private defence of person or property.

The latter is by far the most important of the above and the whole of the present chapter is devoted to it.

Extent of the Right of Private Defence

The provisions defining the right of private defence are spelt out in sections 55-63,

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(1) Section 46, S.P.C.; Hume, i, 195; Gordon, 694; Smith and Hogan, op.cit., 230.
(2) S.G. v. Mahmoud Abdulla ElMalik (1962) S.L.J.R.164, infra.; Smith and Hogan, op.cit., 230-231; see also section 3 of the Criminal Law Act, 1967; Gordon, 694-695.

S.P.C.[1] It is first intended to deal with the extent and general limitations of the right of private defence and then proceed to deal with those situations which the Code expressly recognises as enabling the accused to cause death in the exercise of such right.

Section 55, S.P.C., provides:

> "No act is an offence which is done in the lawful exercise of the right of private defence."

The section simply spells out the universally recognised principle enabling a person to exercise his lawful right of self-preservation against any invasion by another. The extent of the defence is indicated in section 56:

> "Every person has a right, subject to the restrictions hereinafter contained, to defend -
>
> First - his own body and the body of any other person against any offence affecting the human body;
>
> Secondly - the property whether movable or immovable of himself or of any other person against any act, which is an offence falling under the definition of theft, robbery, mischief or criminal trespass or which is an attempt to commit theft, robbery, mischief or criminal trespass."

In relation to defence of the person, the section extends only to offences 'affecting the human body', i.e., those offences falling within sections 246-319 of the Code. Consequently, there is no right of private defence against other offences such as intimidation,[2] insult[3] or defamation.[4] However, in relation to defence of property the enumerated four offences[5] in the section are not meant to be exclusive. The defence

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(1) Sections 96-106, I.P.C.
(2) Section 440, S.P.C.
(3) Section 443, ibid.
(4) Section 437, ibid.
(5) Theft, robbery, mischief and criminal trespass are defined in sections 320, 332, 363 and 380, respectively, of the Code.

will extend to all offences ejusdem generis, i.e., brigandage,[1] house-breaking[2] and house-trespass,[3] because brigandage includes the ingredients of robbery, and house-trespass and house-breaking include the ingredients of criminal trespass. Conversely, defence of property does not extend to extortion,[4] criminal misappropriation[5] and criminal breach of trust.[6]

Section 56 appears to be rather wide in relation to the range of situations enumerated under it in which a person may exercise the right of private defence. Not only that, but the section does not confine itself to the person and property of the accused but extends its protection to the person and property of any other person. It would appear that the section extends to protect a person who kills another in defence of a third person or his property. This is clearly the effect of S.G. v. Mahmoud Abdulla ElMalik,[7] where the deceased entered a woman's house and stole some clothes and household utensils. The woman saw the deceased and started a hue and cry. The deceased started to run away with the stolen property. The accused, a neighbour who heard the woman screaming, chased the deceased. The latter stabbed the accused on the lip and the accused struck him in the back with a spear. He also stabbed him two more times causing his death. It was held that when the accused stabbed the deceased he was acting within the right of private defence.[8] Although the accused may in this case be said to have been defending himself against the deceased, Abu Rannat, C.J., ex-

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(1) Section 333, ibid.
(2) Section 384, ibid.
(3) Section 381, ibid.
(4) Section 325, ibid.
(5) Section 344, ibid.
(6) Section 347, ibid.
(7) (1962) S.L.J.R.164.
(8) However, it was further held that the accused had exceeded his right of private defence by the two subsequent stabs. For a discussion of exceeding the right of private defence see Chapter VI, infra.

pressly stated that the accused was acting "in exercise of the right of private defence against his own person and the property of his neighbour ...."[1] It would appear also to be the law in Scotland[2] that the right of private defence may extend to the protection of person and property of others, although it is doubtful whether it covers situations such as that in Mahmoud Abdulla ElMalik[3], where the deceased had already accomplished his purpose in stealing the goods or injuring a third party. More will be said on this in due course. As to English law the rule that a 'special relationship'[4] must exist between the parties before the accused may lawfully defend the person or property of others does not appear to be applicable at present.[5]

Section 56 may be criticised as too broad on the ground that it omits to make any reference to the accused's duty to retreat. It is well settled in English[6] and Scots[7] laws that the right of private defence will not be available if the accused has a reasonable opportunity to retreat and thus avoid the killing without exposing himself to danger or placing himself at a disadvantage in relation to his defence. The omission of a provision to this effect from section 56 seems to have been deliberate. This appears from the opinions of the authors of the I.P.C. who expressly admitted that they were conscious of the fact that the law laid by them was extremely wide.[8] However, they tried to justify this in the light of the extisting social structure in India. They said:[9]

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(1) (1962) S.L.J.R.164 at P.165; emphasis supplied.
(2) Hume, i, 218-219; H.M.A. v. John Forrest (1837) 1 Swin.404.
(3) Supra.
(4) Hale, i, 483; R. v. Rose (1884) 15 Cox 440.
(5) R. v. Duffy (1967) 1 Q.B.63; Archbold, op.cit., 36 ed., 924; Smith and Hogan, op.cit., 235.
(6) Coke, 55; Hale, i, 481; Smith and Hogan, op.cit., 234-235; Bosanquet, J., in R. v. Smith, (1837) 8 C. & P.160 at P.162.
(7) Robert M'Anally (1836) 1 Swin.210 at P.217; Lord Jamieson in Kizilevicius, 1938 J.C.60 at P.62; Lord Keith in Doherty, 1954 J.C.1 at P.5.
(8) The Indian Law Commission, 1837, Note B, P.19.
(9) Ibid.

> "It may be thought that we have allowed too great a latitude to the exercise of this right; and we are ourselves of opinion that if we had been framing laws for a bold and high-spirited people, accustomed to take the law into their own hand, and to go beyond the line of moderation in repelling injury, it would have been fit to provide additional restrictions. In this country the danger is on the other side; the people are too little disposed to help themselves; the patience with which they submit to the cruel depredations of gang-robbers and to trespass and mischeif committed in the most outrageous manner by bands of ruffians, is one of the most remarkable, and at the same time one of the most discouraging symptoms which the state of society in India presents to us. Under these circumstances we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self-defence."

It is doubtful whether the above remarks are true of the state of society in the Sudan at present. It cannot be ascertained whether the position was different seventy years ago. At any rate, however, the legislature enacted the Indian provisions dealing with self-defence into the S.P.C. without any modification. Nor is there any indication in the case law that these provisions are unsatisfactory. It is submitted that in the present conditions in the Sudan with its system of extended families where a person's safety or that of his property is presumed to be under the protection of the community as a whole, where recourse to public authorities may prove cumbersome and insistence upon it may expose the safety of a person or his property to the risk of injury, it is proper to lay down as few restrictions as possible in relation to the right of private defence.

Limitations on Exercise of the Right of Private Defence

i. - No Self-defence by an Aggressor

The essence of the right of private defence is the protection of the innocent party against unjustifiable attacks on his person or property by another person. It follows from this that the right cannot be relied upon by a person who makes the original at-

tack;

> "if the law allows a person to defend himself against an assailant it cannot allow the assailant to kill him just because he exercised his right of self-defence and so put the assailant's life in danger. It must be as criminal to kill someone who is resisting the attempt to kill him, as it is to kill someone who offers no resistance."[1]

The aggressor wilfully brings upon himself the danger he claims to repel and cannot expect the protection of the law.

There is no express provision in the S.P.C. excluding self-defence by an aggressor. But such a rule is necessarily implied in the definition in section 56 which states that it is no offence to do an act in the lawful exercise of the right of private defence.[2] A person who starts a fight or delivers the first blow can hardly claim to be exercising his 'lawful' right of private defence. This is confirmed by the judgement of Mudawi, P.J., in S.G. v. Kamal ElJack.[3] He said:[4]

> "The right of private defence is limited and circumscribed by the law. It is in fact a surrender of the power of the state, in exceptional circumstances, to the individual, and for this reason the law has been very careful not to allow such power to be abused. The law demands that he who claims this defence should come to court with clean hands. He should not be proved to be an aggressor who courted the attack or sought the trouble. This right extends to causing the death of the assailant, and therefore, unless it is attended with limitations and restrictions in keeping with the concept of the sanctity of human life, the law will be turned into an instrument of oppression handy to the rashling and the bully."

In practice, the difficulty arises as to what the position would be when a quarrel ensues leading to a fatal fight in which both the accused and the deceased were in some way to blame for what happened. Two types of situation must be distinguished:

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(1) Gordon, 697; Cf. Gledhill, 132; Gour, op.cit., vol. I; P.634.
(2) Supra.
(3) (1965) S.L.J.R.65.
(4) Ibid, at P.72; Cf. Salah Hassan, J., in S.G. v. Abu Aisha Hamid, (1966) S.L.J.R.24 at P.25.

a. - Where the accused or the victim initiates the quarrel by a minor act of provocation which leads to a fight in which blows are exchanged until eventually the accused fatally strikes the victim.

b. - Where the accused provokes the fight or strikes the first blow and the victim retaliates in an excessive or disproportionate way which puts the accused's life in danger and prompts him to strike the fatal blow.

The difference between the two situations is that in (a) the nature of the fight does not change and the parties continue to exchange blows which lead to the fatal result in such a way that it becomes very difficult to put the blame fairly and squarely on one party or the other. But in (b) although the accused was responsible for starting the fight, its nature was so changed by the victim's excessive retaliation that the accused could only save his own life by killing the victim.

The tendency of the courts in relation to (a) has been to hold that when both parties enter into a fight voluntarily, the fight is a fair one and a party entering it should expect its likely consequences. The survivor of such a fight is not allowed to plead self-defence because this would lead to the illogical conclusion that both parties to a case may be acting in self-defence.[1] Thus, Creed, L.S., said in S.G. v. Kuku Kafi:[2]

> "Generally speaking, if a man enters a fight voluntarily, he takes the risk of the fight and, if violence is used against him, he is receiving no more harm than he had every reason to expect when he entered the fight, and he cannot successfully plead self-defence. If this principle is ignored, an impossible situation is created, as either party who happened to be getting the worst of a fight into which he voluntarily entered would be entitled to call in self-defence."

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(1) For a further discussion of such situations see Ch. VI, infra.

(2) AC.CP.16.1942, Unrep.; Cf. S.G. v. Luate Mayi, AC.CP.327.1951, Unrep.; S.G. v. Yassin Karada (1956) S.L.J.R.33; Salah Hassan, J., in S.G. v. Abu Aisha Hamid (1966) S.L.J.R.24 at P.25.

Nevertheless, such cases would not be treated as murder, but are reduced to culpable homicide by operation of section 249 (4), S.P.C., dealing with sudden fights upon sudden quarrels. The effect of this subsection together with the law applicable to such cases in the U.K. is subsequently dealt with.[1]

In relation to the situation in (b) above, the accused will not lose his right of self-defence solely because he started or provoked the fight. The reason for this is that the victim's disproportionate retaliation has altogether changed the nature of the fight and the accused has no alternative but to kill the victim, in order to save his own life. The Sudan courts have frequently held that the accused will succeed in his defence if the nature of the fight substantially changes to the extent that the accused is himself put in a position of self-defence.[2] However, it has also been consistently stated that the defence will only succeed if the accused's original act does not put the victim in fear of death or grievous bodily harm. This is correctly so because otherwise the victim's act of retaliation can never be deemed excessive; on the contrary, it will itself be an act of self-defence. In S.G. v. Hussein Adam Fadul[3], the accused unlawfully entered the house of a woman where he found the deceased, the woman's lover. The latter disapproved of the accused's presence, but the accused persisted on staying, and abusing the deceased. A fight broke out and the accused's brother intervened to stop it. The deceased stabbed the latter whereupon the accused fatally stabbed the deceased. The trial court held that the accused was

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(1) Ch. VI, infra.

(2) In S.G. v. Ahmed Billa, AC.CP.158.1944, Unrep., a thief was held justified in killing a cattle owner who overtook him and tried to stab him with a spear; Cf. S.G. v. Adam Mohammed, AC.CP.20.1935, Unrep.; S.G. v. Sabit Rahamtalla, AC.CP.191.1942, Unrep.; S.G. v. Mohamed Bireima, AC.CP.278.1947, Unrep.; S.G. v. Ebaiiih Massar, AC.CP.277.1952, Unrep.

(3) AC.CP.230.1947, Unrep.

not acting in self-defence because "A man cannot ... create a danger and then successfully plead that he was acting in self-defence against that danger."[1] On confirmation, however, Cumings, C.J., disagreed with the trial court's view that a person who started a fight could not have the right of private defence against a dangerous attack by his opponent. He relied on the following remarks from the English Commissioners on the Draft Code:[2]

> "Everyone who has without justification assaulted another, or has provoked an assault from that other, may, nevertheless, justify force subsequent to such assault, if he uses such force under reasonable apprehension of death or grievous bodily harm from the violence of the party first assaulted or provoked, and in the belief on reasonable grounds that it is necessary for his own preservation from death or grievous bodily harm: Provided he did not commence the assault with intent to kill or do grievous bodily harm, and did not endeavour, at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm: Provided, also, that before such necessity arose, he declined further conflict, and quitted or retreated from it as far as practicable."

However, the Chief Justice upheld the court's finding on the ground that the accused had a chance to break the quarrel had he wished to, but he preferred not to do so. The same rules appear to be applicable in English law.[3] In Scotland, however, a distinction was drawn at the time of Hume between self-defence against a 'felon' and self-defence in a 'quarrel', the former relating to cases where the victim's attack on the accused was completely unjustified and unprovoked, and the latter to cases where the attack was provoked by an act of the accused.[4] Hume preferred the former as a basis for a successful plea of self-defence on the ground that it was an inherent right of the accused based on the law of nature.[5] But the rules laid down by

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(1) Ibid, per Atabani, J.
(2) C.2345, Note to section 56 of the Draft Code; the Chief Justice wrongly attributed the above statement to Mayne who merely quotes it favourably, see Mayne, Criminal Law of India, 4 ed. (Madras, 1914), P.229.
(3) Hale, i, 482; Smith and Hogan, op.cit., 233.
(4) Hume, i, 217-222.
(5) Ibid.

Hume to regulate the law of self-defence in a quarrel were so strict as to render the defence meaningless. Thus he stated that:

> "whenever it appears either in the origin or progress of the quarrel, or in the ultimate strife, there was anything faulty or excessive on the part of the survivor; here for the sake of correction and example, a judge inflicts a suitable punishment though it be true that he did not kill out of wickedness or malice, but only to save his own life, and really believing that he could not otherwise escape."[1]

As has been pointed out by Professor Gordon,[2] the effect of the above remarks would be to negate altogether the right of self-defence in a quarrel because Hume clearly excluded the defence whenever the accused started or provoked the fight even where the subsequent act of the victim put the accused's life in danger and completely changed the nature of the fight.

It is perhaps fortunate that Hume's views on this matter do not represent the present Scots law. This appears from the cases of H.M.A. v. Kizileviczius,[3] and Robertson and Donoghue.[4] In the former the jury were directed that if they found the accused had acted in self-defence they should acquit him,[5] though the facts made it very clear that the accused had in fact been responsible for starting the fight. The position was put more clearly in the latter case where Lord Justice-General Normand said:[6]

> "... although an accused person may commit the first assault and may be, in general, the assailant, he is not thereby necessarily excluded from a plea of self-defence. If the victim, in protecting himself, or his property, uses violence altogether disproportionate to the need, and employs savage excess, then the assailant is in his turn entitled to defend himself against the assault by his victim ...."

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(1) Ibid, at P.223; emphasis added.
(2) Gordon, 702.
(3) 1938 J.C.60.
(4) Edinburgh High Court, August 1945, Unrep.; cited in Gordon, 705.
(5) 1938 J.C.60, Lord Jamieson at P.62.
(6) Gordon, 705-706.

Thus the present law in Scotland is in accord with that of the Sudan and it is accepted as satisfactory.[1]

ii. - Recourse to Public Authorities

The right of private defence, being essentially a concession by the State to the individual to protect himself in those exceptional circumstances where the aid of the State cannot be obtained without endangering a person's life or property, it is perhaps trite law to provide as does section 59, S.P.C., that:

> "There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities."

The significance of this provision lies in the fact that without such stipulation the law may be subverted by persons taking it into their own hands and subsequently claiming that they were acting in self-defence. It is a question of fact to be determined from the circumstances of each case whether recourse to the protection of public authorities was possible and whether the accused could have done so without endangering himself or his property.

In relation to the conditions pertaining in the Sudan, recourse to public protection is by far more difficult than it is in the U.K. The reason is that the Sudan, being such a vast and underdeveloped country, suffers a considerable shortage in giving official protection to its citizens. Communications are rather difficult, and, particularly in remote rural areas, insistence on recourse to public authorities in every case would be futile. Consequently, the above provisions must be interpreted widely enough to take these conditions into consideration. Such an attitude was taken in S.G. v. Musa Gibril Musa.[2] The accused stored rain water in the trunk of a tree in

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(1) Ibid, at P.706.
(2) (1959) S.L.J.R.12.

a district in Western Sudan where water is very scarce. One day he discovered that his water had been stolen and he pursued the thieves following their foot traces. When he found them he demanded his water but they refused to give it back. A fight ensued in which the accused killed one of the theives. On his trial for murder he was completely acquitted on the grounds of self-defence.

It is doubtful whether the same decision would have been returned had the facts of the above case occurred in a developed society such as the U.K. The theft having been completed, the accused would most probably be required to seek public protection rather than pursue the thieves himself to try to recover his property by force. Similarly, the decision of the case in the Sudan might have been different if there had been a police station nearby to which the accused could have resorted without risking the loss of his property.[1] But in the circumstances of the case, a strict application of the rule might have resulted in the disappearance of the thieves and the loss of the water. As Ratenlal maintains:[2]

> "The law must not be invoked to oppress persons who, when there is no time to have recourse to the public authorities, find themselves in a position in which they must either exercise the privilege of private defence ... or submit to a forcible invasion of the right of person or property in cases where ... ... the law does not require any such submission."

iii. - Private Defence Against Public Servants

As previously mentioned, section 56 provides that the right of private defence can only be exercised to repel an 'offence'. It follows from this that there is no such right if the act to be repelled is lawful and is not an 'offence' within the criminal law. Such limitation is more specifically spelt out in section 60, S.P.C. It provides:

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(1) Cf. the Indian case of Jeolal, (1867) W.R.34, cited in Gledhill, 137.
(2) Ratenlal, op.cit., 216.

> "There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law."

The section goes on to exclude from the right of self-defence similar acts done by the "direction" of such public servant under the same circumstances as the above. It is a universally accepted principle that an act of a public servant in the lawful exercise of his duties or pursuant to an order of a court of justice is completely justified. Any attempt to obstruct him in the execution of such duties is unlawful.[1] However, section 60 appears to extend this principle to cover cases where the act of the public servant is not strictly justifiable by law provided he acted in the honest belief that it was justifiable, and provided that his act does not cause fear of death or grievous hurt in the accused. The latter proviso means that the public servant should not use more force than is reasonably necessary for the execution of his duties. The courts do not seem to have explained the meaning of the term 'not strictly justifiable by law', but it would appear that it means that the public servant would be protected by the section if he acts in slight excess of his duties or somewhat irregularly.[2] His authority must be defective only in "some minor particular"[3], and the section will have no application if the act was wholly unjustifiable and without authority.[4] Gledhill[5] refers to a number of Indian decisions[6] where resistance to a public officer executing a defective warrant, or making an unlawful arrest, or otherwise acting strictly outside his authority was held not to be sufficient to deprive the accused of his right

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(1) Hale, i, 39, 457; Hume, i, 197-200; sections 45, 46, S.P.C.; Cf. S.G. v. Debba Wad Korkidela, AC.CP.47.1923, Unrep.
(2) Gledhill, 137.
(3) Ratenlal, op.cit., 212-213.
(4) Gledhill, 139; Ratenlal, op.cit., 212.
(5) Gledhill, 139.
(6) Asa, (1913) 14 Cr.L.J.512; Jogendra v. Hiralah, A.I.R. (1924) Cal.959; Achhru Ram v. Emperor, A.I.R. (1926) Lah.326; Suranarayana v. Thota, A.I.R.(1934) Mad. 664; P.P. v. Surayanarayuna Reddi (1937) M.W.N.741; Bhairo v. Emperor, A.I.R.(1941) Sind 82.

of private defence. Such decisions may have persuasive authority in the Sudan, but it still remains the case that the public servants' acts must be substantially unwarranted and not lacking only in some minor respect, in order to deprive him of the protection of the section. In S.G. v. Adam Mohammed Ibrahim[1], the deceased, a policeman, called upon the accused to surrender his arm knife and the latter refused. When the deceased tried to take the knife by force the accused stabbed him to death. It was held that although the deceased had no lawful authority to order the accused to deliver the knife, the latter's act was not in exercise of the right of private defence.

A final requirement of section 60 is that a person is not deprived of his right of private defence if he does not know or has no reason to believe that the act was done by or on the direction of a public servant.[2]

It may be doubted whether the U.K. courts would go as far as section 60 by denying the accused his right of private defence if the act of the public servant was somewhat irregular or 'not strictly' justifiable by law.[3] The considerations which may have prompted the legislature to introduce such a limitation in section 60 can hardly be said to apply to the U.K. In countries such as India and the Sudan public servants may require a greater degree of protection and encouragement in the execution of their duties. Public bodies are until the present day extremely undermanned and under-equipped in their methods of detecting crime and apprehending criminals. Public opinion has still to be more educated on the authority of the law and respect of its servants. However, as time goes on, the rules may call for modification and the con-

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(1) AC.CP.322.1954, Unrep.
(2) Explanations I and 2 to section 60, S.P.C.
(3) Hale, i, 458; R. v. Lockley (1864) 4 F. & F.155; Macdonald, J.C., "Justifiable Homicide", (1897) 4 S.L.T.(News) 225 at P.226; Gordon, 694-695.

cessions in favour of public servants may disappear.

iv. - No More Harm than is Necessary

Section 58, S.P.C., provides:

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

Whether the accused has or has not used more harm than is necessary for his defence is a question of fact depending on the force he applies and the violence to be repelled. But the general principle is that a person should only inflict the amount of harm which is necessary for his safety and for avoiding danger. The rule is also well established in Scots[1] and English[2] laws. The accused should not resort to violence at all if the threat to his safety or property can be avoided otherwise, e.g., where the assailant offers no resistance at all or surrenders once he is apprehended. In the Indian case of Gokool,[3] the accused found D, a starving woman, cutting his paddy. D offered no resistance but the accused struck her on the head and arm causing her death. He was convicted of murder for using more harm than was necessary. There is also no right of private defence if the accused continues to beat the victim to death after the victim is overpowered and has surrendered.[4]

However, in determining whether or not the accused has used more harm than is necessary the court must take all the relevant circumstances of the case into account. As Gledhill puts it:[5]

> "... the degree of force necessary for the purpose

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(1) Macdonald, 106; H.M.A. v. Kizileviczius, 1938 J.C.60 at P.62; H.M.A. v. Doherty 1954 J.C.1 at P.5; H.M.A. v. Graham, 1958 S.L.T.167 at P.169.

(2) Bayley, J., in Dankin's case (1828) 1 Lew.166; Art. 200, Stephen's Digest, applied in R. v. Symondson (1896) 60 J.P.645; Cf. section 3, Criminal Law Act, 1967.

(3) (1886) 5 W.R.33, cited in Gledhill, 134.

(4) Hume, i, 228; H.M.A. v. Graham, 1958 S.L.T.167; John Scully, (1824) 1 C. & P.319.

(5) Gledhill, 135; Cf. Michael and Wechsler, "A Rationale of the Law of Homicide",/...

> of defence is not to be judged from the standpoint of a judge holding an inquiry after the event or even of an impartial spectator. Regard must be had to the circumstances in which the accused was situated .... A man who is assaulted is not bound to modulate his defence step by step according to the vigour of attack before there is reason to believe that the attack is over. He is entitled to secure victory as long as the contest continues. He is not obliged to retreat but may pursue his adversary till he is out of danger. Where the assault assumes a dangerous form, every allowance should be made for one who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool bystander would seem absolutely necessary."

The above statement incorporates a principle generally known as the 'Golden Scales' test under which it is stated that since the accused was acting in self-defence, there is no precise measure of retaliation and the accused is not expected to weigh in 'golden scales' the exact amount of harm that would be necessary for his defence. The principle has frequently been followed in India[1] and in Scotland, Lord Keith put it as follows:[2]

> "You do not need an exact proportion of injury and retaliation; it is not a matter that you weigh in too fine scales .... Some allowance must be made for the excitement or the state of fear or the heat of blood at the moment of the man who is attacked."

Thus, in applying section 58 the Sudan courts should determine whether the harm was necessary or not in the light of the seriousness of the attack to be repelled, the act and state of mind of the accused at the time and all the other circumstances of the case. The question whether in using more harm than is necessary, thereby causing death, the accused should lose his right of private defence altogether or should be

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(contd.) (1937) Col.L.R. at P.736. It has already been stated that in the U.K. the accused is obliged to retreat unless this would expose him to danger of death or serious injury; see supra.

(1) Radhe v. Emperor, A.I.R. (1923) All.357; Fasal Hussein v. Emperor, A.I.R. (1933) Lah.665; Nga Chit Tin v. R., A.I.R. (1939) Ran.225.

(2) H.M.A. v. Doherty, 1954 J.C.1 at Pp.4-5.

convicted of culpable homicide instead of murder is subsequently discussed.[1]

v. - Private Defence Against Incompetent Persons

A situation may arise where a person is attacked by an immature child under the age of legal responsibility or a person who is exempted from responsibility by reason of insanity. In such situations the act of such incompetent person is not an 'offence' to which the right of private defence may apply. Nevertheless, an exception to the rule is found in section 57, S.P.C.[2], which allows the accused to exercise his right of private defence to repel the act of a lunatic, a child, an intoxicated person or a person acting under a mistake of fact.[3] The same rules would appear to apply in English law.[4] In Scotland, it was held in Owens v. H.M.A.[5] that a person who believes himself to be endangered by the act of another does not lose his right of defence if in fact he was not in danger, provided that his belief was not unreasonable. If this is so, then a priori the accused could not be held to lose his right of self-defence if he is in fact in danger merely because the attacker happens to be insane or is a minor.

When Private Defence Extends to the Voluntary Causing of Death

i. - Defence of the Person

Section 61, S.P.C., provides:

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(1) See the discussion of section 249(2), S.P.C., in Ch. VI, infra.
(2) "When an act, which would otherwise be a certain offence is not that offence by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence."
(3) Illustration (b), section 57, S.P.C.
(4) Smith and Hogan, op.cit., 2 ed., P.231.
(5) 1946 J.C.119.

"The right of private defence of the body extends, under the restrictions mentioned in sections 58 and 59, to the voluntary causing of death only when the act to be repelled is of any of the following descriptions, namely:-

(a) an attack which causes reasonable apprehension of death or grievous hurt, or
(b) rape or an assault with the intention of gratifying unnatural lust, or
(c) abduction or kidnapping."

This section, like the following one, is expressly stated to be subject to the restrictions in sections 58 and 59 discussed above. It follows that it has no application if the requirements of those two sections are not satisfied. Subject to this limitation, a person may lawfully cause the death of another who assaults him in such a manner as to cause him fear of death or grievous hurt,[1] or in attempt to commit rape,[2] any unnatural offence,[3] abduction,[4] or kidnapping.[5] Section 61 is much wider than Scots law where a person may only lawfully kill in defence of his life or to resist an attempt to rape.[6] This has been recently confirmed in McCluskey v. H.M.A.[7], where A pleaded self-defence on the ground that he killed D to prevent the latter's attempt to commit sodomy upon him. He was convicted of culpable homicide and his appeal was dismissed on the basis that only danger to 'life' could support a plea of self-defence. In rejecting the accused's contention that self-defence extended to killing in resisting an act of sodomy, Lord Clyde said:[8]

"Murder is one of the most serious

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(1) 'Grievous hurt' is defined in section 272, S.P.C., as including emasculation, permanent deprivation of eyesight, hearing or power of speech, privation of any member or joint or destruction of its powers, permanent disfiguration of head or face, fracture or dislocation of bone or tooth and any hurt which endangers life or causes the sufferer severe pain for twenty-one days.
(2) Section 316, S.P.C.; Cf. S.G. v. Ajok Agany Yom, (1960) S.L.J.R.61.
(3) Section 318, S.P.C.
(4) Section 303, S.P.C.
(5) Section 302, S.P.C.
(6) Hume, i, 218-219; Gordon, 708.
(7) 1959 J.C.39.
(8) Ibid, at P.42.

> crimes in this country, for no man has a right at his own hand to take the life of another. Indeed it is because of this principle of the sanctity of human life that the plea of self-defence arises. Just because life is so precious to all of us, so our law recognises that an accused man may be found not guilty, even of the serious crime of murder, if his own life has been endangered by the assailant .... But I can see no justification at all for extending this defence to a case where there is no apprehension of danger to the accused's life and indeed very little evidence of any real physical injury done to the accused himself, but merely a threat ... of an attack on the appellant's virtue."

In the light of the above statement, it would appear that Lord Keith's view in Crawford[1] that the defence would succeed if there was apprehension of immediate serious injury leading to permanent injury or demembration does not represent the law today unless the injury is of such a nature as to endanger life.

In English law earlier cases suggest that a person may only kill if he is in apprehension of death or grievous bodily harm.[2] There are no recent authorities, but the Scots rule laid down in McCluskey[3] appears to be considered favourably.[4]

Apart from the above differences between the Sudan Code on the one hand, and Scots and English laws on the other, the rest of the rules are the same in the three systems. They all require that the apprehension of danger must be reasonable and the danger must be imminent. The violence used must not be excessive and the killing of the victim must be the only way to avoid danger.[5] Finally, the accused will be within the

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(1) 1950 J.C. 67 at P.71.
(2) Smith (1837) 8 C. & P.160 at P.162; R. v. Rose, (1884) 15 Cox 540 at P.541.
(3) Supra.
(4) Turner, in Kenny, 137.
(5) S.G. v. Adam Mohamed Ahmedai, AC.CP.22.1952, Unrep.; S.G. v. Ismail Bushara (1961) S.L.J.R.22; S.G. v. Zakaria Abu Dahiya (1967) S.L.J.R.9; John Forrest (1837) 1 Swin. 404 at P.417; Kizilevicius, 1938 J.C.60 at P.62; Owens, 1946 J.C.119 at P.124; Doherty, 1954 J.C.1 at P.4; McCluskey, 1959 J.C.39 at P.42; R. v. Smith (1837) 8 C. & P.160; R. v. Chisom (1963) 47 Cr. App. R.130.

right of private defence if his belief that the danger was imminent is mistaken if such belief is formed on reasonable grounds.[1]

ii. - Defence of Property:

Section 62, S.P.C., states:

> "The right of private defence of property extends, under the restrictions mentioned in sections 58 and 59, to the voluntary causing of death only when the act to be repelled is of any of the following descriptions, namely:-
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> (a) robbery, or
> (b) house-breaking by night, or
> (c) mischief by fire committed on any building, tent or vessel, which building, tent or vessel, is used as a human dwelling or as a place for the custody of property, or
> (d) theft, mischief or house-trespass in such circumstances as may reasonably cause apprehension that, if such right of private defence is not exercised, death or grievous hurt will be the consequence."

The reason why the section has been extended to cover such a wide range of offences is perhaps that some of these offences, such as robbery and arson, are in themselves inherently dangerous to the life of the accused. House-breaking by night also involves an element of danger in so far as it is committed at night and the accused, in attempting to defend himself or his porperty, may not be able to ascertain whether the house-breaker is armed or not. But theft, mischief and house-trespass are offences not in themselves involving danger to the accused, and, consequently, the final paragraph of the section expressly provides that killing in repelling any of these offences will not be justified unless they were committed in circumstances which cause apprehension of 'death or grievous hurt'. This provision is rather superfluous because if the circumstances cause the apprehension of death or grievous hurt the killing will be justified under section 61 of the Code, regardless of whether it was done in the course

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(1) S.G. v. Musa Logarita, AC.CP.294.1945, Unrep.; S.G. v. Ali Ahmed Hamad, AC.CP. 21.1955, Unrep.; Owens, 1946 J.C.119; R. v. Chisom (1963) 47 Cr.App.R. 130

of theft, mischief or any other offence.

When any of the enumerated offences is committed or about to be committed in such circumstances that the accused may defend his property without causing death, he will be deprived of his right of private defence under section 58 for inflicting more harm than is necessary if he in fact causes death. Again, the right to kill in defence of property will not apply to causing of death to repel an offence other than those enumerated in the section.[1] Finally, the effect of section 59 would be to deprive the accused from exercising his right if there was sufficient time to have recourse to the protection of public authorities. However, as appears from the decision in S.G. v. Musa Gibril Musa[2], already referred to, the courts will interpret this requirement liberally, so as not to reprive the accused of his right if recourse to public authorities would be hazardous or cannot be obtained without risk of total loss of the property.

Section 62 is also wider than Scots law under which there does not appear to be any right to kill in defence of property at all.[3] In Crawford[4], Lord Keith included resistance to a house-breaker or robber as classic examples of the right of private defence, but Professor Gordon[5] argues that this view would not be followed at present, and agrees with Macdonald[6] that "It is personal danger, not partimonial loss which justifies homicide." Professor Gordon concludes that:[7]

> "... it seems impossible that a twentieth century legal system should allow a man to

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(1) S.G. v. Yousif Galal ElDin, AC.CP.46.1945, Unrep.
(2) Supra.
(3) James Crow (1826) Syme, 188; Gordon, 708-709.
(4) 1950 J.C.67 at P.71.
(5) Gordon, 709.
(6) Maddonald, 107.
(7) Gordon, 709.

> kill to defend his property but not to defend himself against sodomy."

The Sudan law, however, allows killing in both cases but it is doubtful whether this would be acceptable to Gordon because his acceptance of Macdonald's statement and his rejection of Lord Keith's opinion indicate that he is opposed to the idea of allowing a person to kill in defence of property. Such a view may be valid in a highly developed society where police methods of detection are efficient and readily accessible, where property is generally secure, unemployment is low and public opinion is conscious of the sanctity of human life. This can hardly be claimed to be the case in the Sudan and Gordon's view cannot be extended there with equal force. However, even in a society of the former description offences relating to property such as robbery and nocturnal house-breaking can be accompanied by such violence and danger to life that it is questionable whether the right to kill in defence of property should be easily dismissed.

CHAPTER VI

VOLUNTARY CULPABLE HOMICIDE

Introduction

This Chapter deals with those cases which, although falling within the definition of murder, are reduced to culpable homicide not amounting to murder by the application of mitigating factors. The reason for allowing such factors to mitigate the offence is that it is felt that the moral guilt of the offender is less than that of the deliberate killer. The law recognises human frailty and considers as less blameworthy a person who kills in a moment of weakness caused by furious passion and that in such circumstances it may be unjust to convict him of murder and subject him to the extreme penalty.

Lord Macaulay's original draft of the Indian Code included three situations whereby murder was reduced to culpable homicide: provocation,[1] causing death with consent of a victim who 'suffers death or takes the risk of death',[2] and causing death in exceeding in good faith the right of private defence.[3] Two further categories were added when the I.P.C. was finally enacted: homicide by a public servant, or a person aiding him, while in the execution of his duties,[4] and causing death in a sudden fight upon a sudden quarrel.[5] The five categories are now appended as exceptions to section 300, I.P.C. When the S.P.C. was enacted the same provisions were copied into it. They are included in section 249 which provides:

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(1) Clause 297 of the draft I.P.C., 1837.
(2) Clause 298, ibid.
(3) Clause 299, ibid.
(4) Exception 3, section 300, I.P.C.
(5) Exception 4, ibid.

"(1) Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

"(2) Culpable homicide is not murder if the offender, in exercise in good faith of the right of 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.

"(3) Culpable homicide is not murder if the offender, being a public servant acting for the advancement of public justice or being a person aiding a public servant so acting exceeds the powers given to him by law and causes death by doing an act which he in good faith believes to be lawful and necessary for the due discharge of his duty as such public servant or for assisting such public servant in the due discharge of such duty and without ill-will towards the person whose death is caused.

"(4) Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

"(5) Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

The Burden of Proof in Voluntary Culpable Homicide

It is well settled in English law that the burden is always on the prosecution to prove the guilt of the accused beyond reasonable doubt. As Lord Sankey pointed out in Woolmington v. D.P.P.[1]:

"Throughtout the web of the English criminal law one golden thread is to be seen, that it is the duty of the prosecution to prove the prisoner's guilt .... If, at the end of and on the whole of the case, there is a reasonable doubt,

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(1) (1935) A.C.462 at P.481.

> created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal."

Except in insanity[1], whenever there is any evidence of a defence such as self-defence, provocation, coercion or alibi, the prosecution must exclude that defence beyond reasonable doubt. The burden which is on the accused is known as the 'evidential' burden. The difference between the two is that the former relates to the production of 'sufficient evidence' to require the issue to be left to the jury, whereas the latter is the burden on the party who will lose the issue unless he satisfies the jury on the required standard of proof.[2] Whenever evidence satisfying the evidential burden is produced it is for the prosecution to satisfy the jury beyond reasonable doubt that the accused was not acting in self-defence, provocation, coercion, etc.[3] The position is clearly put in the recent case of R. v. Wheeler[4], where Winn, L.J., stated that whenever:

> "the defendant puts forward a justification such as self-defence, such as provocation ... ..., it is very important and is essential that the matter should be so put before the jury that there is no danger of their failing to understand that none of those issues of justification is properly to be regarded as a defence: unfortunately there is sometimes a regrettable habit of referring to them as, for example, the defence of self-defence. Where a judge does slip into the error or quasi-error of referring to such explanations as defences, it is particularly important that he should use language which suffices to make it clear to the jury that they are not defences in respect of which any onus rests on the accused, but are matters which the prosecution must disprove as an essential part of the prosecution case before a verdict of guilty is justified."[5]

The position in Scotland[6] and the Sudan is similar to the above although no clear pronouncements such as those in Woolmington[7] and in Wheeler[4] can be traced to show the

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(1) See Ch. VIII, infra.
(2) Cross R., Evidence, 3 ed., (London, 1967), Pp.71-72; Gordon, "The Burden of Proof on the Accused", 1968 S.L.T.29.
(3) Chan Kan v. The Queen (1955) A.C.206; Bratty v. A.G. for Northern Ireland (1963) A.C.386; R. v. Gill (1963) 1 W.L.R.741; R. v. Johnson (1963) 1 W.L.R.1478.
(4) (1967) 3 All E.R.829.
(5) Ibid, at P.830.
(6) Gordon, op.cit., at P.31.
(7) Supra.

extent of the rule or the difference between the evidential and the persuasive burdens. In Scotland, however, it was stated in H.M.A. v. Owens[1] that the plea of self-defence does not affect the burden on the Crown. Several other cases[2] show that only the evidential burden is on the accused and that it is for the prosecution to satisfy the jury 'beyond reasonable doubt' as to the guilt of the accused. The real question is whether, on the whole of the evidence in the case, the jury is left in reasonable doubt as to the accused's guilt.

In the Sudan the position is regulated by C.C.C.No.3.[3] The Circular provides that it is for the prosecution to prove the offence of murder beyond reasonable doubt.[4] In doing so, it should not content itself with proving the requisite intention or knowledge but must also establish that:

> "the mitigating circumstances which constitute any of the exceptions (i.e., under section 249) do not exist, since the absence of such circumstances is an essential part of the proof of murder."[5]

In other words, the mitigating factors in section 249 are regarded as part of the definition of murder in section 248, and this is confirmed in paragraph (3) of the Circular which provides that once the Court is satisfied beyond reasonable doubt that the accused committed the act with the required mens rea for murder, it must proceed to consider whether any of the mitigating circumstances in section 249 apply.[6] In practice the courts have applied the above principles favourably and have considered it their duty to investigate whether the provisions of section 249 are applicable before

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(1) 1946 S.L.T.227.
(2) Hillan v. H.M.A., 1937 J.C.53; H.M.A. v. Doherty, 1954 J.C.1; McPhelim v. H.M.A., 1960 J.C.17.
(3) Dated 8.8.1950.
(4) In S.G. v. Sitt ElNifour, Maj.ct., 1947, Unrep., Cummings, J., approved of the principle in Woolmington v. D.P.P., supra.
(5) Paragraph 2(b), C.C.C.No.3.
(6) See also C.C.C.No.11, dated 15.2.1952, which reiterates the same principle in paragraph 10(3)(b).

convicting the accused of murder.[1] They have also held that an accused may be entitled to the benefit of one of the exceptions in section 249 even if he does not specifically plead it because "the Court will not allow justice to be sacrificed for a technicality."[2] The accused may also be given the benefit of an exception even where he denies the charge altogether or pleads an alibi.[3]

It appears from the above that the burden on the accused is the 'evidential' one, while the prosecution must prove guilt 'beyond reasonable doubt'. The penultimate paragraph of the above Circular conclusively establishes this. It says:

> "The common mistake is to suppose that the accused must prove beyond any reasonable doubt that he is entitled to one or more of the sub-sections (of section 249). It is sufficient in order to be acquitted of murder, for the accused, or for the evidence itself without the aid of the accused, to raise such a possibility of the existence of circumstances entitling him to the benefit of a sub-section that the Court feels it cannot safely disregard it."[4]

If, after the whole of the evidence, including any explanations by the accused, is given, the Court is left in 'reasonable' doubt, the accused should be given the benefit of the doubt.[5]

The Sudan rules in this connection are more favourable to the accused than those of the U.K., because the Sudan treats the exceptions in section 249 as part of the definition of murder and makes it the duty of the Court to inquire whether any of those exceptions is applicable before it can convict of murder. It is submitted that this

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(1) S.G. v. Nguambori, AC.CP.206.1941, Unrep.; S.G. v. Mohammed Nur ElBedu, AC.CP. 223.1945, Unrep.; S.G. v. Kamal ElJack (1965) S.L.J.R.65.
(2) Creed, C.J., in S.G. v. Nguambori, AC.CP.206.1941, Unrep.
(3) S.G. v. Pakoakpa, AC.CP.241.1933, Unrep.
(4) Emphasis supplied.
(5) Paragraph (4), C.C.C. No.3; Cf. S.G. v. Pamba Badari, AC.CP.179.1945, Unrep.; S.G. v. Mohammed Nur ElBedu, AC.CP.223.1945, Unrep.; S.G. v. Osman Beshir Abdulla, AC.CP.18.1952, Unrep.; S.G. v. Omer Eisa Omer, AC.CP.232.1955, Unrep.; S.G. v. Kamal ElJack, (1965) S.L.J.R.65.

attitude is justifiable because the average individual in the Sudan is far from familiar with rules of pleadings and legal technicalities, and legal representation is only available to the very few who can afford it. A person should not be prejudiced in his defence on account of his ignorance and his inability to provide legal counsel.

Whether the Subsections in 249 are Mutually Exclusive

The exceptions in section 249 dealing with provocation, exceeding the right of private defence and killing upon a sudden fight are closely related and not easy to distinguish. The remaining two exceptions dealing with homicide by a public servant in execution of his duties and homicide by consent are somewhat different in so far as they apply to special types of situation.

In connection with the above three exceptions the Sudan courts have insisted that they are mutually exclusive and that if one of the subsections applies the other two are necessarily excluded.[1] Lindsay, C.J., pointed out that although in certain cases it might be possible for a court, which was not certain of the interpretation of the facts, to give the accused the benefit of more than one subsection, "logically the benefit of a subsection is conferred once and only once in the alternative."[2] However, as will appear from the subsequent discussion, the three subsections are stated in such similar terms that it becomes extremely difficult to hold that the facts of a particular case will fall conclusively within one subsection to the exclusion of the others. In India it was held that the facts of a case may be such as to allow the application of more than one of the exceptions.[3]

The provisions of section 249 will now be examined.

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(1) S.G. v. Sebastiano Lolori, AC.CP.316.1952, Unrep.
(2) S.G. v. Abdel Aziz Bereima, AC.CP.236.1953, Unrep.; compare S.G. v. Hassan Bilal, AC.CP.208.1939, Unrep.
(3) Nagalu v. Emperor, A.I.R.(1928) Mad.136.

I. Provocation

The basic principle underlying the concept of provocation is that the law recognises the frailty of human nature and realises that when a person loses his self-control and is in a fit of rage or passion, he should not be visited with the full rigour of the law. In the words of the authors of the I.P.C.[1]:

> "We agree with the great mass of mankind, and with the majority of jurists, ancient and modern, in thinking that homicide committed in the sudden heat of passion, on great provocation, ought to be punished, but that in general it ought not to be punished so severely as murder. It ought to be punished in order to teach men to entertain a peculiar respect for human life: it ought to be punished in order to give men a motive for accustoming themselves to govern their passions ....
>
> "... however, we would not visit homicide committed in violent passion which had been suddenly provoked with the highest penalties of the law. We think that to treat a person guilty of such homicide as we should treat a murderer would be a highly inexpedient course. A course which would shock the universal feeling of mankind, and would engage the public sympathy on the side of the delinquent against the law."

But neither the I.P.C. nor the S.P.C. contains any definition of provocation. In England Lord Devlin's definition in R. v. Duffy[2] is treated as authoritative. He said:

> "Provocation is some act or series of acts, done by the dead man to the accused, which would cause in any reasonable man, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind."

Similarly, Macdonald's[3] definition of it as:

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(1) The Indian Law Commission, 1837, Note M., P.59; these observations were approved of by the English Criminal Law Commissioners, Second Report, B.P.P., 1846, vol. xxiv, P.26.
(2) (1949) 1 All E.R.932.
(3) Macdonald, 94; for a criticism of his definition see infra.

> "Being agitated and excited, and alarmed by violence, I lost control over myself, and took life, when my presence of mind has left me, and without thought of what I was doing."

has been accepted in Scotland.[1]

Before discussing the actual requirements of provocation, it should be emphasised that, unlike self-defence, provocation is not a complete defence justifying the act of the accused. It is a mitigating factor which reduces murder to culpable homicide and, in other offences, operates to reduce the punishment.[2] In Scotland, Hume[3] and Alison[4] were of opinion that in assault provocation by real injury amounted to a complete defence. This view was accepted in Hillan,[5] but in H.M.A. v. Crawford[6] the decision in Hillan[5] was rejected and Lord Cooper pointed out that although self-defence and provocation often overlap, they are nevertheless separate defences in so far as the former completely exculpates the accused, while the latter mitigates the nature of the offence or reduces punishment.[7] This is the proper view because to hold otherwise would be to confuse self-defence and provocation.[8]

The Sudan law relating to provocation is contained in sections 249(1) and 38 of the Code. The former declares:

> "Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave

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(1) Lord Jamieson in H.M.A. v. Kizilevicius, 1938 J.C. 60 at P.63.
(2) Sections 275, 277 and 296, 297, S.P.C., show that provocation may also be a mitigating factor in hurt and assault; Cf. S.G. v. Hassab ElRassoul Hussein (1963) S.L.J.R.163; in Scotland provocation also mitigates assault, Callender, 1958 S.L.T.24; in England it is limited to cases of murder, R. v. Cunningham (1959) 1 Q.B.288.
(3) Hume, i, 334.
(4) Alison, i, 177.
(5) 1937, J.C.53.
(6) 1950 J.C.67.
(7) Ibid, at P.69.
(8) Cf. Lord Jamieson in H.M.A. v. Kizilevicius, 1938 J.C.60 at Pp.61-63; Smith, T.B., Short Commentary, P.142; see also the English case of R. v. Southgate (1963) 2 All E.R.833; for a contrary view see Scott, R.D., "The Defence of Provocation", 1965 S.L.T. (News) 193.

and sudden provocation causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident."

The subsection is followed by the Explanation that:

"Whether the provocation was grave or sudden enough to prevent the offence from amounting to murder is a question of fact."

Since the operation of the above provisions depends on those in section 38, the latter will be dealt with first. It provides:

"Such grave and sudden provocation as under any section of this Code modifies the nature of an offence or mitigates the penalty which may be inflicted shall not be deemed to include,
(i) provocation sought or voluntarily provoked by the offender as an excuse for committing an offence,
(ii) provocation by anything done in obedience to the law or by a public servant in the lawful exercise of the powers of such public servant, or
(iii) provocation by anything done in the lawful exercise of the right of private defence."

(i) Provocation Sought or Provoked

The provision in section 38(i) that the plea will fail if the provocation was sought or provoked is necessarily implied in the requirement of 'suddenness' under section 249(1). It is evident that if A provokes B to strike or abuse him in order that he may have a pretext for killing B, the killing will be related to A's prior state of mind and not to what followed after B struck him.[1] The English Criminal Law Commissioners were of opinion that it was murder if

"a quarrel is sought with intent to kill or do great bodily harm under colour of provocation offered; for although previously to any mortal blow, provocation be given which might otherwise have operated in extenuation, yet having been voluntarily incurred, the act must be referred to the provocation being but a mode devised for killing with less risk to the offender."[2]

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(1) Hale, i, 457; Cf. R. v. Thomas (1837) 7 C. & P.817.
(2) Fourth Report, B.P.P., 1839, vol. xix, P.xx.

The provocation must be sudden in the sense that it takes the accused unawares and he "must not voluntarily have asked for it."[1] There will thus be no provocation if A, knowing of his wife's illicit relations with D, arms himself and sets out with the deliberate purpose of finding them in flagranti delicto, and killing either or both of them.[2] In S.G. v. Iyeru Lojock[3], Creed, C.J., approved of Gour's[4] remarks that:

> "The effect of this proviso (i.e., the first proviso to Exception I, section 300, I.P.C.), read with the exception, is that the provocation must come to him; he must not go to the provocation. The rule may be illustrated by reference to the cases of adultery, in some of which the aggrieved husband followed his wicked wife to a place of assignation, away from his house where he killed either her or her paramour, and those in which the paramour visited her in his house where he killed him on the spot. In the former case the accused goes deliberately in search of the provocation. In the latter case the provocation comes to him and his act is outside the proviso."

However, the proviso in section 38(i) has in practice been liberally interpreted and an accused would not be deemed to have gone in search of the provocation if he goes out looking for his missing wife and suddenly discovers her in the act of adultery. Thus, in S.G. v. Abdulla Abdel Rahman[5], A warned his mistress against the liaison which had developed between her and D. One day she left the house on the pretence of going to the Mulid[6], but went to D's house. A found her there and took her home, but she left again on the same pretence and again went to D's house. A took his knife and went to D's house where he found them in bed and killed them both. A was convicted

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(1) Creed, Acting C.J., in S.G. v. Ismail Abu Ashman, AC.CP.156.1947, Unrep.; see also Soni, J., in S.G. v. Mohammed Ahmed Gadir (1961) S.L.J.R.46 at P.50, see infra.

(2) S.G. v. Suliman ElGouz, AC.CP.180.1927, Unrep.; S.G. v. Yousif ElMahi, AC.CP. 136.1942, Unrep.; S.G. v. Mansour Abdel Gawi, AC.CP.7.1943, Unrep.; S.G. v. Abdu Mohammed Ahmed, AC.CP.27.1945, Unrep.; S.G. v. Awad Adam Omer (1961) S.L. J.R.75; S.G. v. Musa Samar Musa (1961) S.L.J.R.107; for a Scottish authority see H.M.A. v. Hill, 1941 J.C.59 at P.61.

(3) AC.CP.207.1947, Unrep.

(4) Gour, op.cit., vol.3, P.1981.

(5) AC.CP.88.1954, Unrep.; S.G. v. ElTom Siddig Babiker (1956) S.L.J.R.34; S.G. v. Mohammed Ahmed Gadir (1961) S.L.J.R.46.

(6) Muslim celebration of the anniversary of the birth of the Prophet Mohammed.

of murder on the grounds that the provocation was neither sudden nor grave because, on coming to D's house, A had found what he should have expected. On confirmation, the conviction was altered to culpable homicide because, Creed, C.J., explained, A was entitled to assume that his wife would desist from her conduct after his warnings, and his suspicion that she might have returned to D's house did not deprive him of the plea of provocation.

This tendency was taken further in S.G. v. Mohammed Ahmed Gadir,[1] where the accused had suspected his wife of having an illicit relationship with D. On the day of the incident he knew that she was meeting D, and so he hid himself in the hut where he knew that they would meet until the couple arrived. When D sat on the bed and pulled the woman towards him, A came out and killed D. On confirmation, Abu Rannat, C.J., upheld the conviction of culpable homicide because A had not 'known' of his wife's misconduct but merely suspected it - mere suspicion did not operate to deprive A of the defence because the provocation lay in the 'sudden' confirmation of the suspicion.[2] In doing so, Abu Rannat, C.J., rejected an opinion to the contrary expressed by ElNur and Soni, JJ., to whom the C.J. had sent the case for an opinion. Soni, J., disagreed with the conviction for culpable homicide on the ground that A had sought the provocation. He added:[3]

> "The clause applies when the man is confronted with the provocation; that is the meaning of 'sudden'. If a thing happens or comes on without warning, it is called 'sudden'. A person acts 'suddenly' when he acts without foresought or deliberation. An act is done suddenly when it is performed without delay, when it is speedy, prompt and immediate. If a man thinks over what

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(1) (1961) S.L.J.R.46.
(2) Ibid, at P.51; in the earlier case of S.G. v. Nguambori, AC.CP.206,1941, Unrep., Creed, L.S., said: "suspicions do not prevent the sudden realisation of the truth of those suspicions from forming sudden provocation"; Cf. S.G. v. Mohammed Mabloul (1956) S.L.J.R.36.
(3) Ibid, at P. 50.

> he is going to do, when he plans an action, when he is carrying out what he has planned, he is acting with foresought and deliberation, and his action is not sudden."

Finally, there is no provocation if the accused initiates or challenges D to a fight and the latter is killed, because by starting the fight the accused finds the resistance he should expect.[1] It would not be possible to hold that A sought the provocation but was at the same time provoked by D's reaction.[2] Nevertheless, such cases may be reduced from murder by operation of section 249(4), discussed below.

(ii) Provocation by Acts done in Obedience to Law

Under section 38(ii), provocation is neither sudden nor grave if done by an act in obedience to law or by a public servant in the 'lawful exercise' of his duties. Thus, a person who kills a policeman who is lawfully trying to arrest him cannot plead provocation.[3] In S.G. v. ElDebeib Himeidan and Others,[4] a party of Arabs who were unlawfully hunting giraffes refused to surrender to arrest ordered by some policemen. When the latter tried to force the arrest the Arabs attacked them and a fight ensued in which four of each side were killed. The Arabs' conviction of murder was upheld on the ground that they could not plead provocation against the policemens' lawful act.

Since the proviso expressly requires the act of the public servant to be 'lawful', the accused may successfully plead provocation if the act was not within the former's lawful powers. This was made very clear by the second Indian Law Commissioners. They said:[5]

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(1) S.G. v. Gumaa Shamie Kafrein, AC.CP.26.1941, Unrep.; Gordon, 722-723; see also The English Criminal Law Commissioners, Fourth Report, B.P.P., 1839, vol. xix, Article 50 of the Digest.
(2) Bennet, C.J., in S.G. v. Guleil Said, AC.CP.308.1943, Unrep.
(3) Illustrations (a) and (b), section 38, S.P.C.; Cf. S.G. v. Khamis Suliman Gumaa, AC.CP.235.1954, Unrep.; S.G. v. Ker Ker, AC.CP.172.1951, Unrep.
(4) (1954) S.L.R.11.
(5) The Indian Law Commission, 1846, First Report, para.277.

> "We apprehend that grave provocation given by anything under cover of obedience to law, or under cover of its authority, or by a public servant, or in defence, in excess of what is strictly warranted by the law, in point of violence, or as regards the means used, or the manner of using them and the like, would be admissible in extenuation of homicide under this clause."

The rule is illustrated by S.G. v. Adam Burma Gadeem,[1] where A had been dismissed from the Forest Department and deprived of his right to grow maize in an area previously allocated to him. When he persisted in growing maize, D, a Forest Overseer, ordered A's hut and crop to be burnt down. Enraged by this, A killed D. It was held that section 38(ii) did not deprive A of his right to plead provocation because D's act was unlawful.

It would appear that the same rule would apply in English[2] and Scots[3] law.

(iii) Provocation by Acts done in Self-Defence

It is perhaps trite law to provide as does section 38(iii) that a person acting in 'lawful' exercise of defence of himself or his property cannot be held to have provoked another.[4] Such a person is acting within the law and his action is completely justifiable, provided he is acting within the limits prescribed by the law of private defence.[5] However, the act of such person may amount to provocation if he exceeds those limits.[6] The above observations of the Indian Law Commissioners are also relevant here. The decision of Abu Rannat, C.J., in S.G. v. Ismail Ahmed Gargara,[7] it is submitted, is incorrect and tends to overlook the provisions of section 38(iii). In a quarrel between

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(1) AC.CP.57.1948, Unrep.
(2) R.C.C.P., Cmd.8932, para. 128.
(3) Ibid, para. 131; Hume, i, 250-251, was of opinion that the act of the public officer would not amount to provocation unless it caused serious apprehension of injury; the R.C.C.P. doubted whether this would be followed today.
(4) Cf. Illustration (c), section 38, S.P.C.
(5) See Ch.V, supra.
(6) Cf. Lindsay, C.J., in S.G. v. ElDebeib Hemeidan and Others (1954) S.L.R.11 at P.17.
(7) (1962) S.L.J.R.148.

A and some villagers, A drew his knife and stabbed one of them. The others started to beat him, whereupon he stabbed D, causing his death. Abu Rannat, C.J., altered A's conviction of murder to one of culpable homicide on grounds of provocation. He conceded that the villagers were acting in self-defence, but he nevertheless held that in so acting they had provoked A, because "our Penal Code, S.249(1), is not subject to the third proviso of Exception 1 of section 300, I.P.C."[1]

This is wrong because section 38(iii) is an exact reproduction of the third proviso to Exception 1, section 300, I.P.C. The learned C.J. completely ignored this fact, the reason being, perhaps, that the S.P.C., unlike the I.P.C., does not include the proviso in section 249(1) which states when provocation reduces murder to culpable homicide, but places it in an altogether separate section.

The Requirements of Provocation

The essential ingredients for a successful plea of provocation under section 249(1) of the Code are:

a. - the accused must have lost his power of self-control, through

b. - 'grave', and

c. - 'sudden' provocation.

The Explanation to the subsection is of extreme significance in so far as it expressly provides that whether the provocation was grave or sudden enough is a 'question of fact'. In pre-1957 English law, provocation was considered a question of law and the judge was enabled to leave or withdraw the issue from the jury according to whether or not, in his opinion, the evidence justified it.[2] This resulted in the creation of arbitrary categories of situations where it was held that a 'reasonable man' in the place of the

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(1) Ibid, at P.149.
(2) Mancini v. D.P.P. (1942) A.C.1; Holmes v. D.P.P. (1946) A.C.588.

accused would have been provoked such as, for example, provocation by physical injuries and the discovery of a wife in the act of adultery. The position came to be regarded as unsatisfactory, because, it was argued, provocation was a psychological state of mind, and the judge was not in a position to determine in advance the circumstances under which a person may or may not be provoked. As far back as 1846 the English Criminal Law Commissioners approved of Lord Macaulay's provisions relating to provocation, and continued:[1]

> "It appears to us that the principle of extenuated homicide, being ascertained to be the loss of self-control arising from that human infirmity which is so general and almost universal as to render it proper to make allowances for its admeasuring punishment, it is expedient to leave the consideration of this subject to juries, unfettered by arbitrary distinctions."

More recently, the R.C.C.P.[2] recommended that the issue of provocation should be left to the jury to determine as a question of fact from the circumstances of each case. The position was finally modified by the Homicide Act, 1957, section 3 of which provides:

> "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining the question, the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

The effect of the section is that it will no longer be possible for a judge to withdraw the issue of provocation from the jury on the ground that in his view a reasonable man in the place of the accused will not be provoked.[3] However, the judge may still do

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(1) Second Report, B.P.P., 1846, vol. xxiv, P.26.
(2) Cmd.8932, para. 151.
(3) See infra.

so if there is no evidence to show that the accused was himself provoked.[1] But section 3 of the Act remains unaffected by section 8 of the Criminal Justice Act, 1967 in so far as the reasonable man test is concerned, the reason being that the test is quite independent of the question of intention or foresight, which is the only question with which section 8 is concerned.[2] The effect of the Act on particular situations is discussed presently. Section 3 of the Homicide Act does not apply to Scotland and, despite the recommendation of the R.C.C.P.[3], that any legislation to modify English law should also extend to Scotland, Scots law remains as it was before 1957. The requirements of provocation and the actual practice of the courts will now be discussed.

A. - The Provocation must be 'Sudden'

The requirement of suddenness in provocation involves two elements: firstly, the provocation must not be sought or provoked, and, secondly, the act of retaliation must have followed the act of provocation within a short time. The former has already been dealt with.[4] As to the latter, it is well established in Scots[5] and English[6] law that the provocation must be recent in the sense that the plea will not succeed if a period of time has elapsed between the act of provocation and the retaliation. The basis of the rule is that since the essence of the plea of provocation is the loss of the power of self-control, the plea will not succeed if such a period of time has passed which is adequate for "the blood to cool, and for reason to resume its seat ...."[7]

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(1) R. v. Phillips (1969) AC.130; R. v. Ives (1970) 1 Q.B.208.
(2) Ibid.
(3) Cmd.8932, para. 153.
(4) See supra.
(5) Hume, i, 252; Burnett, op.cit., 17; Alison, i, 8; David Peter, (1807) Hume, i, 253; James Macara (1811) Hume, i, 252; Joseph and Maxwell Allison (1838) 2 Swin 167; H.M.A. v. Hill, 1941 J.C.59.
(6) R. v. Lynch (1832) 5 C. & P.324; R. v. Hayward (1833) 6 C. & P.157; Mancini v. D.P.P. (1942) A.C.1; R. v. Duffy (1949) 1 All E.R.932.
(7) Tindal, C.J., in R. v. Hayward (1833) 6 C. & P.157 at P.159.

Section 249(1), S.P.C., apart from requiring that the provocation must be sudden, provides that the accused must act whilst deprived of the power of self-control. The Sudan courts have tended to reject the plea whenever the evidence shows that the accused had time to regain his self-control or there was a possibility that he was acting with deliberation or premeditation.[1] In S.G. v. Adam ElBushra,[2] D and another greatly provoked A by attacking and injuring him and stripping him of his shirt, A returned to his house, picked up two spears and followed his antagonists, catching up with them after two miles. He threw a spear which missed and, a short while later, threw the other one, killing D. It was held that he could not plead provocation because

> "The suddenness that forms the essence of provocation must have waned from the moment the accused thought of going to his house to bring the weapon."

However, in certain circumstances the plea may succeed although the provocative act or acts have been continuing for a long period of time. This is known as 'cumulative provocation' and is discussed below.

B. - The Provocation must be 'Grave'

Since the Explanation to section 249(1) expressly provides that whether the provocation is grave or sudden enough is a question of fact, the Code has given no definition of the words 'grave' and 'sudden'. The courts have, however, insisted that though the question is one of fact, the plea will not succeed

> "except when all the conditions recognized by law for the applicability of the rule are present."[3]

Such 'conditions' are those laid down by the courts from time to time to determine suddenness and gravity. In laying down these rules the courts have stated that the

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(1) S.G. v. Abdulla Said Medani, AC.CP.37.1937, Unrep.; S.G. v. Gasim Ali, AC.CP. 9.1942, Unrep.

(2) AC.CP.151.1951, Unrep.; Cf. S.G. v. Suleiman ElDukhri, AC.CP.128.1941, Unrep.

(3) B. Awadalla, J., in S.G. v. Musa Samara Musa (1961) S.L.J.R.107 at P.109.

terms 'grave' and 'sudden' are relative and variable according to different situations.[1] It is now intended to examine the attitudes of the courts in relation to such situations.

i. Assaults or Physical Injuries

Provocation by assaults or physical injuries is perhaps the clearest and commonest type of provocation.[2] A person attacked or injured by another is most likely to be so excited as to lose his power of self-control. In the Sudan[3] and England[4] the assault or blow need not endanger life or safety, a slight blow may be sufficient to sustain the plea. In Scotland, however, Hume[5] was of opinion that the provocation must be by "real injuries" and Macdonald[6] stated that the assault must be substantive and that a minor blow will not palliate homicide. Such a view will confuse the pleas of self-defence and provocation, because, if the assault is such as to endanger life or cause serious physical injury, the accused will be acting in self-defence and his action will be completely justified.[7] The R.C.C.P.[8] doubted whether this represented Scots law today and it seems to be accepted that it will not be followed at present.[9] As Professor Gordon puts it:[10]

> "If a man is so provoked by a punch that he loses control and beats his assailant to death with a poker it is hardly logical to refuse to reduce the crime

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(1) Abu Rannat, C.J., in S.G. v. Hassan Talfan Hassan (1956) S.L.J.R.40 at P.41; also in S.G. v. Awad Adam Omer (1961) S.L.J.R.75 at P.79, following the opinion of the Judicial Committee of the Privy Council in A.G. for Ceylon v. Perera (1953) A.C.200 at Pp.206-207.
(2) R.C.C.P., Cmd.8932, para. 128.
(3) Abu Rannat, C.J., in S.G. v. Hassan Talfan Hassan (1956) S.L.J.R.40 at P.41.
(4) R. v. Gross (1913) 23 Cox 455; Viscount Simon in Holmes v. D.P.P. (1946) A.C. 588 at P.589.
(5) Hume, i, 239.
(6) Macdonald, 93; Cf. H.M.A. v. Harris and Others, 1950, Unrep., cited in Gordon, 722, where Lord Justice-Clerk Thomson said: "There must be provocation in a substantial sense. No light or trivial provocation can justify the taking of life."
(7) See Ch.V, supra.
(8) Cmd.8932, para.131.
(9) Smith, T.B., Short Commentary, 143 -144; Gordon 722-723.
(10) Gordon, 722.

> to culpable homicide because he lost control to such a great extent as to be incapable of stopping short of killing the deceased. Such a rule would mean that the more the accused lost control the more likely would he be to be convicted of murder, which would be the reductio ad adsurdum of any attempt to base the law of provocation on ideas of self-defence."

The question arises whether an injury to property will support a plea of provocation. In S.G. v. ElBaleila Balla Baleila,[1] a goods train driven by D ran over A's cattle, killing eighty of them. Infuriated by this, A stabbed D to death. The trial court convicted A of murder, Mudawi, P.J., stating:[2]

> "Provocative acts were never extended to cases of injury to property and it will be a sad day if the extension were effected."

It took only the time for the case to go for confirmation when that 'sad day' arrived. Abu Rannat, C.J., altered the conviction to one of culpable homicide on grounds of provocation. He pointed out that the accused, being an unsophisticated Arab,[3] was provoked by seeing the cattle, his family's wealth, being run over. The learned C. J., however, agreed with the trial court that a city dweller driving his Cadillac in town would not be provoked if a driver of a lorry collided with his car. The case will be referred to again in discussing the concept of the 'reasonable man'. For the moment it is enough to state that injury to property may amount to provocation in the Sudan. It is very doubtful whether a reasonable Scotsman or Englishman would in the present day be treated as having been provoked by damage to property. However, at least in theory, section 3 of the Homicide Act may be taken as wide enough to cover such a situation.

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(1) (1958) S.L.J.R.12.
(2) Ibid, at P.13.
(3) The word 'Arab' in the Sudan is used in a derogatory sense to refer to the rural unsophisticated inhabitants of Northern Sudan.

ii. Discovery and Confession of Adultery

The laws of Sudan,[1] Scotland[2] and England[3] have for a long time recognised that a husband who discovers his wife in the act of adultery and kills her or her paramour will not be guilty of murder. The Sudan[4] and Scotland[5] extended the rule to cover situations where although the husband does not find the couple in flagranti delicto, he finds them

> "in circumstances that reasonably conveyed to his mind that his wife had just committed adultery or was just about to do so."[6]

Further, as was held in the cases of Nguambori, Abdulla Abdel Rahman, Babiker Mohammed Mabloul, and Mohammed Ahmed Gadir, already referred to,[7] the Sudan courts have gone beyond this by allowing the defence of provocation even where the accused had 'suspected' his wife's illicit relations with another man, and his suspicions were confirmed by the subsequent discovery of his wife in the act of adultery. In such cases the provocation has been regarded as consisting in the 'sudden' realisation of the truth of those suspicions.[8] However, it is essential that the suspicion is well founded, and it will not amount to provocation if the accused merely saw his wife speaking to someone or standing near him.[9] This may also be the rule in Scots law.[10]

Again, Sudanese[11] and Scots[12] courts have extended the plea to cover cases where the

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(1) S.G. v. Nguambori, AC.CP.206.1941, Unrep.; S.G. v. Babiker Mohammed Mabloul (1956) S.L.J.R.36.
(2) Hume, i, 245; Burnett, op.cit., 53; Alison, i, 113; Macdonald, 97.
(3) Hale, i, 486; R. v. Maddy (1672) 1 Ventris 158.
(4) S.G. v. Pamba Badari, AC.CP.179.1945, Unrep.; S.G. v. ElTom Siddig Babiker (1956) S.L.J.R.59.
(5) H.M.A. v. Gilmour, 1938 J.C.1.
(6) Ibid, Lord Justice-Clerk Aitchison, at Pp.2-3; the position in England may be the same under section 3 of the Homicide Act, 1957.
(7) See the discussion of section 38, S.P.C., supra.
(8) Lord Guthrie in Callander, 1958 S.L.T.24 at P.25.
(9) S.G. v. Yacoub Mohammed ElTayeb, AC.CP.4.1951, Unrep.; S.G. v. Ahmed Abdullahi Basi, AC.CP.389.1952, Unrep.
(10) H.M.A. v. Hill 1941 J.C.59.
(11) S.G. v. Marima Mendiwa, AC.CP.183.1952, Unrep.; S.G. v. Adam Salih Tibin (1957) S.L.J.R.72; S.G. v. Gadeem Ragab Ali (1962) S.L.J.R.126.
(12) H.M.A. v. Hill, 1941 J.C.59; H.M.A. v. Delaney, 1945 J.C.138; it is unlikely/...

wife confesses to her husband her adulterous relations with another man. The reason for this is that a confession is regarded as a means of conveying information of the fact of adultery and is equated with the actual discovery of adultery.[1] The same rule had been in application in England before 1946.[2] In that year the House of Lords held in Holmes v. D.P.P.[3] that "a sudden confession of adultery without more can never constitute provocation."[4] But the position has now been reversed by section 3 of the Homicide Act under which the issue is left to the jury to determine in the light of things both "done and said."

Relations other than Husband and Wife

The question arises whether a man may successfully plead provocation if the woman who commits adultery is not his wife. Lord Macaulay's Commissioners saw no distinction between cases where the woman was the accused's wife and where she was not.[5] They went on:[6]

> "Circumstances may easily be conceived which would satisfy a Court that a husband had in such a case acted from no feeling of wounded honour or affection, but from mere brutality of nature, or from disappointed cupidity. On the other hand, we conceive that there are many cases in which as much indulgence is due to the excited feelings of a father, or a brother, as to those of a husband. That a worthless, unfaithful and tyrannical husband should be guilty of manslaughter for killing the paramour of his wife, and that an affectionate and high-spirited brother should be guilty of murder, for killing in a paroxysm of rage the seducer of his sister, appears to us inconsistent and unreasonable."

(contd.) that Scots courts would now go back to the pre-1957 English law and follow Holmes, infra, as was suggested by Lord Cooper to the R.C.C.P., Minutes of Evidence, Lord Cooper's Supplementary Memorandum, para.13.

(1) R.C.C.P., Cmd.8932, para.129; Cf. Smith, T.B., "Capital Punishment", 1953 S.L.T. (News) 97 at P.99.

(2) R. v. Rothwell (1871) 12 cox 145 at P.147; R. v. Palmer (1913) 2 K.B.29, 207; R. v. Greening (1913) 9 Cr.App.R.105; R. v. Ellor (1921) 15 Cr.App.R.41.

(3) (1946) A.C.588.

(4) Ibid, Viscount Simon at P.600.

(5) The Indian Law Commission 1837, Note M, P.60.

(6) Ibid.

Considered in the light of the Sudan's present social structure, the above remarks cannot be more apt. The society is very closed and conservative and family honour is held in very high regard. The father, brother or other male members of the family are the guardians of the family honour and reputation. In such circumstances, killings following adultery by daughters, sisters or other female relations are commonplace, and the law cannot disregard such considerations. Further, and on principle, since the essence of the plea of provocation is loss of self-control as a matter of fact, a person who is actually provoked by the discovery of his daughter or sister in the act of sexual intercourse should not be more harshly treated than a husband who discovers his wife in the act of adultery. The Sudan courts have extended the plea to cover a person who kills as a result of discovering his divorced wife[1] or his sister[2] in the act of sexual intercourse.

The case of the mistress presents a rather difficult problem because she has not the same status as the above relations and because the institution itself is reprehensible and repugnant to social values. Nevertheless, the above rule was extended to cover a person who finds his mistress in similar circumstances and kills her.[3] Following the Indian decision in Potharaju v. Emperor,[4] Abu Rannat, C.J., observed in S.G. v. EL Amin Karana:[5]

> "The consensus of opinion in India is that there should be no differentiation between a lawful wife and a mistress

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(1) S.G. v. Hussein Idris Abdulla (1961) S.L.J.R.116.
(2) S.G. v. ElGhum Ahmed, AC.CP.45.1952, Unrep. However, in S.G. v. Musa Samara Musa (1961) S.L.J.R.107, the rule was held not to apply outside the relationship of husband and wife and was denied to the accused who killed the lover of his mother-in-law. The weight of authority is against such view and the case does not represent the law.
(3) S.G. v. Abdulla Abdel Rahman, AC.CP.88.1954, Unrep.
(4) A.I.R.(1932) Mad.25.
(5) (1961) S.L.J.R.95.

> when the question of grave and sudden provocation is in issue ... ... where a man sees a woman in the arms of another, and loses control over himself, the circumstance that she was his mistress and not his wife does not make any real difference for the purpose of Penal Code, s.249(1)."[1]

In Potharaju[2] the Indian position was clearly stated by Waller, J., as follows:[3]

> "One cannot apply considerations of social morality to a purely psychological problem. The question is not whether the appellant ought to have exercised, but whether he lost control over himself. When a man sees a woman, be she his wife or mistress, in the arms of another man, he does not stop to consider whether he has or has not the right to insist on exclusive possession of her person ... ... she is a woman of whose person he desires to be in exclusive possession and that is for the moment, enough for him, he thinks of nothing else."

Before 1957 English courts were reluctant to extend the plea to relationships other than of husband and wife,[4] but the position is now regulated by section 3 of the Homicide Act under which the question is treated as one of fact regardless of the nature of the relationship. In Scotland, however, the rule continues to be confined to matrimonial relationships.[5] Professor Gordon[6] describes it as artificial and argues for its extension along the same lines as those stated by Lord Macaulay's Commissioners.[7]

iii. Words as Provocation

Confessions of adultery apart, the question whether a person may be provoked by mere words or gestures occupied the minds of Commissions, courts and writers for a long time. The English Criminal Law Commissioners[8] stated in 1839 that "words or gestures may often be infinitely more irritating or provoking than a personal injury of a trivial

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(1) Ibid, at P.97.
(2) A.I.R. (1932) Mad.25.
(3) A.I.R. (1932) Mad.25.
(4) R. v. Palmer (1913) 2 K.B.29; R. v. Greening (1913) 9 Cr. App.R.105.
(5) Gordon, 722; this was also stated in Callander, 1958 S.L.T.24, although it does not appear in the report.
(6) Ibid.
(7) Supra.
(8) Fourth Report, B.P.P., 1839, vol. xix, note to Article 43 of the Digest; see also Second Report, B.P.P., 1846, vol. xxiv, Pp.25-26.

nature". Similar opinions were expressed by the R.C.C.P., 1866,[1] and the Criminal Code Bill, 1879,[2] but English law remained unaltered until 1957. The authors of the I.P.C. put the position more clearly. They said:[3]

> It is indisputable fact that gross insults by word or gesture have as great a tendency to move many persons to violent passion, as dangerous or painful bodily injuries. Nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary, the circumstance that a man resents an insult more than a wound is anything but proof that he is a man of peculiarly bad heart. It would be a fortunate thing for mankind if every person felt an outrage which left a stain upon his honour more acutely than an outrage which had fractured one of his limbs. If so, why should we treat an offence produced by the blameable excess of a feeling which all wise legislatures desire to encourage, more severely than we treat the blameable excess of feelings certainly not more respectable?"

Neither the I.P.C. nor the S.P.C. expressly provides that words or gestures may amount to provocation. However, this may be implicit in the Explanation[4] that the question whether the provocation was grave or sudden enough is a question of fact. The effect of this provision is that:

> "A discreet judge ... ... would properly reject the plea of provocation by insulting words in one case, while he would as properly admit it in another, according as the party might be shewn to belong to a class sensitive to insult of this kind or another."[5]

In view of the above, the courts in India and the Sudan have found no difficulty in treating as provocation words of insult or abuse which are calculated to be particularly abusive of a person in the position of the accused.[6] The Sudan courts have stated that

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(1) B.P.P., 1866, vol.xxi, para.7.
(2) C.2345, Pp.24-25; Article 176 of the Draft Code.
(3) The Indian Law Commission, 1837, Note M, P.59.
(4) Explanation to Exception 1, section 300, I.P.C., and Explanation to section 249(1), S.P.C.
(5) The Indian Law Commission, 1846, First Report, para.271.
(6) Chanan Khan v. Emperor, (1949) Lah.123; Nanavati v. State of Maharashtra, (1962) S.C.605.

> "Whether provocation by spoken words is grave or sudden depends as much upon when and how those words were said, as upon the mentality of the person to whom they were addressed."[1]

and that the question should be determined with regard to "the social standing, habits and customs of the people and the sense in which the abusive words were spoken."[2] Thus, where D, who was drunk, abused her sister, and, when asked by her brother to refrain from doing so, retorted in exceptionally vulgar and obscene language[3], where D abused A by implying that he was of slave origin[4], where D told her husband that 'the tracks on the ground' of other men in the village were better than him[5], and where D, in response to A's refusal to give him a drink, said to A 'Why not, have I slept with your mother or sister?'[6], the killing of D was in each considered culpable homicide on grounds of provocation.

In England the decision in Holmes v. D.P.P.[7] frustrated all previous attempts to treat words of insult as provocation. The House of Lords made it clear that in "no case could words alone, save in circumstances of a most extreme and exceptional character"[8] amount to provocation. This came to be regarded as unsatisfactory and the R.C.C.P.[9] recommended that legislation be introduced in both England and Scotland to alter the law. In England the change was effected by section 3 of the Homicide Act.[10] But, as already stated, the section does not apply to Scotland. Professor Smith[11] suggested

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(1) Owen, C.J., in S.G. v. Ahmed Ibrahim Isagha, AC.CP.245.1930, Unrep.
(2) S.G. v. Ahmed Ismail Hamad, AC.CP.260.1954, Unrep.
(3) S.G. v. Suleiman Balula, AC.CP.305.1953, Unrep.
(4) S.G. v. Ismail Ahmed Gargara (1962) S.L.J.R.148.
(5) S.G. v. Mohammed Nur ElBedu, AC.CP.223.1945, Unrep.
(6) S.G. v. Ahmed Ismail Hamad, AC.CP.260.1954, Unrep.; however, in this case the Court of Criminal Appeal altered the conviction to one of murder,. It is submitted that this is wrong because under section 256(1)(c), C.C.P., that Court has no such power, see Ch.II, supra.
(7) (1946) A.C.588.
(8) Viscount Simon, at P.600, Ibid.
(9) Cmd.8932, paras. 151-153.
(10) See supra.
(11) Smith, T.B., Short Commentary, 144; Cf. the opinion of the then Lord Advocate/...

that the reason for this is that it was felt that Scots law already took into account "everything done and said", and, had there been any doubt in the matter, "the lesiglators would certainly have included Scotland ob majorem cautelam."[1]

However, Professor Smith's view seems to contradict the earlier views of Hume[2], Burnett[3], Alison[4] and Macdonald[5] who were of opinion that discovery of adultery was the only exception to the rule that provocation could only result from serious assault. Professor Smith himself had on two previous occasions[6] said that the recommendation that words should be recognised as a ground of provocation in Scotland would be welcomed. Further, the case law does not appear to support his earlier view. Hill[7] and Delaney[8] were confined to confession of adultery and did not extend to the general question of provocation by words of abuse. M'Guinass[9] and Crawford[10] had some element of provocation by words, but the former also included evidence of assault and the latter contained some element of diminished responsibility.[11] More recently, in his direction to the jury in Dodson,[12] Lord Cameron stated that

> "words of insult, however strong, do not seem to reduce the crime from murder to culpable homicide.... That has been the law of Scotland for over a hundred years."

In conclusion, it is agreed with Professor Gordon[13] that:

(contd.) before the House of Commons at the time of the passing of the Homicide Act, Hansard, House of Commons, Jan.28, 1957, vol.563, col.784.

(1) Ibid.
(2) Hume, i, 245.
(3) Burnett, op.cit., 53.
(4) Alison, i, 113.
(5) Macdonald, 97.
(6) "Capital Punishment", 1953 S.L.T. (News) 197 at P.200; The British Commonwealth, U.K., Scotland, P.732.
(7) 1941 J.C.59.
(8) 1945 J.C.138.
(9) 1937 J.C.37.
(10) 1950 J.C.138.
(11) For a further discussion of the two cases see Gordon, 724-725.
(12) The Scotsman, July 28, 1961.
(13) Gordon, 725.

> "since section 3 of the Homicide Act 1957 does not apply to Scotland the position remains doubtful. The mere fact of its non-application may, if anything, tell against its acceptance in Scotland."

A change in the law would thus appear to be necessary to bring it into line with the realities of the plea of provocation and with recent trends elsewhere.

iv. Cumulative Provocation

Despite the requirements of suddenness and gravity, a situation may arise where a person is provoked by a series of minor acts over a period of time until such time as he finally gives vent to his feelings and loses his self-control. Such a case would in Scotland amount to provocation only where the final act in the series is by itself adequately provocative.[1]

> "The fact that the deceased had indulged in a course of provocative conduct may indeed in some circumstances militate against the plea of provocation, as showing that A had become so used to this type of behaviour that it no longer affected his self-control."[2]

However, Crawford,[3] although involving an element of diminished responsibility, may be an authority for cumulative provocation, particularly in the light of the nature of the previous relationship between the accused and the deceased.

The Sudan courts have liberally applied the concept of accumulated provocation in favour of the accused. The fact that he had on previous occasions managed to control himself would not of itself deprive him of the plea if the final act can be traced back to a series of provocative acts.[4] Abu Rannat, C.J., described the position in S.G. v. Gadeem Ragab Ali,[5] by upholding Gour's[6] view that:

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(1) Gordon, 713.
(2) Ibid.
(3) 1950 J.C.138; see also Kizileviczius, 1938 J.C.60.
(4) S.G. v. Mohammed Nur ElBedu, AC.CP.223.1945, Unrep.; S.G. v. Gumaa Abdel Rahman, AC.CP.117.1946, Unrep.; S.G. v. ElGhum Ahmed Ali, AC.CP.45.1952, Unrep.
(5) (1962) S.L.J.R.126 at P.127.
(6) Gour, op.cit., vol. III, P.1976.

> "It has been sometimes said that, if a person had time to reflect, he could not avail himself of this exception. But the question is one of degree. A person may suffer from a provocation so grave that he may brood over it, but may refrain from acting. He may again suffer from a provocation which may completely throw him off his balance."

The rule would apply even where the final act would not by itself give rise to provocation. Thus, in S.G. v. Gumaa Abdel Rahman,[1] A, a retired policeman, urged his nephew to take a second wife because his first wife, D, bore him no children. D resented this and started abusing A by singing a song in which she referred to him as Ghaffir, a term which policemen greatly resent. A and other relations pleaded with D to desist from her conduct, but she would not. A few days later, D was singing this song when A asked her to stop it. When she refused, A shot her dead. On confirmation, it was pointed out that the trial court should have considered the issue of provocation because though the final act was not by itself an act of grave provocation, "it was not an isolated piece of provocation, and that must be taken into consideration in assessing the gravity of the final piece of provocation."[2] It was added:[3]

> "Indeed in some ways the smaller individual acts of provocation often repeated are worse than one act much greater in itself, because the repeated acts go on and on until the inevitable explosion at last occurs ...."

The significance of the above statements is reduced to mere obiter because the accused's conviction of murder was confirmed. However, in S.G. v. Hawa bint Mohammed Sheriff,[4] the conviction was reduced to culpable homicide on grounds of accumulated provocation. Lindsay, C.J., said:

> "It is established law that a series of acts over a period in the aggregate may constitute grave and sudden pro-

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(1) AC.CP.117.1946, Unrep.
(2) Ibid, per Cummings, C.J.
(3) Ibid.
(4) AC.CP.347.1953, Unrep.; Cf. Abu Rannat, C.J., in S.G. v. Adam Salih Tibin (1957) S.L.J.R.72 at P.73.

> vocation although the last act of provocation, taken by itself if unrelated to the earlier acts, might be insufficient to confer the benefit of (section 249(1), S.P.C.)."

However, the courts have been careful enough to realise that the doctrine of cumulative provocation should not be unduly extended. In S.G. v. Ismail Abu Ashman,[1] A lived with his wife, D, in her mother's house. M, a known pimp and eunuch, came to live with them and developed an intimacy with D. Rumour spread that M took D out for purposes of prostitution and, despite A's resentment, M and D continued their relationship. One day he found them together in a beer-house and they laughed at him. He then met them again on the road and attacked them with an axe, killing D. His conviction of murder was upheld on confirmation. Referring to the doctrine of cumulative provocation, Hayes, J., said:

> "We think that this, unless carefully applied, is a dangerous doctrine, certainly it should not be applied when the final act is of a trifling nature ...."

C. - The Accused must have been Provoked: The Reasonable Man Test

Apart from showing that the provocation was grave and sudden, it must also be proved that the accused was in fact provoked. In determining this, the courts have resorted to the test of the 'reasonable man', i.e., whether a reasonable man in the place of the accused would have been provoked to the same extent as the accused. The use of the reasonable man test is in effect a compromise between the law's insistence on the sanctity of human life and its preservation, on one hand, and the recognition of human weakness and frailty, on the other. The concept of the reasonable man in provocation has for a long time applied in English law[2] and the R.C.C.P. discussed it in detail

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(1) AC.CP.156.1947.

(2) R. v. Welsh (1869) 11 Cox 336; R. v. Alexander (1914) 9 Cr.App.R.139; R. v. Lesbini (1914) 3 K.B.1116; Mancini v. D.P.P. (1942) A.C.1; Holmes v. D.P.P. (1946) A.C.588; Bedder v. D.P.P. (1954) 1 W.L.R.1119; R. v. Phillips (1969) A.C.130; R. v. Ives (1970) 1 Q.B.208.

but refused to recommend any change in the law.[1] Consequently, section 3 of the Homicide Act has not changed the law in this respect. In Scotland, decided cases do not make the position very clear, but it has been suggested that the same principles apply.[2] There is, however, so far no accepted definition of 'the reasonable man' and it is doubtful whether it is possible to formulate one.[3] The original draft of the I.P.C. included the following Explanation to the section[4] dealing with provocation:

> "Provocation is designated as 'grave' when it is such as would be likely to move a person of ordinary temper to violent passion...."

But when the Code was enacted the above Explanation was replaced by the present one to the effect that the question whether the provocation was grave or sudden enough is one of fact. It may be argued that the intention of the legislature was to leave the issue to be determined subjectively from the facts of the case and not with reference to the objective criterion of the 'reasonable' or 'ordinary' man. Nevertheless, in practice the courts in both India and the Sudan have preferred to determine the issue by reference to the reasonable man. The attitude of the courts has, however, varied according to the different circumstances of the cases.

i. Peculiarities Common to a Certain Group

The extreme disparities in the stages of civilisation, tradition, culture, education and local environment of different peoples make it impossible to adopt a uniform standard of what would be the attitude or reaction of the reasonable man in a given type of situation. In the Indian sub-continent and the one million square miles of the Sudan there live people of extremely varying traditions, languages, religions, ethnic divisions

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(1) Cmd.8932, para.145.
(2) R.C.C.P., Minutes of Evidence, Lord Cooper, Q.5366-5367.
(3) Cf. Lord Goddard in R. V. McCarthy (1954) 2 Q.B.105 at P.112.
(4) Section 297, draft I.P.C., 1837.

and economic and geo-political conditions. The courts are expected to take judicial notice of such disparities in assessing the standard of the average man of the particular community. They would be ill-advised to follow the standard of the average man in the U.K. or other foreign country with a markedly different social structure. The Sudan courts should apply the standard of the reasonable Sudanese, and, more particularly, the reasonable Sudanese in the particular locality in question. Fortunately, Indian and Sudanese courts have been aware of this difficulty. Thus in the Indian case of Gulam Mustafa Ghano,[1] the accused and deceased were of Baluchi descent. The deceased made a gesture to the accused which was extremely insulting among the Baluchis. In convicting the accused of murder for killing the deceased, the trial court applied the test of the reasonable man as laid down in the English case of R. v. Lesbini.[2] This was rejected on appeal by Davis, C.J., who went on to say:[3]

> "While it is the offender whom the court regards in considering the question whether he was deprived of the power of self-control by grave and sudden provocation, it decides whether this was so by the test of the 'reasonable man', the ordinary normal man, the ordinary normal Baluchi, when dealing with Baluchis and the ordinary reasonable Englishman when dealing with the English."

Similarly, in the Sudan an English C.J. remarked that:

> "Subsections (1) and (4) of section 249 are concessions which the law makes to human frailty as judged by the actual standard of the ordinary man in the Sudan, and not by what any of us think ought to be the standard of the ordinary man in the Sudan."[4]

Further, the difference in the standards of the people 'within' the Sudan has also been

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(1) A.I.R. (1939) Sind 182.
(2) (1914) 3 K.B.1116.
(3) A.I.R. (1939) Sind 182 at P.184; see also the Supreme Court in Nanavati v. State of Maharstra, A.I.R. (1962) S.C.605 at Pp.629-630.
(4) Bennet, C.J., in S.G. v. Mohammed Nur ElBedu, AC.CP.223.1945, Unrep.

acknowledged. Thus, in S.G. v. Ismail Abu Ashman[1], Creed, Acting C.J., stated that the provocation must deprive of his power of self-control a reasonable man

> "with the same upbringing and background of the accused and with the same past experiences as the accused. The gravity of provocation cannot be assessed in isolation from the manner of life of the community of which the accused is a member ...."

Again, in S.G. v. ElBaleila Balla Baleila[2], the facts of which have already been given, Abu Rannat, C.J., said[3]:

> "The 'reasonable man' referred to in the text-books is the man who normally leads such life in the locality and is of the same standard as others."

He distinguished the standard of the unsophisticated nomadic 'Arab' from that of the urban Sudanese, and stated that while the former may be provoked by injury to property, the latter might not. He continued[4]:

> "The real test is whether an ordinary Arab of the standard of (the accused) would be provoked or not."

The same principle has been applied in several subsequent cases[5]. The same attitude has been adopted in New Zealand and Australia to deal with the native population of the Western Samoans in the former and the aboriginies in the latter. The courts have there tended to take judicial notice of the mental and physical peculiarities of such people, instead of subjecting them to the same standards applied to the New Zealander or Australian of European descent[6]. This has also been the tendency in some parts of

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(1) AC.CP.156.1947, Unrep.; Cf. S.G. v. Suleiman Balula, AC.CP.305.1953, Unrep.
(2) (1956) S.L.J.R.12.
(3) Ibid, at P.13.
(4) Ibid.
(5) Abu Rannat, C.J., in S.G. v. Logol Adozie Nadmozia (1966) S.L.J.R.2 at P.3; Salah Hassan, J., in S.G. v. Bakhtanu Baya Bakhtanu (1967) S.L.J.R.90 at P.91.
(6) For a discussion of these attitudes see Marsack, C.C., "Provocation in Trials for Murder", (1959) Crim.L.R.697; Colin Howard "What Colour is the Reasonable Man?" (1961) Crim.L.R.41; see also section 169(2) of the New Zealand Crimes Act, 1961.

Africa. Thus, section 183 of the Zambia Penal Code defines the reasonable man as "an ordinary person of the community to which the accused belongs"; and in Nigeria it was stated that the issue should be determined according to what would amount to provocation

> "in the case of an ordinary reasonable man of the same standing in life and degree of civilization as the accused man, for what might not be regarded as sufficient provocation in the case of an educated and civilized person might ... be reasonably considered as sufficient where it concerns an uneducated and primitive peasant whose passions would naturally not be so much under control as those of the more educated person."[1]

It is submitted that the above attitudes are realistic and are in accord with the principles of criminal responsibility. It is agreed that

> "Until such time as the distinctive identities of these units become merged into something more faithfully representative of nationhood, it would be unrealistic to talk in respect of criminal responsibility of a 'reasonable Indian', or a 'reasonable Ceylonese' or a 'reasonable Malayan'."[2], or Sudanese.

A slightly different question arises where a person from a primitive community migrates to live in a more prosperous and sophisticated society. This may happen within one country with diverse cultures such as, for example, where a Southern or Western Sudanese goes to Khartoum in search of work, or through immigration as where an Asian or West Indian comes to live in London. The question arises whether such a person should be judged by the standards of his own community or by those of the community in which he has decided to settle. The former course presents practical difficulties particularly in relation to the evidence required to satisfy the court that the standards of the accused's community are different. The English decisions in Lesbini[3],

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(1) Francis, J., in R. v. John Okoro (1942) 16 N.L.R.63 at P.65.
(2) Brown, B., "The Ordinary Man in Provocation", (1964) Int. and Comp.L.Q.203 at P.227.
(3) (1914) 3 K.B.1116.

Mancini[1] and Semini[2] as well as the opinion of the majority of the members of the R.C.C.P.[3] prefer the latter course.

But this course may prove rather harsh on the accused. As was pointed out before the R.C.C.P.[4], if the accused was "a foreigner of more excitable temperament", "it is neither fair nor logical to judge him by the standard of the ordinary Englishman".[5] Again, as has been pointed out by Professor Smith[6] although a reasonable Scotsman may be unmoved by such abuse as 'dirty nigger', a visitor from Alabama or Ghana may react differently. Such an attitude is preferable and is certainly more in accord with the subjective test requiring provocation to be proved as a matter of fact.

ii. Peculiarities Special to the Particular Accused

In applying the reasonable man test, English courts specified some attributes which they held the reasonable man did not posses. As a result, an accused person with any of those attributes or peculiarities is judged objectively and the plea of provocation is denied to him. As explained below, the Sudan courts have also followed this course.

a. - Mental peculiarities: The English rule in Lesbini[7] that the plea of provocation is not open to an unusually excitable man has been followed in the Sudan where in several cases the plea was refused to persons 'extremely excitable'[8] or 'weak willed'.[9]

b. - Drunkenness: The rule in the English case of McCarthy[10] that the test of provocation must be judged by the standard of the reasonable 'sober' man, even if the ac-

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(1) (1942) A.C.1.
(2) (1949) K.B.405.
(3) Cmd.8932, para.142; see also Marsack, op.cit., at Pp.702-703; Colin Howard, op.cit., at P.47; Brown, B., op.cit., at P.228.
(4) Ibid, para.141.
(5) Ibid; see also Wilson v. Inyang (1951) 2 K.B.799, where it was stated that the reasonable man in the case of an African living in England is the man with the same background and education as the accused; Cf. R. v. King (1965) 1 Q.B.443.
(6) Smith, T.B., Short Commentary, 143.
(7) (1914) 3 K.B.1116.
(8) Lindsay, C.J., in S.G. v. Ahmed Ismail Hamad, AC.CP.260.1954, Unrep.; M.I. El Nur, J., in S.G. v. Barkia Wajo (1961) S.L.J.R.114 at P.115.
(9) Owen, C.J., in S.G. v. Ahmed Ibrahim Isagha, AC.CP.245.1930, Unrep.
(10) (1954) 2 Q.B.105.

cused was drunk was also applied in several Sudanese cases.[1]

c. - Physical peculiarities: In Bedder v. D.P.P.,[2] the accused, an impotent man, tried to have sexual intercourse with a prostitute. When he failed, she jeered at him, hit and kicked him. Losing his self-control, he stabbed her to death. The House of Lords refused to take the accused's impotence into account and held that a reasonable potent man would not have been provoked by the conduct of the prostitute. They added:[3]

> "It would be plainly illogical not to recognize an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet to recognize for that purpose some unusual physical characteristic, be it impotence or another."

There does not appear to be any Sudanese decision in point, but, judging from the attitude of the courts in the former two categories, the courts may adopt the attitude of the House of Lords in Bedder.[2] In Scotland, Bedder[2] has been criticised by contemporary legal writers[4] and the courts may very well reject it.

Criticism of the Objective Test

The argument in favour of retaining the objective test of the reasonable man in provocation was put before the R.C.C.P. by Lord Cooper who stated that if the rule were to be abolished

> "there might be circumstances in which a bad-tempered man would be acquitted and a good-tempered man would be hanged, which, of course, is neither law nor sense."[5]

This argument impressed the Commission and it declined to recommend any changes in the law.[6] The Commission added:[7]

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(1) S.G. v. Suliman ElGouz, AC.CP.180.1927, Unrep.; S.G. v. Mohammed Saad Suleiman, AC.CP.208.1946, Unrep.; S.G. v. Ahmed Ismail Hamad, AC.CP.260.1954, Unrep.
(2) (1954) 1 W.L.R.1119.
(3) Ibid, at P.1123.
(4) Smith, T.B., "Malice in Murderland", 1957 S.L.T. (News) 129 at P.130; Gordon, 730.
(5) Minutes of Evidence, Q.3153; Cf. Avory, J., in Lesbini (1914) 3 K.B.1116.
(6) Cmd.8932, para.145.
(7) Ibid, para.144.

> "It is a fundamental principle of the criminal law that it should be based on a generally accepted standard of conduct applicable to all citizens alike, and it is important that this principle should not be infringed. Any departure from it might introduce a dangerous latitude into the law. Those idiosyncrasies of individual temperament or mentality that may make a man easily provoked, or more violent in his response to provocation, ought not, therefore, to affect his liability to conviction, although they may justify mitigation of sentence."

On the other hand, the objective test is open to several criticisms:

1. - The use of the concept of the reasonable man in provocation is illogical. The concept might be helpful in civil cases of negligence by enabling the court to determine the degree of prudence or care expected of such a man. But it becomes pointless in relation to provocation because it is inconsistent to inquire whether a 'reasonable' man would 'kill' under provocation, for if he is a reasonable man he will not kill under any provocation.

> "A reasonable man ceases to be reasonable when his passions get out of control and he kills a human being; and to make the unreasonable conduct of a reasonable man a standard for the conduct of others is a bit of a paradox."[1]

Again:

> "The reason why provoked homicide is punished is to deter people from committing the offence; and it is a curious confession of failure on the part of the law to suppose that, notwithstanding the possibility of heavy punishment, an ordinary person will commit it. If the assertion were correct, it would raise serious doubts whether the offence should continue to be punished."[2]

2. - The observation of the R.C.C.P. that the criminal law must apply to all citizens alike loses much of its validity if it is borne in mind that most legal systems make exceptions in favour of lunatics, mental defectives, infants, etc., because their men-

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(1) Gour, op.cit., vol. III, P.1966.
(2) Williams, G., "Provocation and the Reasonable Man", (1954) Crim.L.R.740 at P. 748; see also Hollis, C., The Homicide Act (London, 1961) Pp.88 et seq.

tal conditions are not the same as those of 'reasonable' or 'ordinary' men.

> "To make the provocation test subjective would not infringe any fundamental principle and certainly would not ... affect his (i.e., the accused's) liability to conviction for he would be convicted of manslaughter, a felony which ... carries liability to imprisonment for life."[1]

3. - Lord Cooper's argument that the abolition of the objective test would lead to the acquittal of the bad-tempered man and the hanging of the good-tempered is not convincing and has been severely criticised.[2] First, the argument overlooks the fact that there is no question of anyone being 'acquitted' because the result of a successful plea of provocation is a 'conviction' for culpable homicide. Again, if the good-tempered man loses his self-control, then, a fortiori, a bad-tempered man will also lose his self-control, and they will both be convicted of culpable homicide. Further, if the provocation is not sufficient to provoke a good-tempered man, he will not kill and no question of his guilt, far less his being hanged, will arise. If the same provocation was adequate to provoke a bad-tempered man, he will be convicted of culpable homicide and no injustice would have been done to the good-tempered man who did not kill.

4. - The use of the reasonable man test is also dangerous because, by applying the 'principle of disfacilitation'[3], the courts may confuse a pure matter of evidence by treating it as one of law thereby creating an objective 'standard' of self-control.[4] As Turner says:[5]

> "It creates the incongruity which always arises when a subjective and an objective test of liability are in application at the same time. It introduces a morally insupportable distinction between a man born 'normal' or 'average' and

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(1) Turner, in Russell, Pp.546-547.
(2) Williams, G., "Provocation and the Reasonable Man", (1954) Crim.L.R.740 at P. 751; Turner, Russell, P.546; Kenny, Pp.171-172; Gordon, 728; Smith and Hogan, op.cit., 214-215; Brown, B., op.cit., Pp.228-231.
(3) See Ch.IV, supra.
(4) Gordon, 729.
(5) Turner, in Russell, 535.

> and a man born 'abnormal' or varying from the 'average'. For if the reason for excusing the 'normal' man is that his innate control mechanism has been paralysed by events, how can it be ethically proper to refuse the like benignity to a 'sub-normal' man when his innate control mechanism has been so paralysed; and thus to deal leniently with a man to whom 'nature' has been moderately unkind, while treating with ruthless severity the man to whom 'nature' has been immoderately unkind?"

The law should be concerned with whether the particular accused was in fact provoked. It is completely unreasonable to determine the extent to which a physically deformed or impotent person was provoked by applying the standard of a fit, potent person. Again, a person of subnormal mentality should not be judged by the standard of a normal person. This is particularly so in relation to the Sudan law which does not recognise the defence of diminished responsibility[1] and the accused's only possibility of mitigation of guilt may be a successful plea of provocation.

On the other hand, the law need not take account of mere ill-temper, excitability or voluntary intoxication, because in such situations the law may encourage citizens to change their ways and conform to accepted standards of behaviour. It is agreed with Fitzgerald[2] that:

> "The difficulty is to evolve a test to exclude certain characteristics like hot temper, irritability and drunkenness, things which the accused must fight against and for which he may be responsible, and yet to allow in certain physical or mental idiosyncrasies in fairness to the accused. At the present the law would seem to be that the jury can put the reasonable man into the shoes but not into the skin of the accused."

In conclusion, it must be emphasised that despite the attitude of the Sudan courts, the Explanation to section 249(1), S.P.C., allows for putting the reasonable man into the 'skin' of the accused. The Explanation clearly lays down that the issue is one

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(1) See Ch. VIII, infra.
(2) Fitzgerald, P.J., Criminal Law and Punishment, (Oxford, 1962), 219.

of fact, thereby enabling the courts to adopt a wholly subjective test. In cases involving mental or physical abnormality the courts may completely ignore the reasonable man and inquire whether the accused was in fact provoked by applying standards of persons with the same handicap as the accused.

D. - Provocation and Intention to Kill

The rule that the plea of provocation will not succeed when there is an intention to kill or cause grievous bodily harm was stated in England in R. v. Welsh[1] and in Holmes v. D.P.P.[2] This rule has invited several criticisms on the grounds that its effect will be to defeat the whole purpose of the plea.[3] The reason for this is that if there was no intention to kill or cause grievous bodily harm the case will not amount to murder in the first place and there would be no need to plead provocation. However, in A.G. for Ceylon v. Perera,[4] the Ceylon Court of Criminal Appeal stated that one of the fundamental differences between English law and section 294 of the Ceylon Penal Code (which is idential with section 249(1), S.P.C.) was that in the former, but not in the latter, the plea of provocation would not succeed if there was an intention to kill. This was rejected by the Judicial Committee of the Privy Council, which observed:[5]

> "The defence of provocation does arise when a person does intend to kill or inflict grievous bodily harm, but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation."

This view was subsequently confirmed in Lee Chuen v. R.[6] and several recent cases where

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(1) (1869) 11 Cox 336, Keating, J., at P.338.
(2) (1946) A.C.588, Viscount Simon, at P.598.
(3) Turner, in Russell, 563-572; Williams, G., "Provocation and the Reasonable Man", (1954) Crim.L.R.740 at P.744; Edwards, "The Doctrine of Provocation", (1953) L.Q.R.547 at P.549; see also R.C.C.P., Cmd.8932, para.136.
(4) (1953) A.C.200.
(5) Ibid, Lord Goddard, at P.206.
(6) (1963) A.C.220.

it was stated that the defence of provocation may succeed even although the accused had an intention to kill or cause grievous bodily harm.[1]

This is clearly the law in the Sudan where section 248 of the Code, which defines murder, expressly provides that the case will be reduced to culpable homicide if any of the exceptions in section 249 applies. This implies that the case must first fall within the definition of murder before the provisions of section 249 may be called into action, i.e., there must be an intention to cause death or knowledge that it will be 'the probable' result. This is emphasised further by C.C.C.No.3[2] which provides that the defence of provocation will not even be considered unless the requisite elements of murder are first satisfied.

Similarly, in Scotland it has been doubted whether Macdonald's[3] view, followed in Kizileviczius,[4] that

> "Being agitated and excited, and alarmed by violence, I lost control over myself, and took life when my presence of mind had left me, and without thought of what I was doing."

represents the present law, because it takes no account of the fact that "provocation is a defence to intentional killing."[5] Further,

> "The plea is designed not for someone who kills automatically, but for someone who is so provoked by the deceased that he sees red, and determines on the spot that he will 'swing for the bastard' ... ... unless there was a murderous purpose, or murderous recklessness, there is no need to invoke the plea of provocation at all."[6]

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(1) R. v. Walker (1969) 1 W.L.R.311; R. v. Williams (1968) Crim.L.R.678.
(2) Dated 8.8.1950.
(3) Macdonald, 94.
(4) 1938 J.C.60 at P.63.
(5) Gordon, 717.
(6) Ibid.

E. - The Rule of Proportional Retaliation

It is well settled in English law that the accused's retaliation must bear a reasonable proportion to the act of provocation. The House of Lords stated in Mancini[1] that:

> "to retort, in the heat of passion, induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation ...."[2]

The Homicide Act made no reference to the rule, but cases subsequent to it have made it clear that the rule has not been affected by the Act and that it must continue to apply.[3] The rule was described as:

> "an elliptic way of saying that the reaction of the defendant to the provocation must not exceed what would have been the reaction of the reasonable man."[4]

However, it was added that after the passing of the Act it may be prudent to avoid the actual use of the precise words in Mancini[1] unless it is made clear to the jury that the rule is not a rule of law which they should follow, but a consideration which may or may not commend itself to them.[5]

This also appears to be the case in Scotland[6] although recent cases do not expressly refer to the rule. In the Sudan the rule is not included in section 249(1) but it has found its way in several decisions. Thus, in S.G. v. Ahmed Ismail Hamad,[7] Lindsay C.J., said:

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(1) (1942) A.C.1.
(2) Ibid, Viscount Simon, at P.9; see also Lord Devlin in R. v. Duffy (1949) 1 All E.R.932; Lord Goddard in A.G. for Ceylon v. Perera (1953) A.C.200 at Pp.206-207; R. v. Wardrope (1960) Crim.L.R.770; R. v. Church (1966) 1 Q.B.59.
(3) R. v. Walker (1969) 1 W.L.R.311; R. v. Phillips (1969) A.C.230.
(4) Lord Diplock in R. v. Phillips (1969) A.C.230
(5) Lord Diplock in R. v. Phillips (1969) A.C.230
(6) Burnett, op.cit., 17; Alison, i, 14-15; Macdonald, 93; see also Peter Scott (1823); Edward Aramstrong (1826), both cited in Alison, i, 15.
(7) AC.CP.260.1954, Unrep.; see also S.G. v. Yacoub Mohammed ElTayeb, AC.CP.4. 1951, Unrep.

> "The provocation must be commensurate with the injury inflicted, and not out of all proportion to it: for instance an insult which would constitute sufficient provocation for a blow with the fist ... may not be grave enough to excuse a murderdous attack with an axe or knife to the extent necessary to bring the case within S.249(1)."

More recently, in S.G. v. Hassan Talfan Hassan,[1] Abu Rannat, C.J., approved of the statement in A.G. for Ceylon v. Perera[2] that:

> "The words 'grave' and 'sudden' are both of them relative terms and must, at least, to a great extent be decided by comparing the nature of the provocation with that of the retaliatory act. It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation, otherwise some quite minor or trivial provocation might be thought to excuse the use of a deadly weapon. A blow with a (light stick) is undoubtedly provocation, and provocation which may cause the sufferer to lose a degree of control, but will not excuse the use of a deadly weapon ...."[3]

Again, in S.G. v. Awad Adam Omer,[4] Abu Rannat, C.J., added:[5]

> "... it is wrong to say that, because the Penal Code does not expressly say that the retaliation must bear some relation to the provocation, the contrary is true."

The rule of proportional retaliation is not free from criticism. In the first place, insistence on an exact proportion between provocation and retaliation involves a confusion with the law of private defence. Provocation is normally pleaded when the accused kills the deceased; to say that the accused's act must be proportional to the provocative act would necessarily mean that the act of the deceased must have put the accused's life in danger. If this be so, the accused's act would be completely justifiable under the law of private defence[6] and there would be no need to plead provocation.

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(1) (1956) S.L.J.R.40 at P.41.
(2) (1953) A.C.200.
(3) Ibid, Lord Goddard, at Pp.206-207.
(4) (1965) S.L.J.R.75.
(5) Ibid, at P.79; see also S.G. v. Ibrahim Ahmed ElFeki (1961) S.L.J.R.11 at P.13.
(6) See Ch.V, supra.

Secondly, since the plea of provocation applies when the accused in fact loses his power of self-control, it seems illogical to require him to proportion the ferocity of his reaction to its cause or to make a nice choice of weapon in retaliating. As has recently been pointed out, "the test of reasonableness does not apply to the accused's conduct after the loss of self-control".[1]

Thirdly, the rule involves a practical difficulty, because although the court may endeavour to apply it in cases involving physical injury, it becomes almost impossible to determine the requisite proportion of retaliation where the provocation comprised words of insult or the discovery of a spouse in adultery.

Finally, the rule is open to the same objection stated in connection with 'provocation and intention to kill', i.e., if the accused does not intend to inflict a disproportionate retaliation, and 'unintentionally' causes the death of the deceased, his conviction will at most be for culpable homicide and the need to plead provocation will not arise for the mitigation of the offence.

The rule should, therefore, not be treated as one of law, but as a rule of evidence to be taken into account with all the other circumstances of the case.[2] It may help the court in determining whether the accused was in fact provoked or whether the killing was planned or done in a spirit of revenge after the accused had cooled down.

F. - Third Party Provocation

The concluding words of section 249(1), S.P.C., provide that the plea may succeed where the offender "causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.". Two types of situation must be

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(1) R. v. Southgate (1963) Crim.L.R.570.
(2) Cf. Turner in Russell, 59; Kenny, 167; Williams, G., "The Reasonable Man in Provocation", (1954) Crim.L.R.740 at P.745; Smith and Hogan, op.cit., 213; Gordon, 718.

distinguished:

(a) Where P gives provocation to A, but the latter kills D instead of P.

(b) Where D gives provocation to P, whereupon A becomes infuriated and kills D.

In (a) the plea of provocation would apply if A kills D by 'mistake or accident', his intention being to kill P.[1] But if A 'deliberately' kills D instead of P the act would be murder. Illustration (a), section 249(1) provides that if A, who is provoked by Z, intentionally kills Y, Z's child, the offence is murder "in as much as the provocation was not given by the child". Similarly, the English Court of Criminal Appeal stated in R. v. Simpson[2] that:

> "It cannot be maintained that upon provocation by one person, the killing of another by the provoked person is not murder."

This rule is unsatisfactory because since the essence of provocation is the loss of control in the heat of passion, it would be unrealistic that the accused must kill the provoker. "In fact an attack on an innocent third party may suggest that the accused did lose his self-control".[3]

This was the view taken by the Chief Justice of Hong Kong in the recent case of Ho Chun Yuen,[4] where Simpson[5] was treated as an exceptional case which had not been followed in subsequent cases.

In relation to situation (b) above, section 249(1) is silent and the Sudanese cases do not appear to have dealt with the matter. Some English cases[6] suggest that if

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(1) Illustration (b), section 249(1), S.P.C.; R. v. Brown (1776) 1 Leach 148; R. v. Gross (1913) 23 Cox 455; R. v. Porritt (1961) 3 All E.R.463; however, compare Ho Chun Yuen (1963) Crim.L.R.756.

(2) (1914) 84 L.J.K.B.1893 at P.1895; see also the Australian case of Scriva (1951) V.L.R.298.

(3) O'Regan, R.S., "Indirect Provocation and Misdirected Retaliation" (1968) Crim. L.R.319 at P.323; see also Gordon, 726.

(4) (1961) H.K.L.R.; (1963) Crim.L.R.756.

(5) (1914) H.J.K.B.1893.

(6) Royley's case, Godb.182; 78 E.R.11; R. v. Fisher (1837) C. & P.182; R. v. Harrington (1866) 10 Cox 370.

the deceased's act was addressed to a relative of the accused, the latter may successfully plead provocation. This was recently followed in the Australian case of Terry,[1] where Pope, J., was prepared to extend the rule to cases where the party to whom the deceased's act was addressedwas not a relative. He said (obiter):[2]

> "I do not see any reason why the doctrine should be confined to relatives, for the relationship between the person attacked and the accused must not be a relevant factor when the question whether an ordinary man would be likely to lose his self-control is being considered by the jury."

This appears to be the proper approach because the sole question should be whether the accused lost his self-control, regardless of the type of relationship between the parties. The attitude may also be followed in Scotland.[3] In connection with the Sudan, it is submitted that section 249(1) may be liberally interpreted to allow the plea because the subsection does not require that the provocative act should necessarily be addressed to the accused.

II. Exceeding the Right of Private Defence

The right of private defence as a complete justification to homicide has been discussed in Chapter V. It is now intended to deal with those situations where a person who is lawfully exercising his right of private defence is convicted of culpable homicide for having exceeded the limits of his defence. The law in this respect is contained in section 249(2), S.P.C., which provides:

> "Culpable homicide is not murder if the offender, in the exercise in good faith of the right of 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

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(1) (1964) V.R.248.
(2) Ibid, at P.251.
(3) Gordon, 726-727.

premeditation and without any intention of doing more harm than is necessary for the purpose of such defence."

The first requirement of the subsection is that the offender must have been exercising 'in good faith' his right of private defence. 'Good faith' is defined in section 37, S.P.C., as the doing of a thing 'with due care and attention' but in the present context it means no more than acting bona fide, or in the 'honest' belief that he is acting in private defence - not using the opportunity to pursue a private grudge[1] or taking advantage of the occasion to commit murder.[2]

Before section 249(2) may be successfully pleaded, all the requirements and limitations of the right of private defence, already discussed,[3] must be satisfied. Thus, the subsection will not apply if the accused was the aggressor and the nature of the fight had not been changed by the victim's retaliation to such an extent as to put the accused in a position of self-defence; or if the act to be repelled was not an offence enumerated in section 56, S.P.C.; or if there was ample time to enable the accused to have recourse to protection by public authorities; or if the act to be repelled was the act of a public servant within section 60 of the Code. In all these situations, the accused's act will not be in self-defence and it is impossible to contend that he was 'exceeding' the limits of a right he did not have. However, the provision in section 58, S.P.C., that no more harm than is necessary should be used in exercise of the right of private defence presents a special difficulty in relation to section 249(2), which difficulty will presently be discussed.

The act of the accused must be in 'excess' of his right of private defence. The act will, of course, be wholly justified if he was acting 'within' his right of defence.[4]

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(1) Roberts, C.J., in the Indian case of Po Mye v. The King, A.I.R.(1940) Rangoon 129 at P.130.

(2) S.G. v. Ahmed Taha Mohammed, AC.CP.68.1939; Unrep.; S.G. v. Hassan Bilal, AC.CP.208.1939, Unrep.

(3) Ch.V, supra.

(4) Section 55, S.P.C., Ch.V, supra; further, C.C.C.No.38 of 22.1.1955, directs the courts to consider section 249(2) only after section 55 has been con-/...

Further, the accused's act may only extend to the causing of death under the provisions of sections 61 and 62 of the Code. If so, the act will be completely justifiable,[1] otherwise the killing will be unlawful and in 'excess' of the right of private defence. The subsection would apply in such circumstances to protect the accused from totally losing his right of private defence by reducing his guilt from murder to culpable homicide. The basis of the subsection is that when a person is faced with a dangerous assault he is not expected to weigh his retaliation in 'golden scales', and although at the time he may consider his act to be necessary, yet, considered objectively, it may turn out to have been excessive. The authors of the I.P.C. were strongly in favour of mitigating the guilt of a person who kills in excess of his right of private defence. They said:[2]

> "... the law itself invites men to the very verge of the crime which we have designated as voluntary culpable homicide in defence. It prohibits such homicide indeed. But it authorizes acts which lie very near to such homicide. And this circumstance we think greatly mitigates the guilt of such homicide.
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> "That a man who deliberately kills another in order to prevent that other from pulling his nose should be allowed to go absolutely unpunished would be most dangerous. The law punishes and ought to punish such killing. But we cannot think that the law ought to punish such killing as murder. For the law itself has encouraged the slayer to inflict on the assailant any harm short of death which may be necessary for the purpose of repelling the outrage, - to give the assailant a cut with a knife across the fingers which may render his right hand useless to him for life, or to hurl him down stairs with such force as to break his leg. And it seems difficult to conceive that circumstances which would

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(contd.) sidered; if section 55 was applicable, the act will be justified and there will be no need to consider section 249(2), but if the act was not within section 55, the court must proceed to consider whether or not the act is within the scope of section 249(2).

(1) S.G. v. Adam Mohammed Ahmedai, AC.CP.22.1952, Unrep.; S.G. v. Ali Ahmed Hamad AC.CP.21.1955, Unrep.; S.G. v. Ajok Agany Yom (1961) S.L.J.R.61.

(2) The Indian Law Commission, 1837, Note M, P.62.

> be a full justification of any violence short of homicide should not be a mitigation of the guilt of homicide. That a man should be merely exercising a right by fracturing the skull and knocking out the eye of the assailant, and should be guilty of the highest crime in the Code if he kills the same assailant, - that there should be only a single step between perfect innocence and murder, between perfect impunity and liability to capital punishment, - seems unreasonable. In a case in which the law itself empowers an individual to inflict any harm short of death, it ought hardly, we think, to visit him with the highest punishment if he inflicts death."

Although it is agreed with the authors of the I.P.C. that killing in excess of the right of private defence should be treated less harshly than killings in cold blood, it is submitted that the above arguments are not completely sound. In stating that the law 'invites', 'encourages' or 'empowers' a person to cause any harm short of death, they give the impression that the law in fact condones acts of violence in retaliation. The law does not do this. It allows the use of violence as a necessity for preventing injury. But in so doing it expects the offender to restrain himself and to cause 'no more harm than is necessary' for his defence. The accused will completely lose his right of private defence if he causes more harm than is necessary.[1] The law does not encourage a man to inflict 'any harm short of death' to repel an outrage. Section 249(2) is therefore intended to protect against convicting of murder a person who is in good faith exercising his right of private defence but causes the death of another by exceeding his lawful right. Thus, it was held to apply where D hit A twice with a heavy stick, whereupon A hit D till he fell down and then dealt him a fatal blow,[2] where A chased an escaping thief and stabbed him with a spear after he had fallen down,[3] where D struck A down and sat on him and A drew his knife and stabbed D.[4]

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(1) See the discussion of section 58, S.P.C., in Ch.V, supra.
(2) S.G. v. Mohammed Abul Hassan Abbas, AC.CP.9.1939, Unrep.
(3) S.G. v. Yousif Galal ElDin, AC.CP.46.1945, Unrep.
(4) S.G. v. Mohammed Yahia Abullahi, AC.CP.321.1954, Unrep.; Cf. S.G. v. Mohammed Adam Onour (1963) S.L.J.R.157.

Section 58 and Section 249(2), S.P.C.

A difficulty of interpretation presents itself in comparing section 249(2) with section 58 of the Code. The latter, as has already been pointed out,[1] provides that the right of private defence 'in no case' extends to the causing of more harm than is necessary for the purpose of the defence. The offender will be completely deprived of his right of private defence if he causes more harm than is necessary. On the other hand, section 249(2) reduces the accused's guilt from murder to culpable homicide if he acts 'in excess' of his right of private defence. It is essential for the operation of section 249(2) that there be more harm than is necessary, otherwise there will be no 'excess' and the accused will be acquitted for acting within the right of private defence.

The distinction between the two sections lies in the provision in section 249(2) that the excessive harm must be done "without premeditation and without any intention of doing more harm than is necessary". This appears from the judgement of B. Awadalla, J., in S.G. v. Mohammed Adam Onour.[2] B. Awadalla, J., pointed out that the courts had gone astray in interpreting section 249(2), and went on:[3]

> "They seem to consider that the operative words in this exception are 'exceeds the power given to him by law'. But this section postulates three requisites: '(1) good faith, (2) absence of premeditation, and (3) absence of intention to do unnecessary harm'. The cumulative effect of these three exceptions is that the accused was placed in such circumstances that he honestly thought that if he did not kill, he would be killed or suffer serious injury. In other words, the accused must prove that the circumstances were such that he was entitled to believe that the case was covered by Penal Code, S.61. He must convince the court that there was some assault of some serious nature on the part of the deceased but that he over-stressed its seriousness on account of natural want of judgement which a person cannot be expected to

(1) See Ch.V, supra.
(2) (1963) S.L.J.R.157.
(3) Ibid, at P.158.

> possess at a moment of great excitement, or ... of an aggravated sense of danger."

Thus the effect of section 58 is to deprive the accused completely of his right of private defence if the excessive harm was done intentionally or with premeditation, i.e., if the violence used was completely uncalled for or unnecessary,[1] or where the accused continues to strike his victim after the latter has completely surrendered and is offering no resistance. But where the accused is genuinely acting in self-defence to repel an attack, and kills the deceased by exceeding the limits of the right of self-defence, section 249(2) may be invoked to mitigate the offence from murder to culpable homicide.[2]

In Scotland, Hume[3] was of opinion that killing in exceeding the right of self-defence was culpable homicide, and Alison[4] seems to have been of the same opinion. This was the course followed in Hillan,[5] where Lord Aitchison stated that the act of retaliation may either result in acquittal or in reducing the crime from murder to culpable homicide "when the pannel has struck in his own defence but with a measure of violence that cannot be justified".[6] Similarly, in Kizilevicius,[7] Lord Jamieson distinguished self-defence leading to a complete acquittal from self-defence leading to conviction for culpable homicide and provocation leading to the same result.

However, the above trend, which could have developed in the creation of a distinct plea of unjustifiable self-defence in line with section, 249(2), S.P.C., was eventually

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(1) See the Indian case of Gokool (1886) 5 W.R.33, Ch.V, supra.
(2) S.G. v. Ahmed Taha Mohammed, AC.CP.68.1939, Unrep.; S.G. v. Abdulla Idris, AC.CP.71.1942, Unrep.; S.G. v. Assuro Lotorit (1961) S.L.J.R.58; S.G. v. Mahmoud Abdulla ElMalik (1962) S.L.J.R.164.
(3) Hume, i, 223, 232.
(4) Alison, i, 93, 100, 103.
(5) 1937 J.C.53.
(6) Ibid, at P.58.
(7) 1938 J.C.60.

checked by the decision in Crawford.[1] The accused pleaded self-defence to a charge of murdering his father. The trial judge withdrew that plea from the jury and they convicted him of culpable homicide on the grounds of provocation. On appeal, the conviction was upheld. Lord Cooper stated the distinction between self-defence and provocation as follows:[2]

> "Exculpation is always the sole function of the special defence of self-defence. Provocation and self-defence are often coupled in a special defence, and often ... confused; but provocation is not a special defence and is always available to an accused person without a special plea. The facts relied upon to support a special plea of self-defence usually contain a strong element of provocation, and the lesser plea may succeed where the greater fails; but when in such a case murder is reduced to culpable homicide, or a person accused of assault is found guilty subject to provocation, it is not the special defence of self-defence which is sustained but the plea of provocation. I, of course, respectfully agree with Lord Justice-Clerk Aitchison in Hillan that self-defence and provocation 'in many cases overlap' and with Lord Jamieson in Kizilevicius that 'in many respects the considerations which apply to them are the same'; but I desire to emphasise that the pleas are not identical but entirely separate and distinct, and that the special defence of self-defence must either result in complete exculpation or be rejected outright."

It thus appears that although there is no distinct plea of unjustifiable self-defence in Scots law, the accused would nevertheless be convicted of culpable homicide on grounds of provocation,[3] and Professor Gordon[4] is of opinion that it is unnecessary to create a distinct category of unjustifiable self-defence. However, although it is true that whether the decision is based on unjustifiable self-defence or provocation, the end result is the same, i.e., conviction for culpable homicide, the Scottish approach involves a confusion of self-defence and provocation. The essence of the plea

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(1) 1950 J.C.67.
(2) Ibid, at P.69; emphasis supplied.
(3) Gordon, 716; see also the Crown Agent before the R.C.C.P., Minutes of Evidence, para.9 of his Memorandum.
(4) Ibid.

of provocation is the loss of self-control and it may be difficult to argue that whenever a person has caused death by exceeding his lawful powers of defence, he is deemed to have lost his self-control. He may not in fact have lost his self-control but merely exceeded his self-defence by over-estimating the danger of the deceased's attack. However, this appears to be one of those difficulties which must arise in comparing a codified system with a common law one. Under a code all the rules and limitations of the plea have to be spelt out, whereas under a common law system the position would be flexible enough to reduce the guilt of the offender whenever the circumstances of the case call for it without having to spell out the rules in advance.

It should be mentioned that the concept of a distinct plea of unjustifiable self-defence has recently inspired other legal systems. In Australia the plea is now well-recognised as a result of the decisions in McKay,[1] Howe,[2] and Buffalo.[3] Referring to these developments, Professor Norval Morris said:[4]

> "In articulating this defence, which is of both theoretical importance and likely to be invoked once its potentialities are understood, the Australian courts have made an important contribution to British criminal jurisprudence."

Again, in the Nyasaland case of Jackson s/o Hosiswiki v. R.,[5] Briggs, J., stated that the provocation requirement of 'heat of passion' was not at all necessary in self-defence, and continued:[6]

> "Leaving aside the cases where there is real and imminent danger of death to the accused, it may be perfectly

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(1) (1957) V.R.60.
(2) (1958) A.L.J.212.
(3) (1958) V.R.363.
(4) "Developments in the Law of Homicide", (1960) Crim.L.R.468; for a detailed discussion of the defence see Morris and Howard, Studies in Criminal Law (Oxford, 1964) 113 et seq.
(5) (1962) R. & N.133; reported in (1963) J.A.L., vol., No.1, P.60.
(6) Ibid, at P.62; emphasis added.

> reasonable in some cases for him to cause, and intend to cause, injury sufficiently severe to come within the category of grievous harm. If without heat, but calmly and deliberately, he does so and contrary to his intention causes death, the defence of provocation is not open to him, for he fails in the first requirements of 'heat and passion' or 'loss of self-control'. But if his acts are done in good faith and are only marginally in excess of what would be wholly excusable, it seems contrary to all ideas of justice that he should be convicted of murder."

The underlined part of this statement reinforces the objection to dealing with cases of unjustifiable self-defence under the plea of provocation. The same principles were also applied in the East African case of Muhindi s/o Asumani.[1]

The position in English law is not very clear. Some decisions state that excess of self-defence reduces the offence to manslaughter,[2] and others are opposed to this view.[3] Recent cases have not dealt with the plea. The House of Lords stated in Mancini[4] that the plea of private defence would not succeed unless the accused's life was put in danger. Cross and Jones[5] interpreted this as an implicit rejection of the plea of unjustifiable self-defence. This was confirmed by the Court of Criminal Appeal in the recent decision in R. v. Hassin,[6] where, although the Court did not decide in favour or against the plea, it referred to it as "a novelty in present times". Whatever the position may be in English law, several English writers are clearly in favour of the plea of unjustifiable self-defence.[7]

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(1) (1963) E.A.383; reported in (1963) J.A.L., vol.7, No.1, P.62.
(2) Parke, B., in R. v. Patience (1837) 7 C. & P.775 at P.776; Williams, J., in R. v. Walley (1853) 7 C. & P.245 at P.250; Cockburn, J., in R. v. Weston (1879) 14 Cox 346 at P.351; Darling, J., in R. v. Biggin (1920) 1 K.B.213 at P.219.
(3) R. v. Rose (1883) 15 Cox 540.
(4) (1942) A.C.1.
(5) Cross and Jones, Introduction to Criminal Law, 5 ed. (London, 1964) 148; Cf. Smith and Hogan, op.cit., 238.
(6) (1963) Crim.L.R.852.
(7) Archbold, op.cit., 923; Cross and Jones, op.cit., 131; Smith and Hogan, op. cit., 238.

III. Homicide by a Public Servant

Section 249(3), S.P.C., provides:

> "Culpable homicide is not murder if the offender, being a public servant acting for the advancement of public justice or being a person aiding a public servant so acting exceeds the powers given to him by law and causes death by doing an act which he in good faith believes to be lawful and necessary for the due discharge of his duty as such public servant or for assisting such public servant in the due discharge of such duty and without ill-will towards the person whose death is caused."

As has already been mentioned,[1] the act of a public servant in the lawful exercise of his duties is completely justified. Section 249(3) deals with those cases where such public servant or a person aiding him 'exceeds' his lawful powers and causes death. This is yet another instance of the tendency of the Code to protect public servants acting in the exercise of their duties on grounds of public policy. On the other hand, the law would not allow public servants who act without or in excess of their authority, thereby causing death, to go unpunished. Section 249(3) will therefore not apply if the act is completely outside the public servant's duties. In the Indian case of Empress v. Abdul Hakim,[2] a policeman searching for stolen property in a gypsy camp was offered a bribe which he took and asked for more. When this was refused he arrested one of the gypsies and, when the latter's colleagues tried to free him, the policeman fired, killing one of them. It was held that his act was not reduced to culpable homicide because

> "... while we are fully sensible of the necessity for affording the fullest protection to police officers in the discharge of their duty, it is equally incumbent upon us to take care that the public are protected from extortion and violence at their hands."[3]

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(1) Ch.V, supra.
(2) (1880) I.L.R.3All.253; see also the Indian Law Commission, 1846, First Report, para. 670-673.
(3) Straight, J., at P.258, ibid.

The public servant must 'in good faith' believe that the act is both 'lawful and necessary' for the discharge of his duty. Whether his belief was in good faith or not is a question of fact to be determined from the circumstances of each case. As in section 249(2), the courts have interpreted 'good faith' to mean the honest or bona fide belief that the act was necessary. Thus the accused was held to be within the protection of the subsection even where the belief was negligently or mistakenly formed. Thus in S.G. v. Yousif Badie[1] the accused, a member of a party of policemen pursuing some escaping prisoners, saw a figure moving in the bush and called on it to surrender. When no response was forthcoming, he shot at the figure, killing a man who was not one of the escaping prisoners. He was convicted of murder on the ground that he had not acted in good faith. On confirmation, Bennet, C.J., agreed with the court, but went on to say:

> "Nevertheless, if we consider the words 'good faith' in their more usual and ordinary meaning as synonymous with 'honestly' there is no doubt in my mind that the accused did in good faith believe that the deceased was one of the escaping prisoners and that it was his duty to open fire. Although he did not form his belief with due care and attention he did not ... ... act with thoughtless precipitancy or recklessness which is the real hallmark of criminality."

The accused was granted a free pardon.

It would appear that a killing by a public servant in such circumstances as under section 249(3) may in England[2] and Scotland[3] be treated as manslaughter and culpable homicide respectively. However, in practice, such killings are very rare in the U.K. where, unlike the Sudan, the police are not armed and the standard of policemen and

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(1) AC.CP.216.1945, Unrep.; Cf. S.G. v. Abdel Hamid Hamad ElKaraf, AC.CP.187.1953, Unrep.

(2) R. v. Coffe 1 Ventris, 216; Archbold, op.cit., 941; Russell, 443-444; English Criminal Law Commissioners, Second Report, B.P.P., 1846, vol.xxiv, Pp.28-29.

(3) H.M.A. v. Sheppard, 1941 J.C.67; Macpherson, Edinburgh High Court, Sept. 1940, Unrep.; cited in Sheppard at P.71.

their methods of detection are so high that resort to violence is not normally necessary.

Superior Orders

The question arises whether killing in obedience to orders of a superior officer will fall within section 249(3). In Scotland it would seem that a soldier who kills in the honest belief that he is executing a superior's order will not be convicted of murder.[1] In H.M.A. v. Sheppard,[2] the accused, a soldier, was instructed to guard a deserter and to shoot him, if necessary, to prevent his escape. The prisoner tried to escape and the accused killed him. He was charged with culpable homicide, but his defence that he was acting in the course of his duty was upheld.

No Sudanese cases of killing in obedience to superior orders can be traced, but in India it has been held that the accused's conviction will not be reduced to culpable homicide because the act will not be deemed to have been done in 'good faith'.[3] It is submitted that this may be so where the order is "obviously illegal or improper",[4] or where it is "so flagrantly and violently wrong that no citizen could be expected to obey it".[5] In all other cases the accused's act should be within the provisions of section 249(3), provided he honestly believes that he is under a duty to obey the order even if it be illegal.

> "It is bad public policy to encourage soldiers to disobey orders because they think them improper. And looked at from the point of view of the individual soldier or policeman it is unfair to train a man into automatic obedience, and then to penalize him for acting in the way the state itself has trained him to act."[6]

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(1) Hawton and Parker (1861) 4 Irv.58; Macpherson, Edinburgh High Court, Sept. 1940, Unrep.; see Gordon 393.
(2) 1941 J.C.67.
(3) Subba Naik v. Emperor (1898) I.L.R.21 Mad.249; Allahrakio v. Emperor, A.I.R. (1924) Sind 23.
(4) Gledhill, 482.
(5) Lord Justice-General M'Neill in Hawton and Parker, supra, at Pp.71-72.
(6) Gordon, 391.

Degree of Violence in Lawful Acts

A public servant doing an act which is lawful and necessary for the execution of his duty is expected to use force only when necessary, and with adequate moderation. In the Sudan different provisions and ordinances lay down restrictions on the amount of force necessary, particularly with regard to the use of firearms. Section 30, C.C.P., provides that a person authorised to effect an arrest may use "all means necessary to do so" provided that this does not extend to the causing of death unless the person to be arrested is accused of an offence punishable with death or up to ten year's imprisonment. Section 43 of the Police General Regulations, 1928, lays down the circumstances under which policemen may use firearms in effecting an arrest. Paragraph (4) of the same section provides that in doing so, a policeman must aim at the legs of the person to be arrested. The Prison Regulations of 1948 provide similar conditions in relation to prison staff. In S.G. v. Ali Abdulla Gumaa,[1] a policeman fired at a prisoner escaping from arrest, aiming at his head, and killed him. It was held that he was guilty of culpable homicide under section 249(3) for having exceeded the powers given to him by law under sections 30, C.C.P., and 43 of the Police General Regulations. In confirming the finding, Creed, L.S., said:

> "Reckless killing and use of firearms by the police cannot be tolerated, and if allowed will lead to serious consequences in the relations between the police and the public ...."

In conclusion, it may be said that section 249(3) is working satisfactorily in practice. Cases decided under it are relatively very few.

IV. Homicide in a Sudden Fight

It has previously been mentioned that where a person starts a fight or where two per-

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(1) AC.CP.113.1942, Unrep.

sons voluntarily agree to fight, neither of them can plead self-defence, provided the nature of the fight has not so changed as to put the survivor in a position of defence.[1] However, such persons may escape a conviction for murder under the provisions of section 249(4):

> "Culpable homicide is not murder if it is committed in sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner."

An Explanation to the subsection adds:

> "It is immaterial in such case which party first provokes the other or commits the first assault."

The subsection applies to those cases where a sudden quarrel leads to a fight in which one of the parties is killed, and the evidence does not clearly establish where the blame for the progress of the fight lies or how the fatal blow was struck. Both parties are, to some extent, responsible for bringing about the fatal consequences and the survivor is therefore not to be treated as a murderer.

The Explanation distinguishes the subsection from the pleas of self-defence and provocation. As already explained,[2] the plea of provocation will not succeed if the accused sought or provoked the provocation, and the plea of self-defence will be of no avail to a person who commits the first assault. The Explanation makes it clear that section 249(4) may be invoked even where the accused seeks the provocation or strikes the first blow. The exclusion of the plea of provocation in a situation where section 249(4) may be invoked is demonstrated in S.G. v. Gulail Said.[3] A fight broke out between two parties, following a verbal altercation, in which injuries were sustained on each side. The trial court convicted all accused of causing grievous hurt

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(1) Ch.V, supra.
(2) Supra.
(3) AC.CP.308.1943, Unrep.

under provocation. Bennet, C.J., rejected the court's finding that there was provocation on both sides as an 'impossibility'. He continued:

> "Both sides to a fight can never claim grave and sudden provocation. The Court has found, and I think rightly, that both sides entered freely into the fight and attacked each other simultaneously, that being so, section 38 Sudan Penal Code deprives each of them of the right of relying on mutual provocation engendered by the fight. No doubt, if either had been killed, the killer could have relied upon section 249(4)."

Thus, section 249(4) can be relied upon in those cases where the plea of provocation is not available. Again, despite the provision in section 249(4) that the accused must have acted 'in the heat of passion', the provocation need not be:

> "necessarily sufficient to deprive the offender of self-control but sufficient to befog his reason so that he does things he would not do if in full control of his faculties; there must be mutual aggravation so that it is difficult to apportion the blame between the two combatants."[1]

Consequently, if the other requirements of the subsection are satisfied, the accused need not prove loss of self-control in the same way as he would have done had he pleaded section 249(1).

The subsection is also distinguished from section 249(2) in so far as, unlike the latter, it would reduce the offender's guilt to culpable homicide despite the fact that he may have been responsible for the incident by striking the first blow. "The true import of the Explanation to Exception 4" it was pointed out in India,[2]

> "is that the fact that the accused committed the first assault will not in such circumstances deprive him of the benefit of the Exception. In other words, his being responsible for the first assault in the fight and thus for the entire incident will not aggravate the offence against him because the want of premeditation, the suddenness of the incident, heated passion and his not taking unfair advantage

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(1) Gledhill, 483.
(2) Verma, J., in Abdul Razzag v. State, A.I.R.(1960) All.567 at P.568.

> do not put him at par with one who deliberately commits the murder of another with the intention or knowledge contemplated in S.300, I.P.C."

The position relating to killing in a sudden fight is not as clearly dealt with in England or Scotland. However, it appears that, in circumstances such as those in section 249(4), the accused will be convicted of manslaughter in England[1] on grounds of provocation, and of culpable homicide in Scotland on grounds of provocation or 'self-defence in a quarrel'.[2] However, subsection 249(4) is an improvement on the laws of England and Scotland because it avoids the inconsistency of reducing the crime on the grounds of provocation or self-defence in situations where both pleas may be inapplicable either because the accused sought the provocation or because he struck the first blow. However, the consequences under all three systems are the same, i.e., reduction of the offence from murder to culpable homicide or manslaughter. Having distinguished section 249(4) from self-defence and provocation, the actual requirements of the subsection will now be considered. They are as follows:

(1) There must be a 'sudden fight' from a 'sudden quarrel'. The occasion must be sudden in the sense that there was no premeditation and that the accused does not use the opportunity as a cloak for pre-existing malice. 'Premeditation' may be proved by evidence of

> "previous grudges or previous threats or expressions of ill-feelings, by acts of preparation to kill, such as procuring a deadly weapon, or selecting a dangerous weapon in preference to one less dangerous, and by the manner in which the killing was committed."[3]

In an Indian case it was stated that for a killing to be premeditated:

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(1) R. v. Snow (1776) 1 Leach, 151; Whiteley (1829) 1 Lew.173; Lynch (1832) 5 C. & P.324; Thomas (1837) 7 C. & P.817; the old English plea of 'Chance Medley' under which killing in a fight was excused is now obsolete. Cases falling under it will now be considered in the light of Mancini, Holmes and Semini, supra.

(2) Hume, i, 222; Kizileviczius, 1938 J.C.60.

(3) Nelson, R.A., The Indian Penal Code (Allahabad, 1966) vol.II, P.1541.

> "the accused should have reflected with a view to determine whether he would kill or not and that he should have determined to kill as a result of the reflection; that is to say that the killing should be a premeditated killing upon consideration and not a sudden killing under the momentary excitement and impulse of passions upon provocation given at the time or so recently before as not to allow him time for reflection."[1]

The subsection will therefore not apply to 'duelling' or where, after a verbal quarrel, the parties agree to go out somewhere and settle their grievance over a fight.[2] The Sudan courts, however, seem to have taken a broad view of such situations. Thus, in S.G. v. Attiya Tonga,[3] D went to A's house to have sexual intercourse with A's wife. A realised the purpose of D's visit and armed himself with a knife and a stick and challenged D to a fight. D, who was similarly armed, agreed, and they went some distance in the open and started a fight in which A killed D. A was convicted of culpable homicide because "This is not a case where the parties met, and then parted, prepared themselves for a fight and then fought".[4] Lindsay, C.J., added that the courts took a broad view of section 249(4) and distinguished the case from a 'duel' where "deliberation ensues before it takes place".

Since the subsection requires that there must be a 'fight' as well as a 'quarrel', it follows that it will not apply if one of the parties picks up a deadly weapon and kills the other after verbal abuse, the reason being that in such a case there is no 'fight' within the meaning of the subsection.[5] The word 'fight' is not defined in

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(1) Nga Chit Tin v. The King, A.I.R. (1939) Rangoon 225; Cf. Kirpal Singh v. The State, A.I.R. (1951) Punjab 137.
(2) Gledhill, 483; Mayne, op.cit., 503; see also Rohimuddin v. Emperor, (1897) I.L.R. 5 Cal.31; the same rule is perhaps applicable in English law: Hale, i, 453; R. v. Oneby 17 St.Tr.29.
(3) AC.CP.83.1952, Unrep.; see also S.G. v. Abdel Rahman ElBeshir, AC.CP.5.1951, Unrep.
(4) Ibid, per Abu Rannat, J.
(5) Gledhill, 483; Mayne, op.cit., 502; Gour, op.cit., 1998.

the Code, but its use in the subsection as distinct from 'quarrel' would imply that there must at least be an exchange of blows or some form of violence - though not necessarily the use of a weapon. In the recent case of S.G. v. Awadalla Medani Ahmed[1], Salah Hassan, J., adopted Gour's[2] view that a fight is

> "at least an offer of violence on both sides. It implies mutual provocation and blows on each side upon which the conduct of both parties puts them in respect of guilt upon an equal footing."

However, it should be pointed out that Salah Hassan, J., incorrectly implied that section 249(4) was wider than the corresponding Indian provision[3] because the section included the 'additional' words 'upon a sudden quarrel'[4]. This is not so, because section 249(4) is a verbatim reproduction of Exception (4) of section 300, I.P.C.

Again, since the Explanation to section 249(4) expressly states that it is immaterial who struck the first blow, it follows that the accused need not wait until he is struck before he can successfully invoke the subsection. In the words of Creed, L.S.:

> "in order to become a fight it is not necessary for him (i.e., the accused) to wait to be hit. In a fight a sensible man does not wait for the other man to get in the first blow ...."[5]

(2) The accused must have acted in the 'heat of passion', i.e., it must be shown that the accused's passions were aroused at the time of the act and that he killed the de-

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(1) (1967) S.L.J.R.56 at P.57.
(2) Gour, op.cit., 1998; Cf. Public Prosecutor v. Somasundaram, A.I.R.(1959) Madras, 323. However, in Hans Raj v. Emperor, A.I.R.(1946) Lah.41, it was stated that to constitute a 'fight' within the section no blows need be exchanged and that "A word or gesticulation may be as provocative as a blow", ibid, at P.43. It is doubtful whether verbal abuse can be said to constitute a 'fight'. Such situations would more properly fall under provocation in section 249(1).
(3) Exception (4), section 300, I.P.C.
(4) (1967) S.L.J.R.56 at P.57.
(5) S.G. v. Siddig Alim, AC.CP.319.1945, Unrep.

ceased in a fit of rage. In Nelson's[1] dramatic words:

> "The parties may be borne, as it were, on the waves of the ocean of passion and if the weather is rough and the sea inclement only the fittest can survive."

As in provocation, the subsection will not apply if an adequate period of time has elapsed before the killing takes place, as, for example, where the accused goes to his house to fetch a weapon and returns to kill the deceased,[2] or where the parties are separated and the fight ends and then the accused makes a fresh attack on the deceased.[3] However, the question is one of fact and an accused may still be within the protection of the subsection if a short period of time has elapsed, provided that the killing is done before he has in fact cooled down.

(3) Even if the other conditions are satisfied, the subsection will not apply if the accused takes an 'undue advantage' or acts in a 'cruel or unusual manner'. This is also a question of fact to be determined from the nature and progress of the fight, the weapons used and the injuries inflicted. Thus, where all the persons in a fight used sticks, a person who drew a knife and stabbed another in the back was convicted of murder because:

> "The section is not just intended to be a universal licence to commit murder whenever there is a sudden fight."[4]

The Confirming Authority[5] went on to agree with Gour's[6] opinion that the subsection was available to persons who observed the rules of chivalry:

> "which required adversaries to deliver a challenge, to measure their swords

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(1) Nelson, op.cit., 1545.
(2) Gledhill, 483; S.G. v. Abdulla Mohammed Ali, AC.CP.321.1951, Unrep.; Cf. Hale, i, 453; R. v. Selten (1871) 11 Cox 674; R. v. Lynch (1832) 5 C. & P.324.
(3) Lindsay, C.J., in S.G. v. Gumaa Shamie Kafrein, AC.CP.26.1951, Unrep.
(4) B. Awadalla, J., in S.G. v. Awad Adam Omer (1961) S.L.J.R.75 at P.77.
(5) Ibid.
(6) Gour, op.cit., 2001.

> before deigning to strike, which scorned the hitting of an adversary unawares when placed at an advantage."

The subsection will not apply if the accused uses a deadly weapon against an unarmed man,[1] or slays him in circumstances which show that his conduct was completely uncalled for.[2]

In practice, the tendency of the courts has been to give the accused the benefit of the subsection unless his act clearly shows an intention to kill his adversary.[3] In S.G. v. Ahmed Mohammed ElKelban,[4] the deceased, following upon a sudden quarrel, seized the accused's whip and hit him with it. The accused then drew his knife and stabbed the deceased to death. He was convicted of murder for having taken an 'undue advantage'. On confirmation, Lindsay, C.J., substituted a conviction for culpable homicide under section 249(4). He said:

> "Based on past precedents - subsection 4 is fairly benevolently interpreted by the Court in practice ... . The accused in fact behaved as ninety per cent of the people in his community would have behaved in the circumstances and to the reasonable man I doubt whether the impulsive use of the knife in retaliation against the whip was takingan undue advantage within the meaning of the section or acting in an unfair manner."

In English law the requirement of undue advantage seems to relate to the beginning of the fight rather than to the way it progressed, i.e., if the fight starts on equal terms and, in the course of it, the accused picks up a deadly weapon and kills the deceased, the offence will be manslaughter.[5] This would appear to go beyond section 249(4) under which such a case may be treated as one of undue advantage. However,

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(1) Narayanan v. State, A.I.R. (1956) S.C.99.
(2) Khair Din v. Emperor, A.I.R. (1931) Lah.280.
(3) S.G. v. Wagialla Suleiman, AC.CP.48.1944, Unrep.; S.G. v. Siddig Alim, AC.CP. 319.1945, Unrep.; S.G. v. Hassan Salim, AC.CP.215.1952, Unrep.
(4) AC.CP.67.1954, Unrep.
(5) R. v. Snow (1776) 1 Leach 151; Whiteley (1829) 1 Lew 173; Lord Tenterden, C.J., in Lynch (1832) 5 C. & P.324; Parke, B., in Kirkham (1837) 8 C. & P.115.

the distinction is more apparent than real as is shown by S.G. v. Walli Saeed Mohammed.[1] A fight broke out between A and D after a sudden quarrel. Both A and D wore knives but they fought with bare hands. A suddenly drew his knife and killed D. The trial court convicted A of culpable homicide under section 249(4) by a majority decision. In a dissenting opinion, the President of the court thought that A should have been convicted of murder for having taken undue advantage, because the fight was a fist fight and the accused could have at most used the stick which he had also been carrying. On confirmation, Soni, J., agreed with the opinion of the President. But El Nur, J., upheld the decision of the majority, relying on the English decisions in Whiteley,[2] Lynch[3] and Kirkham,[4] where it was held that if the parties fight on equal terms the subsequent use of a lethal weapon in the course of the fight would still be manslaughter. The opinion of the President that A could have used his stick was rejected because

> "In that heat of blood a man cannot be expected to select his weapon or compare between the effect of various weapons accessible to him so as to use the one appropriate to the attack he was repelling."

This was upheld by Abu Rannat, C.J., on the ground that the deceased was also armed with a knife and the accused succeeded in drawing his knife first. This view is preferable to ElNur's opinion which appears to extend the 'undue advantage' provision somewhat extremely.

(4) It is submitted that a final requirement of section 249(4) is that it would not apply where the deceased is a public servant exercising his lawful duties. The subsection does not expressly so provide as do sections 38 and 60, S.P.C., dealing with

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(1) AC.CP.198.1955, Unrep.
(2) Supra.
(3) Supra.
(4) Supra.

provocation[1], and self-defence[2]. Such limitation on section 249(4) can be implied by analogy with the latter sections and this has indeed been decided in some cases. Thus, in S.G. v. Gibril Mohammed[3], A killed a policeman who was exercising his legal duties. The court convicted A of culpable homicide under section 249(4). But on confirmation, Creed, Acting C.J., sent the case back for reconsideration of finding because A should have been convicted of murder. He said:

> "A policeman lawfully carrying out his legal duties is a personification of the law, and a man can no more have a 'sudden quarrel' or a 'sudden fight' with him than one can have a 'sudden quarrel' or a 'sudden fight' with the law itself."

In the earlier case of S.G. v. Mansour Abdel Gawi[4], it was held that there can be no question of a sudden fight when the accused killed in resisting arrest. However, as was further stated by Creed, Acting C.J., in Gibril Mohammed[3], the position is not the same if the policeman is acting 'unlawfully' because he then ceases to personify the law.

V. Homicide Upon Consent

A. - Consent in cases other than Homicide

Section 51, S.P.C., provides:

> "No act is an offence by reason of the injury it has caused to the person or property of any person who, being above the age of eighteen years, voluntarily and with understanding given his consent express or implied to that act.
>
> "Provided that this section shall not be applicable to acts which are likely to cause death or grievous hurt, nor to acts

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(1) Supra.
(2) Ch.V, supra.
(3) AC.CP.220.1944, Unrep.; Cf. S.G. v. Khamis Suleiman Gumaa, AC.CP.225.1944, Unrep.
(4) AC.CP.7.1943, Unrep.

> which constitute offences independently of any injury which they are capable of causing to the person who has given his consent or to his property."

The section incorporates the principle of volenti non fit injuria exempting from liability acts done with the consent of the injured person, the latter being over the age of eighteen years. It includes also situations where the consent is implied, such as games of sport like wrestling, boxing, soccer, etc., where consent to run the risk of hurt, which is normal in the nature of such games, is implied.[1]

The proviso to the section excludes cases where the accused's act constitutes an offence independently of the injury,[2] or where it is 'likely' to cause death or grievous hurt. The section would nevertheless apply where death results by mere accident or chance in such circumstances that it was not 'likely' to occur.[3]

Again, no offence is committed if the deceased dies in the course of a surgical operation to which he has consented, provided it is performed with reasonable care and skill,[4] the reason being that such operation is deemed necessary for the purpose of safeguarding the patient's life.

B. - Consent in Cases of Homicide

Section 249(5), S.P.C., provides:

> "Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

In explaining the reason for treating homicide upon consent differently from murder

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(1) Illustration to section 51, S.P.C.; for English law see R. v. Donovan (1934) 2 K.B.498; Archbold, op.cit., 980; for Scotland, see Gordon, 774.

(2) e.g., where the accused causes a woman illegally to miscarry, her consent will not affect his liability under section 262, S.P.C., although it may relieve him of liability for the assault; Cf. Gordon, 773-774.

(3) S.G. v. Fastino Modi (1963) S.L.J.R.65; Cf. Williams, G., "Consent and Public Policy", (1962) Crim.L.R.74 at P.81; Gordon, 747-748.

(4) Illustration (c), section 48, S.P.C.

the authors of the I.P.C. said:[1]

> "In the first place the motives which prompt men to the commission of this offence are generally more respectable than those which prompt men to the comission of murder. Sometimes it is the effect of a strong sense of religious duty, sometimes of a strong sense of honor, not unfrequently of humanity. The Soldier who, at the entreaty of a wounded comrade, puts that comrade out of pain, the friend who supplies laudanum to a person suffering the torment of a lingering disease, the freedman who in ancient times held out the sword that his master might fall on it, the high-born native of India who stabs the females of his family at their own entreaty in order to save them from the licentiousness of a band of marauders, would, except in Christian societies, scarcely be thought culpable, and even in Christian societies, would not be regarded by the public, and ought not to be treated by the law, as assassins.
>
> "Again, this crime is by no means productive of so much evil to the community as murder. One evil ingredient is altogether wanting to the offence of voluntary culpable homicide by consent. It does not produce general insecurity. It does not spread terror through society. When we punish murder with such signal severity, we have two ends in view. One end is that people may not be murdered. Another end is that people may not live in constant dread of being murdered. This second end is perhaps the more important of the two. For if assassinations were left unpunished the number of persons assassinated would probably bear a very small proportion to the whole population. But the life of every human being would be passed in constant anxiety and alarm. This property of the offence of murder is not found in the offence of voluntary culpable homicide by consent. Every man who has not given his consent to be put to death is perfectly certain that this latter offence cannot at present be committed on him, and that it will never be bommitted, unless he shall first be convinced that it is his interest to consent to it."

The Second Indian Law Commission[2] approved of the above observations and when the I.P.C. was finally enacted Lord Macaulay's provision[3] relating to homicide upon consent was made the subject of Exception 5 to section 300, I.P.C., with the significant

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(1) The Indian Law Commission, 1837, Note M, P.61.
(2) 1846, First Report, para.294.
(3) Article 298 of the draft I.P.C., 1837.

change that the age of the person consenting should be eighteen instead of twelve years.[1] This was copied into the S.P.C. as section 249(5), the ingredients of which will now be examined.

Nature of the Consent

The definition of the word 'consent' is provided in section 39, S.P.C. It reads:

> "A consent is not such a consent as intended by any section of this Code, if the consent is given by a person under fear of injury or under a misconception of fact, and if the person doing the act knows or has reason to believe that the consent was given in consequence of such fear or misconception; or if the consent was given by a person who from unsoundness of mind or intoxication is unable to understand the nature and consequences of that to which he gives consent; or
> if the consent is given by a person who is under fourteen years of age."

Thus section 249(5) would not apply unless the consent is freely given and the deceased is fully aware of the nature of the act to which he is consenting. There must be no fraud or duress in obtaining the consent.[2] In S.G. v. Ajuko Oluwa,[3] an ordeal in accordance with tribal custom was prepared to discover female poisoners. It consisted of giving the women a potion prepared by the accused to drink, the idea being that those who were innocent would vomit the potion and live, and those who were not would perish. Several women died as a result. The accused was convicted of murder because the women drank the potion to conform to custom or to prove their innocence, but not to suffer the risk of death.[4] In another case, Creed, Acting C. J., pointed out that:

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(1) However, in Masum Ali v. Emperor, A.I.R. (1929) Lah.50, the Exception was held to apply where the consenting victim was only sixteen. It is submitted that the decision is incorrect for contradicting the express provisions of the section.

(2) Gordon, 776-777; R. v. Bennet (1866) 4 F. & F.1105; R. v. Sinclair (1876) 13 Cox 28.

(3) AC.CP.189.1932, Unrep.

(4) The case was sent back for revision of finding but the trial court again convicted of culpable homicide, and the case had to be confirmed.

> "it must always be borne in mind that for an offence to fall within section 249(5) there must be a deliberate consent, in the full meaning of the word, and not a mere acquiescence. There must be a deliberate cold-blooded decision on the part of the deceased to take the risk of death ...."[1]

In the Indian case of Poonai Fattemah,[2] the accused, a snake-charmer, persuaded the deceased that if he got bitten by a snake the accused would cure him by an antidote. The deceased submitted to this and died. It was held that the accused was guilty of murder because the deceased's consent was given under a misconception of fact. Finally, for section 249(5) to apply, the age of the victim must be at least eighteen although consent of a person of fourteen or above is, under section 39 of the Code, adequate for the purposes of general criminal responsibility.

Types of Situations under Section 249(5):

(1) Duelling

The question arises whether the subsection covers persons who arm themselves and agree to fight and one of them is killed. The original draft of the I.P.C. expressly stated that duelling fell within the subsection. But although this provision was omitted from the Code, the second Indian Law Commission was of opinion that duelling fell within the provision 'suffers death or takes the risk of death' in the subsection.[3] This was also the opinion of the witnesses before the R.C.C.P. of 1866.[4] Writers on the Codes, however, differed on the question. Mayne[5] alone maintains that the subsection covers duels, while Ratenlal,[6] Gour[7] and Gledhill[8] hold the contrary view.

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(1) S.G. v. Dud Boli, AC.CP.221.1946, Unrep.
(2) (1869) 12 W.R.7, see Gledhill, 486; Cf. S.G. v. Suleiman Hassan, AC.CP.212. 1942, Unrep.
(3) See the Indian Law Commission, 1846, First Report, para.290; see also the English Criminal Law Commissioners, Second Report, B.P.P., 1846, vol. xxiv, note to Article 16 of the Digest.
(4) B.P.P., 1866, vol. xxi, Minutes of Evidence, Stephen, Q.2117, Sir Mordaunt Wells, Q.3604.
(5) Mayne, op.cit., 504.
(6) Ratenlal, op.cit., 787 - 788.
(7) Gour, op.cit., 2006.
(8) Gledhill, 485.

Indian courts[1] seem to have preferred the latter, while the Sudan courts[2] have followed Mayne. It is submitted that this is the better view because, although when two parties agree to have a duel neither in fact consents to be killed, and each tries to avoid being killed, fighting a duel includes an inherent risk of death, and the accused may very well have been the deceased, and the latter the accused. Further, the subsection is not confined to cases where a person consents to be killed but extends to cases where he suffers the risk of death, and by agreeing to fight a duel a person surely takes such risk. As Mayne puts it[3]:

> "A man consents to death when the infliction of it is a friendly proceeding, which he authorizes. He takes the risk of death when it is a hostile proceeding, which he neither consents to nor authorizes, but which he foresees as the possible termination of a conflict on which he is determined to enter."

Section 249(5) constitutes a significant departure from the laws of England and Scotland, neither of which recognises any category of homicide by consent. As a result killing in a duel or where the parties agree to have a fight would in both countries fall under the definition of murder.[4]

(2) Euthanasia

The observations of the authors of the I.P.C., quoted above,[5] show that section 249(5) applies to cases of mercy killing where a person suffering from a painful and mortal disease or injury consents to his life being terminated by the accused. Such rule

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(1) Empress v. Rohimuddin (1879) I.L.R. 5 Cal.31; Queen Empress v. Nyamuddin (1892) I.L.R. 18 Cal.484. The latter case overruled Shamshere Khan v. Emperor (1881) I.L.R. 6 Cal.154, where it was held that the Exception applied to duels, thus, in turn, overruling Rohimuddin, supra.

(2) S.G. v. Mogo Kano, AC.CP.214.1938, Unrep.; S.G. v. Abdel Rahim Hamid, AC.CP. 22.1941, Unrep.; S.G. v. Dud Boli, AC.CP.221.1946, Unrep.; but see also Abu Rannat, C.J., in S.G. v. Yassin Karada Eisa (1956) S.L.J.R.33 at Pp.34-35.

(3) Mayne, op.cit., 507.

(4) R. v. Young (1838) 8 C. & P.644; R. v. Cuddy (1843) C. & K.210; Hume, i, 230-232.

(5) Supra.

is unknown in the U.K. and cases of 'mercy-killing' would strictly fall under the definition of murder.[1] The R.C.C.P.[2] rejected proposals to take such killings out of the category of murder, and preferred that they should continue to be dealt with under the Prerogative of Mercy. It expressly rejected a proposal to adopt Exception (5), section 300, I.P.C., on the ground that it "would be open to grave objections and would reverse a long-established principle of our law".[3]

Closely connected with the question of mercy-killings is the topical subject of 'Voluntary Euthanasia' which consists of the efforts to introduce legislation to make mercy-killing by doctors completely justifiable. Such efforts have for a very long time been made in the U.K. and elsewhere, but have always met with formidable opposition.[4] Recently, the House of Lords rejected the Voluntary Euthanasia Bill, 1969, a private members' Bill to legalise euthanasia. Advocates of the introduction of such legislation argue that a person suffering from a hopelessly incurable disease should be spared the agony of unnecessary pain by allowing doctors to terminate his life if he freely consents to that. Such persons, it is said, lead a 'vegetable existence' and life to them becomes so worthless that they must be enabled to choose to bring it to an end.

On the other hand, the religious objection is given that life belongs to God alone and that a person cannot consent to ending his own life in the same way as he cannot take another's life. It is also objected to on moral grounds that such a law would

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(1) Article 38(2), Stephen's Digest; R. v. Paine, The Times, February, 25, 1880; H.M.A. v. Rutherford, 1947 J.C.1; in the evidence before the R.C.C.P., Lord Cooper was of the opinion that such cases would be charged as culpable homicide, while Lord Keith saw no reason why they should not be charged as murder, Minutes of Evidence, Lord Cooper, Q.5428; Lord Keith, Q.5186.

(2) Cmd.8932, Para.180.

(3) Ibid, para.175; however, in 1846 the English Criminal Law Commissioners approved of the opinions of the authors of the I.P.C. and recommended that such killings should fall within 'Extenuated homicide', Second Report, B.P.P., 1846, vol.xxiv, note to Article 14 of the Digest.

(4) For a detailed discussion of the subject see Williams, G., Sanctity, op.cit., Pp.272-312.

be open to abuse in so far as it would be most difficult to prove that the patient has given his free consent or whether the disease is curable or not. It is further argued that there may be a possibility that the diagnosis was wrong and, even if it was not, the progress of modern science and research may enable the discovery of ways for curing the disease. In a recent editorial, The Times[1] had this to say about the objections to voluntary euthanasia:

> "To the Christian of traditional views, for whom human life, whether a man's own or another's, is not at his disposal but in God's hands, this proposal is immoral and unacceptable. And so it is from the standpoint of an absolute morality which condemns the taking of innocent human life in any circumstances, though without relating this imperative to any religious scheme."

The difference between the provision in section 249(5) and the attempts to legalise euthanasia is that the former treats mercy-killing as culpable homicide, whereas the latter aims at making such killing completely justifiable. Further, the legalisation of euthanasia is to protect the taking of life by medical men only, whereas section 249(5) is of general application. It is submitted that the legalisation of voluntary euthanasia in the Sudan would meet with more formidable objections than the above. Islamic teachings are strongly against such an idea and the general public perhaps conforms more to those teachings than do Europeans to Christianity. Further, a social structure based on closed communities, extended families and an extreme willingness to care and provide for distant relations even if they are sickly and dying, is less likely to accept the taking of life on such sophisticated grounds. This, perhaps, is the reason why section 48, S.P.C., while declaring that nothing is an offence by reason of the injury it may cause if done without any criminal intention for the purpose of preventing other injury to the person, proceeds to state that "The

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(1) The Times, March 24, 1969

death of a person shall under no circumstances be deemed to be for the benefit of that person".[1]

However, in conclusion it may be said that if and when the time comes for the Sudan laws to legalise voluntary euthanasia, section 249(5) would be found to have been a step in the right direction.

(3) Suicide Pacts

Until recently suicide in English law was a felony known as 'self-murder', and a person who abetted another in committing suicide or the survivor of a 'suicide pact' was held guilty of murder. This proved unsatisfactory and the question was considered by the R.C.C.P., which was of opinion that

> "if two people agree to end their lives together and one is unsuccessful in the attempt, it is neither just nor humane that the survivor, who may often be deserving of pity rather than punishment, should be put on trial for murder."[2]

They recommended the creation of an offence of 'aiding and abetting suicide' so that a person who killed another in pursuance of a suicide pact should not be convicted of murder.[3] Their recommendations were implemented in section 4 of the Homicide Act, 1957, which provides that a person who kills another or is a party to the killing of another in pursuance of a suicide pact shall be guilty only of manslaughter.[4] Further, under the Suicide Act, 1961, suicide is no longer a crime, but section 2 of the same Act punishes with up to fourteen year's imprisonment a person who aids or abets the suicide of another. The distinction between the two Acts is that the 1961

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(1) Section 48, S.P.C., para.(iv); emphasis supplied.
(2) Cmd.8932, para.170.
(3) Ibid, para.174.
(4) Section 4(3) of the Act defines a 'suicide pact' as "a common agreement between two or more persons having for its object the death of all of them, whether or not each is to take his own life, but nothing done by a person who enters into a suicide pact shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact."

Act applies to the case of a person who instigates or helps another to commit suicide, whereas the Act of 1957 deals with those cases where death results from a suicide pact whether the accused has himself killed the deceased or procured a third party to do so.

Although suicide is not a crime in Scotland, the position in connection with abetment of suicide or suicide pacts is not very clear, because neither the Suicide Act nor section 4 of the Homicide Act extends to Scotland. However, a person who aids or abets the suicide of another may be guilty of murder 'art and part', although this is unlikely to occur in practice, and the conviction may only be for culpable homicide.[1] The question of suicide pacts has not been dealt with in recent cases, but it has been stated that the survivor of such a pact would be convicted of culpable homicide.[2] On the other hand, it has been suggested that since suicide is not a crime, the survivor of such a pact should not be guilty of any offence at all.[3] Professor Gordon[4] accepts the view of the R.C.C.P.[5] that where the survivor had himself killed the deceased, the offence should be murder. He goes on to state that even in other situations the survivor may still be convicted, for example, he may be guilty by omission where he owed a legal duty to the protection of the deceased. The question, however, remains open and the courts may sometime be called upon to decide it.

The position under the S.P.C. is very clear. Under section 261, attempt to commit suicide is an offence punishable with imprisonment for up to one year or with fine or both. Abetment of suicide is also distinctly provided for in sections 257 and

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(1) Smith, T.B., The British Commonwealth, U.K., Scotland, P.739; Gordon, "Suicide Pacts", 1958 S.L.T.(News) 209.
(2) R.C.C.P., Minutes of Evidence, Lord Cooper Q.5428; The Crown Agent, Q.1888; Gordon, 712; Smith, T.B., "Capital Punishment", 1953 S.L.T.(News), 197 at P.198.
(3) R.C.C.P., Cmd.8932, para.167; Williams, G., Sanctity, op.cit., 270; N.G., "Legal Aspects of Suicide", 1958 S.L.T.(News)141 at P.144.
(4) Gordon, "Suicide Pacts", 1958 S.L.T.(News)m 209.
(5) Cmd.8932, para.167.

258 of the Code. The survivor of a suicide pact falls under section 249(5) whether or not he himself killed the deceased.[1] This must obviously be so because the distinction between abetment of suicide and suicide pacts is that in the latter the accused takes a more active part in killing the deceased. As Gledhill[2] points out:

> "If A and B conspire to cause the death of B by poison and, in pursuance, A buys the poison and administers it to B, A is guilty of culpable homicide by consent but if B takes the poison himself, A is guilty of abetment of suicide."

It would therefore appear that section 4 of the Homicide Act and section 2 of the Suicide Act have brought English law into conformity with the provisions of the S.P.C.[3] It remains to be seen whether the same modifications will be brought into Scots law. It also remains to be seen whether the Sudan law will be brought into line with English and Scots law by ceasing to punish attempted suicide.

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(1) Gledhill, 485; Cf. Abu Rannat, C.J., in S.G. v. Yassin Karada (1956) S.L.J.R. 33 at P.34; Ujagar Singh v. Emperor, A.I.R. (1918) Lah.145; Dashrath Pathwan v. State, A.I.R. (1958) Patna 190.

(2) Gledhill, 500.

(3) However, the punishment for abetment of suicide in English law extends to 14 years, whereas under section 258, S.P.C., it is a maximum of 10 years. But section 257, S.P.C., goes further than English law by extending the punishment to death or life imprisonment if the deceased be a person under eighteen, an idiot, an insane or an intoxicated person.

CHAPTER VII

UNLAWFUL HOMICIDE SHORT OF CULPABLE HOMICIDE

It has already been mentioned[1] that the S.P.C. recognises three categories of unlawful homicide[2] which fall short of the definition of culpable homicide under section 246. It has also been stated that in the U.K. there is no equivalent discrimination in favour of such additional categories. Instead, all forms of homicide short of murder, apart from voluntary culpable homicide (and infanticide in England), are grouped together under involuntary culpable homicide (or manslaughter). The latter is a vague term which is described negatively as a form of unlawful or criminal homicide falling short of the definition of murder.[3] In the words of Lord Atkin:[4]

> "... of all crimes (involuntary) manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions ... the law ... recognizes murder on the one hand, based mainly, though not exclusively on an intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on the absence of intent to kill, but with the presence of an element of unlawfulness which is the elusive factor."

It must be admitted that the S.P.C. itself includes no definition of the requisite *mens rea* for involuntary culpable homicide. Nevertheless, the difficulty under the Code is less formidable than it is in England or Scotland because the Code simplifies the category of involuntary culpable homicide by excluding from its ambit those forms

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(1) Ch. IV, supra.
(2) Sections 254, 255 and 256, S.P.C.
(3) Kenny, 179; Russell, 562; Smith and Hogan, op.cit., 215; Gordon, 733.
(4) *Andrews v. D.P.P.*, 1937 A.C.576 at P.581; see also Widgery, L.J., in *R. v. Lipman* (1969) 1 Q.B.152 at Pp.158-159.

of unlawful homicide which form the subject of the present Chapter, whereas in the U.K. involuntary culpable homicide is treated in such extensive terms as to include all the abovementioned forms of unlawful homicide.

On the other hand, although the position under the Code is comparatively simple and clear, it is by no means completely satisfactory. The courts continue to face the difficulty of determining whether a case falls within the definition of culpable homicide under section 246 or whether it falls within the definition of one or other of the additional three offences. The content of the latter and the extent to which they differ from culpable homicide will now be dealt with.

I. Negligent Homicide

The authors of the I.P.C. were of opinion that separate provision must be made for the punishment of the negligent or rash causing of death.[1] As a result, Clause 304 of the draft Code provided:

> "Whoever causes the death of any person by any act or illegal omission, which act or omission was so rash or negligent as to indicate the want of due regard for human life, shall be punished with imprisonment ... ... for a term which may extend to two years or fine or both."

The Second Indian Law Commission[2] approved of this Clause, but, for no apparent reason, the Clause was not inserted into the I.P.C. when it was finally passed. However, an amandment to the Code in 1870[3] added the present section 304-A which reintroduced the above Clause in slightly different terms. Exactly the same provisions of section 304-A were included in section 256, S.P.C. It provides:

> "Whoever causes the death of any person by doing any rash or negligent act not

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(1) The Indian Law Commission, 1837, Note M, P.63.
(2) The Indian Law Commission, 1846, First Report, paras. 309-320.
(3) Act XXVII of 1870, section 12.

> amounting to culpable homicide shall be punished with imprisonment for a term which may extend to two years or with fine or with both."

The section thus creates a distinct offence of causing death by negligence. The most significant part of the provision is that the rash or negligent act should not be one which amounts to 'culpable homicide'. In other words, the section cannot be invoked if the act which causes death was 'intentional' or if the offender 'knew' death would be likely to result from it. As has been explained earlier,[1] in such a case the court will apply the 'surprise test' of the reasonable man, and, if it finds that the act was known, or ought to have been known, to be 'likely' to cause death, the offence will come within the definition of culpable homicide in section 246, and section 256 will be excluded. The position was stated by Straight, J., in relation to section 304-A, I.P.C. as follows:[2]

> "Now it is to be observed that section 304-A is directed to offences outside the range of ss. 299 and 300, and obviously contemplates those cases into which neither intention nor knowledge of the kind already mentioned enters. For the rash or negligent act which is declared to be a crime, is not 'amounting to culpable homicide', and it must therefore be taken that intentionally or knowingly inflicted violence, directly and wilfully caused, is excluded."

Similar opinions were expressed by the English Criminal Law Commissioners[3] who stated that the characteristic difference between the mens rea in 'intentional' and 'negligent' acts consisted in that

> "in the latter the offender, for want of exertion, does not foresee and avoid mischief when he might have done so; in the former he incurs (in the case of homicide especially) a far more serious degree of responsibility in knowingly and wilfully encountering the danger of causing the mischief which was, as he knew, likely to result."

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(1) Ch. IV, supra.
(2) Idu Beg (1881) I.L.R. 3 All 776 at Pp.778-779; Cf. Holloway, J., in Nidamarti Nagabhushanam, In re, (1872) Madras H.C.R.119 at P.120; Agrwalla, J., in Tika Ram v. R., A.I.R. (1950) All 300.
(3) Seventh Report, B.P.P., 1843, vol. xix, Pp.25-26.

The basic distinction, therefore, between culpable homicide and negligent homicide lies in the fact that in the former, unlike the latter, the offender is conscious of the risk of death and acts wilfully despite such knowledge. It may be observed that in this respect the distinction between negligent and culpable homicide in the Sudan is clearer than it is in the U.K. The reason for this is that a conviction of culpable homicide in the U.K. does not require foresight or foreseeability. Acts which in the Sudan would fall under section 256 may in the U.K. be treated as falling under culpable homicide. In practice, however, the distinction is not as simple as it might appear to be due to the difficulty of determining whether or not the accused acted wilfully. In S.G. v. Kassab Suleiman and Another,[1] the two accused caught a thief and tied him by the neck to a pole and he died by strangulation. On confirmation, their conviction of murder was altered to one of negligent homicide under section 256 on the ground that neither of them could have known that death was even a 'likely' consequence of the act. On the other hand, in S.G. v. ElShafie Abdel Rahman Warag,[2] D, a lunatic, was placed by his relatives in A's charge for treatment by 'expelling the evil spirit'. According to his normal method of treatment, A bound D, whipped him and kept him without food for some time. The constriction of the bonds resulted in septiceamia and gangrene of which D died. A was convicted of culpable homicide because his continued severe treatment of D indicated that he 'knew' that death was 'likely' to result. This was upheld on confirmation, where Lindsay, C.J., added obiter that had A stopped the treatment once he realised that death was likely to result, the conviction would have been under section 256.

A comparison between the two cases illustrates the difficulty of distinguishing negligent homicide and culpable homicide. It may be accepted that in neither case was

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(1) AC.CP.192.1951, Unrep.
(2) AC.CP.216.1952, Unrep.

there any 'intention' to cause death. Nevertheless, it is not easy to comprehend the grounds on which the accused in the first case were held not to have known that death was 'likely' to occur, while in the second case he was held not to have done. The purpose of the accused in Warrag[1] was obviously to cure the deceased, whereas in Kassab[2] the accused seem to have intended to teach the deceased a lesson. Consequently, consciousness of the risk of death may be more manifest in the latter than in the former. Further, even if it is granted that the deceased was exposed to a more serious hazard in Warrag[1] than in Kassab[2] the distinction between the two cases is not made any clearer, because it is not "the degree of risk, but the wilfully incurring of the risk, which constitutes the higher degree of criminality."[3]

The distinction between the two forms of homicide was rendered more confused by Imam, J., in S.G. v. Fatma Hussein ElBakheit.[4] The deceased was suffering from acute abdominal pain and was taken to A, a well-known primitive doctor, for treatment. A, in accordance with her normal ritual of treatment, burnt some bakhur (a smoky perfume) which was believed to possess her of a 'spirit' which enabled her to diagnose and cure. She then opened the deceased's stomach, using a razor blade, and the deceased bled to death. A was convicted of culpable homicide on the ground that she knew that death was 'likely' to result. On confirmation, Imam, J., substituted a conviction under section 256 on the ground that A could not have known that death was likely to result because, at the time of the act, she did not know what she was doing. Imam, J., continued:[5]

> "This would have been different had the element of recklessness or negligence been in issue; for in the latter no mens rea is required and in the former mens rea may be gathered from the act or acts and the circumstances as a whole."

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(1) Supra.
(2) Supra.
(3) The English Criminal Law Commissioners, Seventh Report, B.P.P., 1843, vol.xix, P.26.
(4) (1966) S.L.J.R.75.
(5) Ibid, at P.79.

It is not exactly clear what the learned judge meant by 'recklessness' in this connection, but he obviously distinguished it from 'negligence' in so far as the former, unlike the latter, required mens rea. Nevertheless, he held that A was guilty under section 256 for being 'criminally reckless'. At any rate, however, he made it clear that A was not guilty of culpable homicide because she neither 'intended' to cause death nor did she have the capacity for 'knowing' that death would be a 'likely' consequence. Had the learned judge stopped here, no difficulty would arise. Instead, he went on to state that, by going through the ritual, the accused knew that she would be in a trance "and she knows or at least she must have reason to know that such a thing is fraught with danger to the victim who is likely to lose his life."[1] This statement clearly reproduces the mens rea for culpable homicide under section 246, i.e., 'knowledge' that the act is likely to cause death. Imam, J., seems to contradict himself in stating, first, that A was deprived of capacity to know that death was likely, and then saying that she must know or have reason to know that going into a trance was likely to cause death, i.e., implying that she was conscious of the 'likelihood' of death occurring. Such consciousness is incompatible with a conviction for negligent homicide. It is, therefore, submitted that the learned judge must have meant that A was aware of the risk of harm to D (as opposed to knowledge of the likelihood of death) but failed to take the necessary precautions against such a risk. As will be explained presently, such an interpretation is in accordance with the meaning of 'rash' under section 256, and is the only possible way of accepting a conviction of negligent homicide in ElBakheit's[2] case.

A significant aspect of that case, however, is that it confirms that, for a conviction of culpable homicide, it is necessary to prove 'intention' or 'knowledge' within sec-

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(1) Ibid, at P.80; emphasis supplied.
(2) Supra.

tion 246. In this respect, the case may be contrasted with the more recent English decision in R. v. Lipman,[1] where A appealed against his conviction for involuntary manslaughter of a girl while under the influence of drugs, on the ground that the jury ought to have been directed that he must have intended to do acts likely to result in harm or must have foreseen that harm was likely to result from his act. The Court of Appeal (Criminal Division) dismissed the appeal stating that no specific intent was necessary in manslaughter and that self-induced intoxication was consequently no defence to the charge. This seems to contradict the decision in ElBakheit[2] which implies that self-induced intoxication or voluntarily going into a trance may be a defence to culpable homicide if it is such as to negate the requirements of intention and knowledge in section 246 of the Code. Consequently, it is apparent that the mens rea for culpable homicide under the S.P.C. is much narrower than it is in English law where it extends to include what under the Code are less serious forms of homicide.

'Rash' or 'Negligent' Acts

Neither the I.P.C. nor the S.P.C. gives any definition of what amounts to a 'rash' or 'negligent' act. The Sudan courts have made no attempt to define those terms, nor, indeed, the implications of section 256 as a whole - they have applied the provisions of the section in a rather pragmatic manner without any elucidation of its terms. However, the Indian courts have made significant pronouncements on interpreting section 304-A, which may be of great value in understanding section 256. The first authoritative exposition of section 304-A appears to be that of Holloway, J., in Nidamarti Nagabhushanam, In re,[3] where the accused kicked and beat his mother to

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(1) (1969) 1 Q.B.152.
(2) Supra.
(3) (1872) 7 Madras H.C.R.119.

death. The trial court acquitted him of culpable homicide due to lack of knowledge of the likelihood of death, and convicted him under section 304-A. This was rejected by Holloway, J., who went on to explain the ingredients of the section as follows:[1]

> "Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civil duty of circumspection. It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories, which are wholly inapplicable to the case of an act or series of acts, themselves intended, which are the direct producers of death."

Similarly, in Empress v. Idu Beg,[2] Straight, J., said:[3]

> "Although I do not pretend for a moment to exhaust the category of cases that fall within S.304-A, I may remark that criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted."

It would thus appear that liability under section 256 consists in the fact that death was not in the contemplation of the offender either because he was 'conscious' of the

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(1) Ibid, at Pp.119-120.
(2) (1881) I.L.R.776.
(3) Ibid, at Pp.779-780.

risk but carelessly hoped that the fatal consequences could be avoided (rashness), or because he was unaware of the risk in circumstances which show that he ought to have been conscious of it and was, consequently, to blame for not having been so (negligence). This interpretation is in accord with Professor Gordon's[1] view that

> "Negligence consists in an inadvertant failure to take reasonable care to avoid a result or discover the existence of an attendant circumstance."

It is submitted that the above definition of 'rash' is rather too wide because it includes 'consciousness' of the risk, i.e., situations where the risk of death is foreseeable. Such situations would in the U.K. would amount to 'reckelessness' and would at least fall within the category of culpable homicide. Straight, J.'s reference to doing an act with 'recklessness or indifference as to the consequences' comes very near to Macdonald's definition of murder.[2] The definition of 'rash' under the Codes is equivalent to what continental systems call 'conscious negligence'.[3]

It should be noted that the words 'rash' and 'negligent' within section 256 are distinct from each other and a single act cannot be both rash and negligent.[4] From the above interpretation of the two words it would seem that the accused in ElBakheit[5] was guilty of a 'rash' act in so far as she was aware of the risk of injury or harm to the deceased but nevertheless failed to take the necessary precautions to prevent it.

Neither Scots nor English law states positively what constitutes the mens rea of negligent homicide. The fact that such homicide is punishable with imprisonment for life in the same way as other forms of culpable homicide or manslaughter has resulted

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(1) Gordon, 226.
(2) Ch. IV, supra; see also Gordon, 212-213.
(3) Gordon, 214-215.
(4) Nidamarti, supra, at P.120; Idu Beg, supra, at P.780; see also Muerji, J., in Chammanlal v. State, A.I.R. (1954) All186.
(5) Supra.

in the reluctance of the courts to convict of negligent homicide people who cause death in the pursuit of their daily activities.[1] Thus, both Scots[2] and English[3] courts have for a long time insisted that liability for negligent homicide requires a greater degree of negligence than what is necessary for liability for negligence in a civil action. But without giving any definition of the mens rea in negligent homicide, the courts have from time to time added such adjectives as 'gross', 'wicked', 'criminal' or 'culpable' before the word 'negligence' in the attempt to describe what degree of negligence was required in a criminal case. The attitude of the courts may be illustrated by the Scottish cases of Cranston,[4] and Paton,[5] and the English case of Andrews v. D.P.P.[6] In the first case, Lord Justice-Clerk Alness pointed out that in the past it was sufficient for a charge of culpable homicide that "any fault on the part of the accused resulting in the death of a fellow human being had been established",[7] but, he continued:[8] "the carelessness which the Crown must prove, according to our conception of the law today, ... must be gross and palpable carelessness. Slight carelessness may found a successful civil claim, but gross carelessness is required ...." in the case of culpable homicide. In the case of Paton[5] it was also indicated that there must be "gross or wicked or criminal negligence, something amounting to, or at any rate, analogous to a criminal indifference to consequences."[9]

Similarly, in Andrews v. D.P.P.,[6] Lord Atkin stated that the causing of death by 'any

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(1) For a description of the attitude of the Scottish courts and the development of the law of negligent homicide, see Gordon, 734-736.
(2) R. v. Jones (1874) 12 Cox 628 at P.629; R. v. Finney (1874) 12 Cox 625 at P. 626; R. v. Doherty (1887) 16 Cox 306 at P.309; R. v. Bateman (1925) 19 Cr. App.R.8 at P.11.
(3) Drever and Tyne (1885) 5 Couper 680 at P.686; Waugh v. Campbell, 1920 J.C.1.
(4) 1931 J.C.28.
(5) 1936 J.C.19.
(6) (1937) A.C.576.
(7) 1931 J.C.28.
(8) Ibid.
(9) 1936 J.C.19 at P.22.

lack of due care' was in the past treated as manslaughter, "but as manners softened and the law became more humane a narrower criterion appeared".[1] He then referred to the statement in R. v. Williams[2] that the prisoner should be "guilty of criminal misconduct, arising from the greatest ignorance and the most criminal inattention", and to a similar statement in R. v. Bateman,[3] and went on to observe that the word 'criminal' was not helpful in any attempt to define a crime, and that other epithets such as 'gross', 'culpable' or 'wicked' were not intended to provide a precise definition of negligent homicide. He continued:[4]

> "I do not myself find the connotations of mens rea helpful in distinguishing between degrees of negligence, nor do the ideas of crime and punishment in themselves carry a jury much further whether in a particular case the degree of negligence shown is a crime and deserves punishment."

He concluded:[5]

> "Simple lack of care such as would constitute civil liability is not enough: for purposes of criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established."

Thus, in the U.K. the degree of negligence necessary for criminal liability must be higher than that required in civil litigation. It is not enough to direct the jury that the negligence must be 'criminal' or culpable because, according to Bateman,[3] this would in effect be asking them to determine a question of law in deciding the difference between what goes "beyond a mere matter of compensation between subjects" and what "showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."[6]

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(1) (1937) A.C.576 at P.581
(2) (1807) 3 C. & P.635, per Lord Ellenborough.
(3) (1925) 19 Cr.App.R.8, per Lord Hewart at P.11.
(4) (1937) A.C.576 at P.583.
(5) Ibid.
(6) (1925) Cr.App.R.8 at P.11.

However, while accepting the above objection, Smith and Hogan[1] maintain that if we are to have a crime based on a certain degree of negligence, its definition in such terms as 'criminal' or 'culpable' would be the only test because it enables the jury to say whether the negligence was bad enough to attract criminal liability. They continued:[2]

> "The 'Bateman test' has the virtue that it draws attention to the fact that there exists civil liability for less degrees of negligence and criminal liabiility should be reserved for gross aberrations."

This may indeed be so. But the test does not in fact tell the jury how to distinguish between the two standards of negligence - they are left in no better position by being told that the negligence must be criminal. As Professor Gordon points out:[3]

> "... to say that there must be criminal negligence before there can be a conviction for culpable homicide is tautologous, unless the word 'criminal' is used emotively; to say there must be gross, or wicked, or palpable, negligence, is just to say that there must be negligence, and add an expletive."

At any rate, it still remains the case that in the U.K. a conviction for negligent homicide requires a high degree of negligence, i.e., that the accused must have been very careless. The Indian courts have also emphasised that the liability under section 304-A is different from civil liability. Thus Mukerji, J., approved of Lord Atkin's observations in Andrews,[4] and went on to say that:

> "... before a conviction can be had under section 304-A, Penal Code, a very high degree of negligence must be found ... ... negligence which must amount to recklessness or utter indifference to consequences and not merely negligence of tort."[5]

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(1) Smith and Hogan, op.cit., 227.
(2) Ibid.
(3) Gordon, 741.
(4) Supra.
(5) Chamman Lal v. State, A.I.R. (1954) All.186.

But the courts in India have put no great emphasis on degrees of negligence and have refrained from inserting any epithets before the word 'negligence'. As already explained,[1] they have contented themselves with simply requiring a high degree of negligence consisting in acting with indifference to the consequences or failure to exercise proper care to guard against the risk of injury. The courts went further by expressly stating that they preferred the concept of mens rea to that of degrees of negligence. Referring to the use of degrees of negligence in English law, Beg, J., said in the recent case of Shiva Ram v. State:[2]

> "... although the concept of degrees of negligence or rashness may be helpful in explaining in non-technical, simple language, to a jury in England the concept of criminal negligence as compared with civil negligence, it is not more illuminating for lawyers than the concept of mens rea. The considerations which weighed with Lord Atkin, in laying down how criminal negligence should be explained to the jury, are not the same which could be placed in the forefront in elucidating the term 'rash' or 'negligent' act as used in section 304-A, I.P.C. for lawyers and courts of law. Whatever may have been said by Lord Atkin, in a different context and in order to indicate how the elusive and undefined contents of the crime of manslaughter may be explained to a jury in England, a sound and reasonable interpretation of section 304-A, I.P.C., is enough for our purposes."

Another objection to the use of expletive terms before 'rash' or 'negligent' in section 304-A, I.P.C., or section 256, S.P.C., is that the sections make no reference to such epithets, and, had the legislature intended these epithets to be read into the sections, it would have inserted them. Beg, J., came to this conclusion in the last-mentioned case when he said:[3]

> "Applying a well recognized principle of interpretation, the absence of such qualifying words must be intentional. But, applying an equally well recognized

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(1) Supra.
(2) A.I.R. (1965) All.196 at P.200.
(3) Ibid.

> principle, we can read the requirements of mens rea into a provision creating a criminal offence and proceed to specify what this means with reference to a particular provision. I, therefore, prefer to conceive of criminal rashness or negligence in terms of mens rea.
>
> "The doctrine of mens rea is neither unhelpful nor obtruse. It is now an essential part of that doctrine that even offences created or defined by statute must rest on the assumption that the mens rea is contemplated by them unless the offence is one of those 'statutory offences' which, either by the force of express words of the statute or by a necessary implication, exclude the assumption."

It should finally be noted that negligent homicide is the least serious of all forms of unlawful homicide and is punishable with a maximum of two year's imprisonment.[1] In the U.K. it is a more serious offence punishable with imprisonment extending up to life. It is therefore submitted that judgements of the U.K. courts in this connection should not be relied upon too much in interpreting the less serious offence under the two Codes. It follows from this that the distinction between negligence as a basis of criminal liability and civil negligence is less clearly marked under the Codes than it is in the U.K.[2]

Killing in Traffic Cases

The reluctance of the U.K. courts to convict persons accused of negligent homicide unless the negligence was 'gross' or 'criminal' is most marked in traffic accidents which result in death. This resulted in the creation of a separate statutory offence punishing the causing of death by dangerous driving. Thus Section 1 of the Road Traffic Act, 1960 (replacing section 8 of the Road Traffic Act, 1956) provides:

> "A person who causes the death of another person by the driving of a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected

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(1) Sections 304-A, I.P.C., 256, S.P.C.
(2) Cf. Agarwalla, J., in Tika Ram v. R, A.I.R. (1950) All.300.

> to be, on the road, shall be liable on a conviction or indictment to imprisonment for ... five years."

This section is an attempt to bridge the gap created by the reluctance to convict motorists of negligent homicide, despite the fact that they may be held liable for causing the death in a civil action for damages. The courts have made it clear that they are:

> "quite familiar with cases in which drivers are found liable by a jury for negligence involving loss of life or injury to person, and yet the public prosecutor would never dream of bringing a complaint."[1]

Although the section necessarily implies that the degree of negligence under it is less than that in manslaughter or culpable homicide, it is not clear what exactly the distinction between the two is. If the negligence is gross or very high the accused may still be convicted of negligent homicide because "cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence".[2] But if the degree of negligence is not so high the conviction will be under section 1 of the Act, provided the death was attributable to the dangerous driving. If it is not so attributable then the conviction will be for mere dangerous or reckless driving under section 2 of the Act as though the death did not occur. The position was described by Jones, J., in the West African case of R. v. Bendu,[3] as follows:[4]

> "The degree of negligence required in the case of manslaughter is of the highest kind. It is that kind which shows such complete disregard for the life and safety of other users of the road as to amount to a crime. This is the kind of negligence for which no compensation can be an answer."

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(1) Lord Salvesen in Waugh v. Campbell, 1920 J.C.1, at P.6; Cf. Lord Atkin in Andrews v. D.P.P. (1937) A.C.576 at P.583.
(2) Lord Atkin in Andrews, ibid.
(3) (1961) Crim.L.R.500
(4) Ibid.

> "The degree of negligence required in the case of causing death by reckless or dangerous driving is not necessarily as high as that required to be proved in the case of manslaughter. Nevertheless, it is still of a high nature and it must be shown that the death was due to the reckless driving of the accused.
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> "In the case of reckless or dangerous driving the degree of negligence required is not necessarily as high as that to be proved in the case causing death by reckless or dangerous driving. A man may drive his vehicle recklessly and even cause death and yet not be guilty of either manslaughter or causing death by reckless or dangerous driving but guilty of reckless or dangerous driving if the death is not attributable to his recklessness."

It is doubtful whether the reasoning given for a conviction of reckless or dangerous driving in the final paragraph is correct. It is not so much the degree of negligence involved which reduces the offender's guilt from section 1 to section 2 or 3 of the Act; it is the fact that the death is not proved to have been caused by the dangerous driving, or is not attributable to it.

Under the S.P.C., killing by dangerous or reckless driving may only be treated as culpable homicide if death is 'known' to be 'likely' to result from the driving, and this is very rare in practice. However, killing in the course of committing the distinct offence of 'dangerous driving' may constitute an offence under section 255, which is discussed below. Apart from that, the causing of death in traffic accidents is punishable as negligent homicide within section 256. The leniency of the penalty in the latter section has enabled the courts to obtain convictions under it without any inhibitions, thus avoiding the dilemma which had faced the U.K. courts which prompted the legislature to make separate provision for causing death by dangerous driving.

Killing in Other Cases

Apart from the rare serious traffic cases, prosecution for negligent homicide in the U.K. is very infrequent. It appears that the main reason for this is that deaths resulting from explosions, accidents in factories, mines or industrial plants are made

the subject of separate statutory provisions. Prosecution under such statutes seems to be preferred to prosecution under the common law. Another factor is that morally:

> "No one would be taken seriously who suggests that whenever a fatal factory or mine accident was caused by gross negligence the manager or foreman or other person responsible should be charged with culpable homicide"[1]

In contrast with the above, the position under the Codes is somewhat different. In the first place, there are no separate statutes dealing with deaths resulting from circumstances such as the above ones. Secondly, the leniency of the punishment for negligent homicide under the I.P.C. and the S.P.C. has enabled the courts to apply the law in all cases where the accused's negligence fell within the Codes. Thus, a conviction for negligent homicide was brought where A fired a gun near a public road without taking the necessary precautions, and causing the death of a passer-by[2], where A accidentally discharged a loaded rifle killing D[3], and where a medically unqualified person caused the death of another by unskilful application of medicine[4]. It is submitted that as time goes on, and as life becomes more hazardous through industrialisation and technology, more and more convictions under section 256 will be brought.

Negligent Homicide and Causation

Section 256 begins by providing expressly 'Whoever causes the death ...', thus implying that the death of the victim must have been caused by the act of the accused. It is not enough to prove that the accused has neglected his duty and that the deceased died. There must be a causal connection between the death and the offender's act. These principles have been emphasised in a number of Indian cases. In Omkar[5], Jenkins, J., said[6]:

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(1) Gordon, 738; see State v. Chinubhai (1959) Bom.L.R.1309, discussed infra.
(2) Emperor v. Morgan (1909) I.L.R.36 Cal.302.
(3) S.G. v. Siddig Osman Babiker, AC.CP.191.1951, Unrep.; contrast R. v. Lamb (1967) 2 Q.B.981.
(4) Sukaroo Kobiraji v. Empress (1887) I.L.R.14 Cal.566; Empress v. De Souza (1920) I.L.R.42 All.272; S.G. v. Mohammed Fadl ElMula, Maj.ct., 1943, Unrep.
(5) (1902) 4 Bom.L.R.679.
(6) Ibid, at P.682.

> "Death should have been the direct result of a rash and negligent act of the accused and that act must have been the proximate and efficient cause .... It must have been the causa causans; it is not enough that it may have been causa sine qua non."

Again, in State v. Chinubhai,[1] the accused were charged under section 304-A for failure to take reasonable measures to protect workers in a mill who had entered a pit and were gassed to death. The accused were acquitted because they were not present at the time of the accident and had no knowledge of the workers entering the pit. Shah, J., added:[2]

> "In our view the rash or negligent act which causes the death of the victim must be the immediate or proximate cause of death and not only an act or omission which can be said to be a remote cause of death ...."

The above attitude is similar to that of the U.K. courts in refusing to convict in cases of factory death.[3] However, the courts in India have preferred to exclude the liability on the basis of the concepts of directness and proximity of causation rather than on any undesirable extra-legal considerations.

Contributory Negligence

The question arises whether the accused would still be convicted under section 256 when the circumstances show that the deceased was also somewhat to blame and had contributed to his own fate. Sudanese cases do not seem to have dealt with the question and, once again, reference is made to Indian cases for guidance. The latter have frequently held that contributory negligence of the deceased will not relieve the accused of liability, provided the latter's act can still be said to have caused the death. The accused's act need not be the sole cause of death, provided it is a sub-

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(1) (1959) Bom.L.R.1309.
(2) Ibid, at P.1311; see also the Supreme Court in Kurban Hussein v. State of Maharashtra, A.I.R. (1965) S.C.622.
(3) See supra; see also Gordon, 738.

stantial cause of it.[1] In Mohammed Bux v. Emperor,[2] A, who was driving a bus, knocked down and killed a pedestrian crossing the road. He was convicted under section 304-A and his contention that the accident was also due to the deceased's negligence was rejected. The court continued:[3]

> "It may be conceded that ordinarily the pedestrians who use the road are not exempt from the duty to take care of themselves, but negligence, if any, on the part of a pedestrian cannot excuse negligence on the part of a driver of such a fast and dangerous vehicle as a motor bus. As between a pedestrian and a driver of a motor vehicle the responsibility of the latter is greater. He has a duty to keep better outlook (sic.) than a pedestrian. The duty to take care increases in proportion to the danger involved in dealing with the instruments which for a man's own purpose he brings into relation of proximity to his neighbours."

The court went on to approve of the opinion of Lord Justice-Clerk Moncrieff in an unnamed Scottish case that, "It lies on the driver to keep clear of foot passengers." However, the courts would not allow themselves to be influenced by the mere death of the victim in determining the accused's liability. The amount of care and circumspection required of the accused should not exceed what is reasonable in the light of ordinary experience of men. He is not expected to exercise an extraordinary degree of care.[4] Thus, in Smith v. Emperor,[5] the accused drove his motor car at night into a road which was closed for repairs. He ran over and killed some workers who were sleeping on the road with their bodies completely covered up. It was held that his conviction under section 304-A could not stand as he should not be expected to look out for persons making an abnormal use of the road.

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(1) Gordon, 742; R. v. Gould (1964) 1 W.L.R.145.
(2) A.I.R. (1935) Nag.200.
(3) Niyogi, J., at P.201; ibid; Cf. Ratnam v. Emperor, A.I.R. (1934) Mad.209.
(4) Alderson, B., in Blyth v. Birmingham Waterworks (1856) 11 Exch.781 at P.784.
(5) (1925) I.L.R. 3 Cal.333.

II. Homicide in the Course of an Offence

As has already been stated,[1] the authors of the I.P.C. were strongly against incorporating into the Code the English rule of constructive homicide allowing the conviction of a person who causes death unintentionally in the commission of another offence or unlawful act. Nevertheless, they were of opinion that such killing must be punished more severely than negligent homicide. As a result they provided in clause 305 of the draft Code:

> "If the illegal act or omission whereby death is caused in the manner described in the last preceding Clause[2] be, apart from the circumstances of its having caused death, an offence other than the offence defined in Clause 327[3], or an attempt to commit an offence, the offender shall be liable to the punishment of the offence so committed or attempted in addition to the punishment provided by the last preceding Clause."

Thus, instead of holding the offender liable for murder or culpable homicide for causing death while committing or attempting to commit another offence, the section punished the offender separately for committing or attempting to commit that other offence, and superimposed on this the punishment for negligent homicide under clause 304 of the draft Code. To explain this, an Illustration was appended to clause 305 stating that if an accused used force on a woman intending to ravish her and, in so doing, negligently caused her death, he would be liable for the punishment of rape as well as that of negligent homicide.

The most significant aspect of clause 305 was that it was not of general application, but was confined to cases where death was caused <u>negligently</u> in the commission of another offence. If death resulted <u>accidentally</u> in the course of committing another

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(1) Ch. IV, supra.
(2) Clause 304 defining 'Negligent Homicide', see supra.
(3) Clause 327 defined the offence of causing grievous hurt negligently.

offence the accused was to "suffer only the punishment of his offence without any addition on account of such accidental death".[1] The reason for this, in the words of the authors of the Code, was that:

> "when an act is in itself innocent, to punish a person who does it because bad consequences which no human wisdom could have foreseen have followed from it, would be in the highest degree barbarous and absurd."[2]

Thus, apart from clause 305, the Indian Commissioners were very unwilling to introduce the concept of constructive mens rea into the Code. Their criticism of the doctrine of constructive homicide has been described as "a model for any reformer who wishes to argue for expunging the doctrine of constructive homicide from the law."[3]

The second Indian Law Commissioners[4] approved of the observations of their predecessors and of the provisions of clause 305. However, when the I.P.C. was finally enacted, clause 305, like clause 304, was omitted from it, again, for no apparent reason. But, unlike clause 304, clause 305 has never been reintroduced into the I.P.C. The latter at present contains no provisions dealing with the causing of death in the course of committing another offence. Homicide is either culpable (including murder) or negligent.

In this respect there is a marked contrast between India and the Sudan. The 1899 S.P.C. contained no provision in relation to unintentional homicide. But when the Code was re-enacted in 1925 the present section 255 was added to it. It provides:

> "Whoever causes the death of any person by doing an act not amounting to culpable homicide which constitutes an offence punishable with imprisonment for one year or with any greater punishment or by any act done in committing such an offence shall be punished with imprisonment for a term which may extend to ten years or with fine or with both."

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(1) The Indian Law Commission, 1837, Note M, P.65.
(2) Ibid, P.64.
(3) Williams, G., "Constructive Manslaughter", (1957) Crim.L.R.293 at P.294.
(4) 1846, First Report, paras. 311-320.

Several cases have stated that section 255 was taken from the Egyptian Penal Code.[1] In fact the latter does not contain any section in exactly identical terms, although the basic principle is reiterated in several sections.[2]

Section 255, in effect, introduces into the Code a qualified version of constructive mens rea in homicide. Unlike pre-1957 English law, it does not treat the causing of death in the course of committing an offence as murder or culpable homicide. Instead, it creates a separate offence and prescribes for it a punishment of up to ten year's imprisonment. It has previously been explained[3] that the Homicide Act, 1957, abolished the doctrine of constructive malice in English law. Cases which were murder before 1957 may at present be considered as falling within involuntary manslaughter, although the Act does not expressly so provide.[4] English law has also for a long time recognised a doctrine of 'constructive manslaughter' under which it is manslaughter to cause death in the commission of an 'unlawful act'. In the past it was enough if the unlawful act was simply wrongful, i.e., a tort.[5] This doctrine proved unsatisfactory on the grounds that it was harsh and contrary to the general principles of criminal liability. The Criminal Law Commissioners[6] and the Criminal Code Bill Commissioners[7] were opposed to it and recommended its abrogation. Field, J., rejected it in R. v. Franklin.[8] The accused took a box from a refreshment stall on a pier and threw it into the sea where it struck a swimmer causing his death.

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(1) S.G. v. Abdel Bagi Said, AC.CP.90.1948, Unrep.; S.G. v. Deng Agany, AC.CP. 132.1951, Unrep.; S.G. v. Siddig Osman Babiker, AC.CP.191.1951, Unrep.

(2) Section 126, Egyptian Penal Code, holds a person liable for causing death if he tortures his victim with a view to extracting a confession; section 486 punishes a person who causes the death of a child by abandoning it in a deserted place; section 257 punishes a person who unintentionally causes death in the commission of arson.

(3) Ch.IV, supra.

(4) Smith and Hogan, op.cit., 220; Cf. Jackson, R.M., "Moot case on Murder and Arson", (1946) 9 C.L.J.154 at Pp.157-158.

(5) R. v. Martin (1827) 3 C. & P.311; R. v. Fenton (1830) 1 Lew.179; R. v. Sullivan (1836) 7 C. & P.641; R. v. Errington (1838) 2 Lew.217.

(6) Fourth Report, B.P.P.,1839, vol.xix, P.28; Second Report, B.P.P.,1846, vol. xxiv, P.17.

(7) C.2345, P.24.

(8) (1883) 15 Cox 163.

Field, J., acquitted the accused of manslaughter because

> "the mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case. I have great abhorrence of constructive crime."[1]

The decision in Andrews v. D.P.P.[2] appears to have been the first real attempt at abrogating the rules, although in several cases before that decision the courts had tried to limit 'unlawful act' to situations where the accused's act was directly connected with or related to the victim's death.[3] In Andrews,[2] the accused was charged with manslaughter for having caused death in the commission of an unlawful act, namely, dangerous driving contrary to section 11 of the Road Traffic Act, 1930. Du Parq, J., directed the jury as follows:[4]

> "If a man is doing an unlawful act - if he is doing something which the law says he must not do, and because he is doing it he kills somebody, then he is guilty not only of that unlawful act, but of manslaughter."

An appeal to the Court of Criminal Appeal and a further appeal to the House of Lords were both dismissed. In the House of Lord's, Du Parq's direction was criticised on the ground that, had it stopped there, it would have wrongly told the jury that any killing in the course of an unlawful act was manslaughter. Lord Atkin went on:[5]

> "There is an obvious difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the legislature makes criminal. If it were otherwise a man who killed another while driving without due care and attention would ex necessitate commit manslaughter."

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(1) Ibid, at P.165.
(2) (1937) A.C.576.
(3) For a discussion of those cases and the development of the rule see Buxton, R.J., "By Any Unlawful Act", (1966) 82 L.Q.R.174.
(4) (1937) A.C.576.
(5) Ibid, at P.585; Cf. Lord Moncreiff in George Broadey (1884) 5 Couper 490 at P.492.

Although the above case has been accepted by some[1] as destroying the concept of constructive malice, it is doubtful whether in fact it goes that far because Lord Atkin's distinction between unlawful acts done negligently and acts which are unlawful due to some other reason implies that killing in the former case is not necessarily manslaughter (unless the degree of negligence is so gross as to amount to criminal negligence) but killing in the course of unlawful acts generally was manslaughter. The position, however, has been made clearer by the decisions in Church[2] and Lamb[3]. In the former, the Court of Criminal Appeal held that it was wrong to direct the jury that whenever an unlawful act is committed, and death is caused, the offence is manslaughter. The Court added that this might have been the law at one time,

> "But it appears ... ... that the passage of years has achieved a transformation in this branch of the law, even in relation to manslaughter, a degree of mens rea has become recognized as essential."[4]

It continued[5]:

> "... the unlawful act must be such as all sober and reasonable people would inevitably recognize must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm."

Similarly, in Lamb[3] a direction to the jury that killing in the course of an unlawful act was manslaughter was rejected on the ground that the mens rea for manslaughter could not be established except by proving "that element of intent without which there can be no assault"; that the unlawful act must constitute at least a 'technical' assault[6].

It would thus appear that the old rule that killing in the course of any wrongful act

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(1) Turner, in Russell, 591 et sep.; Archbold, 933-934; Stephen's Digest, 222.
(2) (1966) 1 Q.B.59.
(3) (1967) 2 Q.B.981.
(4) (1966) 1 Q.B.59, per Edmund Davies, J., at Pp.69-70.
(5) Ibid, at P.70.
(6) (1967) 2 Q.B.981, per Sachs, L.J., at P.988.

or tort is manslaughter is now obsolete. The law at present is that there must be an element of foreseeability of the risk of harm to the deceased. The unlawful act must not be coincidentally taking place when the death occurs.[1] However, it still remains the case that no specific intent to do an act likely to result in death is necessary, provided that objectively 'all sober and reasonable people' must recognise that there is a risk of harm.

Scots law does not seem to have considered the question except in relation to unlawful acts involving either negligence or assault, which is a rather different matter. However, it seems that the modern tendency is not to treat as culpable homicide death resulting accidentally while the accused was committing an unlawful act or engaged in an unlawful employment. Professor Gordon[2] cites the unreported case of Patrick McCarron,[3] where the accused, who was charged with murder for unlawfully firing a gun at his wife, stated that he only meant to 'frighten her' and that the gun went off accidentally. The jury were directed that if they believed his version they should acquit him. The direction did not suggest that in frightening his wife, the accused was doing an unlawful act and must therefore be be convicted of culpable homicide. Professor Gordon favours the view that such killings should not be treated as culpable homicide:

> "It can hardly be the law that a housebreaker who inadvertantly slips on a roof and falls to the ground on top of a passer-by is guilty of culpable homicide just because he fell while employed as a housebreaker and not as a chimney sweep or slater; in both cases death is caused by an accident, and not by any act of the killer at all."[4]

He concludes that convictions for culpable homicide in such cases should not extend

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(1) Buxton, R.J., "By Any Unlawful Act", (1966) 82 L.Q.R.174; Cf. Smith and Hogan, op.cit., 219.
(2) Gordon, 750-751.
(3) Perth High Court, February 1964.
(4) Gordon, 750.

beyond cases involving an intent to cause physical harm or foresight of the possibility of such harm.[1] This is in accord with Buxton's view that English law should be improved "to produce a rule which links the accused's legal guilt much more closely with his moral fault."[2]

The same tendency has been followed in South Africa[3] recently, and the Supreme Court[4] stated that the doctrine of constructive crime, versari in re illicita, was contrary to the fundamental principles of mens rea and to modern ideas of criminal justice. It held that, for a conviction of culpable homicide, the unlawful act must either be negligent or must constitute an assault. It overruled earlier decisions applying the doctrine of constructive homicide, and observed that it had to administer 'a living system of law' and adapt itself to the changing times and conditions and discard doctrines which have become outworn.

In contrast with such developments and with the tendency in several systems to abrogate the doctrine of constructive homicide, section 255, S.P.C., constitutes a compromise between the two extremes of, on the one hand, convicting the accused of culpable homicide or manslaughter, and, on the other, convicting him merely of the unlawful act as though the death had not occurred. In effect, this section punishes the consequences, i.e., the causing of death rather than the unlawful act itself. It applies even where death results accidentally, provided it is attributable to the unlawful act. The accused need not have intended to cause bodily injury nor have foreseen the risk of death or harm if death follows directly from the act. The ingredients of the section will now be considered.

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(1) Ibid, at P.750.
(2) Buxton, R.J., "By Any Unlawful Act", (1966) 82 L.Q.R.174 at P.195.
(3) Die Staat v. Van der Mescht, 1962 (1) S.A.521 (A.D.)
(4) S. V. Bernardus, 1965(3) S.A.287 A.D.

Not Amounting to 'Culpable Homicide'

Like section 256, section 255 provides that liability under it depends on the condition that the accused's act does not amount to 'culpable homicide', i.e., within the meaning of section 246 of the Code. The courts continue to find difficulty in determining whether the unlawful act, or offence, in the course of which death results, is itself 'likely' to cause death or not - whether the conviction should be for culpable homicide or for unintentional homicide under section 255. The difficulty has been more marked in cases of dangerous driving where the offender's conduct may be so highly careless as to indicate 'knowledge' on his part of the 'likelihood' of death. Thus, in S.G. v. Awad Salih Osman[1], A, who was driving a lorry carrying fifty passengers, entered into a race with another lorry and they drove at a very high speed. A tried to swerve to avoid a collision when the lorry overturned, killing nine passengers. A's conviction under section 255 was upheld, but the Confirming Authority pointed out that the conviction may very well have been for culpable homicide. A similar view was expressed in S.G. v. Deng Agany[2], where Lindsay, C.J., stated that section 255 put the adjoining sections of the Code 'out of joint' and hoped that the Court of Criminal Appeal would one day make an authoritative ruling on the section with a view to distinguishing it from those defining culpable homicide and negligent homicide.

It is submitted that the difficulty experienced by the Sudan courts in this respect is not dissimilar from that facing the U.K. courts in determining whether the dangerous driving was so grossly negligent as to call for a conviction of culpable homicide (or manslaughter), or whether it merely requires a conviction under section 1 of the Road Traffic Act, 1960.

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(1) AC.CP.237.1952, Unrep.
(2) AC.CP.132.1951, Unrep.

In the Course of Committing an Offence

For a conviction under section 255 the accused must cause death while doing an act which constitutes an offence punishable with at least one year's imprisonment.[1] The section is thus obviously different from the old common law rule in so far as the 'unlawful act' under the section must be an 'offence', i.e., a criminal act punishable with a minimum of a year's imprisonment, and not a mere wrongful or tortious act. In describing the type of situation falling under section 255, Maclagan, C.J.,[2] referred to the following statement from the commentary remarks on the Egyptian Penal Code:

> "The section covers the classical case of constructive murder in England, where a person doing an act with intent to commit a felony accidentally kills a man, as well as various cases that are treated as manslaughter.
>
> "... the section covers cases where the act in itself is punishable and also causes death, e.g., knowingly selling food injurious to health, or where a burglar puts a trip wire in a garden to hinder pursuit and the householder trips and is killed."

The unlawful act within the section - the offence punishable with imprisonment for one year or more - is itself one of the ingredients of unintentional homicide. Consequently, where the section applies the offender is not separately punishable for having committed the unlawful act itself.[3]

Despite the general nature of the provisions of section 255, in practice the only type of case to which it seems to have been applied are traffic cases, namely, causing

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(1) The 1925 S.P.C. stated that the offence must be punishable with up to six month's imprisonment, but this was changed to one year by Ordinance No.20 of 1950; Cf. S.G. v. Ali Mahmoud Gadein, AC.CP.309.1950, Unrep., where the section was held not to apply because the accused's act was not an offence punishable with a year's imprisonment.

(2) S.G. v. Abdel Bagi Said, AC.CP.90.1948, Unrep.

(3) S.G. v. Victorio Allagabo, AC.CP.209.1942, Unrep.; S.G. v. Ali Zeidan, AC.CP. 194.1942, Unrep.; S.G. v. Deng Agany, AC.CP.132.1951, Unrep.

of death while committing the offence of dangerous driving,[1] or driving while under the influence of drugs or drink,[2] in violation of the Road Traffic Act, 1962.[3] The offence of dangerous driving under the Act is defined in terms similar to those in the U.K. Act. It therefore appears that causing death in the commission of that offence is more harshly dealt with in the Sudan because the punishment under section 255 extends to ten years, whereas the maximum under the U.K. Act is five years. On the other hand, however, in the U.K. dangerous driving may involve such 'gross negligence' as to make the offender liable to a conviction of culpable homicide or manslaughter. But in the Sudan a conviction of culpable homicide requires, at least, knowledge that death was 'likely' to result. This makes the treatment of the offender more harsh in the U.K. because it might be easier to prove that the dangerous driving involved gross negligence than to prove that it involved 'knowledge' of the likelihood of death. As already explained,[4] if the homicide is 'negligent' the punishment in the Sudan carries a maximum of two year's imprisonment, while it extends to life imprisonment in the U.K.

A significant difference between the Sudan and the U.K. in this respect is that in the latter a violation of the Road Traffic Act <u>per se</u> is never considered an 'unlawful act' for the purposes of bringing a conviction of culpable homicide or manslaughter. It is another matter if while committing a traffic offence the offender is

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(1) Section 24 of the Act provides: "(1) If any person drives a vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is actually at the time, or which might reasonable be expected to be, on the road, he shall be guilty of an offence." The section is almost a verbatim reproduction of section 1 of the U.K. Road Traffic Act, 1960.

(2) Section 25 of the Act provides: "If any person drives or attempts to drive or is in charge of a vehicle on the road while under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle he shall be guilty of an offence".

(3) Under Schedule I, para.(1) of the Act both offences are punishable with one year.

(4) Supra.

also committing an 'unlawful act' such as, for example, escaping from arrest. His conviction of culpable homicide would then be for causing death in the commission of the latter unlawful act and not for violating the Road Traffic Act. In the Sudan it is enough for the purposes of section 255 that the offencer was committing a traffic offence punishable with one or more year's imprisonment.

Finally, it is submitted that despite the lack of cases applying section 255, other than traffic cases, the section is wide enough to include all forms of unintentional homicide in the course of committing an offence. Whenever a person causes death by doing any unlawful act which amounts to an offence punishable with a year or more, he may be convicted under the section. Thus, the causing of death in the commission of robbery, rape, mischief by fire, exposure of a child, resisting arrest, etc., will fall under the section because all these offences are punishable with more than a year's imprisonment.[1] However, causing death in the procuration of abortion is not within section 255 because it is separately provided for in section 264, but the punishment for that offence under the latter section is the same as that in section 255.

Causation in Unintentional Homicide

Liability under section 255 depends on whether the unlawful act has in fact 'caused' the deceased's death. The section does not always apply whenever an unlawful act results in death. In S.G. v. Abdel Bagi Said,[2] the accused was driving a lorry transporting petrol. He carried some passengers contrary to section 48 of the Petroleum Regulations, 1948, which prohibits the carrying of passengers in vehicles transporting petrol. The lorry overturned, killing three passengers. The accused was convicted under section 255 for causing death while committing an offence under the above Regulations. On confirmation, Maclagan, C.J., pointed out obiter that the accused

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(1) Under sections 334, 317, 374, 268 and 182, respectively, of the S.P.C.
(2) AC.CP.90.1948, Unrep.

should not have been convicted under section 255 because:

> "to support a conviction under section 255 the death must result more or less directly from the offence. Here the fact that the accused carried passengers in a lorry transporting petrol in no way contributed to the death, which was caused by negligent driving. Had the petrol caught fire, and the passengers burnt to death, then I would say the charge under section 255 would have been correct."

In view of these remarks it is surprising that the learned C.J. nevertheless confirmed the accused's conviction, instead of altering it to negligent homicide under section 256 which appears to have been his opinion of the case. This was done by Lindsay, C.J., in S.G. v. Siddig Osman Babiker.[1] The accused accidentally discharged a loaded gun, killing the deceased. The accused had no licence to handle firearms within section 32(1) of the Arms, Ammunition and Explosives Ordinance, 1932. He was convicted under section 255 for having caused death in committing an offence under the above Ordinance. On confirmation, Lindsay, C.J., substituted a conviction under section 256, because:

> "the unauthorized possession of the firearm was not the cause of the deceased's death, the cause of the deceased's death was the accused's gross negligence."

Thus, although the accused need not have foreseen the likelihood of the deceased's death, it must have resulted 'directly' from the accused's act. Causing death by dangerous driving appears to be the clearest example of this, and it has in several cases been held that if the accused causes death by dangerous driving he is deemed to have caused the deceased's death within section 255.[2] In other situations liability under the section will not arise unless there is a causal relationship between

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(1) AC.CP.191.1951, Unrep.

(2) S.G. v. Victorio Allagabo, AC.CP.209.1942, Unrep.; S.G. v. Deng Agany, AC.CP. 131.1951, Unrep.; S.G. v. Alexander Pollock, AC.CP.208.1952, Unrep.; S.G. v. Awad Salih Osman, AC.CP.237.1952, Unrep.; S.G. v. Ibrahim Gum, Maj.ct. 41C 9.1953, Unrep.

the unlawful act and the death. Thus, although driving while disqualified[1] or without being insured against third party risks[2] are punishable with up to one year's imprisonment[3], it is unlikely that a person who causes death in the commission of such an offence would, in the absence of dangerous or reckless driving, be convicted under section 255.

Negligent and Unintentional Homicide Compared

The basic distinction between sections 256 and 255 is that section 256 requires negligence and section 255 does not. Further, the former punishes acts resulting in death which are not in themselves distinct offences, while section 255 punishes acts which, apart from their resulting in death, are offences under the Code or any other ordinance punishable with imprisonment for a year or more. Further, section 255 is clearly the more serious of the two as the maximum punishment under it is five times that in section 256.

Nevertheless, the distinction between the two sections is not as clear as it might appear to be. The courts have met with considerable difficulty, particularly in traffic cases, in distinguishing them. The difficulty arises in connection with determining whether the case is one of 'dangerous driving' within section 24 of the Road Traffic Act, and consequently calling for a conviction under section 255, or whether it is merely one of 'careless driving'[4] justifying a conviction under section 256. The Confirmring Authority has frequently substituted a conviction under section

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(1) Section 46(3), Road Traffic Act, 1962.
(2) Section 53, ibid.
(3) First Schedule, para.(1), ibid.
(4) Section 22 of the Road Traffic Act, 1962, provides: "If any person drives a vehicle on a road without due care and attention or withour reasonable consideration for other persons using the road he shall be guilty of an offence". The offence is known as 'careless driving' and is punishable under the First Schedule of the Act with up to ten pounds fine.

256 for one under section 255.[1] It has frequently been pointed out that when the accused causes death by careless driving, the fact of death should not unduly influence the court to hold that the driving was dangerous in order to convict the accused under section 255 with a view to enhancing the punishment.[2] In S.G. v. Ali Fadlalla,[3] the accused was driving a lorry carrying passengers and goods at a very high speed in a very narrow road. Another lorry carrying passengers approached from the opposite direction, but the accused did not reduce his speed or allow sufficient space for the other lorry to pass. A collision followed in which six people were killed. The accused was acquitted under section 255 and convicted under section 256 for causing death by a rash or negligent act. The court stated that had it not been for an earlier decision[4] which applied section 256 in similar circumstances, it would have convicted the accused under section 255. It went on:

> "We would have considered that section 256 was intended to cover such rash and negligent acts as are not of themselves specified in any ordinance ... as themselves offences, and section 256 is not generally to limit the operation of section 255 so as in effect to exclude from it any act which, though specified as an offence under some other ordinance, happens to be rash and negligent."

On confirmation, Lindsay, C.J., confirmed the conviction, although he was of opinion that it should have been under section 255. In another case[5] he criticised section 255 in view of the difficulty of distinguishing it from section 256.

In any case, however, the question whether section 255 or 256 applies to a particular

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(1) S.G. v. Siddig Osman Babiker, AC.CP.191.1951, Unrep.; S.G. v. Mirghani Idris, AC.CP.249.1951, Unrep.; S.G. v. Awad Salih Osman, AC.CP.237.1952, Unrep.; S.G. v. Khalifa Osman, B.N.P. Maj.ct.8.1954, Unrep.
(2) S.G. v. Mirghani Idris, AC.CP.249.1951, Unrep.
(3) AC.CP.72.1951, Unrep.
(4) S.G. v. Petiteo Lado, AC.CP.121.1950, Unrep.
(5) S.G. v. Deng Agany, AC.CP.132.1951, Unrep.

factual situation remains one of fact to be determined from the circumstances of each case. But the criteria for distinguishing the two sections from one another, on the one hand, and distinguishing each of them from culpable homicide, on the other, continue to present difficulties to the courts, especially in road deaths.

III. Causing Death with the Intention of Causing Hurt

Section 254, S.P.C., provides:

> "Whoever causes the death of any person by doing an act not amounting to culpable homicide but done with the intention of causing hurt or grievous hurt, shall be punished with imprisonment for a term which may extend to fourteen years or with fine or with both."

No equivalent provision is found in the I.P.C. Nor was the section included in the 1899 S.P.C. But, like section 255, section 254 was added to the Code when it was re-enacted in 1925. It was copied from section 236 of the Egyptian Penal Code. The purpose of the section is to deal with those cases where death is caused unintentionally by an act intended to cause hurt. It is different from section 256 in so far as the latter does not apply to acts intended to cause hurt, but is confined to cases where the killing is caused negligently by an inadvertant act.

Section 254 is also distinct from section 255 because, whereas the latter deals with causing death in the commission of an offence punishable with imprisonment for a year or more, the former is confined to cases where death results from an intention to cause 'hurt or grievous hurt'. It may be argued that since the causing of hurt or grievous hurt is an offence punishable with imprisonment for one year and seven years under section 277 and 278, respectively, the causing of death in such circumstances should fall within section 255. Consequently, section 254 would overlap with section 255. However, such an argument is unacceptable because section 254 is more specific

and is expressly meant to apply to such cases, while section 255 is of general application. Such an interpretation would render the provisions of section 254 superfluous and the courts have rightly rejected any attempt to construe section 255 in such a wide manner.[1]

The basis of section 254 is to prevent the commission of acts which endanger bodily safety and which may eventually result in death. The law of homicide can preserve life best by prohibiting acts which endanger it. As Michael and Wechsler put it:[2]

> "We rarely know with certainty whether particular kinds of behaviour will or will not cause death. What we usually know is that behaviour of certain sorts is capable of causing death and does so more or less frequently. Therefore, if we are to endeavour to prevent behaviour which, when it occurs, actually causes death, we must do so, for the most part by preventing behaviour which is likely to cause death."

Section 254, like sections 255 and 256, also provides that liability under it depends on the condition that the act which caused death must not amount to 'culpable homicide'. Thus, although the act may be intended to cause hurt or grievous hurt, the section will not apply if, by application of the objective criterion of the 'surprise test', the act is deemed to be 'likely' to cause death within the meaning of section 246. The distinction between involuntary culpable homicide and section 254 presents more difficulty than that between the former and either section 255 or section 256. The reason for this is that section 254 deals with the 'intentional' infliction of hurt or grievous hurt. The margin between such cases and those where death is 'likely' to occur is very thin indeed. Two types of situation must, however, be distinguished:

(a) Intention to Cause Grievous Hurt

It has earlier[3] been explained that an intention to cause 'grievous bodily harm' would in English law render the accused liable to a conviction of murder, and may in Scot-

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(1) S.C. v. Ismail Ali Shatto, AC.CP.64.1943, Unrep.
(2) Michael and Wechsler, op.cit., at P.731.
(3) Ch. IV, supra.

land indicate such "wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences ...".[1]

In contrast with the above, section 254 appears too lenient in providing that a person who kills with the intention of causing 'grievous hurt' is not even guilty of involuntary culpable homicide, far less murder, but is liable for a conviction under the lesser offence defined in the section. The distinction between section 254 and involuntary culpable homicide in this respect becomes more unconvincing. It can hardly be claimed that any criterion can be formulated to differentiate between an injury intended to cause 'grievous hurt' and one known to be 'likely' to cause death. This is even more so if it is borne in mind that 'grievous bodily hurt' is defined in section 272 of the Code to include emasculation, privation or permanent impairment of the powers of any member or joint, permanent disfiguration of the head or face, fracture or dislocation of a bone and, more significantly:

> "any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain or unable to follow his ordinary pursuits."[2]

The above definition leaves little or no room for distinguishing between injuries which are 'likely' to cause death and those which amount to 'grievous hurt' but are not likely to result in death. If the test to be applied is the 'surprise test' of the 'reasonable man', one would wonder whether it can be claimed with any confidence that the reasonable man would be surprised if death results from an act which causes emasculation or permanent privation of a limb or permanent disfiguration of the head or face. Would he be surprised if death results from an injury which endangers life or causes severe bodily pain? If this be so, it cannot be visualised what type of injury would not

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(1) Macdonald, 89.
(2) Section 272, S.P.C.; emphasis supplied.

cause this fictitious creature to be surprised if it results in death. If it is said that it is only such injuries as a shot in the head or a stab in the stomach or back which would not cause him surprise when it is followed by death - then, are we not leaving the domain of 'likelihoods' and entering that of 'probabilities'? - with the result that we move into the distinction between murder and involuntary culpable homicide rather than that between the latter and section 254.

The difficulty in distinguishing involuntary culpable homicide from section 254 has for a long time been experienced by the courts without being satisfactorily resolved. Cases continue to occur where a fight ensues between the parties during which one of them draws a knife and stabs the other or gives him a blow with an okaz (heavy stick) on the head or other part of the body causing his death. Carrying such weapons is commonplace in the Sudan, particularly in the more rural and remote areas. When a fight 'suddenly' ensues resulting in death it may generally be assumed that there was no intention to kill. But even in such a case, and even where the court decides that death was not 'the probable' result of the act, it would still have to decide whether the case was one of involuntary culpable homicide, or came under section 254. Creed, C.J., took great pains in attempting to clarify the distinction in several cases in his period as Chief Justice in the late 1930s and early 40s. In S.G. v. ElMahi Radwan,[1] the accused hit the deceased on the head with an okaz, causing his death. He was convicted under section 254. In confirming the conviction, Creed, C.J., said that the court should have considered whether the blow was 'likely' to cause death in which case the conviction should have been for culpable homicide. He quoted a statement from an earlier unnamed case which said that "Many of the sticks used in the Sudan are deadly weapons, and when used on the head, are at least 'likely' to cause

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(1) AC.CP.250.1936, Unrep.

death". He expressed the same opinion in S.G. v. Ahmed Ali Omer[1], the facts of which were similar to the above. But, again, he confirmed the conviction under section 254 on the ground that the punishment inflicted would have been adequate had the accused been convicted of culpable homicide. However, in S.G. v. Nasir Azrag[2] he, as Legal Secretary, refused to confirm a conviction under section 254 regardless of the similarity in the facts to the above two cases. He sent the case back for re-trial, observing that:

> "If it is true that the deceased's skull was broken as is alleged, the Confirming Authority is entirely unable to accept the finding that the accused had no reason to know that death was a 'likely' consequence of his act ... . The Confirming Authority has insisted again and again for many years that, if an accused person hits another person with a stick, other than a light stick, on the head with such violence that he cracks the skull of that person, he normally has reason to know that death is a 'likely' consequence of his act."

He continued:

> "Were death not a 'likely' result of stick blows on the head, the Confirming Authority would be in a state of perpetual surprise, as day after day it deals with cases in which death is caused by a stick blow on the Deceased's head."

Consequently, the Confirming Authority refused in a number of cases to confirm a conviction under section 254 when a conviction for involuntary culpable homicide could have been brought.[3] On other occasions it would reluctantly uphold the conviction on the sole ground that the punishment would be adequate in any case.[4] Conversely, situations have arisen where the trial court convicts the accused of culpable homicide and the Confirming Authority substitutes a conviction under section

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(1) AC.CP.163.1939, Unrep.
(2) AC.CP.183.1941, Unrep.; see also his opinion in S.G. v. Abu Ali Eisa, AC.CP. 250.1940, Unrep.
(3) S.G. v. Lado Modi, AC.CP.265.1943, Unrep.; S.G. v. Mohammed Ali Hassani, AC. CP.188.1944, Unrep.
(4) S.G. v. Roar Gai Seis, AC.CP.217.1955, Unrep.

254 because the injury is not considered to be 'likely' to result in death.[1] Recently, in S.G. v. Galil Shashati,[2] the accused kicked the deceased in the abdomen and the latter fell unconscious and died a short while later. On confirmation, the accused's conviction for culpable homicide was rejected and a conviction under section 254 substituted on the ground that he could not have known that death was 'likely' to follow. Abu Rannat, C.J., stated that a reasonable man would have been 'surprised' that the blow had caused death, and added:[3] "The accused is not a doctor who knows that a slight blow on the abdomen which leaves no sign would cause death". However, it still remains the case that the definition of 'grievous hurt' in section 272 of the Code is far too wide and will continue to present difficulties in distinguishing section 254 from involuntary culpable homicide. Nor do decided cases interpreting the Code make the position any clearer. Consequently, whether a case falls within one or the other of the two offences continues to be arbitrarily decided by the courts, although some help may be found in the nature of the injury, the part of the body injured, the weapon used, and other relevant circumstances of the case.

(b) Intention to Cause Hurt

Section 254 also applies where the intention of the accused is to cause simple, as opposed to grievous, hurt. 'Hurt' is defined in section 271 of the Code as "bodily pain, disease or infirmity ...". However, it is not every type of hurt which causes the accused to be convicted under section 254. The law sometimes allows the infliction of slight hurt and if this, due to unforeseen circumstances, results in death, the accused would not be liable under the section because the infliction of hurt was lawful. Section 54, S.P.C., provides:

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(1) S.G. v. Kafi Khalil, AC.CP.377.1952, Unrep.; S.G. v. Imole Imatong, AC.CP.22.1955, Unrep.
(2) (1962) S.L.J.R.243.
(3) Ibid, at P.247.

> "No act is an offence by reason that it causes or that it is intended to cause or that it is known to be likely to cause any injury if that injury is so slight that no person of ordinary sense and temper would complain of such injury."

Read in the light of the above section, it is clear that liability under section 254 will not arise if the type of intended harm is very slight or trivial. Thus, if A jokingly pushes a friend or gives him a slight punch and the latter dies due to unforeseen circumstances, such as an extremely weak heart, the accused is not likely to be prosecuted under this section. Similarly, a parent or schoolmaster who inflicts reasonable punishment to chastise a child would not be prosecuted if the child dies in similarly unforeseen circumstances. The rule is the same in England.[1] In Scotland, Lord Cooper's reference in Robertson and Donoghue[2] to "the intruder or aggressor, acting from criminal intent and in pursuance of some criminal purpose ...", indicates that no liability would arise if the assault or intended injury was not 'criminal'. But Rutherford[3] and, to some extent, Bird[4] appear to show that this is not necessarily so. In the former, where the accused put his tie around his girlfriend's throat in order to humour her or 'give her a fright', the jury was directed that "on no view of evidence" could it accept that the case was one of casual homicide or pure misadventure.[5] Similarly, in Bird,[4] Lord Jamieson directed the jury that any death following from an assault was culpable homicide and that the assault need not involve great violence, but could be a mere "threatening gesture". It has been

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(1) R. v. Griffin (1869) 11 Cox 402; Cleary v. Booth (1893) 1 Q.V.465; see also Russell, op.cit., Pp.457-464; Smith and Hogan, op.cit., 221; further, section 1(7) of the Children and Young Persons Offences Act, 1933, enables a parent, teacher or person having lawful control of a child to administer punishment to him. The same is also provided in the Children and Young Persons (Scotland) Act, 1937.

(2) Edinburgh High Court, August 1945, Unrep., Gordon, 748.

(3) 1947 J.C.1.

(4) 1952 J.C.23.

(5) 1947 J.C.1, Lord Cooper at P.5.

suggested that the better approach would be to require an element of 'wickedness' because:

> "Such a requirement would at least remove technical assaults, such as threatening gestures or physical pushes, from the operation of the rule that any assault resulting in death is culpable homicide."[1]

To return to section 254, it is clear that if the intention to cause hurt is unlawful and death results from such hurt the requirements of the section will be satisfied. This part of the section is intended to cover those cases where, although the hurt caused is not grievous, the deceased dies due to unforeseen circumstances, such as a diseased heart or a ruptured spleen, or if the injury is infected and death results from tetanus, gangrene or septicaemia, or if the deceased was a weak old person or a tender child. In such situations the underlying principle of liability is that the accused should 'take the victim as he finds him'. In dealing with the doctrine of causation[2] it has been explained that under Explanation 1 to section 246, S.P.C., a person who accelerates the death of another who is suffering from a disease or disorder is deemed to have caused that person's death. It has also been explained that under Explanation 2 of the same section a person will be deemed to have caused the deceased's death even where the latter's life could have been saved by resort to proper medical treatment.

Although the principles of causation are generally the same in the Sudan, India, Scotland and England, there is a considerable difference between these systems in determining the type of offence for which a person who causes death in the above circumstances may be held liable. In Scotland and England the conviction will be for culpable homicide and manslaughter respectively.[3] In the Sudan the effect of section 254

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(1) Gordon, 749.
(2) Ch. III, supra.
(3) Rutherford, 1947 J.C.1; Bird, 1952, J.C.23; R. v. Wild (1837) 2 Lew.214; R. v. Woods (1921) 85 J.P.272.

is to take the offence out of the category of culpable homicide, and deal with it separately. It is submitted that this is the more logical approach and the one more in accord with the concept of criminal responsibility, particularly as they are defined in the S.P.C. The Code makes it clear that liability for culpable homicide depends on 'intention', or 'knowledge' of the 'likelihood' of the act causing death. It follows that a person cannot be convicted of culpable homicide in the absence of these conditions. It is evident that a person who gives another a blow in the stomach or scratches another's face slightly, and the latter dies because his spleen is ruptured or his scratch is infected with tetanus, can hardly be said to have 'intended' or 'known' that the injury would be 'likely' to cause death. The 'reasonable man' would be 'surprised' that death resulted from such a blow or scratch. As Professor Gordon points out,[1] it is a non sequitur to say that the principle that the accused should take his victim as he finds him can be applied to any type of physical condition. He goes on:[2]

> "There is a great difference between a patent weakness such as infancy or old age, which the accused must have known of and ought to have taken into account, and a latent condition which he cannot be expected to have known of or even suspected. Responsibility for a latent condition cannot rest on negligence. But the effect of the rule is that the law is enabled to pretend to be proceeding on the ground of negligence, and to pretend that the victim's death was reasonably foreseeable, since it is reasonably foreseeable that a slight injury may kill someone with a weak heart - what the law conveniently forgets is that it is only foreseeable to someone who knows about the weak heart."

The Sudan law avoids the above criticism because if the accused knew of the deceased's heart he would know that a blow may be 'likely' to cause his death - in which case the conviction will be for culpable homicide. But if the accused has no knowledge at all of the deceased's latent condition, death would not be foreseeable and the

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(1) Gordon, 745.
(2) Ibid.

conviction would be under section 254.

Section 254 is also an improvement on the I.P.C. which contains no corresponding provision. In India a person who causes death in circumstances which would in the Sudan fall under section 254, would be convicted merely of causing hurt (or grievous hurt) as though the death had not occurred.[1] This used to be the position in the Sudan before 1925,[2] but at present it is not permissible to bring in a conviction for hurt in such circumstances.[3] In S.G. v. Akec Magol,[4] the accused hit the deceased on the head with a heavy okaz. The latter refused to obtain medical treatment and died due to complications following from the blow. The trial court convicted the accused of causing grievous hurt under section 278, S.P.C. On confirmation, the case was sent back for reconsideration of finding. Abu Rannat, C.J., pointed out that the conviction must be under section 254 because the effect of Explanation 2 of section 246 is to hold the accused responsible for 'causing' the death, and he cannot thereafter be convicted merely of causing hurt.[5]

The reason why the position under the I.P.C. is illogical is because section 299 of it is followed by exactly the same two Explanations as section 246, S.P.C. Consequently, even where death follows from such unforeseen circumstances as a weak heart or a diseased spleen, the effect of the two Explanations is to hold that the accused has 'caused' the death. It therefore seems incongruous to say, on the one hand, that A has caused D's death, and on the other to hold him guilty of merely causing hurt or grievous hurt. Section 254 thus fills in a gap which under the I.P.C. remains unbridged.

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(1) Empress v. Idu Beg (1881) I.L.R. 3 All.776; Bharat Singh v. Emperor, A.I.R. (1932) Oudh 279; Emperor v. Lal Bakhsh, A.I.R. (1945) Lah.43.
(2) S.G. v. Hereika Wad Sulka, AC.CP.276.1923, Unrep.
(3) S.G. v. Abboudi Ali ElTeleib, AC.CP.189.1931, Unrep.
(4) (1961) S.L.J.R.20.
(5) Ibid, at P.21.

In conclusion, it may be said that, like section 255, section 254 is a compromise between the two extremes - conviction for culpable homicide (or manslaughter) as in the U.K., or conviction for hurt as in India. Again, like section 255, it punishes the consequences (the causing of death) rather than the act itself. As Hassib, J., said in S.G. v. Bushra Hamadein:[1]

> "The act punishable under Penal Code, S.254, is not the guilty mind. It is the consequences of that guilty mind. Penal Code, S.254, is our own and has no equivalent in Indian Penal law yet is a section similar in formula to Penal Code S.255, which penalizes the consequences of intending to commit an offence. In both sections the act punishable is the causing of death in the course of doing a smaller offence, i.e., hurt or grievous hurt under Penal Code S.254, and an offence punishable with imprisonment for one year."

Thus, although section 254 somewhat incorporates the idea of constructive responsibility, it is morally defensible because it provides a deterrent against the commission of acts which might result in death by punishing them more severely (a maximum of fourteen year's imprisonment). The courts have consistently applied the section whenever someone causes death when his intention was to cause injury - if death results from such unforeseen circumstances as those discussed above.[2]

Finally, it must be noted that it is immaterial for a conviction under the section whether the accused's intention was to cause 'hurt' or 'grievous hurt'. This may, however, be relevant in assessing the appropriate sentence.[3]

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(1) (1962) S.L.J.R.118 at P.119.

(2) S.G. v. Kafi Khalil, AC.CP.377.1952, Unrep.; S.G. v. Khalid ElRabie Hassan, KTM.Maj.ct.21.1953, Unrep.; S.G. v. Imole Imatong, AC.CP.22.1955, Unrep.; S.G. v. Galil Shashati (1962) S.L.J.R.243; S.G. v. Leben Ramando (1963) S.L.J.R.168.

(3) Gledhill, 495; Cf. Lord Jamieson in Bird, 1952 J.C.23 at P.25.

C H A P T E R VIII

MENTAL ABNORMALITY AND THE LAW OF HOMICIDE

I. Insanity

Introduction

It is a common feature of most contemporary legal systems that liability for serious crimes is made to depend not only on the external illegal act of the offender, but on his having done it in a certain state of mind or *mens rea*. Consequently, and as a rule, a person will not be held responsible for his conduct if it is the result of some mental disease or mental abnormality. The reason why such persons are treated as irresponsible is that the law regards it as highly improper to hold them morally blameable.

However, there is as yet no universally accepted criterion for determining the extent to which mental disease or abnormality will exempt the accused from responsibility. Different legal systems have at different times adopted different formulae for dealing with the problem. The search for such solutions has indeed been rendered more formidable by the confusion between what are referred to as 'legal' insanity and 'medical' insanity. From his point of view, the medical expert is concerned with the accused's mental condition and his susceptibility to psychiatric treatment. The lawyer, on the other hand, is not concerned with different types of diseases or their diagnosis, but is primarily concerned with whether that disease or abnormality

has affected the accused's responsibility for his acts as ascertained by defined legal criteria. In doing so, however, lawyers rely to a great extent on the opinion of medical experts on the accused's mental condition. This resulted in the creation of a rift between lawyers and psychiatrists, particularly in the last few decades due to the vast discoveries in the working and mechanism of the human mind, and the law's desire to keep pace with such developments. Glueck describes the conflict as follows:

> "Lawyers tend to look upon psychiatrists as fuzzy apologists for criminals, while psychiatrists tend to regard lawyers as devious phrasemongers."[1]

The problem may best be approached from the viewpoint that the question of responsibility is neither a 'purely' legal or medical one.

> "It is essentially a moral question, with which the law is intimately concerned and to whose solution medicine can bring valuable aid ...."[2]

Whether the accused was or was not responsible for his actions will be determined by the courts in accordance with the relevant legal criteria, and medical evidence will continue to assist the court in its difficult inquiry.

> "It is not the function of the medical witness to usurp the function of the court but to assist it; it is for the expert to depose to the existence, nature and extent of the unsoundness of mind; it is for the court to say whether, at the time of committing the act, the accused's state of mind was such as to bring him within the scope of the exception."[3]

The solutions followed in different systems to deal with the question of mental abnormality will now be considered.

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(1) Glueck, S., Law and Psychiatry, (London, 1969) Pp.4-5.
(2) R.C.C.P., Cmd.8932, Para.283.
(3) Gledhill, 103.

Insanity as a Defence: The M'Naghten Rules

By far the most celebrated test of irresponsibility due to mental illness is that currently known as the M'Naghten Rules.[1] In 1843, Daniel M'Naghten, who was suffering from the delusion that the Government was persecuting him, killed the secretary of the then Prime Minister, mistaking him for the latter. His acquittal on grounds of insanity caused public unrest and the matter was debated by the House of Lords which formulated a number of questions on the issue and sent them to the Judges. The Judges' answers to the questions came to be known as the M'Naghten Rules and have been followed by the courts ever since. The Rules were also accepted in the U.S.A.,[2] parts of Australia,[3] Canada,[4] New Zealand,[5] India,[6] Ceylon[7] and Pakistan.[8] The Rules may be summarised as follows:

1. Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved.

2. To

> "establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

3. If a person commits an offence under an insane delusion, and is not in other re-

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(1) (1843) 10 Cl. & F.200; 8 E.R.718.
(2) See R.C.C.P., Cmd.8932, Appendix 9(B); for recent developments, see infra.
(3) Ibid, Appendix 9(A); see also section 27 of the Queensland Criminal Code, section 27 of Western Australia Criminal Code, section 16 of the Tasmania Criminal Code; for a discussion of the development and changes in Australian law see Morris and Howard, op.cit., 37 et seq.
(4) Section 19 of the Canadian Criminal Code.
(5) Section 43 of the New Zealand Crimes Act, 1908.
(6) Section 84, I.P.C.
(7) Section 77, Ceylon Penal Code.
(8) R.C.C.P., Cmd.8932, Appendix 9(A).

spects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion pertains were real.

Criticism of the Rules

Ever since their inception, the M'Naghten Rules have been subjected to severe criticisms, both from medical as well as legal quarters.[1] Briefly stated, the reasons for this were, first, that the Rules are only concerned with the cognitive or intellectual aspects of the mind (i.e., knowledge) and take no account of modern psychiatric developments which treat the mind as an indivisible whole. As was pointed out on one occasion:

> "Unsoundness of mind is no longer regarded as in essence a disorder of the intellectual or cognitive faculties. The modern view is that it is something much more profoundly related to the whole organism - a morbid change in the emotional and instinctive activities with or without intellectual derangement."[2]

By concentrating on the cognitive aspect of the mind the Rules fail to recognise that a person may have the capacity for knowledge but that as a result of another mental disease he should not be held accountable for his actions. Secondly, the Rules take no account of mental disorders which affect the accused's will and his capacity to control his actions, i.e., the concept of irresistible impulse. Finally, several other objections were raised against the meaning given to certain phrases in the Rules

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(1) Stephen, H.C.L., vol. II, Chap. 17; Report of the Committee on Insanity and Crime, 1923, Cmd.2005, (hereinafter referred to as the Atkin Committee); R.C.C.P., Cmd.8932, paras. 289-297; see also Appendix 8(d) for summary of earlier criticisms; Whitlock, F.A., Criminal Responsibility and Mental Illness, (London, 1963), 35-53; Glueck, op.cit., 43-78; the inadequacy of the Rules has also been recognised by the House of Lords in Williamson v. Williamson, (1964) A.C.698; and by the Scots courts in H.M.A. v. Kidd 1960 J.C. 61 at P.71; and Breen v. Breen, 1961 S.C.158; and by the American courts in U.S. v. Freeman, 357 F.2 ct.606 (1966).

(2) The Atkin Committee, Cmd.2005, P.5; this was the opinion expressed by the British Medical Association before the Committee.

by the courts in their attempts to interpret them. These latter objections will be pointed out subsequently when the Rules are discussed in the light of the Sudan law of insanity.

The question of the relation of mental illness to criminal responsibility was considered by the Atkin Committee[1] in 1923 and, more thoroughly, by the Royal Commission on Capital Punishment.[2] The former was of opinion that the Rules should be retained and that an addition be made to them recognising the concept of irresistible impulse.[3] The latter Commission examined the matter in greater detail and came forward with much more radical recommendations. They stated that in practice both judge and jury disregarded the Rules when 'common sense' made it clear that the accused was insane although under the Rules he would be guilty - the question to be asked was "whether the accused was so insane that it would be unreasonable to hold him responsible for his actions".[4] They thus agreed with Lord Cooper's[5] observation that:

> "However much you charge the jury as to the M'Naghten Rules or any other test, the question they would put to themselves when they retire is - Is this man mad or is he not?'"[6]

The Commission concluded that no precise formula could be found to determine the state of mind which exempts a person from criminal responsibility.[7] They recommended that the M'Naghten Rules should be abrogated and the question should be left to the jury to determine whether at the time of doing the act the accused was "suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible."[8] Alternatively, they were of opinion that, if the Rules were to

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(1) Cmd.2005.
(2) Cmd.8932.
(3) Cmd.2005, P.21. A Bill to implement its recommendations was rejected in 1924.
(4) Cmd.8932, para.322.
(5) Ibid, Minutes of Evidence, Q.5479.
(6) Ibid, para.322.
(7) Ibid. para.323.
(8) Ibid, para.333 and Recommendation 17.

be retained, they should be enlarged by an addition to the effect that the accused should not be held responsible if, as a result of mental disease, he was labouring under

> "a disorder of emotion such that, while appreciating the nature and quality of the act, and that it was wrong, he did not possess sufficient power to prevent himself from committing it."[1]

None of the above recommendations of either Commission was implemented and the Rules continued to be applied until 1957 when the English law of insanity was greatly modified by the adoption of the Scottish concept of 'diminished responsibility' in the Homicide Act of that year. Before dealing with the latter it is intended to see the extent to which the Rules have been followed or modified and to examine the alternative criteria that have been offered.

Scots Law and M'Naghten

The law of insanity in Scotland does not have the same place of significance it has in other jurisdictions because generally the issue is either determined earlier on a plea in bar of trial, or the defence of diminished responsibility is pleaded. It is therefore not easy to state with certainty what Scots law is in relation to insanity. However, it would appear that before the M'Naghten Rules the law was wide enough to cover more than mere cognitive incapacity. In Hume's[2] words, there must be:

> "an absolute alienation of reason ... such a disease as deprives the patient of the knowledge of the true aspect and position of things about him, - hindering him from distinguishing friend or foe - and gives him to the impulse of his own distempered fancy."

The introduction of M'Naghten into Scots law was made by Lord Hope in James Gibson,[3]

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(1) Ibid, para.333 and Recommendation 18.
(2) Hume, i, 37; for a description of Scots law before 1843 see Gordon, 317-319.
(3) (1844) 2 Broun 332.

one year after M'Naghten. He directed the jury in accordance with the Rules and added that Scots law did not recognise irresistible impulse because, however strong the impulse, the offender 'chooses' to commit the crime through his wickedness and his rebellion against God. Lord Hope[1] and other judges[2] continued to state the law in accordance with the Rules in several subsequent cases.

During the same period there was a tendency in some cases to reject the right-wrong[3] test in the Rules, or to recognise irresistible impulse[4] as a defence. This tendency culminated in the express rejection of the Rules by Lord Moncreiff in the early 1870s. He emphasised that the law should reject rigid criteria and keep pace with the advances in science. In Eliza Sinclair or Clapton[5] he stated that a mother who had killed her two children may succeed in a defence of irresistible impulse if her act was due to 'mental disease'. Further, in Archibald Miller,[6] he said that it was:

> "entirely imperfect and inaccurate to say that if a man has a conception intellectually of moral or legal obligation he is of sound mind .... A man may be entirely insane, and yet may know well that an act which he does is forbidden by law .... It is not a question of knowledge but of soundness of mind. If the man have not a sane mind to apply his knowledge, the mere intellectual apprehension of an injunction or prohibition may stimulate his mind to do an act simply because it is forbidden .... You may discard these definitions altogether. They only mislead."[7]

According to Lord Moncreiff, the question was simply whether the accused's mind was diseased to such an extent that it affected his control of his conduct.[8] He rejected

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(1) Elizabeth Yates (1847) Ark.238 at Pp.240-241; George Lillie Smith (1855) 2 Irv.1.
(2) Lord M'Neill in George Bryce (1864) 4 Irv.506; Lord Justice-Clerk Inglis in Andrew Brown (1866) 5 Irv.215.
(3) Isabella Blyth (1852) J.Shaw 567; Alex Milne (1863) 4 Irv.301.
(4) James Denny Scott, (1853) 1 Irv.132, Lord Cockburn at P.142; John M'Fadyen, (1860) 3 Irv.650, Lord Cowan at P.665.
(5) (1871) 2 Couper 73.
(6) (1874) 3 Couper 16.
(7) Ibid, at P.18.
(8) James Macklin (1876) 3 Couper 257.

any attempt to formulate legal criteria or tests for determining irresponsibility and preferred the more pragmatic approach (currently known as 'the causal approach', reference to which is subsequently made in greater detail) under which the only question was whether the accused's act could be attributed to 'mental disease'.
However, this approach was not subsequently consistently followed. In some cases[1] the Rules were treated as authoritative, in others[2] the law was stated in terms of the Rules together with the defence of irresistible impulse, and in yet others[3] the Rules were completely disregarded and Lord Moncreiff's approach preferred.
In the evidence before the R.C.C.P., the Scottish witnesses[4] differed on whether the Rules were or were not part of Scots law, and the Commission seems to have concluded that they were not.[5] The current tendency appears to be to ignore the Rules and follow the causal approach,[6] as is shown in some civil[7] and criminal[8] cases. The clearest statement on the matter is that of Lord Strachan in H.M.A. v. Kidd[9] where he said that the question should be treated broadly by determining as a matter of fact, whether or not the accused was of unsound mind; there must be a mental defect by which the accused's reason was overpowered rendering him incapable of controlling his conduct and reactions. He continued:[10]

"At one time, following English law, it was held in Scotland that if an accused did not know the nature

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(1) Alex Dingwall (1867) 5 Irv.466 at P.467; Thomas Ferguson (1881) 4 Couper 552 at P.557.
(2) James Denny Scott (1853) 1 Irv.132 at P.142.
(3) H.M.A. v. Brown (1907) 5 Adam 312 at P.346; H.M.A. v. Sharp, 1927 J.C.66; H.M.A. v. Mitchell, 1951 J.C.53 at P.54.
(4) Minutes of Evidence, Lord Cooper, Q.5465, 5479, 5506; Lord Keith, Q.5189; Memorandum of the Faculty of Advocates, para.12.
(5) Cmd.8932, para.257.
(6) Smith T.B., "Diminished Responsibility", (1957) Crim.L.R.354 at P.355; also his British Justice, The Scottish Contribution, (London, 1961) 105; Gordon, 329.
(7) Mackenzie v. Mackenzie, 1960 S.C.332; Breen v. Breen, 1961 S.C.158.
(8) H.M.A. v. Kidd, 1960 J.C.61, followed in Henry J. Burnett, Aberdeen High Court July 1963, Unrep.; Gordon 329.
(9) 1960 J.C.61.
(10) Ibid, at Pp.70-71.

> and quality of the act committed, or if he did know it but did not know he was doing wrong, it was held he was insane.. That was the test but that test has not been followed in Scotland in the most recent cases. Knowledge of the nature and quality of the act, and knowledge that he is doing wrong, may no doubt be an element, indeed are an element, in deciding whether a man is sane or insane, but they do not ... afford a complete or perfect test of insanity. A man may know very well what he is doing, and may know that it is wrong, and he may none the less be insane."

Insanity Under the S.P.C.

Section 63 of the 1899 S.P.C. copied section 84 of the I.P.C. which, in turn, substantially incorporated the M'Naghten Rules. It provided:

> "Nothing is an offence which is done by a person who, at the time of doing it, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

The section differed from the Rules in its reference to 'unsoundness of mind' instead of 'defect of reason from disease of the mind', and to 'nature' instead of 'nature and quality'. Further, the section used the phrase 'wrong or contrary to law' thus modifying the restrictive meaning of 'wrong' in the Rules as relating to 'legally' wrong acts.[1] However, as a whole, the section reproduced the weakness of the Rules in their concentration on cognition and the right-wrong test without allowing for other types of abnormality.

When the Code was re-enacted in 1925 the section was repealed and replaced by the present section 50 which was taken from Egyptian law[2] and forms a significant departure from both the Indian law and the M'Naghten Rules. It provides:

> "No act is an offence which is done by a person who at the time of doing it did not possess the power of appreciating

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(1) R. v. Windle (1952) 2 Q.B. 826; for a further discussion of this question, see infra.

(2) Section 62(1) of the Egyptian Penal Code; see Awad, M., The Criminal Law (Arabic), (Cairo, 1963,)Ch. 4.

the nature of his acts or of controlling them by reason of,
(a) permanent or temporary insanity or mental infirmity ...."

The issues for determination under section 50 have from an early date been outlined by Creed, C.J., in a number of cases.[1] The tendency of the courts to interpret the section in the light of English and Indian laws led Flaxman, a later Chief Justice, to spell out these issues in a legal circular. Paragraph (4) of C.C.C.No.21[2] states that the issues to be determined by the court under section 50 are the following:

"(a) At the time of the act did the accused possess the power of appreciating his act?
(b) If so, did he possess the power of controlling it?
(c) If either (a) or (b) is answered in the negative, was such inability to appreciate or control the result of permanent or temporary insanity or mental infirmity?"

The ingredients of the section will now be dealt with separately.

"Appreciate":-

The first striking difference between section 50 and the M'Naghten Rules is that the former uses 'appreciate' instead of the narrower 'know' in the Rules. In so doing, the section allows for a more comprehensive test of the extent of the accused's awareness of what he is doing and does not limit the inquiry to superficial cognition. The American Law Institute's Model Penal Code has also preferred 'appreciation' to knowledge in its test of irresponsibility. Section 4.01 of the latter Code provides:

"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease ... he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."[3]

Again, section 1 of the Criminal Justice (Northern Ireland) Act, 1966, defines an

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(1) S.G. v. Kenyi Meri, AC.CP.264.1936, Unrep.; S.G. v. Mohammed Ali Mohammed, AC.CP.179.1937, Unrep.; S.G. v. Mohammed Ohag Mohammed, AC.CP.57.1937, Unrep.; S.G. v. Abdel Bari Abdulla, AC.CP.193.1938, Unrep.

(2) Dated 1.1.1954; this Circular cancels and replaces the earlier C.C.C.No. 21 dated 15.6.1952.

(3) For examination of this test see infra.

'insane person' as one who suffers from mental abnormality which prevents him "from appreciating what he is doing; or from appreciating that what he is doing is either wrong or contrary to law;". It is also generally accepted that "'Appreciation is a wide enough term to cover all aspects of the conduct - its nature, its consequences, its moral value and its legal effect".[1] In the recent American case of U.S. v. Freeman,[2] it was expressly stated that the word 'appreciate' was preferable to 'know' because:

> "... mere intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behaviour, can have little significance."[3]

This also finds support in Lord Strachan's directions in H.M.A. v. Kidd.[4]

"Nature of the Act":-

Section 50, also unlike the M'Naghten Rules, refers merely to 'nature' of the act and omits any mention of its 'quality'. However, it is perhaps paradoxical that whereas under the Rules 'nature and quality' were interpreted to mean one thing, i.e., the 'physical' as opposed to the 'moral' character of the act,[5] 'nature' in section 50 has been interpreted to include the 'quality' of the act, and therefore embraces both the 'physical' nature of the act as well as its 'moral' value. In an attempt to emphasise this interpretation paragraph (9) of C.C.C.No.21 provides:

> "Section 50 differs from the law of England as stated in the Judges Answers in McNAGHTEN'S CASE. Magistrates and Presidents of courts should therefore avoid any attempt to whittle down or elaborate the plain meaning of the words 'the nature of his acts' in Section 50 by reference to the technical meaning attached to certain words in McNAGHTEN'S CASE."

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(1) Gordon, 316; see also Glueck, op.cit., 69; J. Hogget, "M'Naghten, Smith and Northern Ireland", (1967) Crim.L.R.258 at P.259.
(2) 357 F 2d. 606 (1966).
(3) Kaufman, J., at P.623, ibid.
(4) 1960 J.C.61 at Pp.70-71; see supra.
(5) R. v. Codere (1916) 12 Cr.App.R.21.

The Circular goes on:[1]

> "The meaning of the words 'nature of his acts' is not restricted to the purely physical nature of his acts, e.g., A owing to temporary insanity believes that a determined attack is being made on his life by armed men. A thereupon kills a defenceless man (D) by stabbing him in the stomach. Although A may have appreciated that he was killing a man (D) he did not appreciate the nature of his acts within the meaning of Section 50 S.P.C."

Although the Circular affirms the distinction between section 50 and the Rules and points out that 'nature' of the act within section 50 is not confined to its 'physical' nature, the example used to illustrate the distinction is somewhat unfortunate because it is a case of delusion which may entitle the accused to an acquittal even under the M'Naghten formula. A better illustration of the distinction may be found in the case of S.G. v. Abdel Bari Abdulla,[2] also a case of insane delusion. Creed, C.J., emphasised the general distinction between the section and the Rules and went on:

> "In my opinion the meaning of the words 'appreciating the nature of his acts' should not be unduly restricted. It should ... ... be interpreted as covering (a) cases in which the accused person is ignorant of the nature of his act in the sense that he is ignorant of the properties and operation of external agencies which he brings into play (e.g., an idiot firing a gun believing it to be a harmless toy), (b) cases in which he is ignorant of the quality of his act in the sense that he knows the result which will follow his act, but is incapable of appreciating the elementary principles which make up the heinous and shocking nature of the result (e.g., an idiot unable to perceive the difference between shooting a man and shooting an ape), and also (c) cases in which, owing to an insane delusion, a man does an act which he bona fide believes to be justified in doing or bound to do.
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> "The words 'nature of his act' do not imply a complete abstraction of the physical act from all its surroundings."[3]

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(1) Para.(10).
(2) AC.CP.193.1938, Unrep.
(3) The explanation in (a) and (b) in this statement is taken from Gour, op.cit., vol. I, 492.

This makes it clear that 'nature' in section 50 is wider than 'nature and quality' in the Rules as interpreted in Codere.[1] The accused will not fall within the Rules if he knows that he is killing a man but he will be protected under section 50 if he knows this fact but is unaware of its moral value or "if he does not appreciate the shocking character of his act to the community".[2] The interpretation in Abdel Bari's[3] case has recently been followed by Abu Rannat, C.J., in S.G. v. Mousa Adam Ishag,[4] which further illustrates that section 50 is wider than the Rules in its dealing with delusions. The accused had a history of mental instability and suffered from a delusion that wherever he went people abused and persecuted him. He left his family and wandered from one village to the other but his obsession became worse. He finally reached a village where he immediately set fire to a hut, stabbed a man who tried to put it out and stabbed another to death. Abu Rannat, C.J., quashed the accused's conviction of murder and substituted a finding under section 50 on the ground that he could not be said to have appreciated the 'nature' of his act. Although Abdel Bari's[3] case was not referred to, the learned C.J. gave the word 'nature' the same interpretation given to it by Creed, C.J., in that case.

In relation to delusions, it is submitted that had the M'Naghten Rules been applied to the facts of Mousa Adam Ishag,[4] the accused would probably have been convicted because his liability would be considered on the assumption that the facts to which the delusion pertained were real. Clearly the fact that the accused believed that he was being abused and persecuted by others gives him no justification for taking a man's life.

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(1) (1916) 12 Cr.App.R.21.
(2) Tatai, E.A., "Insanity and Criminal Responsibility", (1966) S.L.J.R.238 at P.243.
(3) Supra.
(4) (1958) S.L.J.R.1; see also S.G. v. Mahmoud Shaibo, Maj.ct., Kordofan, 1939, Unrep., Gledhill, 100.

It is thus clear that section 50 is wider than the M'Naghten Rules as interpreted in Codere[1] the effect of which is to render the words 'and quality' superfluous.

Uncontrollable Impulse

A further improvement of section 50 on the Rules is that it expressly admits the concept of uncontrollable impulse within the defence of insanity. It has for a long time been pointed out that a person may know the nature of what he is doing, know that it is wrong or contrary to law but, nevertheless, because of mental abnormality, or insanity, he fails to prevent himself from committing it. Such a person should not be punished because he lacked the capacity to control his acts and because, from a utilitarian viewpoint

> "that punishment or the threat of it will no more persuade a man to resist an irresistible impulse than it will persuade a one-legged man to win an Olympic race."[2]

As already stated, one of the most serious objections to the M'Naghten Rules is their failure to recongise irresistible impulse and their taking no account of the volitional and emotional aspects of personality. The concept of irresistibel impulse widens the narrow scope of the cognitive test and gives the expert medical witness a broader scope to testify on the accused's mental condition.

> "It catches in its exculpatory net many persons with mental aberration whom the knowledge tests miss, such as those whose mental processes have been affected by long-standing epileptic seizure states, general paresis, senile dementia and even extreme compulsive neuroses."[3]

Stephen[4] was of opinion that the concept of irresistible impulse was already part of

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(1) Supra.
(2) Gordon, 310.
(3) Glueck, op.cit., 54.
(4) Stephen, H.C.L., vol. II, 167-168; see also the direction to the jury in R. v. Fryer (1912) 24 Cox 403; R. v. Jolly (1919) 83 J.P.296; similar opinions were also expressed before the R.C.C.P., Minutes of Evidence, Mathews, Q.2127-2128, 2203; Sir John Anderson, Q.4497-4498; see also Evatt, J., in the/...

the M'Naghten Rules. He recognised the defence in his Criminal Code Bill of 1878 but this was rejected by the Commissioners who reported on the Bill, on the ground that such a defence would be indistinguishable from cases where the accused was motivated by revenge, hatred or ungovernable passion.[1] Stephen's view does not also appear to be supported by the case law. Thus in Kopsch,[2] Lord Hewart, C.J., described the concept of irresistible impulse as "a fantastic theory ... which, if it were to become part of our criminal law, would be merely subversive".[3] Further, the Court of Criminal Appeal consistently refused to accept the concept as falling within the Rules[4] and the same view was recently taken by the Judicial Committee of the Privy Council in the Australian case of South Australia v. Brown.[5]

Stephen's view was adopted by the Atkin Committee which recommended that:

> "It should be recognized that a person charged criminally with an offence is irresponsible for his act when the act is committed under an impulse which the prisoner was by mental disease in substance deprived of the power to resist."[6]

A similar recommendation was made by the R.C.C.P.[7] but, as has already been pointed out,[8] neither recommendation was implemented.

However, the concept of irresistible impulse has been recognised in several jurisdictions where the M'Naghten Rules were unknown[9] or where they were modified.[10] The tendency of the Scots courts to include irresistible impulse in the defence of insanity

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(contd.) Australian case of Sodeman v. The King (1936) C.L.R.192 at P.227.

(1) B.P.P., 1878-1879, vol. xx, Pp.17-18; see Article 67 of the Draft Code, 1879.
(2) (1925) 19 Cr.App.R.50.
(3) Ibid, at Pp.51-52.
(4) R. v. Thomas (1911) 17 Cr.App.R.36; R. v. Coelho (1914) 10 Cr.App.R.210; R.v. Holt (1920) 15 Cr. App.R.10; R. v. Quarmby (1921) 15 Cr.App.R.163; R. v. Flavell (1926) 19 Cr.App.R.141.
(5) (1960) A.C.432.
(6) Cmd.2005, P.21.
(7) Cmd.8932, para.333 and Recommendation 18.
(8) Supra.
(9) e.g., Belgium, France, Switzerland, R.C.C.P., Appendix 9.
(10) e.g. parts of Australia, parts of U.S.A., and South Africa, R.C.C.P., Appendix 9.

in some of the cases has already been pointed out.[1]

Returning now to the merits of the defence of irresistible impulse, it must be noted that one of the most familiar objections to it is that relating to evidence, i.e., the difficulty of proving whether the impulse was 'irresistible' or whether it was merely 'unresisted'. This difficulty seems to be somewhat exaggerated because, though it is admitted that it is not an easy task to determine whether in fact the impulse was not resisted or was irresistible, the issue seems to be one which should be proved as a medical fact leaving the court to make its inference in the same way as it would where the issue is one of incapacity to appreciate the nature of the act. As Professor Gledhill maintains:[2]

> "one may doubt whether it is more difficult to decide whether, at the precise moment, the accused knew the nature of his act or that it was wrong."

In supporting the recommendation of the R.C.C.P. to add the defence of irresistible impulse to the M'Naghten Rules, Morris and Howard said:[3]

> "... juries are already required to find facts in a complex medico-legal practice when they apply the M'Naghten Rules; requiring them to find one more fact such as the accused's capacity to prevent himself from committing the crime, would not unduly increase their already onerous burden, for ascertaining the ability of one with a diseased mind to know certain facts concerning his actions is quite as difficult as ascertaining his ability to control those actions."

The difficulty becomes less formidable when it is noted that section 50 states that incapacity to control acts must result from 'insanity or mental infirmity'. Thus,

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(1) See supra; see also Gordon, 312-313.

(2) Gledhill, 101; however, on another occasion he said: "One may doubt whether in the Sudan or Northern Nigeria medical services are of such a standard that expert witnesses competent to distinguish between an irresistible impulse and an impulse not in fact resisted, are readily available.", "The Indian Penal Code in Northern Nigeria and the Sudan", op.cit., 12.

(3) Morris and Howard, op.cit., 53; Cf. Hart, H.L.A., Punishment and Responsibility, (Oxford, 1968), 203.

irresistible impulse per se is not a defence, it must result from mental disease or infirmity. Consequently, acts done in uncontrolled fits of passion, jealousy or rage are excluded.[1]

In S.G. v. Ahmed Fadl ElMula,[2] the accused was convicted of murder for slaughtering his sixteen year old wife for no apparent reason. The conviction was confirmed by Maclagan, C.J., who pointed out that the accused's marital problems had caused his uncontrollable rage. He added:

> "Our law, unlike the law of England, does recognize uncontrollable impulse as a possible defence; but only where it is induced by ... mental infirmity."

The requirement that the uncontrollable impulse must result from insanity or mental infirmity is currently generally accepted by Sudanese lawyers.[3] Conversely, mere mental abnormality does not excuse the offender's act unless it is proved that the abnormality has caused the inability to control acts. In S.G. v. Munhal ElNur,[4] the accused, an invalid stated to be suffering from 'paralysis agitan', killed a boy of eight who had been playing with his daughter. He explained his action by stating that the boy had annoyed him by jumping over the bed. His conviction for murder was confirmed. Flaxman, C.J., said:

> "There is no doubt that the accused is abnormal, but abnormality alone will not relieve him of criminal responsibility. He must, by reason of the abnormality, at the time of the crime, have been incapable of appreciating what he was doing, or of controlling his acts".

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(1) Similar opinions were expressed by the Australian courts in Sodeman v. The King (1936) C.L.R.19 and South Australia v. Brown (1960) A.C.432.

(2) AC.CP.13.1948, Unrep.

(3) In answering the Questionnaire, seven respondents agreed that irresistible impulse was not a defence per se, and that it must be proved that the impulse was the result of mental disease; only one thought it was a defence per se and the rest failed to reply, Q.14, Part III, A, Questionnaire.

(4) AC.CP.78.1941, Unrep.

However, it by no means follows that there is no difficulty in proving uncontrollable impulse under section 50. The courts have been faced with the problem for a long time. In S.G. v. Omer Mohammed,[1] the court equated section 50 with the M'Naghten Rules and held that irresistible impulse was not within the section. In other cases the courts recognised that it was within the section but emphasised the difficulty of its proof. Thus, in S.G. v. Lako Lolika,[2] Maclagan, C.J., pointed out that the defence was unknown in English law but was 'unfortunately' included in the S.P.C.; and that under the latter for the defence to succeed it must be 'most strictly proved'. More recently, in S.G. v. Abdel Wahab Abdel Sakhi,[3] Abu Rannat, C.J., recognised that the defence fell within section 50 and went on to state the difficulty as follows:[4]

> "As to control of the act, this refers to cases of irresistible or unresisted impulse. It is known that most crimes are the result of temptation or impulses that are not resisted, and it is absurd to expect any court to accept a medical opinion that an act was the result of an irresistible impulse beyond control of the patient without corroborative evidence."

Along similar lines as that of the difficulty of proof it has been suggested that there is no such thing as an 'irresistible' impulse and that the real test should be whether the accused would still have committed his crime had he had "a policeman at his elbow".[5] This is by no means a convincing test because even a completely insane person may refrain from committing a criminal act when he is being watched by a policeman. The real objection to such an argument is that the offender may in fact be suffering from a mental disease, and although he may not commit a criminal act

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(1) AC.CP.131.1935, Unrep.
(2) AC.CP.154.1949, Unrep.
(3) (1961) S.L.J.R.110.
(4) Ibid, at P.111.
(5) Baron Bramwell in R. v. Hayes (1859) 1 F. & F.666 at P.667.

in the presence of a policeman, he may be inclined to do so as soon as the latter goes away. Further, as Glueck points out, such a test overlooks

> "the fact that most patients in mental hospitals are deterrable; but that does not make them less mentally ill. And unless we are ready to disgrace and punish the mentally ill for their crimes, the question of their deterrability does not seem to have much relevance."[1]

The test seems to have been referred to by Bell, C.J., in S.G. v. Ahmed Mohammed El Ramli[2] and Bennet, C.J., in S.G. v. Awad ElKarim Ali.[3] In the latter case the accused met a young girl carrying a baby and, for no reason, gave the baby a blow on the head. The girl dropped the baby and ran away, whereupon the accused gave it two more blows, causing its death. He was convicted of murder. On reference for confirmation, a finding under section 50 was substituted. Bennet, C.J., pointed out that the court was influenced by the consideration that the accused would not have committed the act had he had a policeman at his elbow. In rejecting this, he said:

> "Whilst this consideration may give rise to some inference of capacity to control, I do not think it by any means gives rise to the decisive inference given to it by the Court. The power of control is dependent upon all the cricumstances present at the time. We cannot follow another's mental processess, let alone the processes of a diseased brain or determine what might or might not have been the effect of some intervening circumstance or why. The capacity to control must be inferred from the actual circumstances present at the time."

The policeman-at-one's-elbow test does not seem to have recurred in recent cases and it is accepted that it should not be considered as part of the Sudan law.[4]

It should finally be pointed out that section 50 refers to incapacity to 'control' one's acts, i.e., uncontrollable acts rather than 'irresistible impulse'. It thus

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(1) Glueck, op.cit., 52; see also Gledhill, 101-102.
(2) AC.CP.175.1927, Unrep.
(3) AC.CP.135.1945, Unrep.
(4) Gledhill, 102.

avoids the narrow interpretation which could be given to 'irresistible impulse' as consisting of a spontaneous or sudden burst to commit a crime. This was the criticism made by the R.C.C.P.[1] who pointed out that the term 'irresistible impulse' was too narrow as it implied that the crime must have been 'suddenly and impulsively committed after a sharp internal conflict'. They went on:[2]

> "The sufferer from this disease experiences a change of mood which alters the whole of his existence. He may believe, for instance, that a future of such degredation and misery awaits both him and his family that death for all is a less dreadful alternative. Even the thought that the acts he contemplates are murder and suicide pales into insignificance in contrast with what he otherwise expects. The criminal act, in such circumstances, may be the reverse of impulsive. It may be coolly and carefully prepared; yet it is still the act of a madman."

They therefore recommended that the test should be whether the offender was incapable of preventing himself from doing the act.[3] Again, in the American case of Durham v. U.S.,[4] which will subsequently be discussed, the Court of Appeal of the District of Columbia, in rejecting the concept of irresistible impulse, said:

> "We find the 'irresistible impulse' test is also inadequate in that it gives no recognition to brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test."

The Northern Ireland Criminal Justice Act of 1966 has also preferred to state the defence in terms of incapacity to control rather than irresistible impulse.[5] Section 50, therefore, escapes the above criticism and covers cases where the offender commits the crime "after a long period of brooding and reflection or is gradually carried towards it without any real attempt to resist this tendency".[6] There do not seem to

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(1) Cmd.8932, para.314.
(2) Ibid.
(3) Ibid, para.317 and Recommendation 18.
(4) 214 F. 2d. 862 (D.C.Cir.1954).
(5) Section I(c); for a comment on this see Hogget, op.cit., at P.261.
(6) R.C.C.P., Cmd.8932, para.315.

be many Sudanese cases underlining the significance of the distinction. However, in S.G. v. Munhal ElNur[1], Flaxman, C.J., observed in relation to the provision of uncontrollable impulse under the section that on the facts of the case:

> "It is possible that a long period of illness may have made this man less capable of controlling his passion than a person in a normal state of health ...."

In conclusion, it may therefore be pointed out that the provision for incapacity to control acts under section 50 is satisfactory and does not seem to have presented the courts with insuperable difficulties.[2]

'Permanent or Temporary Insanity':-

The offender's incapacity to appreciate the nature of his acts or control them must be the result of 'permanent or temporary insanity or mental infirmity' according to the provisions of section 50. The section does not provide any definition for what may amount to 'insanity' or 'mental infirmity' but it would seem that the provision is wide enough to cover

> "any abnormality of mind from whatever cause which produces the effects, at the time of doing the act, referred to in the (preceding) words of the section."[3]

It would seem from the general and wide provisions of the section and from the practice of the courts, that the latter need not confine themselves to any rigid categories of mental disease or disorder, but should approach the problem from a broad viewpoint, taking all the circumstances of the case into consideration in order to determine whether the accused's incapacity can be attributed to 'insanity or mental infirmity' or not. Thus, paragraph (5) of C.C.C.No.21 provides:

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(1) AC.CP.78.1941, Unrep.
(2) This seems also to be the general opinion of those directly concerned with the application of the section at present, see Q.12, 13, Part III, A, of the Questionnaire.
(3) Gledhill, 99.

"In order to determine the issue the Court will require evidence of the accused's behaviour and in appropriate cases consideration should be given to calling the following persons as witnesses:-

(a) A doctor (this is essential wherever possible).
(b) Prison or Police officers who have had the opportunity of observing the accused, and
(c) Relations and friends of the accused who have likewise had the opportunity to observe him."

In the recent case of S.G. v. Khidir Abdulla ElHussein[1], Imam, J., approved of a statement in Gour[2] that:

"In all cases where legal insanity is set up, it is most material to consider the circumstances which have preceded, attended or followed the crime; whether there was deliberation and preparation for the act; whether it was made in a manner which showed a desire for concealment, whether after the crime, the offender showed consciousness of guilt, and made efforts to avoid detection; whether after his arrest, he offered false excuses and made false statements. The behaviour of the accused after the act would be very relevant."

Imam, J., continued to explain how the accused's state of mind may be ascertained:

"Direct evidence may be forthcoming as to his overt acts, but it cannot speak of the state of mind. It will, therefore, have to judge not only by his contemporaneous act, words and conduct, but also his predisposition and his prior and subsequent acts and conduct. As the fact to be inquired into is his mental power of cognition at the time, all facts tending to throw a light on it are relevant. The usual method adopted in such inquiry is:

i. to place the accused under medical observation,
ii. to let in evidence as to the prisoner's antecedents,
iii. to observe and note his demeanour in court,
iv. to see if his crime was supported by motive, or
v. circumstances which postulate cognition, such as
vi. preparation, the choice of weapon, and the manner of using it,
vii. attempts of concealment, either before or at the time of the act, or afterwards,

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(1) (1966) S.L.J.R.110 at P.127.
(2) Gour, op.cit., vol.I, 7 ed., (1962), 367.

viii. the circumstances attending the commission of the crime, such as the choice of time, place and opportunity,
ix. the assistance of an accomplice,
x. the statements made immediately after the crime."[1]

Such then are the broad considerations which a court will take into account before determining whether the offender is entitled to the protection under section 50. It is apparent from the above that the court is by no means confined to the testimony of medical experts before deciding the issue. However, since the question of expert testimony is of great significance in cases of insanity it is intended to consider its place in such trials in the Sudan.

Expert Medical Evidence and Insanity Trials under the S.P.C.

Ever since the introduction of the Code, the Sudan courts have experienced the onerous difficulty of determining the issue of insanity with very little or no expert psychiatric evidence. It is of some significance that the last-mentioned Circular requires evidence of doctors to be given 'wherever possible' because until 1966 there were only three psychiatrists[2] in a country of fifteen million people scattered over an area of one million square miles. At present the number may have reached six or seven, all of whom are stationed in the capital city or one or two of the major towns. It is consequently impossible for a handful of psychiatrists to give evidence whenever the issue of insanity is raised in any part of the country. Hence, the provision that such evidence should be given 'wherever possible'. In some remote areas even physicians and general practitioners are hard to come by. It is such a state of affairs which prompted B. Awadalla, J.,[3] to advocate the amendment of a rule[4] which prevented the admission of written reports by psychiatrists in such trials. He said:[5]

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(1) (1966) S.L.J.R.110 at Pp.127-128.
(2) Tatai, op.cit., 240.
(3) S.G. v. Abdulla ElHassan Omara (1962) S.L.J.R.98.
(4) Section 229 C.C.P. requires expert evidence to be given 'orally' before the court.
(5) (1962) S.L.J.R.98 at P.99.

> "... this is a serious lacuna in the law which calls for immediate action. Psychiatrists are very important and highly-occupied doctors, and it would mean an impossible encroachment upon their time if they are to be summoned outside Khartoum to give viva voce evidence whenever the defence of insanity is set up."

Much as one would disagree with such an opinion, in view of the extreme significance of expert evidence in such trials, it admittedly reflects the practical difficulties which face the courts.

The percentage of insanity trials in which expert psychiatric evidence is given cannot be conclusively ascertained,[1] but it has been put as low as five or ten per cent.[2] The courts, therefore, have to determine the issue from the general evidence and circumstances of the case. Under such circumstances it may be argued that the position would be much improved by the adoption of a broad definition of insanity which would give the courts more scope and freedom than they have at present. They would no longer be confined to strictly defined rules in determining the issue of irresponsibility and the lack of expert evidence would be less exasperating than it is at the moment.

However, against the above background it is not surprising that in practice the Confirming Authority has in a number of cases rejected the accused's conviction by the trial court and ordered that he be sent for examination by a psychiatrist, and, upon the latter's report, substituted a finding under section 50.[3] On other occasions, such a finding has been substituted without sending the accused for such examination.[4]

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(1) Q.2(b) and (c), Part III, A, Questionnaire.
(2) Ibid.
(3) S.G. v. Kanno Koko, AC.CP.25.1951, Unrep.; S.G. v. Adam Musa Abu Hamad (1961) S.L.J.R.232.
(4) S.G. v. Awad ElKarim Ali, (1958) S.L.J.R.1; S.G. v. Ibrahim Idris, AC.CP.470.1966, Unrep.; S.G. v. Khidir Abdulla ElHussein (1966) S.L.J.R.110. It should be pointed out that in the U.K. the Court of Appeal has a power to appoint a psychiatrist to sit as an assessor to the court, but this power is not used/...

In the few cases where expert psychiatric evidence is forthcoming the psychiatrist is regarded as a neutral witness of the court giving an unbiased opinion on the mental condition of the patient.[1] He is normally a doctor in the Government's service; hence his inclusion in the prosecution witnesses list.[2] In principle, there is no objection to the accused having his own expert witnesses but this is virtually unknown.[3] In Scotland, the practice is for the Crown to sent the accused for psychiatric examination soon after arrest. If they report that he is insane a copy of the report is sent to the defence counsel who will set a plea in bar of trial.

One blessing of the present system in the Sudan is that the courts are at least spared the 'battle of the experts' where they may be called upon to choose between two opposing views from equally eminent psychiatrists reporting on the accused's mental condition. It may be this consideration which prompted the American Law Institute to provide in the Model Penal Code that whenever notice of an intention to plead insanity is given the court must appoint a psychiatrist to examine and report on the accused's mental state.[4]

On the other hand, however, the system in the Sudan at present has the disadvantage that the courts may treat the expert's testimony as conclusive and act solely upon it to determine the issue. It has already been said that in a number of cases the Confirming Authority has rejected conviction by trial courts and substituted findings of insanity relying completely on a psychiatrist's report after the trial.[5] This would result in confusing medical insanity with legal irresponsibility, and would in-

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(contd.) in practice, see Carraher, 1946 J.C.108, where the Scottish courts declined to do so.

(1) Q.2(g) and (h), Part III, A, Questionnaire; Cf. Tatai, op.cit., 255.
(2) Ibid.
(3) Ibid, Q.2(i).
(4) Section 4.05; Cf. R.C.C.P., Cmd.8932, paras.437-441.
(5) Supra.

volve an abandonment by the courts of their duty to determine the issue from all the evidence and circumstances of the case.[1] This, indeed, seems to be the general tendency at present.[2] However, in S.G. v. Idris Adam,[3] the Confirming Authority tried to draw the court's attention to the proper course of action, and it is hoped that its observations will be followed. The accused killed a woman who insulted him and refused to marry him after he had divorced his wife in order to marry her. Relying on medical opinion that the accused was of unsound mind the court reached a finding under section 50. The Confirming Authority sent the case back for revision of finding and directed the court not to content itself with the medical opinion, but to proceed with determining whether the unsoundness of mind had deprived the accused of the capacity to appreciate the nature of his acts or to control them. Nevertheless, the trial court retained its original finding and the Confirming Authority had to confirm it.[4] In doing so, however, Owen C.J., said (obiter):

> "The doctor testified only to the possibility that he (the accused) was of unsound mind. It was not for him to decide. It was for the court to decide on the evidence before it, and definitely, that at the time when the accused killed this woman he was incapable of appreciating the nature of his act or of controlling it by reason of temporary insanity."[5]

The tendency to accpet medical evidence as conclusive may further be illustrated by

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(1) However, if the expert evidence is unanimous and the other evidence does not contradict it, a finding contrary to the expert evidence would be incorrect, see R. v. Matheson (1958) 42 Cr.App.R.145 at P.151.

(2) Ten of the respondents to the Questionnaire were of opinion that expert evidence was accepted as conclusive; seven thought that it was persuasive, and two did not know; Q.2(f), Part III, A, Questionnaire.

(3) AC.CP.245.1933, Unrep.

(4) Under section 256(1)(d), C.C.P., the Confirming Authority may not send a case back for revision of finding or sentence more than once, see Ch. II, supra.

(5) See also Bennet, C.J., in S.G. v. Awad ElKarim Ali, AC.CP.235.1945, Unrep.

the opinion of Abu Rannat, C.J., in S.G. v. Mousa Adam Ishag,[1] already referred to.[2] In altering the court's finding of guilt to one of insanity under section 50, S.P.C., the learned C.J. said:

> "The court answered the question 'was A at the time of stabbing D suffering from insanity or mental infirmity?' in the affirmative. I cannot then understand how they reached a different conclusion in answer to the questions whether he was appreciating the nature of his acts or of controlling them."[3]

It is respectfully submitted that Abu Rannat's opinion is erroneous and that the dictum of Owen, C.J., in the earlier case is much more preferable. The court may well be satisfied that the accused was suffering from some form of insanity or infirmity as appears from the medical or other evidence. But the inquiry should not stop there. The court should further proceed to inquire into the effect of such insanity or infirmity on the accused's actions, i.e., whether it has deprived him of the capacity to appreciate the nature of his acts or control them within the meaning of section 50. Otherwise the distinction between medical insanity and legal irresponsibility will be blurred and the respective functions of the medical witness and the court would be confused.

'Mental Infirmity' under Section 50

The Sudan courts seem to have made no definite attempts to define the meaning of the term 'mental infirmity' within the provisions of section 50. The general tendency has been to find the accused incapable of appreciating the nature of his acts or of controlling them 'by reason of permanent or temporary insanity or mental infirmity' without specifying whether the particular accused fell within the 'insanity' or the 'mental infirmity' provision. Nor do lawyers in the Sudan at present appear

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(1) (1958) S.L.J.R.1.
(2) Supra.
(3) (1958) S.L.J.R.1 at P.2.

to know what is meant exactly by the term 'mental infirmity'.[1] One case can, however, be traced where the above term was equated with 'mental abnormality'. This is the case of S.G. v. Munhal ElNur,[2] where Flaxman, C.J., said:

> "There is no doubt that the accused is abnormal, but abnormality alone will not relieve him of criminal responsibility. He must by reason of this abnormality, at the time of the crime, have been incapable of appreciating what he was doing, or of controlling his acts."

It is submitted that the reference in section 50 to both 'insanity' and 'mental infirmity' implies that they are two different mental conditions. 'Mental infirmity' within the section may be distinguished from psychosis and may be said to refer to such cases of natural abnormality as mental abnormality, idiocy and imbecility,[3] i.e., those conditions which would fall within the category of 'mental deficiency' in the U.K.

The term 'mental infirmity' is found in the Australian and Nigerian Codes. Section 227 of the Queensland Criminal Code, 1899, exempts from criminal responsibility persons suffering from "a state of mental disease or natural mental infirmity". It has been stated that 'mental infirmity' within this provision refers to mental defectives.[4] Almost exactly the same provision is included in section 28 of the Nigerian Criminal Code. In interpreting the term 'natural mental infirmity' within the section, the West African Court of Appeal said in R. v. Omoni:[5]

> "The words 'natural mental infirmity' mean ... ... a defect in mental power neither produced by his (the accused's) own fault nor the result of disease of the mind."[6]

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(1) In reply to a question on the meaning of that term not a single lawyer ventured to give it any precise definition or refer to a case where it was authoritatively interpreted, Q.3, Part III, B, of the Questionnaire.
(2) AC.CP.78.1941, Unrep.; Cf. Awad, M., op.cit., 683.
(3) Gledhill, 99.
(4) Morris and Howard, op.cit., Pp.54-55.
(5) (1940) 12 W.A.C.A.511.
(6) Ibid, Verity, C.J., at P.512.

Under English law it is doubtful whether in view of the decision in Straffen[1], 'mental deficiency' is a disease of the mind within the M'Naghten Rules. In Straffen[1] the trial judge emphasised the distinction between insanity and mental deficiency by directing the jury as follows:

> "... ask yourselves whether you are satisfied that at the time when he did that murder he was insane within the meaning of the criminal law; not that he was feeble-minded; not that he had no remorse; not that he may be weak in his judgement; not that he fails to appreciate the consequences of his act; but was he insane through a defect of reason caused by disease of the mind, so that either he did not know the nature and quality of his act, or if he did know it, he did not know that it was wrong."

It is not conclusively settled whether mental deficiency falls within the special defence of insanity in Scotland, although it may be accepted as a plea in bar of trial.[2] However, in Scotland and England mental deficiency may fall within the defence of diminished responsibility[3] which is subsequently dealt with. What should be emphasised at present is that in neither system does mental deficiency appear to fall within the special defence of insanity.[4]

It would thus appear that section 50, S.P.C., in providing for 'mental infirmity' as a ground for complete irresponsibility is wider than both English and Scots laws, which treat such cases as falling within the defence of diminished responsibility.

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(1) (1952) 2 Q.B.911. The Law Reports do not deal with the issue under consideration, but the case is fully reported in Fairfield and Fullbrook, Trial of John Thomas Straffen (London, 1954).

(2) Barr v. Herron, 1968 J.C.20; see note on the case in (1968) 32 J.Cr.L.113; Cf. R.C.C.P., Cmd.8932, Paras.341-343; Cf. R. v. Webb (1969) 2 Q.B.278.

(3) R.C.C.P., Cmd.8932, para.343.

(4) The R.C.C.P. stated that the M'Naghten Rules were interpreted to include mental deficiency in cases where the other conditions of the Rules were satisfied, ibid, para.344; Cf. Williams, G., C.L.G.P., 447. This view does not seem to have much support and the R.C.C.P. itself suggested that legislation was necessary to clarify the matter.

From this viewpoint, section 50 is comparable to section 1 of the Northern Ireland Criminal Justice Act, 1966, which defines 'mental abnormality as an:

> "abnormality of mind which arises from a condition of arrested or retarded development of mind or any inherent causes or is induced by disease or injury."

Confusion of Section 50 S.P.C. with the M'Naghten Rules

Despite the clearly different wording of section 50, and despite the express warning in C.C.C.No.21[1] and in several cases[2] directing the magistrates to refrain from confusing the section with either the M'Naghten Rules or the Indian law of insanity, the Sudan courts have from time to time interpreted the section as being identical with M'Naghten and the Indian law.

It is suggested that several factors are responsible for the tendency to confuse section 50 with the Rules and it is thought that the most important of these factors is the fact that the Sudan law of insanity before 1925 was an almost exact reproduction of the M'Naghten Rules.[3] This factor seems to have been overlooked by those writers[4] who emphasised the existence of the confusion and by all the lawyers who cared to respond to the Questionnaire.[5] It is submitted that the majority are not even aware of the fact that the law before 1925 was based on the Rules.

It is mainly this consideration, coupled with the fact that until the early fifties the Code was administered by British magistrates who owed their legal education to the common law and were influenced by its rules, which is mainly responsible for the

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(1) See infra.
(2) Ibid.
(3) Section 63 of the 1899 Penal Code, see infra.
(4) Tatai, op.cit., 247-248; Vasdev, K., Insanity and Criminal Responsibility in the Sudan, (Khartoum, 1968), 20-24.
(5) Q.3, Part III, A, of the Questionnaire.

confusion of section 50 with the Rules. Further, the great majority of Sudanese judges and magistrates were brought up in the same legal tradition and still tend to refer to English decisions and writings in their interpretation of the Code. It is somewhat paradoxical that hardly any case can be traced which attempted to construe section 50 in the light of cases or commentaries on the Egyptian Code upon which the section is in fact based.

Another reason for the confusion is the fact that law reporting started as late as 1956 and the judges had no means of reading or following judgements applying the different provisions of section 50. The first directive to the courts drawing their attention to the difference between the section and the Rules was C.C.C.No.21 which was issued twenty-seven years after the section had been in application.

Lastly, and equally significantly, the lack of expert psychiatric evidence in cases of insanity to help the courts in the proper interpretation and application of the section left the courts with an unenviable burden and this prompted them to seek refuge in English and Indian decisions and writings leading to the confusion between the latter laws and the section.[1]

The confusion can be traced in a number of early as well as recent cases. Thus, in S.G. v. Matuko Tuklo,[2] it was held that section 50 followed very closely section 84 of the Indian Code and that it laid down two tests: whether A knew the nature of his act or whether he knew that it was 'wrong' or 'contrary to law'.[3] In S.G. v.

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(1) Q.2(a), Part III, A of the Questionnaire.
(2) AC.CP.109.1932, Unrep.
(3) The provision 'or contrary to law' in section 84, I.P.C., was introduced to modify the interpretation of the word 'wrong' in the M'Naghten Rules in R. v. Windle (1952) 2 Q.B.826, as meaning 'legally wrong'. Under Indian law, therefore, the accused would still be held irresponsible if his act is known to be 'legally wrong' but is considered to be 'morally' justifiable: Kader Nasyer Shah v. Emperor (1896) 23 Cal.604; Ashiruddin v. King, A.I.R.(1949) Cal.182. This interpretation has also been accepted by the Australian courts: Dixon, J., in R. v. Porter (1936) 86 C.L.R.358. It seems that this is/...

Omer Mohammed,[1] section 50 was held to include the same test as the M'Naghten Rules. This tendency was, however, temporarily checked by Creed, C.J., in 1938, in the case of S.G. v. Abdel Bari Abdulla.[2] The learned C.J., pointed out that the issues under section 50 were:

> "perfectly straightforward and to arrive at correct findings normally presents no difficulties, and normally necessitates no reference to the complications of M'Naghten's Case, which explains a law in some ways different from our own. (Section 50 is based on the Egyptian Codes, not on English law)."

He then outlined the issues for determination under section 50 and this was the basis for C.C.C.No.21[3] which restates Creed's interpretation and reiterates the distinction between the section and the M'Naghten Rules. But this by no means finally settled the matter as is shown by two recent conflicting cases. It is remarkable that the confusion in these cases occurred at the level, not of the trial courts but, of the Confirming Authority itself and by the same C.J. The first case was that of S.G. v. Mousa Adam Ishag,[4] the facts of which have already been given. Abu Rannat, C.J., in conformity with the C.C.C. and Creed's views, pointed out:[5]

> "... it is fitting to mention that our law is different from India and England in detail although the result may be the same. For example, we do not recognise the English and Indian test of lack of knowledge that the act he does is wrong or contrary to law."

Three years later the case of S.G. v. Abdel Wahab Abdel Sakhi,[6] came for confirmation

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(contd.) generally accepted as the better view: Norval Morris, "'Wrong' in the M'Naghten Rules", (1953) 16 M.L.R.435 at P.436; Morris and Howard, op. cit., 44-47; but see Montrose, "The M'Naghten Rules", (1954) 17 M.L.R.383.

(1) AC.CP.131.1935, Unrep.; see also S.G. v. Ater Rang, AC.CP.151.1935, Unrep.; Cf. Awad, M., op.cit., 680-681.

(2) AC.CP.193.1938, Unrep.

(3) Infra.

(4) (1958) S.L.J.R.1.

(5) Ibid, at P.2.

(6) (1961) S.L.J.R.110.

before the same C.J. In confirming the court's finding, he explained the law in section 50 as follows:[1]

> "To establish a defence on the ground of insanity, it must clearly be proved that at the time of committing the act, the accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, he did not know he was doing what was wrong."

Thus, the learned C.J. adopted almost the exact wording of the Judges' Answers in the M'Naghten Rules. In so doing he misinterpreted section 50, disregarded the express warning in C.C.C.No.21 and contradicted his own views as stated in the earlier case. The same attitude seems to have been taken by B. Awadalla, J., in S.G. v. Nafisa Dafalla,[2] where he approved a statement in Ratenlal that to be held within the defence of insanity the accused must:

> "suffer from insanity of such a nature or degree as to preclude him fron knowing the nature of his acts, or obscure the distinction between right and wrong."[3]

Contemporary Attitudes

It would appear that the above tendency of equating the section with the Rules has not been followed in the more recent cases.[4] In an attempt to ascertain the current opinions of lawyers in the Sudan and to ascertain the extent to which they are aware of the differences between the section and the Rules several questions were formulated and presented to them. Their opinions on these questions varied to some extent. Of nineteen lawyers, eleven agreed that the application of the section by the courts showed some confusion; three did not agree to this and five did not know

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(1) Ibid, at P.111.
(2) (1961) S.L.J.R.199 at Pp.200-201.
(3) Ratenlal, op.cit., (19 ed., 1956), 159.
(4) S.G. v. Abdulla ElHassan Omara (1962) S.L.J.R.98; S.G. v. Ibrahim Idris, AC.CP.470.1966, Unrep.; S.G. v. Khiddir Abdulla ElHussein, (1966) S.L.J.R. 110. In the latter case it was expressly stated that the issues for determination under section 50 are those outlined in the Circular.

whether this was so or not.[1] On the more specific questions, fourteen agreed that section 50 was not identical with the Rules or with section 84, I.P.C.; two did not know and the other three declined to answer.[2] All of the above fourteen were of opinion that the section was wider than the Rules and section 84, I.P.C. Their reasons for this were confined to the fact that section 50 included the defence of irresistible impulse and also provided for 'mental infirmity'.[3]

Further, eleven were of the opinion that 'nature' of the act within the section included the 'quality' of the act; two disagreed with this view and the rest failed to reply. Of the former eleven, five were of opinion that the words 'nature' and 'quality' were synonymous, two declined to answer and the other four stated that the words were different, but none of the latter ventured to show what the distinction was.[4]

Finally, on whether section 50 included the right-wrong test in the Rules, six respondents said it did not, six thought it did and the remaining seven gave no reply.[5] Of the latter six, three were of opinion that the accused's act should be known to be both 'legally' and 'morally' wrong; two expressed no opinion on this question, and the sixth thought that the accused should be held responsible if he knew that the act was 'legally' wrong.[6]

With due respect, it is submitted that the state of affairs reflected in the above views is far from satisfactory. The above views represent the opinions of many leading lawyers responsible for the application and interpretation of the Code in trial courts, as Confirming Authority, at the Bar and in the academic field. It

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(1) Q.1, Part III, A, of the Questionnaire.
(2) Ibid, Q.4.
(3) Ibid, Q.5.
(4) Ibid, Q.8, 9 and 10.
(5) Ibid, Q.6.
(6) Ibid, Q.7.

is indeed to be expected that such a cross-section of lawyers would reflect a better and more consistent understanding of this branch of the criminal law, because of its significance and its frequent application in everyday life.

It is concluded that there is an urgent need for a fresh directive or circular which may finally settle the matter. Such a directive should re-emphasise the fact that section 50 of the Code is much wider than English and Indian law. All persons concerned with the application of the section must clearly realise that the word 'appreciate' in the section has wider connotations than 'know' in the Rules, in so far as it covers more than the mere cognitive aspects of the mind; that the word 'nature' in the section is wider and more elaborate than 'nature and quality' within the Rules; that the section is also a great improvement on the Rules in its recognition of the defence of uncontrollable impulse within the defence of insanity; that the section is also wider than the Rules in its recognition of 'mental infirmity' as a basis for complete irresponsibility. Finally, it must be pointed out that the right-wrong test has no place in the Code and the courts should refrain from applying it.

It is only with such understanding that a proper and more liberal interpretation of the section can be achieved. This, together with the increase in expert psychiatric evidence in insanity trials, the publication of leading cases in the Reports and the reliance by the courts on decisions of local superior courts on the interpretation of the section, the growing familiarity of the average member of the public with legal rules and proceedings and the increase of legal representation of prisoners, would greatly help to give true meaning to the comparatively liberal words of the section.

Section 50 and Recent Criteria of Criminal Irresponsibility

The universal dissatisfaction with the M'Naghten Rules has led to several attempts to reach a sounder criterion for the determination of the question of mental illness and legal irresponsibility. It has already been seen[1] that as far back as the 1870s Lord Moncreiff tried to introduce into Scots law what has been referred to as the 'causal approach' under which the traditional tests of irresponsibility were rejected as outdated and the alternative approach was adopted whereby the accused would not be held responsible if his criminal act was simply proved to be the product of mental disease.[2] This attitude seems to owe its origin to the New Hampshire Court's decision in State v. Jones,[3] where it was laid down that the rule to be followed was that "if the killing was the offspring of mental disease the defendant should be acquitted".[4] The New Hampshire Rule provided the basis for the rule in Durham v. U.S.,[5] where the Court of Appeals for the District of Columbia adopted the test that:

> "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."

The clearest advantage of the Durham rule and the other causal tests is that in rejecting the conventional tests of irresponsibility they allow for more flexibility by broadening the area of legally relevant material. They allow the expert wit-

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(1) Supra.
(2) This attitude is also somewhat similar to the test recommended by the R.C.C.P. who were of opinion that the whole question should be left to the jury to determine whether "the accused was suffering from disease of the mind ... to such a degree that he ought not to be held responsible."; R.C.C.P., Cmd. 8932, Recommendation 19. But the latter test is more vague in so far as it does not make it clear that the criminal act must be the product or result of the disease.
(3) 50 N.H.369 (1871).
(4) Ibid, at P.394; see also State v. Pike, 49 N.H.399 (1870).
(5) 214 F. 2d.862 (D.C. Cir.1954).

ness a wider scope of testimony in relation to the accused's mental condition and consequently widen the court's scope for assessing the issue of irresponsibility.[1] Compared with section 50, S.P.C., the above tests are open to some criticism. In the first place, unlike section 50 (and the M'Naghten Rules for that matter) the Durham rule or the causal approach provides the lawyer with no explicit standard or guidance as to the type of mental disorder which is required for the purposes of the test. It seems to equate all types of mental abnormality with legal irresponsibility and it is consequently vulnerable to the 'thin edge of the wedge' objection that it may result in absolving most criminals from liability for punishment. It may be argued that section 50 is equally vague in so far as it refers to 'insanity or mental infirmity', but clearly the latter provisions are more definite and specific than 'mental disease' or 'mental defect' within the New Hampshire and Durham tests.

Secondly, the causal approach relies too heavily on the 'product' or 'offspring' tests without giving any indication on the nature of the nexus or link between the mental disease and the act. Indeed, the M'Naghten Rules make it clear that the mental disease must affect the accused's ability to know the nature and quality of the act or its wrongness, and section 50 requires incapacity to appreciate the nature of the act or control it. The causal tests do not spell out the nature of this relationship. As Glueck put it:[2]

> "The traditional tests require the jury to find not merely the presence of mental illness but that the disorder had an effect in destroying or at least greatly limiting the processes of mentation, comprehension and self-control basic to guided behaviour. Durham, on the other hand, jumps directly from the finding of mental disease to the finding of lack of responsibility without specifying that the jury should go through the intermediate stage of assessing the effect of

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(1) Glueck, op.cit., 91; Gordon, 314.
(2) Glueck, op.cit., 104; see also Gordon, 315.

> the mental illness on the processes crucial to rational and controlled conduct."

The Durham formula was also rejected in U.S. v. Freeman[1] on the grounds that it raised a "near-impossible problem of causation" in its failure "to give the fact finder any standard by which to measure the competency of the accused".[2]

Finally, the causal approach would create some practical difficulties if it were adopted in a country with the present socio-political structure of the Sudan. The reason for this is that the causal approach appears to be workable only in an environment where expertpsychiatric evidence is readily available. The definition in Durham of 'disease' as a condition which is capable of improving or getting worse and 'defect' as a condition which does not change, makes it almost impossible for a court to determine what would amount to a disease or defect without the assistance of expert medical testimory. The adoption of such a test will therefore put an enormous task on the courts in a country where expert evidence is hardly forthcoming and where judges lack any training in that branch of science.

The American Law Institute's Test

The Durham test has not proved to be completely satisfactory and was rejected in several American jurisdictions.[3] It was also rejected by the American Law Institute in its Model Penal Code. Section 4.01 of the latter has therefore introduced the following test:

> "(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

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(1) 357 F. 2d.606 (1966).
(2) Kaufman, J., at P.621, ibid.
(3) U.S. v. Currens 290 F. 2d.751 (1961); Kowsek v. State, 8 Wis. 2d.640, cited in Glueck, op.cit., 11.

"(2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

The above test has found some acceptance in several American states either through legislation[1] or through judicial decisions.[2] In effect the test is an attempt to rephrase the M'Naghten and irresistible impulse tests in a more sophisticated manner. It is in several ways similar to the test in section 50, S.P.C. They both prefer the use of the wider and more appropriate word 'appreciate' instead of the narrower 'know'. Again, like section 50, the A.L.I. test improves on the Durham test by spelling out the legal standard by which legal insanity can be ascertained, i.e., lack of substantial capacity to appreciate the criminality of an act or conform conduct to the requirements of law. It should be pointed out that in this respect section 50 appears to be preferable to the A.L.I. test because the former is wider in so far as it refers to incapacity to appreciate the 'nature' of the act, whereas the latter is concerned with incapacity to appreciate the act's 'criminality' or 'wrongfulness'.[3] In its use of the more neutral word 'nature' section 50 avoids the controversy over the right-wrong concept and whether the accused should have failed to appreciate that the act was 'legally' wrong or 'morally' wrong, or both.[4]

Finally, like section 50, the A.L.I. test also recognises the defence of uncontrol-

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(1) Vermont and Illinois.

(2) U.S. v. Currens, 290 F. 2d.751 (1961); U.S. v. Freeman, 357 F. 2d.606 (1966). Note that in adopting the test Currens has completely omitted the test's reference to cognition (i.e., incapacity to appreciate the criminality of one's conduct) and confined itself to incapacity to conform one's acts to the requirements of law. This has been rightly criticised on the ground that the objection to the M'Naghten Rules is not that they use cognition as a test of criminal liability, but that lack of cognition as their only measure of irresponsibility; see Glueck, op.cit., 71.

(3) The Model Penal Code suggests that 'criminality' may be replaced by 'wrongfulness.'

(4) Gordon, 316; Tatai, op.cit., 247.

lable impulse in terms wider than the phrase 'irresistible impulse' which, as already suggested,[1] is open to some objection. It may, however, be possible that lack of capacity to 'conform his conduct to the requirements of law' is wider than incapacity to control his acts, but this does not appear to be conclusively so.

The most striking difference between section 50 and the A.L.I. test is that the latter expressly provides that the accused would come within the defence if he lacks 'substantial' capacity, whereas section 50 is silent on the matter. Nor do the cases show whether lack of capacity under section 50 should be 'total' or substantial. However, the significance of the distinction is greatly diminished by the failure of the A.L.I. test to define the term 'substantial'. It leaves open the question 'How substantial is substantial?'. As has been pointed out,[2] "We can all agree that substantial means something more than slight or than just a very little. But how much more?".

Conclusion

It is clear from the above discussion that no single criterion can be universally accepted as completely satisfactory for the issue of determining irresponsibility. The M'Naghten Rules are rigid, outdated and incompatible with modern notions of psychiatry. The causal test in the New Hampshire rule, Lord Moncreiff's approach and the Durham formula, raise the difficulty of determining the causal link between the mental disease and the criminal act, and fail to define the legal standard upon which a court or jury may decide the extent to which the offender's mind has been affected. Thus, there may be some substance in Professor Gordon's anticipation that:

> "the time may not be far distant when the whole position of insanity will have to be reconsidered. It may be that the

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(1) Supra.
(2) Glueck, op.cit., 22; Cf. Gordon, 316.

> idea of insanity as affecting responsibility should be abandoned and replaced by the idea of mental illness as affecting punishment."[1]

This is, in fact, the view advocated by Lady Wootton[2] and accepted with some qualification by Professor Hart.[3] More will be said on it when diminished responsibility is dealt with.

But it remains to be seen whether this will occur. Until then, however, it is submitted that the test in section 50 is satisfactory if it is liberally applied. The section takes the offender's mind as a whole and rejects M'Naghten's concentration on the mind's cognitive aspects. It rejects the right-wrong test, recognises uncontrollable impulse as a defence, and provides for mental infirmity as a ground of total irresponsibility. It avoids the difficulties posed by Durham and the other causal tests, and provides a relatively satisfactory criterion along the lines accepted by the American Law Institute.

Insanity in Bar of Trial

Section 284, C.C.P., provides:

> "(1) When in the course of an inquiry or trial there is reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the inquiry or trial shall be adjourned and the facts shall be reported to the Governor and the Governor shall cause the accused to be examined by one or more medical officers who shall report to him.
>
> "(2) If the unsoundness of mind is established the enquiry or trial shall be further adjourned until such time as the accused shall have sufficiently recovered to make his defence and in the meantime, subject to any general or special regulations to be issued or passed by the Chief Justice, the

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(1) Gordon, 316-317.
(2) Wootton, B., Crime and the Criminal Law (London, 1963), Ch. 3.
(3) Hart, H.L.A., Punishment and Responsibility, Ch. VIII.

accused shall be placed in such custody as the Governor thinks fit."[1]

The section deals with the question of fitness to plead when the accused is first brought before a court in an inquiry or trial. Unlike the case under section 50, the issue here is primarily whether the accused can be given a fair trial. The basic consideration is whether the accused is generally of 'unsound mind' and whether he can follow the proceedings and make his defence. In other jurisdictions it has been held that the accused will be considered unfit to plead if he is unable to understand the charge, or appreciate the pleas of guilty and not guilty, or follow the evidence or instruct his counsel.[2] Thus, where the accused is a deaf mute he will generally be found unfit to plead because he cannot be communicated with and it would be impossible for him to make his defence.[3]

It is not clear whether in the Sudan a person who suffers from hysterical amnesia which prevents him from remembering anything about the circumstances of the crime would be found unfit to plead. Such a plea was rejected in Scotland on the ground that such persons understood the charge and proceedings and could communicate with counsel.[4] This is also followed in English law.[5]

Section 284(2), C.C.P., makes it clear that the adjournment of the trial should be

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(1) Subsection (3) lays down the circumstances and conditions under which the Governor may allow the accused to be placed in the custody of relatives or friends.

(2) R. v. Governor of Stafford Prison (1902) 2 K.B.81; H.M.A. v. Brown (1907) 5 Adam 312 at P.346; H.M.A. v. Cameron, Perth High Court, June 1946, Unrep., Gordon, 330; R. v. Sharp (1957) Crim.L.R.821; Smith and Hogan, op.cit., 100; Gordon, 330; Tatai, op.cit., 252.

(3) S.G. v. Mohammed Suleiman ElIsool, Unrep., cited in Vasdev, op.cit., 6; Cf. S.G. v. Mohammed Ibrahim Hussein, AC.CP.40.1948, Unrep.; R. v. Roberts (1954) 2 Q.B.329; see also Lord Wark in H.M.A. v. Wilson, 1942 J.C.75 at P. 79; Jean Campell (1817) Hume, i, 45; in both the latter cases, however, the accused was found fit to plead and acquitted.

(4) Russell v. H.M.A., 1946 J.C.37.

(5) R. v. Padola (1960) 1 Q.B.325.

only 'until such time as the accused shall have sufficiently recovered to make his defence'. In other words, he may be brought back for inquiry or trial as soon as he is deemed fit to plead, and this is not uncommon in practice.[1] There is nothing to prevent this course being followed in Scotland[2] or England, but in practice it is very seldom done.[3]

Treatment of Persons found Unfit to Plead

Under the combined effect of subsections (2) and (3) of section 284 above a person found unfit to plead is handed over to the executive authority (the Governor, or at present, the Commissioner of the Province) to determine the type of custody under which he should be placed. The usual practice, particularly in such serious cases as homicide, is that the accused is detained in prison in the same way as other criminals. This poses the difficulty that it might be thought unfair to detain in prison (or in a State mental hospital in the U.K.) for an indefinite period a person who has not been tried or has not been proved to have committed the criminal act. This is much more so when the accused is not suffering from a mental disease which would have justified his compulsory detention in a prison or mental hospital in any case, or where he has a substantive defence to the offence charged such as, for example, an alibi.

It would appear that in such situations the best solution is to allow the court to deal with the accused's substantive defence first, or to require the prosecution at least to set up a prima facie case against him before the issue of his fitness is dealt with. If he is found not to have committed the act, he should immediately be discharged and set free. But if he is found to have committed the criminal act

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(1) S.G. v. Nafisa Dafalla (1961) S.L.J.R.199; S.G. v. Abdulla ElHassan Omara (1962) S.L.J.R.98; S.G. v. Abdel A'l Mahmoud Khalid (1962) S.L.J.R.115.
(2) H.M.A. v. Bickerstaff, 1926 J.C.65.
(3) R.C.C.P., Cmd.8932, para.222; Gordon, 331.

the court may then proceed to decide the issue of fitness. This course has been adopted by section 4 of the Criminal Procedure (Insanity) Act, 1964, in England. It gives the judge a discretion to postpone the issue of fitness till any time up to opening the case for the defence, and if, after the case for the prosecution, there is not sufficient evidence to justify conviction, the jury should be directed to acquit.[1]

In relation to the Sudan, it has been suggested[2] that the position is the same as the above. It is doubtful whether this is so because the Code makes no reference to such procedure at all, nor has it been laid down in any circular or followed by the courts. However, the above source is correct in maintaining that such a course "would decrease the dreadful possibility of committing an innocent accused to years of custody before he can stand trial and be acquitted."[3]

Insanity as a Bar to Execution

Before the abolition of the death penalty it was provided in English law that if it appeared to the Secretary of State that a person under the sentence of death was insane, the latter should appoint two or more medical practitioners to inquire and report on that person's mental condition.[4] The object of such inquiry was to "bridge the gap ... between the criteria of irresponsibility according to law and the medical criteria of insanity,"[5] and to ensure that no person who was insane could be executed. These provisions did not apply to Scotland, but the practice there was to hold a similar inquiry whenever there was doubt as to the prisoner's mental condition.[6]

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(1) Cf. R. v. Robertson (1968) 1 W.L.R.1767; R. v. Webb (1969) 2 Q.B.278; R. v. Burles (1970) 2 W.L.R.597.
(2) Tatai, op.cit., 253.
(3) Ibid.
(4) Section 2(4), Criminal Lunatics Act, 1884.
(5) R.C.C.P., Cmd.8932, Para.359.
(6) Ibid, para.262.

In the Sudan there is no similar express provision either in the Code or in the Circulars. Guidance may, however, be found in S.G. v. Gultan Beshir,[1] where the prisoner, who was under a sentence of death, became insane. The Governor asked the opinion of the Acting C.J. on the matter. The latter replied:

> "If such circumstance as this arises, when accused becomes insane after trial and before execution of the death sentenc, the procedure in the Sudan would be for the Chief Justice, having already confirmed the death sentence, to recommend to the President to exercise his powers under Code of Criminal Procedure, S.277, for the commutation of the death sentence into any sentence allowed by law."[2]

There does not seem to be any objection to such a course if the accused becomes insane after the trial. But where the accused had pleaded insanity at the trial and his plea was rejected the practice is open to the objection that the subsequent inquiry is an interference by the Executive in the function of the courts, in so far as it amounts to a rejection of the court's finding reached in a properly conducted trial. The R.C.C.P.[3] rejected such an objection on the ground that the subsequent medical inquiry differed from the trial proceedings because while the latter were concerned with the accused's mental condition at the time of committing the act, the former related to his mental condition at the time of the inquiry. It was further pointed out[4] that the inquiry after trial was only concerned with 'medical' insanity and not with whether the accused was insane within the M'Naghten Rules. The Commission's view is preferable because it is more in accord with the humane principle that insane persons should not be executed.

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(1) (1961) S.L.J.R.147.
(2) M.I. ElNur, Acting C.J., at P.148, ibid.
(3) Cmd.8932, para.365.
(4) Ibid, para.366.

Verdict and Procedure

Section 285, C.C.P., provides that if the evidence at the trial shows that the accused has done the act but was, at the time of doing it, deprived of the power of appreciating the nature of his acts or of controlling them by reason of insanity or mental infirmity:

> "the Court shall record its finding that he did the act but was at the time of doing it of unsound mind and shall forward him to the Governor to be dealt with as under the preceding section."

The verdict in insanity cases, therefore, is that the accused 'did the act but was at the time of doing it of unsound mind.' The section clearly excludes the old English verdict of 'guilty but insane',[1] which had for a long time been criticised as illogical.[2] It has recently been replaced by the verdict that the accused should be found 'not guilty by reason of insanity'.[3] The 'guilty but insane' verdict has never applied in Scots law.[4] The position in the Sudan is further clarified by paragraph (11) of C.C.C.No.21, which says:

> "The phrase 'guilty but insane' should never be used in criminal cases in this country as it forms no part of the law of the Sudan."

As has already been explained,[5] section 284, C.C.P., provides that the consequence of a finding of insanity under section 50 is to forward the accused to the Commissioner of the Province to determine the type of custody under which he should be kept. C.C.C.No.32[6] lays down the conditions and circumstances which should guide the Com-

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(1) Section 2(1), Trial of Lunatics Act, 1883.
(2) The Atkin Committee, Cmd.2005, Pp.11-12; R.C.C.P., Cmd.8932, para.459.
(3) Section 1, Criminal Procedure (Insanity) Act, 1964.
(4) Section 88 of the Lunacy (Scotland) Act, 1857, required the jury to find that the accused was acquitted on grounds of insanity. Such persons are at present dealt with under section 60 of the Mental Health (Scotland) Act, 1960, see infra.
(5) Supra.
(6) Dated 1.6.1953.

missioner in determining the appropriate custody. It provides that persons who are dangerous or who may be a threat to public security should be kept in 'close custody'.[1] Such custody ordinarily means 'prisons' because as yet in the Sudan there are no separate institutions where persons found unfit to plead or acquitted on grounds of insanity may be detained. They are kept in prisons and are subject to prison regulations in the same way as other criminals and are given no psychiatric treatment nor provided with any methods of rehabilitation.[2]

In such circumstances one may doubt whether there is any wisdom in pleading the defence of insanity when the accused's lot is not dissimilar from that when he is actually convicted. It would seem that at present the most significant advantage of pleading insanity is that the accused may avoid the sentence of death on a charge of murder. Again, in all other situations a person detained on a finding of insanity will regain his liberty immediately he recovers sanity; whereas he might have to be detained for a longer period had he been under a sentence of imprisonment. This, however, is a reversible argument because a person may spend a longer period in prison (before he regains sanity) than he would have done had he been under a specific period of imprisonment. It should be mentioned that in the U.K., after the abolition of the death penalty, there are signs of a tendency on the part of accused to plead guilty so as to be sentenced to a definite term of imprisonment, rather than to plead insanity and run the risk of indefinite detention in a mental hospital.[3]

In the Sudan detention on a finding of insanity used to be for an indefinite period. This led to some difficulties because the Executive authorities continued to receive

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(1) Ibid, para. (10).
(2) Tatai, op.cit., 263.
(3) Gordon, (1967) 31 J.Cr.L.270; Harrison, (1968) 32 J.Cr.L.119.

endless applications from detainees asking to be released or put in the custody of relatives or friends on the grounds that they had recovered or that they were no longer so dangerous as to warrant their further detention.[1] The difficulty has been partly resolved by Abu Rannat, C.J., by amending C.C.C.No.32 to the extent that a detainee should not be kept for more than twelve months on the first remand, two years on the second, and three years on the third or any subsequent remand. This ensures that periodic reports are made on the detainee's mental condition enabling the authorities to determine whether the prisoner should be released or not, and the type of custody in which he should be kept.

Burden of Proof in Insanity

The rule in M'Naghten that everyone is presumed to be sane until the contrary is proved was in several cases taken to imply that the burdon of proof of insanity lay on the accused.[2] This seems to have been accepted in Woolmington v. D.P.P.,[3] where it was stated that insanity was an exception to the rule that it was for the prosecution to prove the accused's guilt beyond reasonable doubt.

This rule is unsatisfactory and leads to an anamolous situation in relation to the first leg of the M'Naghten Rules (i.e., knowledge of the nature and quality of the act). The reason for this is that it is for the prosecution to prove that the act was done with the requisite mens rea, i.e., it was done intentionally or recklessly. But if the burden of proving insanity is on the accused it would seem that the accused will have to prove lack of knowledge on his part and therefore a conflict re-

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(1) For comments on these difficulties, see S.G. v. Yacoub Mohammed, AC.CP.22.1930, Unrep.; S.G. v. Idris Adam, AC.CP.245.1933, Unrep.

(2) Stokes (1848) 3 Car. & Kir.185; Layton (1849) 4 Cox 149; Smith (1910) 6 Cr. App.R.19.

(3) (1935) A.C.462 at P.481.

sults as to the respective roles of the prosecution and defence. The courts do not seem to have dealt with this problem but Professor Glanville Williams argues that the only burden on the accused should be the 'evidential' one (i.e., producing sufficient evidence to raise a 'reasonable doubt' as to his mental condition), and that the 'persuasive' burden (i.e., proof beyond reasonable doubt) always rests on the prosecution.[1] This solution seems to resolve the above difficulty and appears to be generally acceptable.[2]

As to the onus of proof which lies on the accused in cases of insanity, it appears that this is fulfilled if the accused satisfied the court of his insanity 'on a balance of probabilities' in the same way as in civil litigation. He need not prove his insanity 'beyond reasonable doubt'.[3] This appears to be accepted in Australia,[4] in England[5] and in Scotland.[6]

In the Sudan, C.C.C.No.3 of 1952 provides that the onus of proving insanity is 'squarely' on the accused. The Circular does not make it clear what is meant by 'squarely' but it would seem that it only implies proof 'on balance of probabilities'.[7] The whole question has recently been dealt with by Imam, J., in S.G. v. Khidir Abdulla ElHussein.[8] After referring to C.C.C.No.21 (which sets out the issues to be determined under section 50, S.P.C.) he pointed out that this Circular requires insanity to be proved 'beyond reasonable doubt'[9] and went on to reject this requirement by stating that the Sudan courts were more in favour of reducing the burden to the standard of 'balance of probabilities'.[10] He stated further that the accused would suc-

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(1) Williams, G., C.L.G.P., para.165.
(2) Smith and Hogan, op.cit., 108-109; Morris and Howard, op.cit., 56-61.
(3) Williams, G., op.cit., para.165; Smith and Hogan, op.cit., 108.
(4) Sodeman v. R. (1936) C.L.R.192 at P.228.
(5) R. v. Carr Briant (1943) K.B.607 at Pp.610-611.
(6) H.M.A. v. Kidd, 1960 J.C.61 at Pp.68-69.
(7) S.G. v. Mousa Adam Ishag (1958) S.L.J.R.1; see also Gledhill, 102-103.
(8) (1966) S.L.J.R.110.
(9) It is doubtful whether this inference is correct because the Circular makes no reference at all to the extent of the burden which lies on the accused.
(10) (1966) S.L.J.R.110 at P.126.

ceed in his defence if he showed a 'reasonable possibility' that he was not sane at the time of the act.[1] He concluded:[2]

> "It seems that the rigour of the heavier burden of proof was meant, at a time when medical science was not far advanced, to set barriers and barricades in the path of feigned such defences in order that a minimum of such feigning defendants could skip punishment, but now with the big strides in that direction the chance of their being detected is increased; but in spite of development in medical science and due to inherent human shortcomings and frailties, the worlds of mind and self are far from being fathomable, and their secrets still remained buried in the deep depth of being and it is therefore better that ten such feigning accused persons should flout the law than one single person who is in need of care and cure be punished, for he is innocent in the eye of reason. The only problem that remains is that firm and correct steps are to be taken to ensure that such persons are not allowed to be a menace to others, but this is another matter."

It would appear from this that the Sudan courts would also prefer the lesser burden of proof.

II. Diminished Responsibility

Origin and Consequences

The concept of diminished responsibility has been recognised in Scots law for over a hundred years as a device to avoid the passing of the sentence of death in murder cases where the accused, though not insane, is suffering from some form of mental abnormality or weakness. The effect of the doctrine is that a prisoner who successfully pleads it is sent to prison for any term of years up to life imprisonment. The abolition of the death sentence for murder has somewhat blurred the distinction between that offence and culpable homicide (or manslaughter) because the punishment for murder is now imprisonment for life and there may be cases where the court may

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(1) Ibid, at P.128.
(2) Ibid.

impose exactly the same sentence on a person convicted of culpable homicide on grounds of diminished responsibility.[1]

Contrary to the belief of the R.C.C.P.[2] the defence of diminished responsibility in Scotland has not been confined to cases of murder, but has been applied in several other cases for the purpose of passing a less severe sentence.[3]

Before 1957 English law took no account of mental abnormality short of insanity within the M'Naghten Rules for the purpose of reducing murder to manslaughter. The R.C.C.P. concluded against recommending the introduction of the Scots doctrine into English law on the ground that it would be too radical an amendment of the law for a very limited purpose.[4] However, that doctrine was finally introduced into English law by the Homicide Act, 1957, as a compromise between the controversy over the abolition of the death penalty and the retention of the M'Naghten Rules. Section 2 of the Act provides:

> "(i) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease of injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing ....
>
> "(ii) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter."

It should at the outset be emphasised that the doctrine of diminished responsibility does not affect responsibility in the sense of guilt or culpability but merely oper-

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(1) e.g., Kirkwood, 1939 J.C.36; for the effect of the Mental Health Acts, 1959 and 1960, see infra.
(2) Cmd.8932, paras.377-378.
(3) Macdonald, op.cit., 117; Smith, T.B., Short Commentary, 153; also his article "Diminished Responsibility", (1957) Crim.L.R., 354 at P.357; however, it was recently stated that the plea is only applicable to murder, H.M.A. v. Cunningham, 1963 J.C.80 at P.84.
(4) Cmd.8932, para.413.

erates to mitigate punishment.[1] There is no need to give notice of a plea of diminished responsibility as a special defence in the same manner as insanity. In this respect the doctrine is analogous to that of provocation because in both cases the offender is held responsible and convicted but his sentence is reduced due to mitigating factors. In diminished responsibility these factors consist in the recognition by modern psychiatric medicine of the existence of types of mental weakness short of insanity which justify the treatment of the prisoner as being less blameable than an ordinary man.

It is only in murder cases that the doctrine operates to alter the character or nature of the offence, i.e., from murder to culpable homicide or manslaughter. However, even then, it is argued,[2] that this has been rendered necessary by the fact that the penalty for murder is fixed and that the reduction of the offence to the lesser one, being the only way for reducing punishment, is merely a 'device' to avoid a fixed punishment.

It must also be pointed out that the doctrine has lost much of its significance as a result of the provisions of the Mental Health Acts of 1959 and 1960 in England and Scotland respectively, and as a result of the abolition of capital punishment. Section 60 of the Mental Health Act, 1959,[3] enables a court which convicts a person of an offence other than murder to make an order committing him to a mental hospital instead of dealing with him in any other way, provided he is suitable for such compulsory detention. Consequently, except in cases of murder, the Act enables the courts to deal with mentally ill offenders without recourse to the doctrine of diminished responsibility. Again, where on a charge of murder a plea of diminished

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(1) Smith, T.B., Short Commentary, 153-154; Gordon, 333.
(2) Ibid.
(3) Section 55 of the Mental Health (Scotland) Act, 1960.

responsibility is successfully pleaded, the court may, instead of sentencing the accused to prison, order his detention in a mental hospital if his mental condition is such as to justify the requirements of the Act. The abolition of the death penalty in murder leaves no reason why the provisions of the Act should not be extended to cover murder cases and it has been suggested that this should be done.[1]

Development of the Doctrine

The development of the concept of diminished responsibility in Scots law is owed to Lord Deas who first introduced it in the case of Dingwall,[2] where the accused, an alcoholic, stabbed his wife for having hidden away his liquor and money. He had previously had attacks of delirium tremens and stated in his defence that he remembered nothing of the crime. Lord Deas directed the jury that the unpremeditated nature of the attack, the accused's kindness to his wife when he was sober, his peculiar mental condition weakened by disease and attacks of delirium tremens justified them in returning a verdict of culpable homicide.[3] Again, in John M'Lean,[4] where the accused was an imbecile and weakminded person since childhood, Lord Deas told the jury that:

> "without being insane in the legal sense, so as not to be amenable to punishment, a prisoner may yet labour under that degree of weakness or mental infirmity which may make it both right and legal to take that state of mind into account ...."[5]

The same principles were subsequently applied in several subsequent cases by Lord Deas[6] and other judges.[7]

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(1) Gordon, 339.
(2) (1867) 5 Irv.466.
(3) Ibid, at Pp.479-480.
(4) (1876) 3 Couper 334.
(5) Ibid, at P.337.
(6) Andrew Granger (1878) 4 Couper 86; Thomas Ferguson (1881) 4 Couper 552; Helen Thompson or Brown (1882) 4 Couper 596; Francis Grove (1882) 4 Couper 598.
(7) Lord M'Laren in H.M.A. v. Robert Smith (1893) 1 Adam 34.

By the beginning of the present century, however, Scots courts had begun to be somewhat distrustful of the doctrine on the grounds 'that its frequent and unlimited application might result in many murderers escaping the death penalty or many insane persons escaping incarceration in a lunatic asylum'. This attitude led to a restrictive interpretation of the doctrine. Thus, in H.M.A. v. Aitken,[1] Lord Stormonth Darling stated that the doctrine:

> "required to be applied with great caution. It could only be applied if a jury were satisfied that there was something amounting to brain disease."[2]

Lord Johnston described the doctrine as 'illogical' and refused to follow it in H.M.A. v. Higgins.[3] These were followed by H.M.A. v. Savage,[4] which is regarded as the most important case in the doctrine and which has been described as "the M'Naghten Rules of diminished responsibility."[5] Lord Justice-Clerk Alness then directed the jury that the doctrine should be applied with caution and continued to give a definition of the doctrine which is regarded as the locus classicus on the matter.[6] He said:[7]

> "That there may be such a state of mind of a person, short of actual insanity, as may reduce the quality of his act from murder to culpable homicide, is, so far as I can judge from the cases cited to me, an established doctrine in the law of Scotland. It is a comparatively recent doctrine, and, as has at least twice been said from the bench to a jury, it must be applied with care. Formerly there were only two classes of prisoner - those who were completely responsible and those who were completely irresponsible. Our law has now come to recognize in murder cases a third class ... namely those who, while they may not merit the description of being insane, are nevertheless in such a condition as to reduce the quality of their act from murder to culpable homicide. It is very difficult to put it in a phrase, but it has been

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(1) (1902) 4 Adam 88.
(2) Ibid, at P.94.
(3) 1914 J.C.1.
(4) 1923 J.C.49.
(5) Gordon, 345.
(6) Ibid, at P.346.
(7) 1923 J.C.49 at Pp.50-51.

> put in this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility - in other words, the prisoner in question must be only partially accountable for his actions."

The Savage formula has been accepted as authoritative in the subsequent cases of Braithwaite[1] and Carraher.[2] In the former, Lord Justice-Clerk Cooper emphasised that it was not enough for the purpose of the defence to show that the accused was of short temper, or was unusually excitable or lacking in self-control.[3] In the more significant case of Carraher,[2] a Full Bench decision, Lord Justice-General Normand, in denying the defence of diminished responsibility to a psychopath,[4] said that:

> "the plea of diminished responsibility, which is anomalous in our law, should not be extended or given wider scope than has hitherto been accorded to it in the decisions."[5]

This statement by Lord Normand has aroused severe criticism on the grounds that it tends to close the door for any future development of the doctrine of diminished responsibility. Thus, Professor Smith argues that it is doubtful whether reference to past decisions can fix limits on the doctrine.[6] He went on to say that the doctrine was "too protean" to be so treated and that the whole question should be left to the jury to determine along common sense lines.[7] Professor Gordon points out that the categories of diminished responsibility should not be closed if the law is to keep pace with scientific developments,[8] and that:

> "if the categories of diminished responsibility are closed, the strange result

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(1) 1945 J.C.55.
(2) 1946 J.C.108.
(3) 1945 J.C.55 at Pp.57-58.
(4) For a discussion of the law relating to psychopaths see infra.
(5) 1946 J.C.108 at P.118.
(6) Smith, T.B., Short Commentary, 159-160.
(7) Ibid.
(8) Gordon, 348-349; see also Lord Keith "Some Observations on Diminished Responsibility", (1959) 27 Medico Legal Journal, Pp.7-8.

> is reached that a system which has no rigid criterion for distinguishing the sane from the insane, the guilty from the innocent, has such a criterion for deciding whether an accused's mental condition is such as to merit some mitigation of punishment. And the criterion it has is the worst possible - nothing can ever amount to diminished responsibility in the future unless it amounted to diminished responsibility before 1946."[1]

The interpretation of the doctrine in English law seems to have taken a somewhat different and possibly wider course. In the early days of the Homicide Act the judges contented themselves merely with reading the section to the jury and asking them to apply it without giving them any further explanation.[2] This unsatisfactory practice was changed by the decision of the Court of Criminal Appeal in R. v. Byrne[3] and at present it is considered improper to leave the jury with the wording of the Act without any elucidation on its interpretation.[4] Byrne, a sexual psychopath, strangled a girl and mutilated her body. At his trial for murder evidence was given that he had from an early age been subject to perverted violent passions which he found very difficult to resist. He was convicted of murder but the Court of Criminal Appeal quashed the conviction on grounds of misdirection on the defence of diminished responsibility. Although the Court referred to the defence as one of "borderline insanity" as in Savage,[5] Braithwaite[6] and Carraher,[7] it went on to give it an interpretation wider than that given to it in the last-mentioned cases. Thus, Lord Parker said:[8]

> "'Abnormality of mind' which has to be contrasted with the time-honoured expression in the M'Naghten Rules

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(1) Ibid, at Pp.348-349.
(2) R. v. Spriggs (1958) 1 Q.B.270; R. v. Walden (1959) 3 All E.R.203.
(3) (1960) 2 Q.B.396.
(4) R. v. Terry (1961) 2 Q.B.314.
(5) Supra.
(6) Supra.
(7) Supra.
(8) (1960) 2 Q.B.396 at P.403.

> 'defect of reason', means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgement whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with rational judgement."

A year after that the Judicial Committee of the Privy Council pointed out in Rose v. R. that reference to "borderline insanity" was not always helpful, especially when 'insanity' was associated with its narrow meaning in the M'Naghten Rules. This, it was stated, would result in an "undue limitation of the wide words" of section 2 of the Homicide Act.[2]

Consequently, if the courts have to define diminished responsibility in terms of 'borderline insanity' they must be aware that 'insanity' here is used in a broad popular sense and not in the sense of the M'Naghten Rules.

> "A man may know the nature and quality of his act perfectly well and be aware that it is wrong in law and yet unable to prevent himself from doing it. Such a person in no way borders on insanity within the M'Naghten Rules; yet he should be able to rely on the defence of diminished responsibility."[3]

However, the difference between Scots and English laws in this respect should not be over-emphasised because in their reference to 'borderline insanity' the Scots courts, as has already been explained,[4] have not in recent years confined themselves to the narrow meaning of insanity in the M'Naghten Rules, but have preferred a much broader attitude. As Professor Gordon[5] has stated in referring to the Savage[6] rule:

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(1) (1961) A.C.496, P. 507.
(2) Ibid.
(3) Smith and Hogan, op.cit., 114.
(4) Supra.
(5) Gordon, 348.
(6) Supra.

> "Unless the requirement of disease or borderline insanity is unduly stressed, it would probably allow the doctrine to keep pace with medical science. What may be guarded against is any tendency to treat it as if it were a statute in the same way in which the M'Naghten Rules have been treated in England."

Psychopathic Personality

The decision in Bryne[1] further illustrates the different attitude of the Scots and English courts in dealing with the problem of the psychopath. English courts had even before Byrne[1] showed a willingness to recognise psychopathic personality as falling within diminished responsibility.[2] Lord Parker's definition of 'abnormality of mind' is now generally accepted as recognising this.[3] In Scotland, Carraher[4] was so decided because of the special circumstances of the spread of violence in Glasgow in the period after the war, and because of the suspicion on the part of the courts that psychiatrists might undermine the concept of criminal responsibility by treating all habitual criminals as psychopaths.[5]

At any rate, recent opinion does not seem to accept Carraher's[4] rejection of psychopathic personality.[6] As Lord Keith said:[7]

> "There can be no permanence of ideas in a matter of this kind, we move with the times. It must be left to Scottish courts to consider what weight judges or juries may give to evidence of psychopathic traits in a particular individual."

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(1) Supra.
(2) R. v. Spriggs (1958) 1 Q.B.270; R. v. Matheson (1958) 1 W.L.R.474.
(3) Williams, G., C.L.G.P., 542; Hart, H.L.A., The Morality of the Criminal Law, (London, 1965), 11; the R.C.C.P. doubted the authority of Carraher and stated that the psychopath should be considered of diminished responsibility, Cmd. 8932, para.401.
(4) Supra.
(5) Smith, T.B., Short Commentary, 160; Gordon, 348-350; Lord Cooper before the R.C.C.P., Minutes of Evidence, Q.5468.
(6) See the opinions of Smith, T.B., and Gordon, supra; the latter adds that the Mental Health (Scotland) Act, 1960, should be treated as superceding Carraher in so far as the latter excluded psychopathy from diminished responsibility.
(7) Lord Keith, op.cit., at P.8.

In the recent case of H.M.A. v. Gordon,[1] the accused, a psychopath, pleaded guilty to charges of rape and culpable homicide. The Crown asked for a hospital order with unlimited restriction on discharge.[2] The defence, relying on Carraher,[3] contended that there was insufficient evidence to justify the order, but the court rejected this contention and granted the order. The decision may imply that Carraher[3] is now abandoned and that a psychopath may in future be regarded as being of diminished responsibility. The Crown may in future abstain from contesting the issue (i.e., a plea of guilty of culpable homicide instead of murder) if they consider a hospital order to be appropriate. However, it still remains to be seen whether the Scottish courts would expressly recognise the psychopath as falling within the defence of diminished responsibility.

The position of the psychopath in the law of the Sudan is far from clear as the Code makes no express reference to it and the courts do not appear to have specifically dealt with it. It may, however, be suggested that if the condition of the accused as indicated by his antecedents and the circumstances of his crime show a case of severe mental abnormality or deficiency, he may be treated as falling within the provision of 'mental infirmity' in section 50, S.P.C., and consequently held to be completely irresponsible. Otherwise, he will be held completely responsible but the fact of psychopathy may be taken into consideration in assessing the appropriate sentence.

The Mental Health Acts[4]

The question of psychopathic personality continues to create some difficulties in

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(1) (1967) 31 J.Cr.L.270.
(2) Under section 55 of the Mental Health (Scotland) Act, 1960.
(3) Supra.
(4) For a detailed discussion of the effect of the Mental Health Acts on criminal responsibility see: Edwards, J.Ll.J., "Diminished Responsibility", Essays in Criminal Science, ed. G.O.W. Mueller (London, 1961), Pp.301 et seq.

relation to the question of criminal responsibility generally. Psychopathy is a recently discovered phenomenon and has yet to be verified by universal medical experience. Although some would maintain that psychopathy is a new euphimism for 'moral imbecility' or 'moral deficiency'[1], and that it is distinct from psychosis and neurosis, there is no accepted definition of what psychopathy is. However, it may be generally described as a defect of character or personality which manifests itself from an early age in violent emotions, immaturity and perverted anti-social behaviour.[2] The passing of the English Mental Health Act, 1959, and the Mental Health (Scotland) Act, 1960, has given rise to some controversy over the question of criminal responsibility and mental abnormality, particularly psychopathy. Section 60 of the English Act (section 55 of the Scottish Act) gives the court a discretion of, instead of passing a sentence of imprisonment on a person convicted of an offence (excluding capital offences), to order his detention in a mental hospital. The inclusion of the psychopath within the Act, coupled with the recognition of the doctrine of diminished responsibility, has been taken as a weakening of the whole concept of responsibility.[3] Lady Wootton interpreted this special treatment of the psychopath as being the 'thin edge of the wedge' which threatened to obliterate the foundation of criminal responsibility. She thus welcomed the Act and saw it as evidence of this tendency and as the first step towards the 'withering away' of the concept of criminal responsibility:

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(1) Under the Mental Deficiency Acts, 1913, 1927, and the Mental Deficiency and Lunacy (Scotland) Act, 1913. These Acts have now been superceded by the Mental Health Acts.

(2) R.C.C.P., Minutes of Evidence, Memorandum of Sir D.K. Henderson, para.17; Williams, G., C.L.G.P., 536; Gordon, 351.

(3) Barbara Wootton, Social Science and Social Pathology, (London, 1959), 249 et seq.; Crime and the Criminal Law (London, 1963), Ch. 3, "Diminished Responsibility: A Layman's View" (1960) L.Q.R.224.

> "... once we allow any movement away from a rigid intellectual test of responsibility on McNaghten lines, our feet are set upon a slippery slope which offers no resting-place short of the total abandonment of the whole concept of responsibility."[1]

According to Lady Wootton, there will in future be need to pay attention to the accused's blameworthiness, and the only question would be whether he was susceptible to treatment or not.[2]

The above criticisms do not command much support and have in fact been rejected by several legal writers.[3] Briefly stated, the reasons advanced by such writers are that these criticisms are based on false presumptions. The Mental Health Acts, it is pointed out, do not affect the issue of responsibility as reflected in the finding of guilt, but are merely concerned with the treatment of offenders. They do not 'by-pass' the question of responsibility or eliminate the concept of mens rea, but merely expand the court's discretion in dealing with the offenders by giving them a choice between penal and therapeutic measures. Further, the Acts do not extend to all psychopaths because admission to hospital is only an alternative course to be followed only where the court is satisfied that ordinary penal measures would be inadequate. Finally, the elimination of the concept of mens rea from the criminal law would lead to more serious problems and will threaten the freedom of the individual by increasing official interference, and subjecting the individual to prolonged investigations for what may turn out to be a mere accidental or uninten-

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(1) Social Science and Social Pathology, op.cit., P.249.
(2) Ibid, Pp.249-254; Professor Hart considers this as too extreme and advocates a 'moderate' scheme according to which mens rea would continue to be relevant and would have to be settled before conviction, except in so far as it related to mental abnormality. The latter will be investigated only after conviction - the pleas of insanity and diminished responsibility should be eliminated and the Mental Health Act should be extended to all offences including murder, Punishment and Responsibility, Ch. VIII.
(3) Edwards, op.cit.; Williams, G., The Times, Feb.16, 1960; Gordon, 350-352.

tional act.

Diminished Responsibility and Irresistible Impulse

A final word on the decision in Byrne[1] is that it unequivocally recognises irresistible impulse as falling within the defence of diminished responsibility. Lord Parker expressly stated that 'abnormality of mind' extends to "the ability to exercise will-power to control physical acts in accordance with rational judgement".[2] His Lordship continued to recognise the difficulty of distinguishing an 'irresistible' impulse from one which was 'unresisted', and stated that it could be resolved in " a broad common-sense way" by taking medical evidence together with all the relevant circumstances of the case and the statements and behaviour of the accused.[3] As Smith and Hogan put it[4]:

> "The test appears to be one of moral responsibility. A man whose impulse is irresistible bears no moral responsibility for his act, for he has no choice; a man whose impulse is much more difficult to resist than that of an ordinary man bears a diminished degree of responsibility for his act."

Diminished Responsibility and the Law of the Sudan

It is only in very recent years that the term 'diminished responsibility' has been used in relation to the Sudan law of insanity. However, it has been suggested[5] that the Sudan law already includes the concept of diminished responsibility in the provision of 'mental infirmity' in section 50 of the Code. Another view[6] is that the doctrine has been introduced in recent years through the decisions of the courts.

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(1) (1960) 2 Q.B.396.
(2) Ibid at P.403.
(3) Ibid at P.404.
(4) Smith and Hogan, op.cit., 113.
(5) Vasdev, K., op.cit., 61-65.
(6) Tatai, op.cit., at P.256.

With respect it is submitted that both these opinions are erroneous and that the concept of diminished responsibility as discussed above forms no part of the Sudan law. It is now intended to discuss the above views in greater detail.

Section 50, S.P.C.

It has already been shown,[1] that the term 'mental infirmity' in section 50 is wide enough to include cases of mental disorder other than those caused by disease of the mind, e.g., mental deficiency. In so doing the section catches within its ambit cases which under Scottish and English laws would fall outside the defence of insanity and within that of diminished responsibility. But this by no means implies that section 50 recognises the concept of diminished responsibility as applied in the above systems. That concept has essentially and primarily been introduced as a device to avoid the passing of the sentence of death in cases where although the accused's state of mind does not fall within the defence of insanity, it is considered to be so impaired that he should not be held fully responsible.

This clearly is not the same effect which follows from the application of section 50. The latter equates 'mental infirmity' with insanity and treats those found to be mentally infirm as though they were insane, e.g., indefinite detention. Thus, though a mentally infirm person may succeed in escaping the punishment for murder (death or life imprisonment) he is not sent to prison for a certain period of years but is kept in indefinite custody in the same way as insane persons. The section recognises no half-way house where the accused's responsibility is 'diminished' so that he is convicted of culpable homicide instead of murder. The accused is either completely sane and therefore guilty of murder and sentenced accordingly, or he is

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(1) Supra.

completely irresponsible and is dealt with as such.

The Case Law

The other suggestion is that:

> "There is no statutory law which deals with the doctrine of diminished responsibility in the Sudan; but the doctrine has been introduced by the courts as a defence to reduce punishment with regard to some kinds of homicide which according to Penal Code would have been capital murder."[1]

This view seems to be based on the recent decision of S.G. v. Nafisa Dafalla,[2] where the accused killed her husband, a well-known doctor, in his sleep for having told her that he was about to get married to a second wife. The defence set up the plea of insanity relying on evidence of the accused's past behaviour consisting of isolated incidents of quarrels with her relations, letters she had written to them, an attempt at suicide, and evidence of her psychiatric treatment for 'tormenting feelings of jealousy and suspicion' towards her husband. The court rejected the defence and convicted the accused of murder and sentenced her to death. It approved of a statement in Ratenlal[3] that:

> "A person cannot be said to be insane when all that is established is that he was moody, irritable and conceited and may be said to have been peculiar but at no time did he suffer from insanity of such nature or degree as to preclude him from knowing the nature of his acts, or obscure the distinction between right and wrong."

On reference for confirmation, the conviction of murder was upheld but the sentence was changed to one of life imprisonment. Several reasons were given for the reduction of sentence by B. Awadalla, J. The first and most important reason was that the fact that the accused was labouring under grave feelings of jealousy led to her

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(1) Tatai, op.cit., 256.
(2) (1961) S.L.J.R.199.
(3) Ratenlal, op.cit., (19 ed., 1956), 159.

irritable and hot-tempered disposition. Awadalla, J., went on to describe her as "the melancholic type described by Hale as the partially insane 'who ... discover their defect in excessive fears and grief'".[1] He then pointed out that such persons would in England be convicted of manslaughter by operation of the doctrine of diminished responsibility under the Homicide Act, and continued:[2]

> "Our law of course makes no such discrimination in favour of the partially insane ... ...; but I hope that for that reason alone we should not lose sight of the consideration which prompted the English legislature to effect a change in this important compartment of criminal responsibility."

Other reasons[3] for reducing the sentence included the deceased's provocative attitude of telling his wife of his intention to remarry, the loss of all family to her, and the undesirable impact which would be left on her children if she were to be executed.

Judge Awadalla's reference to the concept of diminished responsibility appears to be the first ever in any Sudanese case, and subsequent cases do not seem to have given the matter further consideration. It is submitted that it is incorrect to infer from the above case that it has 'introduced' diminished responsibility into the Sudan law. The learned judge himself made this abundantly clear by stating at the outset of his dictum that the Sudan law "makes no such discrimination in favour of the partially insane". The concept was merely referred to as <u>one</u> only of several factors for not executing the death sentence. Further, the accused's conviction of <u>murder</u> was confirmed; this would not have been the case had the concept of diminished responsibility (as known in the U.K.) been part of the Sudan law. It is

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(1) (1961) S.L.J.R.199 at Pp.203-204.
(2) Ibid, at P.204.
(3) Ibid.

submitted that the Sudan law is at present at the stage of Dingwall[1] in nineteenth century Scotland, taking into account differences in procedure, when the courts take the accused's state of mind into consideration in reducing the sentence for murder. It may be argued that in the U.K. the conviction is reduced from murder to culpable homicide (or manslaughter) because it is the only way in which the sentence for murder can be reduced because the sentence is fixed by law; and that this is not the case in the Sudan where the court may pass either the death penalty or imprisonment for life.[2] But such an argument is not sound because in the Sudan, too, the penalty for murder is in some way fixed, although it is admittedly fixed in the alternative - death or life imprisonment. Consequently, the reduction of the sentence in Nafisa Dafalla[3] from death to life imprisonment by no means indicates the application of diminished responsibility because imprisonment for life is an alternative punishment for murder. Had the sentence been reduced to a few year's imprisonment, which the Confirming Authority could have done quite lawfully,[4] the argument would have had more substance.

It is further thought that the Confirming Authority could have followed the same course it took in Nafisa Dafalla[3] without making any reference to the doctrine of diminished responsibility. Under section 256(1)(b), C.C.P., the Confirming Authority has an absolute discretion to commute a sentence of death into one of imprisonment and fine or imprisonment only or fine only. The section has in practice been frequently invoked whenever it was desirable to reduce the sentence on one ground or the other. Indeed, in this context, Nafisa Dafalla[3] does not provide a new principle in so far as the commutation of the death sentence on grounds of mental abnormality is concerned.

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(1) See supra.
(2) Section 251, S.P.C.
(3) Supra.
(4) Section 256 (1)(b), C.C.P., see infra.

Several cases prior to Nafisa Dafalla[1] illustrate this.[2] Thus, in S.G. v. ElAmin Babiker Mohammed[3], the accused, who was suffering from a shivering sickness which affected his mental stability, was subjected to some Feki treatment.[4] He formed the belief that his misfortunes were caused by the Feki and killed him. He was convicted of murder and sentenced to death. Flaxman, C.J., confirmed the finding but reduced the sentence to life imprisonment on the ground that "The accused was not far from the borderline of insanity ...". The C.J. added:

> "This is an instance where, in view of the obvious mental instability of the accused, the court need not have passed the death sentence."

The death sentence was also commuted in S.G. v. Zeinab bint AbuBakr[5], where the accused was described as a "half-crazy wild middle aged woman who does not realize the seriousness of the crime she has committed".

The recent case of S.G. v. Abdel A'L Mahmoud Khalid[6] is even more significant in this respect because the case went for confirmation before Awadalla, J., the same judge who delivered the judgement in Nafisa Dafalla.[1] The accused, described as of low intelligence, and slow understanding, and as excitable and irritable, was suffering from a recurring delusion of homosexual advances and killed a man whom he thought had approached him. He was convicted of murder and sentenced to death. B. Awadalla

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(1) (1961) S.L.J.R.199.
(2) The tendency of trial courts and the Confirming Authority to avoid passing the death penalty in cases of infanticide has already been dealt with: Ch. IV, supra.
(3) AC.CP.126.1942, Unrep.
(4) Feki treatment is a primitive method of treating lunatics usually practised by religious elders. It consists of whipping the patients, giving them potions to drink and keeping them in seclusion, presumably to drive away the evil spirit.
(5) AC.CP.241.1941, Unrep.
(6) (1962) S.L.J.R.115.

J., confirmed the finding and continued:[1]

> "Such delusions are no doubt the result of some mental abnormality which, though not sufficient to exonerate him from responsibility altogether, is in my view important in considering the punishment to be awarded or to move the Confirming Authority to commute."

The learned judge made no reference at all to the concept of diminished responsibility nor to his own dictum in Nafisa Dafalla.[2] More significantly, instead of invoking section 256 (1)(b), C.C.P., to commute the sentence, the Confirming Authority recommended that the Head of State commute the death sentence under its prerogative of mercy. The issue was therefore left to the discretion of the Executive instead of its being judicially determined in accordance with the Code and with the pre-existing practice. This clearly indicates that the concept of diminished responsibility has not in fact been recognised by the courts as a judicial addition to the Sudan law.

Conclusion

In conclusion it is submitted that diminished responsibility has no place in the Sudan either under the Code or in the case law. This opinion finds strong support among contemporary Sudanese lawyers. Respondents to the Questionnaire generally either agreed with the above conclusion or admitted a complete lack of familiarity with the doctrine itself. Of the nineteen respondents, only seven professed any knowledge of the meaning and scope of the doctrine. The rest admitted little or no familiarity with the doctrine or declined to respond.[3] Of the former seven, four were of opinion that the doctrine formed part of the Sudan law within the provision of 'mental infirmity' within section 50, though none of them knew what 'mental

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(1) (1962) S.L.J.R.115 at Pp.116-117.
(2) (1961) S.L.J.R.199.
(3) Q.1, Part III, B, Questionnaire.

infirmity' really meant;[1] two disagreed with this view and the seventh gave no reply.[2] Finally, ten disagreed with the view that Nafisa Dafalla[3] introduced the doctrine into the law of the Sudan; eight failed to respond and only one agreed with this view.[4]

Is the Introduction of the Doctrine Necessary?

The question arises whether the introduction of the defence of diminished responsibility in the Sudan would be necessary. It is submitted that this is not so because of the following reasons:

1. - As already stated, under the present Sudan law a person who would in Scotland and England be found of diminished responsibility would probably fall within the 'mental infirmity' provision under section 50, S.P.C. In such a case he would be dealt with under section 285, C.C.P.[5], and will generally be subject to indefinite detention in a prison together with other criminals who may be serving specific periods of years. Thus, a person falling within the provision of 'mental infirmity' under section 50 will be treated in roughly the same way as though he was sentenced to imprisonment on a finding of diminished responsibility had the latter defence been part of the law of the Sudan. The only difference, however, is that a verdict of diminished responsibility may imply a definite period of years whereas detention under section 50 is indefinite.[6] Nevertheless, if the accused is not dangerous to himself or to others (which may well be the case in 'mental infirmity' as distinct from insanity) he may be put in the custody of relatives or friends or released as cured

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(1) Q.2, ibid.
(2) Ibid.
(3) Supra.
(4) Q.3-4, Part III, B, Questionnaire.
(5) Supra.
(6) A verdict of diminished responsibility may be followed by imprisonment for life, e.g., Kirkwood v. H.M.A., 1939 J.C.36; R. V. Matheson (1958) 42 Cr. App.R.145; but this is very rare in practice, see Lord Hunter in Fiddes 1967 S.L.T.2 at P.3.

after a certain period of time which may even be shorter than he would have served had he been sentenced to a specific period of years on a finding of diminihsed responsibility. On the other hand, if his mental condition does not permit his release or if he is dangerous he may be kept indefinitely in prison. This would ensure that the security of the public is more preserved than when he is serving a period of years at the expiry of which he must be released regardless of his mental condition.

2. - Even where the accused does not fall within section 50 the recognition of the doctrine would still be unnecessary if it is borne in mind that the primary function of the doctrine is to avoid the passing of the death penalty. The reason for this is that the punishment for murder in the Sudan is not as rigidly fixed as it is in Britain. The court has a discretion to pass either a sentence of death or of life imprisonment.[1] Although such discretion is a judicial not an arbitrary one and although there are specified categories of cases where the alternative punishment of imprisonment for life may be passed,[2] these categories are by no means closed. Consequently, if the accused's mental condition does not bring him within section 50, but justifies the passing of a sentence of life imprisonment instead of the death sentence, the court may proceed to do so.[3]

3. - The third reason against the introduction of the doctrine is concerned with the power of the Confirming Authority under section 256 (1)(b), C.C.P., already referred to. This power is more significant than the above discretion of the trial court because, whereas the trial court is restricted to passing either the sentence

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(1) Except in the case of murder by a life convict where under section 252, S.P.C., the death sentence is mandatory.
(2) C.C.C.No.26, dated 15.6.1952, see Ch. II, supra.
(3) Flaxman, C.J., in S.G. v. ElAmin Babiker Mohammed, AC.CP.126.1942, Unrep., see supra.

of death or that of life imprisonment, the Confirming Authority is under no such limitation. It may commute a sentence of death to one of life imprisonment and may reduce either of these two punishments to one of imprisonment for a fixed period of years or even to a fine. In doing so the Confirming Authority may take into account the mental peculiarities of the accused and award the punishment which it deems appropriate. As was previously shown,[1] this appears to be working satisfactorily in practice.

4. - Finally, the introduction of diminished responsibility may create more difficulties for the courts in view of the extreme lack of expert psychiatric staff. The courts will have the extra burden of determining whether the accused's responsibility was 'diminished' or not without expert assistance on the accused's mental concition. The recognition of the doctrine presupposes the availability of psychiatric expertise which at the present time is hardly available in the Sudan.

III. Intoxication

The question of drunkenness continues to present some difficulties in relation to the issue of criminal responsibility. The reason for this is that, on the one hand, it is felt that the fact that the accused has willingly and voluntarily got himself drunk is no reason for absolving him of responsibility. On the other hand, it is a basic rule of criminal responsibility that a person cannot be convicted of an offence unless he has committed it with the requisite mens rea.

At any rate, it seems to be established that a person who forms a sober intention to commit a crime, as, for example, to kill another, and then gets drunk to give himself 'Dutch courage', and kills that person, will be guilty of murder.[2] The reason

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(1) Supra.
(2) Lord Denning in A.G. for Northern Ireland v. Gallagher (1963) A.C.349 at P.382; Gordon, 355; Gledhill, 127.

for this is that if the accused had

> "the requisite intent at the time when he got drunk he can be properly convicted, even if he did not have it at the time of committing the act."[1]

The above rule does not appear to be completely satisfactory because the problem seems to be one of proof of intention. If it can be established that at the time of the act the accused lacked the requisite intent due to his state of intoxication, there appears to be no good reason why the inquiry should go back and investigate his prior intentions. The crucial time for the intention is the time of the act and if he had no intention at that time he should not be convicted. The rule could only be supported on grounds of policy rather than on the rules of criminal liability.[2] The situation is more difficult where there is no prior intent to commit a crime but the offender voluntarily gets intoxicated and commits an offence. In early times drunkenness was considered as an aggravation of the crime committed rather than a basis of excuse from liability.[3] The development of the concept of mens rea has modified the rigour of this rule and the rule now is that intoxication is not a defence unless it amounts to insanity or deprives the accused of capacity to form the intention required for the particular crime.[4] In Scots law before 1921, drunkenness would be taken into account to determine whether the offender should be convicted of murder or culpable homicide on the ground that he was suffering from delirium tremens or lacked the requisite malice which constituted the mens rea for the offence.[5] In 1921 the case of H.M.A. v. Campbell[6] introduced into Scots law the English law rule

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(1) Williams, G., C.L.G.P.571.
(2) Smith and Hogan, op.cit., 120.
(3) Beverely Case (1603) 4 Co.Rep.125; Hume, i, 45-46.
(4) D.P.P. v. Beard (1920) A.C.479; see also Stephen, J., in R. v. Doherty (1887) 16 Cox 306.
(5) H.M.A. v. Andrew Granger (1878) 4 Couper 86; H.M.A. v. Margaret Robertson (1886) 1 White 93; H.M.A. v. M'Donald (1890) 2 White 517; H.M.A. v. Kane (1892) 3 White 386.
(6) 1921 J.C.1; see also Kennedy v. H.M.A., 1944 J.C.171.

in D.P.P. v. Beard.[1] In the latter case the accused was charged with the murder of a thirteen year old girl by placing his hand over her mouth and throat in an attempt to rape her. His plea of drunkenness was rejected and he was convicted of murder. The Court of Criminal Appeal quashed the conviction on the grounds that the jury were not directed that they should acquit the accused unless they were satisfied that he was capable of knowing that what he was doing was dangerous.[2] The House of Lords rejected this and restored the conviction of murder. Lord Birkenhead stated the law as follows:[3]

> "1. That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged. The distinction between the defence of insanity in the true sense caused by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention, has been preserved throughout the cases ....
>
> "2. That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other factors in order to determine whether or not he had that intent.
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> "3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts."

The rule is therefore that voluntary intoxication, however acute, will not excuse or mitigate the offence unless it renders the accused incapable of forming 'specific intent' required for that offence.[4] This was exactly the situation in the Sudan

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(1) (1920) A.C.479.
(2) i.e., in accordance with the earlier decision in R. v. Meade (1909) 1 K.B.895.
(3) (1920) A.C.479 at Pp.500-502; see also Lord Devlin in Broadhurst v. R. (1964) A.C.441 at P.463.
(4) The term 'specific intent' is misleading and tends to confuse intent generally with 'specific' intent. It has been generally accepted that it means no more than that intent should be one of the constituent elements of/...

under the Code of 1899. Section 65 of it provided:

> "In cases where an act is not an offence unless done with a particular knowledge or intent is done by a person in a state of intoxication, the fact of intoxication shall be taken into account in determining the knowledge or intent with which the act was done."

The above section was omitted from the Code when it was re-enacted in 1925, and was replaced by the present section 42 which states:

> "A person who does an act in a state of intoxication is presumed to have the same knowledge as he would have had if he had not been intoxicated."

The section lays down a presumption that an intoxicated offender should be treated in the same way as to knowledge as though he was sober. The section makes no reference to 'intention' at all, but the courts have interpretated it to include a presumption of intention as well.

The question immediately arises whether the presumption under section 42 is rebuttable or conclusive. The first thing to note in this connection is that section 42, unlike section 41 which deals with the presumption of general knowledge,[1] does not include

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(contd.) the crime: Williams, C.L.G.P., 569-570; Smith and Hogan, op.cit., 38, 117-118; Cross, R., "Specific Intent", (1961) Crim.L.R.510. Further, under section 8 of the Criminal Justice Act, 1967, proof of intention or foresight must be determined by reference "to all the evidence drawing such inferences from the evidence as appear proper in the circumstances". Consequently, evidence of drunkenness short of incapacity to form an intent cannot be excluded from the jury. However, in the recent case of R. v. Lipman (1969) 3 All.E.R.410 it was held that if death resulted from an unlawful act of the accused no 'specific intent' need be proved for a conviction of manslaughter. The case means that voluntary intoxication is not a defence to manslaughter, and accepts that drunkenness could only provide a defence when a 'specific intent' was required. This is unsatisfactory and the case clearly contradicts section 8 of the Criminal Justice Act which rules out the restriction of the defence of drunkenness to cases of intent as opposed to cases of foresight.

(1) Section 41 provides: "A person is presumed, unless the contrary is proved, to have knowledge of any material fact if such fact is a matter of common knowledge".

the provision 'unless the contrary is proved'. This led to some confusion in the cases as to the rebuttability or otherwise of the presumption in section 42. In S.G. v. Hassan Mohammed ElSayyad,[1] the accused, who had killed a person in a drunken brawl, pleaded drunkenness to a charge of murder. His conviction of murder was upheld by Abu Rannat, C.J., who said:[2]

> "The question to be asked is this: Is the presumption a rebuttable one? The answer in my view is 'No' for in its terms it is not, especially when you compare it with section 41. I therefore come to the conclusion that the accused must have known that death would be the probable consequence of his act."

The same C.J. stated in S.G. v. Deng Manguen[3] that drunkenness can only constitute a defence if it amounts to delirium tremens.

On the other hand, Abu Rannat, C.J., himself adopted a different course in other cases without mentioning the presumption in section 42. In S.G. v. Eidalla[4] he stated the law in accordance with Lord Birkenhead's dictum in Beard[5] and in S.G. v. Abujuku Musa[6] he stated that the evidence did not show that the accused's drunkenness rendered him incapable of forming a 'specific intent'. Although no mention was made of section 42 in the latter two cases, it is clear that the learned C.J. has come very near to accepting the rebuttability of the presumption in that section. This has now been expressly confirmed, again by Abu Rannat, C.J., in S.G. v. Mursal Saeed Fadl ElMula,[7] the most recent reported case on the subject. The accused, who was extremely drunk refused to give the two deceased a lift in his lorry and threatened to run them down, which he did, killing both of them. He was convicted of

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(1) (1961) S.L.J.R.153.
(2) Ibid, at P.155; Cf. Maclagan, C.J., in S.G. v. Rahmtalla Abdulla, AC.CP.66. 1948, Unrep.
(3) (1961) S.L.J.R.17 at P.18.
(4) (1956) S.L.J.R.42.
(5) Supra.
(6) (1961) S.L.J.R.127 at P.128.
(7) (1962) S.L.J.R.214.

murder but in refusing to confirm the finding, Abu Rannat, C.J., said:[1]

> "It may be argued that Penal Code, S.42, attributes knowledge to an intoxicated person, but it should be noted that the presumption of knowledge in Penal Code, S.42, is rebuttable and the accused can disprove it."

He consequently concluded that the accused was incapable of knowing the consequences of his act and could not, therefore, be convicted of murder or of culpable homicide. A conviction for unintentional homicide under section 255, S.P.C., was substituted. It is submitted that the C.J. has finally arrived at the preferable view. The case brings the Sudan law in accord with English and Scots laws and with the provisions of section 65 of the 1899 Code which, for no apparent reason, has been omitted from the present Code.

There is, however, one interesting difference between the law of the Sudan and those of England and Scotland. In the latter systems where intoxication renders the accused incapable of forming the requisite intent or knowledge the conviction will be for manslaughter in England and for culpable homicide in Scotland. But this is not the case under the S.P.C. where the accused cannot be convicted of 'culpable homicide not amounting to murder' because the latter offence requires 'intention' or 'knowledge' of likelihood as a minimum.[2] If it is established that the accused's intoxication has rendered him incapable of forming that intention of knowledge the conviction must be for another offence, e.g., unintentional homicide under section 255 of the Code as in the last-mentioned case.

Finally, it seems to be generally accepted that where the intoxication falls short of insanity or of depriving the accused of capacity to form the requisite mens rea

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(1) Ibid, at P.215.
(2) Ch. IV, supra.

it will be taken into account in determining the appropriate sentence.[1]

Involuntary Intoxication

Involuntary intoxication under the S.P.C. is dealt with in the same section as insanity, section 50. Subsection (b) of that section provides that the accused will not be guilty of any offence if, at the time of the act, he was incapable of appreciating the nature of his acts or of controlling them by reason of "intoxication caused by any substance administered to him against his will or without his knowledge". It must first be proved that the substance was administered to the accused against his will or without his knowledge. This is a very rare occurrence and there do not appear to be any decided cases on the subsection.[2] Nor does there seem to be any authority on the matter in English or Scots laws, although it is accepted that involuntary drunkenness, if sufficiently established, constitutes a good defence.[3] The reason for the lack of cases on involuntary intoxication has been explained by Hall as follows:

> "... the case law implies that a person would need to be bound hand and foot and the liquor literally poured down his throat or, possibly, that he would have to be threatened with immediate serious injury before the exception, so universally voiced, would have any effect."[4]

Intoxication and Insanity

It has been pointed out in several Sudanese cases[5] that intoxication will be a good defence if it amounts to delirium tremens or any other form of insanity. This is,

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(1) Hume, i, 40-41; Gordon, 357; Cross and Jones, op.cit., 75; S.G. v. Covert Duffy, AC.CP.166.1942, Unrep.; S.G. v. Rahmtalla Abdulla, AC.CP.61.1948, Unrep.; S.G. v. Hassan Mohammed ElSayyad (1961) S.L.J.R.153; S.G. v. Mukhtar Hussein Idris, (1961) S.L.J.R.30.

(2) The defence was raised in S.G. v. Nafisa Dafalla (1961) S.L.J.R.199, but was rejected on the ground that it was incompatible with the defence of insanity which had also been set up.

(3) Williams, G., C.L.G.P., 562; Smith and Hogan, op.cit., 118; Gordon, 364.

(4) Hall, op.cit., 540.

(5) S.G. v. Rahmtalla Abdulla, AC.CP.66.1948, Unrep.; S.G. v. Deng Manguen/...

indeed, a universally accepted rule.[1] The only difficulty in this respect is that of proving that excessive drink has resulted in insanity, even if temporarily. If this is established the accused will be acquitted, but if he does not know that his act is wrong merely because he is heavily drunk, he will be convicted.

Criticism and Proposals for Reform

The rules regulating the effect of intoxication on criminal responsibility are not completely satisfactory. There is still some controversy over whether a person who voluntarily gets drunk should be held liable for all the consequences of his conduct, or whether his state of intoxication should be considered as affecting his responsibility. The former attitude finds favour with the courts on grounds of policy for the protection of the public, whereas the latter view, which is more consonant with the principles of criminal liability, is preferred by jurists. Consequently, the rule in Beard[2] is not considered satisfactory on the ground that it is a compromise between the two above attitudes. The problem of dealing with the effect of intoxication on mens rea, it is argued,[3] is different from that of dealing with the drunken offender, and the two problems should be dealt with separately. It is, therefore, concluded that an accused should be acquitted if his crime is wholly the product of intoxication and if:

> "it can be shown that but for the drink the accused would never have considered committing it ... whether or not he was capable of intending to commit it, and whether or not in his drunken state he did intend to commit it."[4]

(contd.) (1961) S.L.J.R.17; S.G. v. Abujuku Musa (1961) S.L.J.R.127; see also Gledhill, 126.

(1) Stephen, J., in R. v. Davis (1881) 14 Cox 563 at P.564; approved by the House of Lords in D.P.P. V. Beard (1920) A.C.479; Lord Justice-Clerk Inglis in Alex Milne (1863) 4 Irv.301 at P.344; Lord Justice-Clerk Macdonald in H.M.A. v. M'Donald (1890) 2 White 517 at P.521.

(2) Supra.

(3) Gordon, 366.

(4) Ibid, Cf. Hall, op.cit., 556.

On the other hand, if his intoxication falls short of the above standard he should be convicted. The question of his intoxication may then be considered in mitigation of punishment. Public protection may be effected by the creation of a new offence, 'drunk and dangerous', which may succeed in preventing some of the consequences of drunkenness before they occur.[1] It is thought that reform along such lines is necessary to bring the law into harmony with the principles of criminal liability.

(1) Williams, G., C.L.G.P., 573; Cross and Jones, op.cit., 75; Gordon 366-367.

CHAPTER IX

CONCLUSIONS

Since it is a primary function of the Criminal law to protect the individual against homicide and bodily injury it becomes of great significance to investigate the extent to which it does or should operate to this end. In the foregoing Chapters an attempt has been made to ascertain the Sudan law of homicide and to compare and contrast it with other systems in order to have a better appraisal of it and to determine whether it calls for any modification. It was stated at the outset that the S.P.C. was based on the I.P.C. which had in turn been largely taken from nineteenth century English law. Since that time, and particularly in the latter half of the present century, English law has undergone considerable modifications and alterations. The numerous efforts made in the last hundred and forty years to modify English criminal law have resulted in several reforms. For the purposes of the law of homicide, as we have seen, the most significant changes were made by such statutes as The Infanticide Act, 1938, The Homicide Act, 1957, the Mental Health Act, 1959, The Suicide Act, 1961, The Criminal Procedure (Insanity) Act, 1964, The Criminal Justice Act, 1967, The Abortion Act, 1967, The Criminal Law Act, 1967, and The Murder (Abolition of Death Penalty) Act, 1969. Alongside these statutes the courts have from time to time made significant modifications of the old common law rules.

But the I.P.C. has not undergone any significant modifications since it first came into force. Admittedly, some of the changes brought about in English law by the above Acts were already included in the I.P.C. and, in this respect, the need for change does not arise. On the other hand, however, many of the above changes are

based on modern notions of criminal responsibility and constitute an improvement on the law of homicide as included in the I.P.C. Hence the question arises whether the I.P.C., and consequently the S.P.C., calls for modification along the recent developments on the matter elsewhere.

For the purposes of the S.P.C., the present work has shown that though the S.P.C. was based on the I.P.C., the former includes considerable variations from the latter, particularly in the fields of homicide and mental abnormality. Passed almost fifty years after the I.P.C., the S.P.C. had the advantage of improving on the former by benefiting from subsequent research on the matter and from some criticisms of the provisions of the I.P.C. It is unfortunate that no preparatory work or reports by commissions or committees on the process of drafting the S.P.C. can be traced. The Indian Code seems to have been introduced into the Sudan and renamed the Sudan Penal Code after making some arbitrary modifications. As a result, the student of the S.P.C. has been deprived of the benefit of research in the arguments for or against the suitability or otherwise of the particular provisions of the Code, and the reason why modification of some of the provisions was considered necessary.

Factors Influencing Interpretation

In discussing the application of the provisions of the S.P.C. and considering whether it should be modified in accordance with recent developments in the U.K. or elsewhere one must bear in mind the disparities in the conomic, geographical, cultural and socio-political conditions of the respective countries. Rules of law are not applied in the abstract; consideration must be given to the characteristics and attributes of the people to whom the law is to apply. As time goes on these attributes may change and the law may then call for modification. It is now intended to outline

the particular circumstances which influence the Sudan courts in their application of the Code.

General Conditions and Characteristics

The Sudan courts have generally been careful to apply the Code in the light of the general circumstances of the country and the local peculiarities of the people. Thus, in applying the theories of causation the courts have taken notice of the primitive beliefs of the people and their general attitude towards seeking medical treatment, the difficulty in means of communication, and the considerable lack of hospitals and medical staff and equipment. In so doing they have adopted a different attitude from that of the U.K. courts. The deceased's reluctance or apathy in seeking medical help, his application of primitive medicines, the distance from hospital or the unavailability of skilful medical care, are all factors of common occurrence in the Sudan. The courts are therefore less inclined to treat such factors as having broken the chain of causation. This may not be so in the U.K. at present because the average member of the public is much more sophisticated, medical help is within easy reach and hospitals are well equipped and adequately staffed.

Similar considerations have influenced both the authors of the Code and the courts in connection with the law of private defence. It has been explained that the provisions of the Code dealing with private defence of the person and property are very extensive. This is rendered necessary by the nature of the social structure and by the relative insecurity of person and property due to the inadequacy of facilities of public protection. It has also been seen that the courts have refrained from applying with full rigour the provision in section 59 of the Code denying the accused his right of private defence in cases where he could resort to public protection. This is extremely necessary, particularly in remote areas where facilities for pro-

tection by public authorities are minimal. Otherwise the safety of the individual and the security of his property would be jeopardized. In this connection, the courts have also held that damage to property may constitute adequate proof of provocation. The law in the U.K. may in theory be the same but it is doubtful whether in practice the courts would go so far due to the considerable disparity in the prevailing conditions and attitudes.

More significantly, in assessing the extent of the offender's knowledge of probability of the risk of death in the mens rea of murder, and in determining the extent to which the offender has been provoked, the courts have fallen back on the test of the 'reasonable man'. In connection with the question of knowledge in murder the courts would determine what knowledge the reasonable man would have had and attribute such knowledge to the accused. It has been explained that this attitude is undesirable. It applies an objective test contrary to the expressly subjective provisions of the Code. The average or ordinary man in the Sudan is generally illiterate and simple, and his standard of common knowledge is rather limited. He may know that a stab wound in the heart or stomach or a shot in the head would probably cause death, but he does not know that a cut in the arm may sever a vein or contract an infection which would eventually cause death. He has no knowledge of the physiology of the human body or the effect of wounds or other complications on the life of another. In such circumstances it is manifestly unjust to attribute to him the common knowledge of the fictitious reasonable man in every case which results in death. However, in assessing the extent of the effect of provocation on the accused, the courts have generally taken into account the particular accused's different cultural and environmental peculiarities. This is essential in a society with a plurality of religious, ethnic and linguistic groups belonging to different cultural back-

grounds. But there is no indication that the courts will also adopt the subjective test in order to determine the effect of provocation on an accused with peculiar mental or physical characteristics.

Finally, the courts have also adopted a favourable line in cases of murder which involve peculiar circumstances rooted in the accused's peculiar beliefs and cultures. This has been illustrated by several instances of killings resulting from belief in witchcraft, ghosts and evil spirits. The courts have in this connection emphasised that no criminal responsibility arises where a person acts under a genuine mistake of fact influenced by superstitious beliefs. On the other hand, they have made it very clear that the law has in this respect a leading role to play and that it will operate to eradicate archaic and superstitious beliefs.

Protection of Public Officers

It is a noticeable feature of the S.P.C. that it lays down special provisions relieving from responsibility or reducing the guilt of public servants who cause death in the execution of their duties. The act of a public servant in the lawful exercise of his duty is universally recognised as involving no criminal liability even if it causes death, provided that the force used was necessary for the due execution of that duty.

The Code also provides under section 60 that an accused cannot plead the right of private defence against the act of a public servant even if the latter's act is not completely lawful. Again, an act of a public servant in the lawful exercise of his duties can never amount to provocation nor can an accused plead the exception of 'sudden fight' in section 249(4) if he causes the death of such public servant. Further, a public officer who causes death in excess of his lawful duties will not be guilty of murder, but will have his offence reduced to culpable homicide if the

provisions of section 249(3) are satisfied.

The above provisions have in practice been liberally interpreted in favour of such public servants. It may be objected that the above provisions are too wide and that the law should not allow its officers such excessive indulgence which may lead to abuse. On the other hand, however, these are concessions which the law makes in favour of its agents to encourage them in the efficient execution of their duties. In a country like the Sudan such concessions may at present be necessary because the law has yet to educate public opinion in its authority and in respect for its servants. When the day comes when public opinion is so educated, when methods of detecting crime are improved, and when police forces are adequately manned and equipped the need for such special considerations may disappear. At the same time, however, the courts should not lose sight of the fact that public officers who are too quick on the trigger should be effectively dealt with.

Main Differences between the Laws of the Sudan and the U.K.

The most striking difference between the criminal law of the Sudan and that of the U.K. is that the former is codified and the latter is not. The merits and demerits of codification are not within the scope of the present work, but it may be significant to find out the extent to which the difference in form affects the law relating to homicide. Generally, the difficulty in enacting a Code is the somewhat ambitious claim to comprehensiveness. As has been explained in the foregoing Chapters, the S.P.C. has attempted to spell out in detail the rules which may be applicable to all types of factual situations. In doing so it includes not only the substantive provisions in the sections, but complements these with Explanations and Illustrations explaining the content of the sections or demonstrating the manner in which they should

be applied. Nevertheless the Code has at times been found inadequate with the result that judicial Circulars have from time to time been passed to fill in the gaps. Further, the enactment of a Code may prove unsatisfactory when the unusual case calls for different treatment, or when attitudes change towards the treatment of a particular type of situation. This is clearly demonstrated by the present state of the law of child killing. The courts have for a long time recognised that such cases deserve a more lenient treatment than other murders. In their attempts to do so the courts have resorted to different formulae, none of which is satisfactory, and the law in this respect has been rendered greatly confused.

Such a problem need not arise under common law systems which are based on case law and on the operation of the doctrine of binding precedent. Situations that arise from time to time may be dealt with by trial courts and appellate bodies until consistent rules of law are applied. The modification or alteration of the rules may also be done occasionally by superior courts or by Acts of Parliament. Changes which have been effected in the U.K. in this manner have already been referred to.[1]

On the other hand, it may be argued that a Code is necessary for the clarification and certainty of the law, and for showing the different grounds upon which each type of case has come to be decided. This is best illustrated by the provisions of section 249(1), (2), and (4), dealing respectively with provocation, exceeding the right

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(1) However, it should be borne in mind that even in a common law system the courts may be too timid in modifying a rule of law which is generally accepted as outdated and archaic. The adherence of the English courts to M'Naghten until the law had to be changed by Parliament may be the best illustration of this attitude. The introduction of diminished responsibility by the Scottish courts demonstrates the other extreme. The question depends to a great extent on the actual judges concerned, the nature of the need for reform and the attitudes of the public.

of private defence, and causing death in a sudden fight upon a sudden quarrel. It has already been explained that in the U.K. an accused person who kills another in excess of his right of private defence may be convicted of culpable homicide on grounds of provocation. In the Sudan he is separately dealt with under section 249(2). The latter solution appears to be the better one. The pleas of provocation and of exceeding the right of private defence are distinct and each of them is meant to apply to a particular type of situation. It is illogical to claim that in every case in which a person causes death in exceeding his right of private defence his guilt is reduced on grounds of provocation. The ingredients of provocation are distinct from those of exceeding the right of private defence and if the guilt of the accused is to be reduced on grounds of provocation those ingredients must be specifically proved. Along the same lines one would object to the U.K. practice of reducing the guilt of a person who kills in a sudden fight by relying on the plea of provocation. Such cases under the Code are also distinctly provided for under section 249(4). However, it may be argued that the three types of situation are not radically distinct from each other and that the whole purpose of the law is to reduce the guilt of the offender from murder to culpable homicide because he acted in a sudden fit of rage either due to provocation or in a sudden fight or in exceeding his right of defence. This argument may have some substance because in practice the Sudan courts have found it very difficult to decide with any degree of certainty whether any of the subsections is applicable to the exclusion of the other two. Consequently, the position in the common law may have a merit of flexibility in dealing with and adjusting itself to different types of situation as they arise.

Specific Differences

In connection with the actual differences in the law applied in the U.K. and the Sudan

as discussed in the preceding Chapters, the procedural aspects will be dealt with first.

The Sudan system of constitution of Major courts allowing lay magistrates to sit as full members of the trial court is undesirable and should be abolished as soon as adequate qualified magistrates are recruited. The jury system would not be a satisfactory alternative at present. It presupposes a high degree of literacy and a reasonable standard of common knowledge and sophistication which is lacking in the Sudan.

Secondly, the power of the Confirming Authority to reduce the death penalty to one of imprisonment for any term or to a fine is too extensive and should also be abolished. It has no equivalence in the U.K. The penalty for murder must be fixed in accordance with the provisions of the Code. Considerations of clemency or compassion must be dealt with through the prerogative of mercy. Any type of homicide which is considered less serious than murder must be separately provided for.

Further, the power of the Confirming Authority to set aside an acquittal and to order a revision of finding or a re-trial is also repugnant. An acquittal must be final and the matter should end at the trial court. Indeed, the time may have come to review the whole process of confirmation and consider whether it should be brought to an end so that the judgement of the trial court is considered final subject to the right to appeal.

Finally, the power of the Court of Criminal Appeal to substitute a sentence of death instead of one of life imprisonment is unjust and inhumane and should be repealed.

In relation to police inquiries and the admissibility of statements by the accused the Sudan law requiring confessions to be taken before a magistrate is much better than the U.K. rules. The Sudan law ensures the voluntariness of such statements and protects the interests of the accused without hampering the police in their duty

of detecting crime.

Turning now to the substantive law of homicide, it is thought there does not appear to be any significant distinctions between the Sudan law and that of the U.K. in relation to the question of actus reus and the theories of causation. In relation to the latter, it has already been explained that the attitude of the Sudan courts may be slightly different because of the social and economic factors involved.

By far the most marked distinction between the above systems lies in their treatment of the law of murder and their attempt to distinguish it from culpable homicide or manslaughter. Intention to kill presents no difficulties and it is considered a sufficient mens rea of murder in all the systems under consideration. Again, the question of constructive murder does not cause much controversy at present. It was abolished in England; it has never formed part of the law of the Sudan and does not seem to be applicable in Scotland today.

The Sudan law dealing with child murder is confused and it is suggested that the Code be amended so that a distinct offence of infanticide be created.

The real difficulties in connection with the law of murder spring from the alternative mens rea of murder under section 248(b) of the Code, i.e., knowledge that death would be the probable result of the offender's act. It has been explained that in this respect the S.P.C. marks a significant departure from the I.P.C. by rejecting the latter's detailed definitions included in subsections (2), (3), and (4) of section 300, and adopting the simpler formula of knowledge of probability. Although there is no express indication to this effect, this formula seems to have been taken from the works of Stephen which appeared in the period between passing the I.P.C. and the S.P.C. It refers simply to cases of death involving extremely gross recklessness indicating an indifference to the safety of others. The actual wording of the formula in terms of knowledge of probability has never been recognised in the U.K.

As has been explained in Chapter IV its adoption in the S.P.C. has not proved satisfactory. The objections to it consist in the courts' attitude of assessing knowledge objectively by using the reasonable man as a standard rather than a test, and in their determining the unsatisfactory notion of probability by the more unsatisfactory notion of the 'surprise test'. It has been concluded that the position is unsatisfactory. It has also been suggested that in practice there may be no difference whether the courts follow a subjective or an objective test. The question which will always have to be answered is whether the accused's conduct is so reckless and dangerous that he ought to be punished as a murderer. From this viewpoint it has been concluded that the moral approach followed by the Scots courts is perhaps the best solution to the problem.

Closely connected with the question of assessing probability is that of determining the 'likelihood' of the act causing death. The distinction between murder and culpable homicide is vague and unsatisfactory. It depends on the arbitrary notions of the trial court of what types of injury it considers 'likely' or 'probable' to cause death. The Code contains no definition of what amounts to involuntary culpable homicide, but the law in the U.K. is not any more convincing in this respect. It lays down the circumstances under which a killing amounts to murder, and then states that if the case falls short of that description it is involuntary culpable homicide. It may in fact be argued that the distinction between murder and culpable homicide is clearer in the Sudan than in the U.K. The reason for this is that the Code excludes from the category of culpable homicide those forms of homicide defined in sections 254, 255 and 256. The latter forms of homicide receive no separate treatment in the U.K. but are treated as falling within involuntary culpable homicide. As a result the offence of involuntary culpable homicide is much narrower in the Sudan and there is less room for confusing it with murder.

However, this is by no means to say that the position under the S.P.C. is more satisfactory. It may be morally defensible to treat more leniently and provide separately for the types of homicide defined under sections 254, 255 and 256 of the Code, but as has been explained, the distinction of the above sections from each other and from involuntary culpable homicide in practice is no easy task. Thus, section 254 excludes from culpable homicide those cases where the offender intends to cause 'grievous hurt'. If it is borne in mind that the definition of 'grievous hurt' under the Code includes emasculation, permanent privation of member or joint, and even hurt which 'endangers life', it cannot be seen how any court would fail to treat such type of injury as 'likely' to cause death, and consequently falling within the offence of culpable homicide. Nor is section 256 capable of easier differentiation from culpable homicide. The section excludes from the ambit of culpable homicide killings done 'rashly' or 'negligently'. But the word 'rash' has in practice, in India at any rate, been interpreted to include cases where the offender is aware or conscious of the risk of death. If the Sudan courts are to follow this interpretation it cannot be visualised how they can distinguish negligent homicide from culpable homicide manifested in knowledge of the likelihood of death. Although the Sudan courts have in practice refrained from giving any clear meaning to the words 'rash' and 'negligent', they continue to face the difficulty of distinguishing section 256 from involuntary culpable homicide. The same difficulty is present in determining the distinction between section 255 and involuntary culpable homicide, and this has been very clear in cases of death resulting from dangerous driving. Section 255, however, is a clear improvement on the law in the U.K. It excludes from the category of culpable homicide cases where death is caused unintentionally or accidentally in the commission of an offence punishable with at least one year's imprisonment. Although it may no longer by the law in the U.K. that killing in the course

of any unlawful act is within the definition of culpable homicide, this branch of the law remains unsettled and its limits have yet to be defined.

Finally, it has been explained that in practice the Sudan courts have considerable difficulty in determining whether the offence falls within section 254, 255 or 256. In the light of the above it may be doubted whether the Sudan Code has been improved by dealing separately with the offences defined in these three sections.

Another significant distinction between the Sudan and the U.K. is that in the former it is culpable homicide not amounting to murder to cause death by consent of a person who is over eighteen years. This is strictly within the definition of murder in the U.K., and the Sudan law seems to be the preferable one.

On the other hand, it is not an offence in the U.K. to attempt to commit suicide but this is still punishable under the Code. Most contemporary legal systems have realised the futility and injustice of punishing a person who attempts to commit suicide, and the Code may be improved by repealing this offence.

Finally, like the law of murder, the rules relating to insanity and mental abnormality constitute a significant contrast between the Sudan and the U.K. The Sudan law had previously accepted the M'Naghten formula as laid down in section 84, I.P.C. But this was rejected in 1925 when the present section 50 was enacted. The latter is much broader than M'Naghten and is more in accord with the notions of criminal responsibility and the developments in psychiatry. Its confusion in practice with M'Naghten and with section 84, I.P.C., is unwarranted and must be checked.

However, since the introduction of the section, significant developments have occurred elsewhere in the field of mental abnormality. In England the law was greatly modified by the Homicide Act, 1957, which introduced the Scottish doctrine of diminished responsibility. In America, several jurisdictions rejected M'Naghten and introduced new formulae to deal with the problem. Again, in the U.K. the Mental Health Acts of

1959 and 1960 were introduced thus adopting a more refined attitude to the whole problem.

The Sudan law does not recognise the doctrine of diminished responsibility, but the present rules of procedure permit the courts to deal more leniently with a convicted person who is mentally abnormal. It is submitted that the present law in the Sudan is satisfactory and that there is no need to adopt the concept of diminished responsibility. Nor will it be a significant improvement on the law at the present stage to introduce legislation along the lines of the Mental Health Acts. The latter presuppose the existence of sophisticated institutions for the treatment and cure of the mentally abnormal, an adequate number of psychiatric experts, staff and equipment. There is a considerable lack of such facilities in the Sudan and the need for such refined legislation does not at present arise.

A final word on the law relating to intoxication. The law in this respect is unsatisfactory both in the U.K. and the Sudan. It fails to distinguish between the effect of drunkenness on mens rea and the problem of dealing with the drunken offender generally. The law should be reformed so that a person should be acquitted if he would not have committed the offence 'but for' the fact that he was drunk. Otherwise he must be convicted. For the sake of public protection, a separate offence of 'drunk and dangerous' may be created which may enable the prevention of the consequences of intoxication before they occur.

Summary of Proposals for Reform and Clarification of the Sudan Law

(1) The present system of constitution of Major courts is unsatisfactory. Lay Magistrates should disappear from such courts as soon as practicable.

(2) The Confirming Authority should have no power to reduce the death penalty to

less than life imprisonment.

(3) An acquittal should be final and the Confirming Authority should have no power to set it aside and order a revision of the finding or a re-trial. The time may have come for the whole process of confirmation to be reviewed so that the judgement of the trial court is rendered final subject to a right of appeal.

(4) The Court of Criminal Appeal should have no power to substitute the death penalty instead of one of life imprisonment passed by the trial court; nor should the death penalty be imposed by the trial court when the case is sent back to it for revision of sentence.

(5) The Code must be amended so that a separate offence be created to deal with child murder by mothers under the influence of child birth.

(6) The criterion of knowledge of probability under section 248(b) of the Code is subjective. The courts should refrain from determining knowledge along objective lines. However, there may be room for a more radical reform so that the whole question is dealt with along the moral approach followed in Scotland.

(7) The presumption that a man intends the natural and probable consequences of his acts is no longer part of the Sudan law and the courts should refrain from using it, or, at least, from applying it as a matter of law.

(8) Attempted suicide should no longer be an offence punishable under the Code.

(9) The law of insanity in section 50 is wider and more embracing than M'Naghten and Indian law and must not be confused with them.

(10) The concept of diminished responsibility does not form part of the law of the Sudan nor is there any present need for its adoption.

(11) The whole question of mental abnormality may in future call for modification when there are adequate facilities and institutions for dealing with mentally abnormal offenders.

(12) The presumption of knowledge in intoxication laid down in section 42 is rebuttable. The law relating to drunkenness may be reformed by excusing from liability a person who would not have committed the offence had he not been drunk. A separate offence may also be created to deal with dangerous drunkenness to prevent its undesirable consequences.

In conclusion it is submitted that the above clarifications and the implementation of the suggested modifications will greatly improve the Sudan law of homicide. In addition, the courts should interpret the provisions of the Code in accordance with the needs and particular conditions of the country. Guidance should primarily be sought in the decisions of Sudanese superior courts. Circumspection should be exercised in borrowing from English and other foreign systems. The variations of the Code from Indian law should also be taken into account in interpreting the provisions of the S.P.C. These factors coupled with the increase in law reporting and legal writings, the growing awareness of public opinion, the increase in legal representation and the development of legal aid, will contribute to the development of a satisfactory Sudanese law of homicide.

APPENDIX

ATTITUDES AND OPINIONS OF CONTEMPORARY SUDANESE LAWYERS

It will be observed that in the foregoing chapters reference has from time to time been made to the views of some Sudanese lawyers on some aspects of the present work. Such views are taken from a Questionnaire which was prepared and distributed among the more experienced members of the Judiciary, the Bar, the Ministry of Justice and some academic lawyers.[1] The respondents included an ex-Chief Justice, the Public Prosecutor, the Advocate General, several High Court and Province Judges, some Magistrates of the First Class and a few law lecturers and advocates. A copy of the Questionnaire is fully set out at the end of this summary.

It is presently intended to give an overall picture of the results of the Questionnaire. Its purpose was twofold: first, it was intended to obtain information from the respondents on some matters that are either not provided for in the Code or not authoritatively dealt with in decided cases. Secondly, it was thought necessary and useful to ascertain the views of the respondents on some criticisms of the law and on suggested modification or amendment to it. In this respect the hypothesis is that some of the present provisions of the Code are unsatisfactory and there is need to amend the law; and, in other cases, although the provisions of the Code are satisfactory, their interpretation by the courts in practice is not; and the practice must change.

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(1) The task was undertaken in the period July-September, 1968, the whole of which time the present writer spent between law courts, chambers and offices attempting to encourage respondents to fill in the Questionnaire. In the end, only nineteen out of forty copies were filled in, and the rest had to be abandoned.

The Questionnaire was divided into three parts: Part I dealt with such procedural matters as the composition of the trial court, the powers of the Confirming Authority in relation to homicide, and the Prerogative of Mercy; Part II dealt generally with some aspects of the mens rea of murder and, more specifically, with the law relating to child-killing; Part III was devoted to insanity and diminished responsibility. The form of the Questionnaire was either to ask questions requiring information or opinions on some controversial matters, or to suggest some criticism or modification of the present law and invite the respondents to state whether or not they agreed. The contents of the Questionnaire will now be dealt with in the above order. To avoid unnecessary repetition of what has been said in the preceding chapters the following discussion will be in much more general terms.

I. Procedural Matters

The respondents showed a general dissatisfaction with the present system of constitution of Major Courts. They confirmed the writer's opinion that lay magistrates should not be allowed to sit on such courts and that the present system must be abolished as soon as adequate qualified magistrates are recruited to the Judiciary. This was the opinion of about 68% of the respondents. Although the system may have some advantages which prompted the remaining 32% to prefer its retention, it is agreed with the majority view that the disadvantages by far outweigh the advantages. Homicide trials are of extreme significance and involve the determination of some complex issues which have an important bearing on the whole of the criminal law, such as, for example, intention, knowledge, self-defence, provocation, mental abnormality, etc. Lay magistrates are by no means in a position to deal with and pronounce on such matters. To require them to do so is unrealistic and may result in confusing the law. To argue that it is in fact the professional President of the court, not the lay members, who determines such issues is to defeat the whole purpose of the law which

meant the lay members to become 'full' members of the court. The position would be different and there would be no objection were those members sitting as mere 'assessors' helping the President in the conduct of the trial by explaining to him the peculiar circumstances of a case which may be rooted in the prevailing beliefs or customs of the particular community, or helping him to assess the evidence or the punishment. But their full participation as members of the court who can outvote the legally qualified President even in matters of law is objectionable. It is therefore thought that the present system should be reformed as soon as practicable.

In connection with the powers of the Confirming Authority it was suggested to the respondents that the power to reduce the death penalty to one of imprisonment for any perior or of fine,[1] without altering the conviction of murder, was too wide. It was explained to them that such power is not in accord with section 251, S.P.C., which fixes the penalty for murder at death or life imprisonment; that it blurred the distinction between murder and other forms of homicide; that it may result in injustice in so far as a murderer might get away with a few years' imprisonment, whereas a person guilty of a lesser form of homicide may be sent to prison for a longer period; and that as the punishment for murder should be certain, any forms of homicide which are considered less blameworthy should either be taken out of the category of murder by separate legislation, or should be dealt with by the Executive in its Prerogative of Mercy.

The majority of respondents accepted the above observations and agreed that the law should be modified so that such power should be abolished altogether or restricted. Those who disagreed argued in favour of the present system. They argued that section 251 is binding on the trial court alone and not on the Confirming Authority; that

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(1) Under section 256(1), C.C.P., see Ch. II, supra.

although there is a possibility of blurring the distinction between murder and other forms of homicide, the exercise of the above power was essential to deal with cases of homicide deserving lenient punishment; and that it was preferable for such power to be within the judicial rather than the executive discretion.

It is submitted that the minority view is unacceptable. The objection to the power of the Confirming Authority in this connection did not overlook the arguments put forward by the minority. It is conceded that section 251 is only binding on the trial court, and that the law should not punish with undue severity cases which call for compassion and leniency. The objection is based on the premise that cases which 'usually' call for leniency, such as, for example, child murder, must be separately provided for so that the trial court is enabled to pass the appropriate sentence. Again, when the unusual case calls for lenient consideration the court and the Confirming Authority should both apply the law as it is laid down in the Code and leave the matter of leniency to be dealt with by the Executive. Such a solution would prevent the present mockery and confusion of the law and would render it more certain. The line of demarcation between murder and other forms of homicide will be preserved and unnecessary procedures will be brought to an end.

Closely related to the above problem is whether the Court of Criminal Appeal should continue to have power under section 261, C.C.P., to increase the sentence, and, more particularly, to substitute a sentence of death for one of life imprisonment. The respondents were almost equally divided on this question: 42% thought that it should have neither power; 42% thought that it should have both; and the remaining 16% were of the opinion that while the Court should have a general power to increase sentence, this should not extend to the substitution of the death penalty for one of life imprisonment. Thus, 58% were of opinion that the Court should not have power to substitute the death penalty when an accused had been sentenced to life imprisonment.

The present writer is of opinion that the Court should have no power to increase sentence at all because the trial court is in a much better position to assess the appropriate punishment. Particularly, it is agreed with the majority that under no circumstances should a person sentenced to life imprisonment have his sentence changed to one of death. It is immoral and inhuman to subject a person to such an ordeal after he was tried by a competent court which duly pronounced the sentence in public.
In relation to the power of the Confirming Authority to set aside an order of acquittal made by a competent court there was general agreement that such power is necessary. It was argued that the trial court might err in the application of the law or the admission of evidence with the result that an obviously guilty person may go scot free. It was further pointed out that trial courts comprise unqualified magistrates and a President with a short legal experience, and that the Confirming Authority is in a much better position to put things right and to ensure the application of a uniform law. This represented the views of 74% of the respondents; 16% were opposed to these views and thought the Confirming Authority should have no such power; the remaining 10% were opposed to the whole process of confirmation and thought that it should be abolished. Those who were in favour of such power were also of opinion that in such cases the Confirming Authority should have a general power to order a new trial. It has been shown in Chapter II that the minority view is preferred and that the Confirming Authority should have no power to set aside an acquittal and order a new trial. It is further submitted that there is some wisdom in the opinion of the 10% who questioned the necessity of the whole process of confirmation. The procedure of automatic confirmation of judgements of major and minor courts owes its origin to British military procedure. Under the latter a verdict and sentence of a trial court have to be confirmed by a higher authority.[1] The procedure was introduced into the C.C.P. because

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(1) For a description of the procedure of the trial and the power of the confirming/...

the Code was administered by British army officers in its first few years. This has never been changed and the confirmation of judgements of major and minor courts continues to be part of the trial verdict de novo. But the time may now have come to abolish this procedure altogether. Military officers and administrators no longer preside over major courts, and the latter may now be much more relied upon to apply the law properly. Consequently, a judgement of a major court should in future be considered final subject to the accused's right of appeal. This would eliminate the possibility of setting aside an order of acquittal and ordering a new trial. Finally, in connection with the Prerogative of Mercy, the respondents gave little or no information apart from the provisions regulating the matter under the C.C.P. However, the subject involves no controversial issues and calls for no further consideration.

II. The Mens Rea of Murder

The attitude of the respondents in relation to the mens rea of murder was rather pragmatic and non-committal. There was a marked tendency to refrain from giving any analytical answers or cite precedents or sections of the Code in support of the answers. Again, the answers were extremely variable and contradictory to the extent of making it rather difficult to ascertain what the law in fact is. However, this is favourable to the contention in Chapter IV that there is a confusion in the cases as to what the law of murder is and that the position is unsatisfactory. For example, in connection with the presumption that a man 'intends the natural and probable consequences of his acts', 58% thought that the presumption was applicable in the Sudan and that the courts were bound to apply it as a matter of law; 26% thought that it was applicable but that the courts were not bound to apply it if there was evidence to

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(contd.) body see Manual of Military Law, Part I, 1965, H.M.S.O., Ch. III.

rebut it; 10% were of opinion that the presumption was not applicable at all. As has been explained in Chapter IV the presumption was included in section 43, S.P.C., which was subsequently repealed. But the courts have, nevertheless, continued to apply it from time to time to determine the question of intention under section 248 (a) of the Code. It is submitted that such a tendency is incorrect and the repeal of section 43 must imply that the presumption should no longer be applied, which view is only shared by 10% of the respondents. It is also thought that the matter should be clarified by a directive along the lines of section 8 of the English Criminal Justice Act, 1967.

On the question of 'knowledge' or probability, the alternative mens rea for murder under section 248(b), S.P.C., the respondents demonstrated a remarkable misunderstanding of the subsection. This also confirms the conclusion in Chapter IV that the general practice of the courts is to apply an objective test in determining the question of knowledge despite the express wording of section 248(b) to the contrary. It was suggested to the respondents that the subsection lays down a subjective criterion for determining knowledge by requiring proof that the accused knew (as opposed to 'must have known' or 'had reason to know') that death would be the probable consequence of his acts. Nevertheless, all the respondents stated that the test is objective and that this was the only way of determining whether the accused 'knew' that death was the probable result, i.e., by determining whether 'the reasonable man would have known' and then imputing such knowledge to the accused. Some of the respondents went further by suggesting that the word 'knew' was perhaps put into the section as a result of drafting oversight, and that the section was meant to be objective.

With due respect, it is submitted that the above interpretation of the subsection is completely incorrect. To say that the word 'knew' was not meant to be included in the section is evidently incorrect. It has been explained in Chapter IV that the

section had previously provided that the accused 'knew or had reason to know', and that an amendment to the section in 1950 deleted the words 'or had reason to know'. This undoubtedly implies that the intention of the legislature was to leave a purely subjective test. Had the intention been otherwise, the legislature would have omitted the word 'knew' leaving 'had reason to know'. The fact that it followed exactly the opposite course makes nonsense of the argument that the word 'knew' was not meant to be in the subsection.

It follows from this that the proof of knowledge under the subsection must proceed along subjective lines, i.e., it must be proved that 'the accused' knew that death would be the probable result of his act. It may, however, be conceded that proof of knowledge under the subsection on completely subjective grounds may prove impossible and that the courts must determine the extent of the accused's knowledge by assessing what the knowledge or reaction of 'the reasonable man' would be. But in so doing, the courts should not blindly impute to the accused the knowledge of what in fact the court itself decides would have been the knowledge of the reasonable man. This is 'the principle of disfacilitation', reference to which has been made in Chapter IV. The courts should apply the concept of the reasonable man as a test not as a standard. They must take into account the mentality, common knowledge, background and other peculiarities of the accused, and must not attribute to him the knowledge of the abstract reasonable man who is in fact nothing but a fictitious creation reflecting the attitude of the trial court itself.

Further, the respondents do not seem to have a proper understanding of the difference between section 248(a) (dealing with 'intention') and section 248(b) (dealing with 'knowledge'). 37% failed to state the distinction between the two subsections; 16% thought they were indistinguishable; 10% stated that the distinction lay in the

fact that section 248(a) requires premeditation or motive, whereas section 248(b) does not. Only the remaining 37% rightly distinguished between the two subsections by stating that section 248(a) is confined to cases where there is proof of intent to cause death whether directly or by necessary inference from the evidence, and section 248(b) applies where, although there is no evidence of intent, the accused's conduct can only be explained in terms of knowledge of probability of death occurring.

Finally, in connection with the more specific problem of child-killing, there was a general agreement among the respondents with the arguments put forward to them showing that the present law is unsatisfactory and that there is some need for the creation of a separate offence of infanticide. There was also a general agreement that the new offence should be along the lines of the English Infanticide Act, 1938. There were, however, some insignificant variations on the contents of the proposed offence. Only 10% of the respondents thought that there was no need to introduce any new legislation, although they agreed that the mother should in such cases be treated differently from other murderers. They contended that the present law deals with the matter adequately. The fallacy of such a contention has been clearly brought out in Chapter IV.

III. Insanity and Diminished Responsibility

In the final part of the Questionnaire, some valuable information was obtained from the respondents on some questions of practice. In relation to the law, however, the respondents again showed a considerable lack of familiarity with some of the significant aspects of mental abnormality. They also demonstrated a considerable confusion in the proper understanding of the law of insanity as laid down in section 50, S.P.C., which, again, confirms the assertions made in Chapter VIII in this connection.

80% of the respondents agreed with the assertion that the law of insanity in section 50 has in practice been to some extent confused by the courts; 10% opposed this and the other 10% declined to respond. Reasons for the confusion of the law were given as lack of expert psychiatric evidence in insanity trials and the unfamiliarity of magistrates with the medical aspects of the matter, lack of law reporting and the inability of trial courts to ascertain the law as laid down by the superior courts, lack of legal representation and the unfamiliarity of accused with the rules of pleading. Asked specifically whether they thought that section 50 was wider than the M'Naghten Rules and section 84, I.P.C., and to give reasons for their opinions, 32% thought that section 50 was wider but gave no reasons; 26% declined to respond; and the remaining 42% said that the section was wider because it included 'mental infirmity' and inability to control acts within the defence of insanity.

Again, 32% thought that section 50 included the right-wrong test in the M'Naghten Rules; 42% gave no answer and the remaining 26%, rightly, stated that the right-wrong test has no place in section 50. Further, asked whether 'nature' of the act within section 50 includes the 'quality' of the act, 37% declined to respond; 32% thought 'nature' of the act includes its 'quality' and that the two words are synonymous; 10% disagreed with this view completely and the rest said that although 'nature' includes 'quality' the two words are not synonymous; but none of the respondents gave any reasons in support of their views.

Only 48% answered the question whether the defence of uncontrollable impulse in section 50 was satisfactory. 27% thought that the defence was satisfactory and 21% stated that it presented difficulties of interpretation. None of the respondents gave any illustrations or made reference to decided cases.

Finally, in connection with diminished responsibility, 32% admitted that they were not at all familiar with the doctrine; and 21% declined to respond. Of the rest,

10% claimed some knowledge of it and the remaining 37% claimed full familiarity. Of the former 53% who gave no answer or admitted unfamiliarity with the doctrine, half, understandably, declined any further response to the remaining questions, but the other half joined the rest in responding to some of the questions. Thus, those who responded to the remaining questions formed 74% of the respondents. 32% agreed with the suggestion[1] that the expression 'mental infirmity' in section 50 is wide enough to cover diminished responsibility; 21% gave no answer; and the remaining 21% disagreed with the above interpretation.

Again, in response to the question whether diminished responsibility had been introduced into the Sudan law through judicial decisions,[2] and more particularly, by the decision in S.G. v. Nafisa Dafalla,[3] only 5% thought that this was so. The remaining 95% rejected this view altogether or failed to respond.

Finally, asked whether the introduction of the doctrine of diminished responsibility would be an improvement on the Sudan law of insanity, apart from those 32% who thought that the doctrine was already part of the law as included in the section, only 26% responded: 21% thought that the introduction of the doctrine would be an improvement on the present law and 5% dissented from this view.

Conclusions:

It may in conclusion be said that the questionnaire has been of graat value for the purposes of the present work. It has helped to clarify several matters that could not be understood by reference to the Code or to decided cases. It has also reinforced many criticisms of several matters and given support to some of the suggested amendments and modifications of the present law. The questionnaire has confirmed the

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(1) Vasdev, K., The Laws of Insanity in the Sudan, op.cit., 59, see Ch. VIII, supra.
(2) Tatai, op.cit., at P.257, see Ch. VIII, supra.
(3) (1961) S.L.J.R.199 at P.204; see Ch. VIII, supra.

view that the system of lay magistrates sitting on trial courts is defective and needs to be altered; that the power of the Confirming Authority to reduce a sentence of death to one of imprisonment or fine without altering the accused's conviction of murder is unsatisfactory and needs to be abolished or restricted; and that the Court of Criminal Appeal should no longer have the power to substitute a sentence of death for one of life imprisonment.

In connection with the mens rea of murder, the Questionnaire has confirmed the contention that the law is in practice confused and that the position is by no means satisfactory. More specifically, it has conclusively emphasised that in practice the courts apply an objective criterion to determine the question of knowledge in murder, contrary to the express wording of the Code which lays down a subjective test. Further, the inadequacy of the law in relation to child-killing was generally conceded and overwhelming support was expressed for the proposal that separate legislation is necessary for the creation of a distinct offence of infanticide.

In relation to mental abnormality, the result has demonstrated the truth of the assertion that the law of insanity in section 50 is rather confused and misunderstood by the courts and that there is need for clarification of the law and its proper understanding. Again, the results have confirmed the view that the doctrine of diminished responsibility is unknown to the law of the Sudan, whether in section 50 or in judicial decisions. They have also shown that there is no great substance in any suggestion that the introduction of the doctrine will be an improvement on the law of the Sudan.

On the other hand, however, the Questionnaire results have not supported the contention that the Confirming Authority should not continue to have a general power to increase sentence. Again, there has been no general support for the view that the Con-

.irming Authority should have no power to set aside an order of acquittal or to order a new trial in such a case.

However, it must finally be pointed out that the results have shown a considerable lack of familiarity with several significant legal issues. The respondents refrained from giving any convincing legal arguments, and references to provisions in the Code or the Circulars or judicial precedents were minimal. Further, on several occasions, they refrained altogether from answering the questions. It is not very clear whether this was the result of mere apathy, laziness or lack of knowledge of the proper answers. It may be ventured to say that it is the latter. More seriously, the results have frequently shown conflicting and varied attitudes and opinions on some basic legal issues.

It is respectfully submitted that this is unsatisfactory. The respondents represented a cross-section of some prominent lawyers engaged in the everyday application of the Code in all the spheres of the legal profession. The least that could be expected of them was general agreement, or lack of disagreement and contradiction, on those issues which call for consideration in everyday life.

In conclusion, it is hoped that as time goes on, and law reporting becomes more developed, the law will become more certain and those responsible for its interpretation will be more familiar with it and more definite about it.

QUESTIONNAIRE

Edinburgh, June 1968

The object of this Questionnaire is to seek clarification on some procedural and substantive aspects of the Sudan law of homicide that are either not provided for in the S.P.C. (Sudan Penal Code) or, if provided for, have not been clearly or authoritatively interpreted in the decisions of the Courts. It is also intended to find out the views of Judges and other practising lawyers on some proposed amendments to the law of homicide. The result of the Questionnaire will remain entirely confidential and will mention no names. Therefore, a full personal opinion in answer to the questions will be greatly appreciated. Some of the questions require a simple "YES" "NO" or "DON'T KNOW" answer; others require a brief statement of opinion. A few blank sheets are left at the end of the Questionnaire for any specific remarks or elaborations of answers (when doing so please indicate the number of the Part and the Question). Any general comment on the whole or any relevant subject you might feel has been left out would also be welcome in the space at the end. Illustrations of answers by decided cases (giving dates and references), sections of the Code or Circulars are also invited.

Part I: Miscellaneous Matters of Procedure.

A - Constitution of Major Courts

(1) Do you approve of the system of lay (third class) magistrates sitting on Major Courts?

(2) What are the advantages of that system?

(i)

(ii)

(iii)

(iv)

(3) Are lay magistrates in fact on a par with the legally qualified President of the Court?

(4) To what extent are lay members influenced by the opinion of the President in specific cases?

(5) State briefly how the President's influence on them may vary according to the following:

(a) Questions of fact

(b) Questions of law

(c) The finding

(d) The sentence

(6) Should this system disappear altogether as more qualified magistrates are recruited to the Judiciary?

(7) Should the system continue and should the lay members continue to have the same powers and functions?

(8) Should their functions exclude any prouncements on:

(a) Matters of fact?

or

(b) Matters of law?

or

(c) The finding?

or

(d) The sentence?

or

(e) Any one or more of the above?

(9) Should the lay members be allowed to sit on the Court as mere "assessors" without a right to vote?

(10) Would trial by "jury" be a better alternative for the present system? Briefly state your reasons.

(11) What other changes, if any, would you consider more appropriate in the present system?

B - Powers of the Confirming Authority

(1) The powers under Section 256 (1) (b) C.C.P.

It is suggested that the powers of the Confirming Authority to reduce a sentence from one of death to one of imprisonment for a few years or to a fine only - without altering the finding of guilty of murder - is too wide. Briefly stated the reasons for this are as follows:

a. This power is not in accord with Section 251 S.P.C. which fixed the punishment for murder at death or imprisonment for life.

b. It blurs the distinction between different forms of homicide because, although in theory the conviction for murder is allowed to stand the punishment is reduced to such an extent that new forms of homicide (e.g. infanticide) might unconsciously be created.

c. As a corollary from the above the rule might result in injustice becuase whereas a murderer might be allowed to get away with a few years in prison or a mere fine, a person convicted of a lesser form of homicide might suffer a more severe punishment.

d. Punishment for murder must be certain. Any forms of homicide for which such punishment is considered inappropriate should either be taken out of the category of murder by legislation or should be dealt with by the Executive Authorities rather than a judicial body applying the law in the Code.

(1) Do you agree with the above observations?

(2) Would you like to comment on all or any one or more of them?

a. -

b. -

c. -

d. -

(3) What advantages, if any, do you attribute to the exercise of such power?

a. -

b. -

c. -

(4) Do you consider that this power should be abolished altogether or that it should be restricted?

(5) If it should be restricted in what manner should that be done?

C - New Trials

(1) Should the Confirming Authority continue to have power to set aside an acquittal after an accused has been competently tried? give reasons:

a. -

b. -

c. -

(2) Should it have power in such case to order a new trial?

(3) Should this power be general or should it be limited to cases where fresh evidence is forthcoming?

(4) Should the Court of Criminal Appeal continue to have power to increase sentence?

(5) Should such power include the power to substitute a sentence of death for one of imprisonment for life?

D - Prerogative of Mercy

(1) Has the Head of State any discretion over the prerogative of mercy, i.e.:

(a) Can he disregard a recommendation for mercy?

(b) Can he order a reprieve where no recommendation has been made?

(c) Can he order a reprieve when it is recommended that the death sentence be carried out?

(2) On what grounds can he exercise the above mentioned powers respectively?

(a)

(b)

(c)

Part II:

A - Mens Rea in Murder

1. Intention: Section 248 (a)

(i) In determining the question of intention in murder is the presumption that a man intends the natural and probably consequence of his acts applicable?

(ii) If so, is the Court bound to apply it?

2. Knowledge: Section 248 (b)

Under s. 248 (b) the alternative mens rea to intention in murder is evidence that the accused "knew" (not "must have known" or "had reason to know") that death was a probable and not only a likely consequence of his acts. This is apparently a subjective test. Nevertheless under section 20A to determine the extent of such knowledge an objective test is supplied.

Is such knowledge presumed or must it be specifically proved? i.e. is the test applied in practice a subjective or an objective one? Please state your reasons.

3. Do you consider section 248 (b) to be an alternative to section 248 (a)?

4. What is the distinction between the two provisions and to which type of case (give some illustrations) would each subsection apply?

B - Child-killing and the Law of Murder

The killing of a newly-gorn child is strictly murder and there is no separate provision for it in the S.P.C. In practice, however, the trial Court sentences the mother to life imprisonment and the Confirming Authority reduces that to a sentence of imprisonment for two or three years provided it is established that the mother has acted under the influence of child birth. In doing so the Confirming Authority has resorted to different formulae, viz., adoption of the English Infanticide Act, 1938, alteration of the murder conviction to one of culpable homicide not amounting to murder on grounds of provocation, or on grounds of the mental condition of the mother.

It is submitted that the law in this compartment is rather confused and the grounds upon which the Courts proceed are far from clear. It is further thought that the insistence on the trial Court to pass a sentence of life imprisonment (which is not going to be confirmed) is a mockery of the law.

It is, therefore, concluded that new legislation be introduced to take this category of homicide outside the scope of murder.

(1) Do you approve of the view that mothers who kill their newly-born children while suffering from childbirth should be treated differently from other murderers?

(2) If so, state your reasons for this:

(a)

(b)

(c)

(d)

(3) Should this question continue to be dealt with as at present?

(4) Is it necessary that new legislation be introduced to deal with it?

(5) Should such legislation be along the same lines as the English Infanticide Act, 1938?

(6) If not, what variations would you think should be made? In particular:

(i) Should the requisite mental condition of the mother be the same as in the English Act? If not, how different should it be?

(ii) Would you limit the child's age at 12 months? If not, what limit and why?

(iii) What should be the maximum punishment for such offence?

(iv) Must the child be illegitimate or should the rule be of general application?

Part III Insanity and Diminished Responsibility

A - Insanity

Cases decided by the Sudan Courts on the issue of insanity show considerable confusion and conflict over the application and extent of section 50 S.P.C. and other provisions on the subject.

(1) Do you agree that the law of insanity in the Sudan has to some extent been confused?

(2) It has been suggested that one of the reasons for this is the lack of skilful psychiatric or medical evidence in criminal trials and the ignorance of the judges of the technical aspects of the matter.

a. - Do you agree with this?

b. - Can you give an estimate of the proportion of insanity cases where expert psychiatric evidence is given?

c. - Do Courts insist on medical or psychiatric evidence whenever the issue is pled?

d. - Do Courts accept as expert psychiatric evidence opinions of

(a) General physicians?

(b) Medical assistants?

e. - What weight of evidence does each of the above carry?

(a)

(b)

f. - Is evidence by an expert psychiatrist accepted as conclusive? If not what weight does it carry? In other words, to what extent is the distinction between "medical" insanity and "legal" insanity preserved?

g. - Are all psychiatric experts who give evidence in such trials in the service of the government?

h. - Are they considered witnesses for the prosecution or neutral witnesses of the Court?

i. - Can the accused have his own psychiatric experts? Is this advisable?

(3) What other factors, if any, do you consider have contributed to the confusion of the law of insanity?

1.

2.

3.

(4) Is section 50, S.P.C., identical with the English (and Indian) Laws of insanity?

(5) If not, is the section:

a. - Wider?

or

b. - Narrower in scope than the above laws? State your reasons briefly:

1.

2.

3.

(6) Does section 50 include the right-wrong test in the McNaughten Rules?

(7) If so, should the act be wrong:

a. - According to law;

or

b. - morally;

or

c. - both?

(8) Does the expression "nature of the act" in section 50 include the "quality" of the act?

(9) If so, are the two expressions synonymous?

(10) If not, how would you distinguish between them?

(11) What is the practice in respect of insanity after the verdict and sentence?

a. - How is it ascertained? and

b. - What are its consequences?

(12) Is the Defence of "uncontrollable impulse" in section 50 satisfactory?

(13) Has it presented any difficulties over proving whether the impulse was "irresistible" or that it was merely "not resisted"? Would you give an elaborate answer.

(14) Does the defence of irresistible impulse depend upon the presence of "insanity and mental infirmity" or is it a defence <u>per se</u>?

B. - <u>Diminished Responsibility</u>:

(1) Are you familiar with the Scottish concept of Diminished Responsibility?

(2) It has been suggested (see Krishna Vasdev - "The Laws of Insanity in the Sudan" p.59) that the expression "mental infirmity" in section 50 includes the concept of Diminished Responsibility.

a. - Do you agree to this proposition?

b. - If not, what is the meaning of "mental infirmity" in section 50?

c. - How different is that from Diminished Responsibility?

(3) It has also been suggested (see E. Tatai 1966 S.L.J.R.238, 257) that the doctrine of diminished responsibility has been introduced in the Sudan by recent decisions.

a. - Would you accept that observation?

b. - What are your reasons? Indicate reference to cases in support of your answer.

(4) Even if this doctrine is not already part of the law of the Sudan or even if it has not been recently introduced, it has indeed been discussed with approval in the recent case of S.G. v. Nafisa Dafalla (1961) S.L.J.R.199, 204. Per Babiker Awadalla, J.

a. - Would you consider that as tantamount to a recognition of the doctrine in the Sudan Law?

b. - Would the introduction of the doctrine be an improvement on section 50 of the S.P.C? Indicate your reasons:

1.

2.

3.

4.

(5) What other alterations or amendments do you consider necessary for the law of insanity in the Sudan?

NAME: .....

DATE: .....

Thank you very much for your kind help and co-operation.

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