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PARADOXES IN COMMON LAW OF CRIME: A COMPARATIVE ANALYSIS IN LIGHT OF CRIMINAL LAW OF UNITED KINGDOM, HONG KONG AND INDIA

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I The common law heritage

THE COMMON law of crime covers a vast area, extending to several jurisdictions that are distinct geographically, culturally and ideologically. While the more known common law jurisdictions obtaining in the United Kingdom, the United States of America, Australia and Canada are better researched, documented and published the lesser known ones remain, by and large, under researched and unexplored. But the very fact that the common law principles are followed and applied in diverse common law jurisdictions, itself calls for a constant evaluation of the mutations taking place in the criminal law's body and form in respective common law jurisdictions.

The present paper makes an endeavour (which may later on be extended to more jurisdictions and issues) to highlight certain critical issues, described here as paradoxes, within the universe of the common law of crime. The idea of highlighting certain critical issues is not to pass any kind of value judgment on the rationality or efficacy of the common law system, but to point out how in the process of reconciling diverse values, the system undergoes changes which may be an evidence of its dynamic character. Since the paper proposes to examine the critical issues in the light of criminal law of the United Kingdom (hereinafter UK), Hong Kong and India, one will have an opportunity to learn how the critical issues are addressed by the three legal systems with different political and legal history. The diversity witnessed in the aforesaid three common law jurisdictions, is to be deduced in the light of the text of criminal law, role of the criminal judiciary and the significance attached to the values such as individual autonomy, social defence and justice within these systems.

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II The three criminal law systems

The criminal law system of Hong Kong is almost a prototype of the system prevailing in the UK. Like the UK, the Hong Kong criminal law is not yet compiled in a consolidated code form (this is very much unlike India where the British decided to undertake a massive codification exercise including codification of criminal law, way back in the middle of the nineteenth century itself). The basic criminal law of Hong Kong is constituted by the principles of common law and sporadic but fairly exhaustive criminal legislations or ordinances, passed from time to time by the former British authorities. Such laws are more or less on the lines of the criminal statutes in the UK Thus, in Hong Kong the areas in which no legislation exists, the common law principles apply unreservedly. In interpreting and declaring criminal law, the criminal courts in Hong Kong are largely inclined to follow the UK judicial authorities. Firstly, because the decision rendered by the UK courts before July 1, 1997 had a binding value for the courts in Hong Kong (by virtue of the Sino British Agreement of 1981). Second, though the post 1997 British judicial authorities have only a persuasive value for the courts in Hong Kong but following the rulings of the UK courts appears to be more natural and safer course for the local judges educated and brought-up in western traditions. However, there are occasions when the Hong Kong criminal courts have differed from the UK counterparts and handed down ruling that are more suited to the Hong Kong society ethos. The Hong Kong society ethos is mainly constituted by preference for the interest of the society over the individual, greater sanctity of the letter of the law and preference for Asian values such as stricter regimentation of sexual instincts etc. Unlike the UK and Hong Kong, the criminal law system in India is known more for its codified form and wider ambit of judicial creativity through interpretation of the text. The British rulers in the context of its rule in India appreciated fairly early the dangers of ruling a large country subjected to diverse system of criminal laws and lost little time in providing a basic criminal law code in 1860 itself (the Indian Penal Code). Since the enactment of the code, many special criminal legislation have come up to add to the corpus of the criminal law body, but the idea of written criminal law has sunk so deep in the minds that it is not ordinarily possible in India to even think of an unwritten law of crimes, like the traditional common law any more. Yet another significant fact relating to the Indian criminal law system is the role played by the judiciary in its evolution. The over one hundred and

forty-five year old Indian criminal law is largely a product of judicial interpretations and creativity, which under the British rule till 1947 was subjected to the authority of Privy Council rulings and the direct influence of the British courts. In the post independence period (after 1947) the criminal law has grown out of the law laid down by the ruling of the Supreme Court of India and the various state high courts. Such rulings are primarily based on the provision of the penal code and other criminal statutes and the creative interpretations of the superior courts. Unlike the criminal courts of Hong Kong, the Indian courts today, are neither bound by the UK judicial authorities nor do those authorities have a persuasive value for them. It is extremely rare for either a lawyer or a judge to rely on a Privy Council or House of Lords authority any more. But perhaps on account of the newly generated impact of globalization on the judiciary, in a recent ruling *Jacob Mathew* v. *State of Punjab*,[1] the Indian Supreme Court has relied expressly on a House of Lords ruling in *Bolam* case[2] of 1957 vintage, for resolving a negligent criminal liability issue involving a medical doctor, under section 304A of Indian Penal Code.

III Locating the paradox

The common law of crime can be characterized for its special concern for the mental or moral blameworthiness element, which may in turn assume a positive character as one of the essential elements of criminal liability or take the form of one of the liability negativing conditions. Also the requirement of subjective proof of the mental element, particularly for the offence of murder, that permits diverse interpretations of mental element under dissimilar fact situations in the common law systems of the UK Hong Kong and India, leading to paradoxical findings. In the foregoing pages three of the aforesaid 'paradoxes' are discussed, both, with a view of understanding their real import and their usefulness in the context of respective systems.

The paradox of retaining the assault-manslaughter rule

The core of free-will rationalization of criminal law is that unless the accused appreciates the risk of a particular consequence he cannot be attributed to possess the required mental element for criminal liability. But it is paradoxical that for the offence of manslaughter, in UK, if death is

1. AIR 2005 SC 3180.
2. (1957) 2 All ER 118.

brought about in the course of committing an assault, even of a minor nature, the accused shall be held guilty of an offence of manslaughter. That in effect means according recognition to the age old 'assault-manslaughter' rule, which implies that once a person has crossed a significant moral threshold, his liability will be determined by the harm actually produced, whether he had foreseen it or not. Andrew Ashworth has strongly critiqued the practice of retaining assault-manslaughter rule in these words:[3]

> The felony-murder rule was abolished in England in 1957, but it remains a law in many American states. Its spirit survives in modern English law in the law of manslaughter: If D commits a criminal offence which produces a risk of some harm to another person, and death results from that offence, the crime must be manslaughter. This is so, even though D merely intended to commit a minor assault, and the victim by chance fell awkwardly. The law of manslaughter takes the criminal intention or recklessness (as to a minor offence), couples it with the harm caused (which is major) and constructs liability for a serious offence.

Ashworth challenges those who support 'assault-manslaughter' rule by arguing that where death is a direct result of a wrongful act the accused has crossed a significant threshold and should bear criminal responsibility for the consequences by putting forward the following counter-argument: [4]

> This may be criticized as going too far: if the fault is great, why not argue that all minor assaults should be punishable with up to maximum of life imprisonment, because any assault could (albeit in unusual circumstances) cause death? Surely one can separate D's wrong in committing the minor crime from the accidental consequences of death?... This 'moral threshold' reasoning attributes far greater significance to luck or chance than is proper on autonomy-based approach of choice and control.

The express or implied acceptance of such an 'assault-manslaughter' rule tends to produce anomalous results when applied to cases involving coincidence of *actus reus* and *mens rea* particularly in case in which the guilty mind of the higher offence is not shown to exist at any stage in the commission of the crime. Notable (as well as notorious) in this regard are the two English cases of *R.* v. *Church*[5] and *R.* v. *Le Brun*.[6] In *Church* the accused had invited for sexual pleasure purpose the woman victim to his

3. *Id.* at 161.
4. *Ibid.*
5. (1965) 2 All ER 72.
6. (1991) 4 All ER 673.

van. On not being able to satisfy her sexually she rebuked and passed snide remarks about his masculinity, which provoked the accused who knocked her down unconscious. The accused tried to revive her for sometime, but panicked and threw her into the river to give it a colour of death by drowning. The trial judge directed the jury that if the woman was alive before being thrown, whether the accused knew it or not that she was alive, it was manslaughter. Lord Edmund Davies appeared to concur with the spirit of trial judges' formulation when he observed: [7]

> Unlawful act must be such as all sober and reasonable people would enevitably recognize must subject the other person to, at least, the risk of some harm, resulting there from, albeit not a serious harm.

David Ormerod[8] has critiqued the objective dangerousness test expounded in *Church* in terms of its three aspects thus:[9]

> First, that there must be a 'likelihood' of harm. This suggests more than a possibility, but not perhaps that it is more probable than not. Secondly, that the type of harm involved is only 'some' harm, not serious harm. This contrasts with the requirement in gross negligence manslaughter of a risk of death. Thirdly, that there is no requirement that the accused himself forces any risk of harm. Historically unlawful act manslaughter was limited to cases in which the accused had at least foreseen injury of his victim resulting from his crime.

The facts in *Church* belie any reasonable conclusion that the accused could have at any time entertained even the possibility of death in his mind. His fun and frolic relationship with the victim had suddenly turned sour and later believing her to be dead he threw her into the river in a state of panic. He neither had foresight of death at the time of earlier assault nor at the time of later drowning. In *LeBrun* the facts are further distanced from the foresight of death. The accused had in a heated argument with his wife on a street knocked her down unconscious. In trying to lift her up the victim further slipped out of his hand and hit her head against the sharp edge of the pavement leading to grave skull injury and ultimate death. Applying the *Church* logic the court in *LeBurn* had no difficulty in arriving at a manslaughter verdict, mainly because the initial assault of the accused had directly resulted in death. In *Church* the accused had at least been

7. Smith and Hogan, *Criminal Law* 480 (2005).
8. The editor of the 11th edition of Smith and Hogan, *Criminal Law* (2005).
9. *Id.* at 480-81.

responsible for indulging in death producing conduct (drowning in the river), but in *Lebrun* the consequence of death was accidental or was a mere mischance. In this way in *Church* and *LeBrun* the courts not only dispensed with the traditional moral blameworthiness basis of manslaughter liability but also obliterate the subtle distinction between the facts of these two cases from the foresight of consequences point of view. Worst still, the two cases were in a way equated with *Thabo Meli* v. *R.,*[10] which had totally different facts, involving elaborate planning, and concerted action. In *Church* the court had explicitly mentioned that the principle of *Thabo Meli* applied to manslaughter and that the jury was entitled to regard the appellants' conduct as a series of acts which culminated in her death.

Though in Hong Kong no case of *Church* or *LeBrun* type facts has reached the appellate court level so far, but the UK court rulings are most likely to be followed here for want of express legislative or judicial authority to the contrary. Unlike the UK and Hong Kong, in India the possibilities of application of assault-manslaughter type rule is precluded both by the codified form of homicide law and judicial interpretations which have grown independently of the influence of the UK judicial authorities. The codified culpable homicide law in India under section 299 requires causing death by doing an act with either of the three states of mind, namely :

(a) Intention of causing death,

(b) Intention of causing a bodily injury likely to cause death;

(c) Knowledge of likelihood of causing death.

Particularly clause (b) and (c) that are relevant for the present enquiry require an awareness of likelihood of bringing about death on the part of the accused as a necessary ingredient of the offence. Therefore, where it cannot be established that the accused had likelihood of death in his mind a conviction for a lower degree culpable homicide (akin to manslaughter) is not possible. Again the accused may not have likelihood of death in his mind for diverse reasons *i.e.* the initial assault or injury was trivial or minor, the accused believed that the victim is already dead, the death came about by unforeseen course of events etc. The *Church* or *LeBrun* type fact situation has reached the appellate court level in several cases in India.[11] However, the most comprehensive discussion and analysis of the relevant law can be found in a full bench Madras High Court ruling *In re Palani*

10. (1954) All ER 375 (PC).

11. See *Gaur Gobind Thakur, Inre* (1866) 6 W.R.G. 55L; *QE* v. *Kahndu* (1892) 15 Bom. 194; *Emp.* v. *Dalu Sardar* (1915) 26 IC. 157.

Goundan.[12] The facts of the case were: The accused struck his wife a blow on the head with a ploughshare, which knocked her unconscious. He believed her to be dead and with a view to giving it a colour of suicide hanged her by a rope. The post-mortem report revealed that the ploughshare blow was not fatal and the death had been caused due to asphyxiation on account of hanging. The trial court convicted the accused of murder. In his appeal before the high court the two judges differed in their conclusion, Napier J upholding the conviction while Sadashiv Aiyar J favoring a reversal. The reversal opinion was based on a construction of the codified law, namely section 299 of the penal code. The judge observed thus: [13]

> The intention "to cause such bodily injury as is likely to cause death" cannot, in my opinion, mean anything except "bodily injury" to a living human body.

According to him for committing a culpable homicide the accused while directing his act should be aware that it is likely to affect a living human being. Wallis CJ in his order to the reference was inclined to concur with the view of Sadashiv Aiyar J when he held: [14]

> The intention of the accused must be judged not in the light of actual circumstances but in the light of what he supposed to be the circumstances… a man is not guilty of culpable homicide, if his intention was directed only to what he believed to be a lifeless body.

> On the basis of the facts admitted that the accused at the time of hanging believed her to be dead, the court had no difficulty in arriving at the conclusion that the accused can neither be convicted of murder nor even of culpable homicide, though may be convicted of the initial assault and fabricating false evidence. Though the *Palani Goundan* ruling may appear to have been disputed in a few later decisions,[15] but its minimum moral blameworthiness threshold requirement value remains unimpaired even today.

Paradox of different standard of carelessness for medical negligence liability

Criminal liability for recklessness has always been problematic. This is because carelessness has been understood differently by scholars and

12. AIR 1920 Mad (FB) 862.
13. *Id.* at 865-66.
14. *Id.* at 867.
15. *Kaliappa Goundan* (1933) 57 Mad. 158; *Nannhu Gobarya* (1960) Cr LJ 605 (M.P.); *Ashok Laxman Sohoni* AIR 1977 SC 1319.

judges, leading to extreme judicial interpretations. In the past five decades itself, the UK judicial scene has witnessed at least three major versions of 'recklessness' as the basis of criminal liability. First, in *R.* v. *Cunningham,*[16] recklessness was defined in subjective terms as advertent and unlawful risk taking. Such a subjective formulation of recklessness was in tune with the then prevailing academic opinion of scholars such as Kenny. Second, *R.*v. *Caldwell*[17] that found the *Cunningham* formulation too narrow and favoured recklessness to include within its ambit even inadvertent unlawful risk taking. The broader *Caldwell* formulation permitted determining recklessness in objective terms. Here the accused was attributed to appreciate the risk of injury arising out of his unlawful act on the basis of reasonable man's appreciation. The objective standard set by *Caldwell* ignored even the tender age and diminished mental capabilities for the purposes of providing a more effective crimes control strategy that relied more on externally laid down standards. The *Caldwell* formulation dominated the scene for over two decades and enormously enhanced the possibilities of criminal liability creation for reckless conducts in situations such as automobile/motor manslaughters etc. Third, formulation in *R.* v. *G. and Another*[18] has given to recklessness a swing back to the *Cunningham* that restores the requirement of advertent unlawful risk taking as an essential element of recklessness. Since the facts in *R.* v. *G.* related to recklessness of tender age accused, its implications for facts situations involving adults is yet to be fully appreciated.

However, the courts in Hong Kong have been quick in appreciating the new formulation of recklessness propounded by *R.* v. *G.* and have already taken steps to distance themselves from the overbroad *Caldwell* formulation. The Court of Final Appeal in *Sin Kam Wah* v. *HKSAR*[19] and *HKSAR* v. *Tand Yuk Wah*[20] have expressly taken the *R.* v. *G*. line and rejected the *Caldwell* line. This way the English and Hong Kong laws, for want of codification, are subject to the swings of judicial interpretations that tend to create avoidable ambiguity. But in India the codified nature of law clearly specifies the precise nature of recklessness required for diverse offences such as causing death by rash or negligent act (section 304A IPC), endangering human life by rash driving (section 279 IPC) etc. Despite codification the most significant recklessness offence namely causing death by rash or negligent act has been recently subject to several controversies. The first related to distinction between foresight or likelihood of death

16. (1957) 2 All ER 412.
17. (1981) 1 All ER 412.
18. (2003) UK 50 HL.
19. (2005) 2 HKLRD 375.
20. CACC 132 OF 2005.

under section 299 (b) or (c) and section 304A and according different standards for advertent risk taking by professionals such as doctors or paramedical staff etc.

Interpretation of recklessness of medical professionals in the context of section 304A IPC (an offence relating to causing death by rash or negligent act) was in question in *Jacob Mathew* v. *State of Punjab.*[21] The facts of this case were that a patient admitted to a private hospital developed breathing trouble. The duty doctor arranged an oxygen cylinder for restoring his condition. The cylinder was found to be empty and the other available cylinder could not be made functional because it lacked proper contraption. In the process precious time was lost, leading to death of the patient due to lack of oxygen. A report was lodged before the police against the duty doctor and his companion. Charges were framed by the magistrate under section 304A. The accused filed revision application before the sessions court for quashing of the framing of charges. On dismissal of the revision the accused approached the high court for quashing the charges in the exercise of inherent power. The high court dismissed the petition. Feeling aggrieved the accused approached the Supreme Court. The Supreme Court speaking through R.C. Lahoti CJ (G.P. Mathur and P.K. Balasubraminian JJ concurring) held: [22]

> Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply….To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

The Supreme Court not only required a much higher degree of recklessness on the part of medical professionals for a conviction under section 304A, but also preferred to lay-down restrictive guidelines that would further limit their criminal liability for recklessness thus: (a) No private complaint for prosecution of doctors for recklessness shall be entertained unless it is supported by a credible opinion of another doctor,

21. *Supra* note 1.
22. *Id.* at 3198-99.

(b) The investigating officer before proceeding against the doctor shall obtain independent and competent opinion about rashness or negligence. The doctor may not be arrested in a routine manner, unless the arrest is found necessary for furthering investigation etc.[23]

In *Jacob Mathew* the Supreme Court not only propagated a differential standard of recklessness, in cases of medical professionals, but also suggested guidelines that would further limit the liability of doctors. This is in sharp contrast to the House of Lord ruling in *Adomako*,[24] where the anesthetist's failure to notice the detachment of tube supplying oxygen to the patient in the course of operation that led to the patients' death, was considered enough to attract conviction for gross negligence manslaughter. The House of Lord laid down: [25]

> D must have been in breach of duty of care under the ordinary principle of negligence; the negligence must have caused death; and it must in the opinion of the Jury, amount to gross negligence.

The *Adomako* like was approved even in a post *R.* v. *G.* case in *R* .v. *Ankit Misra*[26] where the court explicitly ruled that: [27]

> A doctor would be told that grossly negligent treatment of a patient which exposed him or her to the risk of death, and caused it would constitute manslaughter.

Paradox of carrying opposition to strict liability for sexual offences against children too far

The scholars of criminal law have been extremely critical of the trend of proliferation of strict liability offences in the common law world.[28] Their opposition to strict liability is both against the legislative and the judicial trends. The core of such opposition lies in the exclusion of the requirement of *mens rea* either expressly or by implication. Since legislature rarely exercises its power of express exclusion, often judiciary is lapped-up with the responsibility of excluding *mens rea* by implication. The problem of implied exclusion presents interesting cross country variations, in matter of creation of strict liability. Particularly disputed and

23. *Id.* at 3200.
24. (1995) 1 AC 171.
25. Quoted in *supra* note 7 at 83.
26. (2004) EWCA Crim 2375.
27. *Id.*, para 64.
28. Smith and Hogan, *Criminal Law-Cases and Materials* 214 (9th Edn. 2006).

controversial are the statutes that create strict liability for sexual assaults and indecency involving minors.

The House of Lords decision in *B (a minor)* v. *DPP*[29] and *R.* v. *K*[30] appear to have gone too far in their opposition to strict liability. Both relate to offence involving indecency and sexual aggression directed against children in which the issue related to exclusion of *mens rea* by implication was raised. In the first case the accused aged 15 had incited a co-passenger girl aged 13 years to a grossly indecent act. In his prosecution under section 1(1) of the Indecency with Children Act, 1960 the accused pleaded acting under a mistaken belief as to the girl's age whom he believed to be over 14 years. The House of Lords refused to treat the concerned offence as one for which the presumption of *mens rea* could be excluded either expressly or by necessary implication, thereby denying strict liability and thus allowing the appeal. The three leading judgments of Lord Nicholls of Birkenbead (Lord Irvine of Lairg LC and Lord Mackay of Clashfern concurring with Lords Nicholls, along with Lords Steyn and Hutton), Lord Steyn and Lord Hutton have adduced diverse reasons for arriving at the conclusion of upholding the appeal and ultimate acquittal. According to Lord Nicholls the main question raised by the appeal related to the mental element for the offence, under section 1(a) of the Indecency with Children Act, so far as the age ingredient is concerned. The decision of Lord Nicholls is mainly premised on the common law principle that prefers honest belief over reasonable belief for the following reasons: [31]

> Considered as a matter of principle, the honest belief approach must be preferable. By definition the mental element in a crime is concerned with a subjective state of mind, such as intent or belief. To the extent that an overriding objective limit (on reasonable grounds') is introduced, the subjective element is displaced. To that extent a person who lacks the necessary intent or belief may nevertheless commit the offence. When that occurs the defendant's 'fault' lies exclusively in falling short of an objective standard. His crime lies in his negligence. A statute may, so provide expressly or by necessary implication. But this can have no place in, a common law principle, of general application, which is concerned with the need for a mental element as an essential ingredient of a criminal offence.

29. (2000) 1 All ER 833.
30. (2001) UKHL 41.
31. *Supra* note 29 at 837.

Further, Lord Nicholls could locate neither in the statutory context or otherwise sufficient reasons to displace the application of common law presumption in the construction of the relevant provision of the Indecency with Children Act. Accordingly their Lordship preferred to rest the burden of proving the absence of genuine belief by the accused that the victim was above 14 years, on the prosecution. In the same vein Lord Nicholls went ahead to critique some of the reasoning in *R.*v. *Prince*,[32] a case decided some hundred and twenty-five years ago. The aspects of the *R.* v. *Prince* regarded 'unsound' by Lord Nicholls are: [33]

> For instance, Bramwell B seems to have regarded the common law presumption as ousted because the act forbidden was 'wrong in itself', Denmen J appears to have considered it was 'reasonably clear' that the 1861 Act was an act of strict liability so far the age element was concerned. On its face this is a lesser standard than necessary implications.… But clumsy parliamentary drafting is an insecure basis for finding a necessary implication elsewhere, even in the same statute. *R.* v. *Prince,* and later decisions based on it, must now be read in the light of this decision of your Lordships' House on the nature and weight of the common law presumption.

The *R.* v. *Prince* ruling has also been critiqued by Lord Steyn in response to prosecution counsel's reliance on principle of construction. His Lordship had little difficulty in arriving at the following conclusion: [34]

> In any event, I would reject the contention that there is a special rule of construction in respect of age-based sexual offences which is untouched by the presumption as explained in *Sweet* v. *Parsley.* Moreover, *R.* v. *Prince* is out of line with the modern trend in criminal law which is that a defendant should be judged on the facts as he believes them to be.… It is no longer possible to extract from *R.*v. *Prince* a special principle of construction applicable only to age-based sexual offences.

However, the thrust of Lord Steyn's opinion is that: 'First, the *actus reus* of an offence under section 1(1) is widely defined, which includes any act of heterosexual or homosexual behavior with a victim under 14 years, or even incitements of a child below 14 years by mere words or sexual overtones. Second, section 1(1)) creates an offence of truly criminal

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32. (1875) LR2 CCR 154; (1874-80) All ER 881.

33. *Supra* note 29. However, Bramwell Bs' opinion appears at (1875) LR 2 CCR at 174 and Denmen J's at (1875) LR 2 CCR at 178.

34. *Id.* at 850.

35. *Id.* at 849.

character, because after the amendment it may entail penalty up to ten years imprisonment.' Lord Steyn appreciated a legislative policy prohibiting sexual exploitation of girls, but opined that that was not enough to create strict liability in these words: [35]

> It is undoubtedly right that it is clear legislative policy prohibiting the sexual exploitation of girls. It is unquestionably a great social evil as Lord Hutton so clearly explains. Whatever can be done sensibly and justly to stamp it out ought to be done. The real question is: what does this policy tell us about the critical question whether S. 1(a) is an offence of strict liability or not? It is not enough to label the statute as one dealing with grave social evil and from that to infer that strict liability was intended …. The cardinal principle of construction described by Lord Reid in *Sweet* v. *Parsley* is not to be displaced by such speculative considerations as to chosen legislative technique.

In contrast to Lord Nicholls and Lord Steyn, Lord Hutton appeared to be far more inclined to favour strict liability in dealing with statutes like the one in question. That is the reason for the judge to expressly recognize the force in the divisional court decision of Rougier J that though any violation of a child's innocence attracts very great stigma, yet the protection of children from sexual abuse is a social and moral imperative'.[36] In the same vein Lord Hutton went ahead to approve the approach thus: [37]

> This approach recognizes, rightly in my opinion, that in a criminal statute intended to protect children the court should not focus solely on the right of the accused but should also take into account the rights of children to be protected

Inspired by child protection considerations Lord Hutton displayed clear willingness to infer that the intention of Parliament in enacting section 1(a) of the 1960 Act was to create strict liability so that honest belief as to the age of the child should not be a defense. But after having gone so far, the judge appears to have suddenly reverted to the traditional position to conclude: [38]

> But the test is not whether it is a reasonable implication that the statute rules out *mens rea* as a constituent part of the crime – the test is whether it is a necessary implication. Applying this test, I

36. *Id*. at 854.
37. *Ibid*.
38. *Id*. at 855.

> am of opinion that there are considerations which point to conclusion that it is not a necessary implication.

Thus, unanimously the House of Lords ruled out strict liability and the accused was acquitted of the charges for an offence under section 1(1) of the 1960 Act.

R. v. *K.*[39] was yet another House of Lords ruling coming close on the heels of *B (a minor),* involving sexual aggression on a minor girl. Since in this case the House of Lords relied heavily on the reasoning and logic of the former ruling, it may be useful to appreciate the facts of the two cases in a comparative frame. The two points of comparison are the *age factor* (both of the victim and the accused) and the criminal *conduct factor.* In *B (a minor)* the victim was a girl of 13 and the accused was a man of 15 years. Unlike in *R.* v. *K.* the victim was a girl of 14 and the accused was a man of 26 years. Furthermore, in *B (a minor)* the alleged criminal conduct was repeatedly asking the girl, a co-passenger in a public transport, to perform oral sex, thereby inciting a girl below 14 years to commit an act of gross indecency. Unlike this, in *R.* v. *K.* the accused had indulged in sexual intercourse with a girl below 16 years (she was 14 years of age), that was allegedly consensual. Furthermore, the accused pleaded that he believed the girl to be above 16 years of age. Thus in *R.* v. *K.* the fact were far from consensual sexual experimentation between precocious teenagers and the conduct in question was no mere incitement to indecency but actual indecent assault on a minor girl. These two cases that differed materially on aforestated factual matrix were decided by the diverse benches of the House of Lords more or less on the same lines. It may be interesting to point out that in *B (a minor)* both Lord Nicholls and Lord Steyn were most mindful of hardship likely to be created for precocious teenagers indulging in consensual sexual experimentation if strict liability was inferred under section 1(1) of the 1960 Act, but the same Lords fell silent on the point in *R.* v. *K.*, where the accused was clearly twelve years older than the victim girl of 14 years and no teenager sexual experimentation was in question. In *R.* v. *K.* independent opinions were delivered by Lord Bingham of Cornhill (Lord Nicholls of Birekenhead concurring), Lord Steyn, Lord Hobhouse of Woodborough and Lord Millet. In *R.* v. *K.* the point of law of public importance identified by the court of appeal at the time of grant of leave to appeal were:

(a) Is a defendant entitled to be acquitted of the offence of indecent assault on a complaint under the age of 16 years, contrary to

39. (2001) UK HL 41.

> section 14 (1) of the Sexual Offences Act, 1956, if he may hold an honest belief that the complainant in question was aged 16 years or over?
>
> (b) If yes, must the belief be held on reasonable grounds?

The notable opinions of Lord Bingham, Lord Steyn and Lord Millet were inclined to answer question (a) in the affirmative and question (b) in the negative. The thrust of Lord Bingham's opinion is conveyed in the following observation: [40]

> There is nothing in the language of the statute which justifies, as a matter of necessary implication, the conclusion that Parliament must have intended to exclude this element of the ingredient of *mens rea* in S. 14 anymore than in S. 1. If the effect of the presumption is read into, S. 14 with reference to the defendant's belief as to the age of the victim, no absurdity results.

As per Lord Bingham again:[41]

> The rule of law is not well served if a crime is defined in terms wide enough to cover contract which is not regarded as criminal and is then left to the prosecuting authorities to exercise blanket discretion not to prosecute to avoid injustice

Lord Bingham had this word of caution for any forthcoming legislative initiative in the field of sexual offences: [42]

> [I]n any forthcoming recasting of the law on sexual offences, the *mens rea* requirement should be defined with extreme care and precision. Parliament is sovereign and has the responsibility to decide where the boundaries of criminal activities be drawn.

Unlike the judicial authorities in the UK, the courts in Hong Kong are more favorably disposed towards strict criminal liability that may be created in a wide variety of diverse fact situations such as offences against employment of children,[43] construction and sites safety,[44] etc. Particularly relevant for the present purpose are the cases of strict liability for sexual offences against minors. In a series of a cases on the theme such as *R.* v.. *Poon Pink Kwok and Another,*[45] *R.* v. *Savage (No. 3)*[46] and *HKSAR* v. *So*

40. *Id*. at 907.
41. *Id*. at 908.
42. *Id*. at 907.
43. *A.G.*v. *Demand Enterprises Ltd.* (1987)HKLR 195.
44. *A.G.*v. *Shun Shing Construction Co. Ltd* (1986) C.A. HKLR 311; *Halim Sulkmau* (1997) HKLR 214.
45. (1993) HKLR 56.
46. (1997) 2HKC 768.

Wai Lun,[47] the courts in Hong Kong have experienced little difficulty in applying strict liability. The *Wai Lun* case facts are very similar to *R.* v. *K.,* where the accused was charged under section 124 (1) of the Crimes Ord. (cap. 200) for having sexual intercourse with a girl of 13 years. The accused pleaded that he had no knowledge that the girl was below 16 years of age. Ma J, CJHC adverting specially to mistake as to age had made the following observation:

> There has not been, as far as I know, any decision of this court which directly deals with the defence of honest and reasonable belief in the offence of unlawful sexual intercourse with an under aged girl. This clearly shows that reasonable belief defence has seen expressly rejected is Hong Kong.

The Hong Kong Court was aware of the House of Lords ruling in *B (a minor)* and *R.* v. *K.,* but distinguished them from the case on hand as follows:[48]

> The position in Hong Kong, especially given our legislative history, compared with the English position is distinguishable. In our view the presumption of *mens rea* has been displaced by necessary implication and we conclude that the offence under S. 124 (1) is one of absolute liability meaning that the defence of honest and reasonable belief is not available to a defendant.

The court provided the following rationale for applying the principle of strict liability:[49]

> The policy behind these provisions is clear, namely, the protection of young girls from sexual abuse, this being in the public interest.

Why did the court in Hong Kong assert that it is in public interest to protect the young girls even without bothering to establish subjective blameworthiness of the accused? Did the court rule strict liability (absolute liability) under section 124 (1) because the statute was so appropriately worded or did the strict liability verdict have anything to do with Asian values that considers protection of children a paramount value? Though there are no similar strict liability measures in India, but if there was one, the Indian courts too would have no difficulty in ruling for strict liability like their Hong Kong counter parts. The fact that the legislature decides to erect a special legislation to protect a vulnerable section of the society

47. (2005) 1 HKLRD 443.
48. *Id*., para 26.
49. *Id*., para 38.

against a grave menace could itself have been treated as an evidence of lawmakers' intention to create strict liability by implication. Even in *B (a minor)* Lord Hutton did concede: [50]

> That in a criminal statute intended to protect the children the court should not solely focus on the rights of the accused but should also take into account the rights of the children to be protected.

IV Conclusion

The three paradoxical situations discussed in the foregoing pages are an indication of diverse common law system's response to the mental element requirement. Despite a few disparities there do exist several commonalties that lead to the following conclusions:

(i) All the common law systems accord high priority to the guilty mind or moral blameworthiness elements. Even under the codified criminal law systems the requirement of establishing *mens rea* remains to be all important.

(ii) For more serious crimes, particularly offences against the human body such as murder/manslaughter or culpable homicide, higher degree of moral blameworthiness is insisted upon, requiring volitional commission of a harmful conduct and cognition of bringing about death or grave harm. But the continued determination of manslaughter liability on the basis of out-dated assault-manslaughter rule or the creation of manslaughter liability in automobile/doctor manslaughter cases does take us back to objective liability times.

(iii) Codification of murder/manslaughter law and a clear provision for minimum degree of moral blameworthiness could go a long way in rationalizing the *Church* and *Lebrun* type rulings, something the courts in India could easily do in *Palani Goundan* case.

(iv) Though strict criminal liability means creation of liability either by express or implied exclusion of *mens rea* element, but the courts rarely agree to exclude *mens rea* in actual cases. But the two House of Lords ruling, namely, *B (a minor)* v. *DPP* and *R.* v. *K.* have become notorious for their anti-strict liability stand. Particularly *R.* v. *K.,* where the defendant of 26 who had sexual intercourse with a girl of 14 years was permitted to successfully

50. *Supra* note 29 at 854.

plead that he honestly believed her to be above 16 years. Technically the court may have been right that in the aforesaid statute *mens rea* was not excluded by necessary implications. But what social facts are required to arrive at a conclusion of 'necessary implication' is contextually determined. Is the Asian society context markedly different from the British society in this respect?