The Law Commission

Working Paper No 55

Second Programme, Item XVIII

Codification of the Criminal Law

General Principles

Defences of General Application

LONDON
HER MAJESTY'S STATIONERY OFFICE
50p net

This Working Paper, completed for publication on 22nd May 1974, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

The Law Commission will be grateful for comments before 1 January 1975.

All correspondence should be addressed to:

C. W. Dyment,
Law Commission,
Conquest House,
37/38 John Street,
Theobalds Road,
London WC1N 2BQ
(Tel: 01-242 0861, Ext.: 1)

The Law Commission

Working Paper No 55

Second Programme, Item XVIII

Codification of the Criminal Law

General Principles

Defences of General Application

LONDON
HER MAJESTY'S STATIONERY OFFICE
1974

ISBN 0 11 730086 1

THE LAW COMMISSION

WORKING PAPER NO. 55

SECOND PROGRAMME, ITEM XVIII

CODIFICATION OF THE CRIMINAL LAW

GENERAL PRINCIPLES

DEFENCES OF GENERAL APPLICATION

CONTENTS

INTRODUCTION BY THE LAW COMMISSION

The Working Party[1] assisting the Law Commission in its examination of the general principles of the criminal law with a view to codification has prepared the present Working Paper on defences of general application. It forms the fifth in a series[2] which is intended as a basis upon which to seek the views of those concerned with the criminal law. In accordance with its usual policy of consultation, the Commission is publishing the Working Paper and invites comment from all those having an interest in its subject matter.

---

1. For membership, see p. iv.
2. The previous Working Papers are "The Mental Element in Crime" (W.P. No. 31), "Parties, Complicity and Liability for the Acts of Another" (W.P. No. 43), "Criminal Liability of Corporations" (W.P. No. 44) and "Inchoate Offences" (W.P. No. 50).

MEMBERSHIP OF THE WORKING PARTY

Joint Chairmen:	Mr Derek Hodgson, Q.C.
	Mr Norman Marsh, Q.C.
Law Commission member:	The Hon. Mr Justice Cooke
Members, other than representatives of the Law Commission:	* The Rt. Hon. Lord Justice Edmund Davies
	His Honour Judge Buzzard
	Mr T.R. Fitzwalter Butler
	Mr A.E. Cox
	Mr R. Du Cann
	Mr J.N. Martin, O.B.E.
	* Professor Glanville L. Williams, Q.C., LL.D., F.B.A.
	Mr F.L.T. Graham-Harrison, C.B. (Home Office)
alternate	(* Sir Kenneth Jones, C.B.E. ((Home Office) (+ Mr J. Nursaw (Home Office)
Secretary:	Mr J.C.R. Fieldsend (Law Commission)
Assistant Secretary:	Mr C.W. Dyment (Law Commission)

* Also members of the Criminal Law Revision Committee.

\+ Secretary of the Criminal Law Revision Committee.

THE WORKING PARTY'S PAPER

CODIFICATION OF THE CRIMINAL LAW

GENERAL PRINCIPLES

DEFENCES OF GENERAL APPLICATION

I. INTRODUCTION

1. This Working Paper is the fifth in a series dealing with the general part of the proposed Criminal Code, prepared by the Working Party assisting the Law Commission in its work upon the general part of the criminal law[1]. The Paper deals with certain defences of general application, namely, duress and necessity, and considers also the advisability of providing for two other defences, coercion and entrapment[2]. While the Paper expresses views as to whether the defences of duress and necessity should be available in respect of charges involving murder and bodily injury, it does not deal at all with the question of self-defence. This is a matter which pertains solely to offences against the person and, as such, falls wholly within the purview of the Criminal Law Revision Committee in its current examination of those offences.

2. While duress and necessity bear similarities in the sense that they are both intended to provide a defence for an individual, who would otherwise be guilty of an offence, because pressure in one form or another beyond his control is exerted upon him, the elements of the defences are not the same.

---

1. Membership of the Working Party is listed at p. iv, above.
2. See Working Paper No. 17, Working Party's Preliminary Working Paper, "The Field of Enquiry", Subjects 21, 22 and 23.

Completely separate treatment has, therefore, been accorded to each of them. The Paper examines the defences in turn to determine whether they are required in the criminal law, and if so in what terms they should be defined. In accordance with the policy of previous Papers in this series, comment and criticism are invited upon these proposals.

II. DURESS

(a) Present law

3. A crime is said to be committed under duress (or duress per minas) where there is a threat of physical harm if the act constituting the actus reus of the offence[3] be not done. It differs in more than one respect from necessity. The element of force with which the defendant is faced arises in all cases out of the wrongful threats of another to inflict some harm if the criminal act is not committed, but in the case of necessity this is not usually so: the element of force in the latter case may result from natural causes. This difference points to a further distinction between the two defences. Duress may be regarded essentially as a concession to human infirmity in the face of an overwhelming evil threatened by another; necessity normally envisages a situation where the defendant is presented with a choice between doing either certain harm or other harm the consequences of which are far worse, and his choice of the former, therefore, represents a course which is morally preferable. We return to these distinctions later[4].

---

3. Glanville Williams, Criminal Law (2nd ed., 1961), p. 751.
4. See further, paras. 15 and 25.

4. The most recent authority[5] sums up the English case law by stating that "it is clearly established that duress provides a defence in all offences including perjury (except possibly treason or murder as a principal)" where there have been "threats of death or serious personal injury so that the commission of the alleged offence was no longer the voluntary act of the accused"[6]. This conclusion was based upon a survey of cases in which the existence of the defence had been upheld or adverted to in relation to the commission of treason[7], malicious damage[8], larceny[9], receiving stolen goods[10], arson[11] and unlawful possession of ammunition[12].

5. As to what kind of threats at present suffice to constitute the defence, we have already quoted recent authority[13] which specifies "threats of death or serious personal injury". No case decides that a threat of injury to property, as distinct from injury to the person, will suffice, and until recently it was thought that the threat had to be one of immediate action and not of harm at some time in the future.

6. The scope of the defence in English law has now been construed more widely as a result of the decision in R. v. Hudson and Taylor[14]. Two girls, of 19 and 17 years of age,

---

5. R. v. Hudson and Taylor [1971] 2 Q.B. 202.
6. Ibid., at 206.
7. Purdy (1946) 10 Jo. Cr. L. 182; but contra this, obiter, Steane [1947] K.B. 997, 1005 per Goddard L.C.J.
8. Crutchley (1831) 5 C. & P. 133.
9. Gill [1963] 1 W.L.R. 841.
10. A-G v. Whelan [1934] I.R. 518.
11. Shiartos (unrep.) referred to in Gill (n. 9 above) at pp. 845-6.
12. Subramaniam v. Public Prosecutor [1956] 1 W.L.R. 965 (P.C.).
13. R. v. Hudson [1971] 2 Q.B. 202, 206.
14. [1971] 2 Q.B. 202, referred to hereafter as Hudson.

were indicted for perjury for having given false evidence by not identifying a defendant at his trial as the assailant of the complainant, when in fact they knew that he was the assailant. They pleaded duress because of threats of injury made before that trial and the presence in court during it of one of those who had uttered the threats. The Court of Appeal allowed their appeal, holding that the issue of duress should have been left to the jury. The court's judgment (delivered by Widgery L.J.) stated that, for the defence of duress to operate, the threat must be effective at the moment when the crime (i.e. here the perjury) was committed; the threat must be "present" in that it is effective to "neutralise the will" of the accused at that time. When, however, there is no opportunity for delaying tactics at the moment of decision, the existence at that moment of the requisite threats should suffice to provide the defence "even though the threatened injury may not follow instantly but after an interval"[15]. The court also referred to the duty of individuals threatened to seek police protection, stating that it was open to the prosecution to prove that the defendant failed to avail himself of an opportunity reasonably open to him to render the threat ineffective; in considering this the jury should have regard to the defendant's age and circumstances, and to any risks to him involved in that course of action. The court took the view that the police could provide effective protection in some cases, but not in others, although, since it was not necessary for the decision, this point was not fully explored.

7. Before considering proposals for reform of the existing law we draw attention briefly to the provisions of certain Codes. Section 23 of the English draft Code[16] permitted compulsion (i.e. threat of death or grievous bodily harm) as a defence

---

15. Ibid., p. 207.

16. Appendix to the Report of the Criminal Code Bill Commission, (1879) C. 2345.

to any charge other than that of treason, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm and arson. The influence of that draft Code is evident in the Canadian and New Zealand criminal Codes[17]. By contrast the Indian Penal Code[18] allows the threat of death to excuse any crime except murder and offences against the state punishable with death. The common law in the U.S.A. permits duress as a defence to a charge of any crime except murder, but this exception is not to be found in the Model Penal Code[19]. Particular provisions of these Codes are considered in more detail at the appropriate place hereafter.

(b) Should the defence of duress be retained?

8. It is necessary to consider whether duress should be a defence at all, as distinct from a reason for reducing any penalty which might otherwise be appropriate, because this view has been canvassed as a result of the possible width of the defence following the decision in Hudson[20]. There seem to be two reasons for suggesting that duress should not be a defence at all, one jurisprudential, the other moral. In the first place, it may be said, in our view correctly, that duress does not negative mens rea[21]; the defendants in Hudson intended to commit perjury, although they did so unwillingly, and the threats did not turn their "voluntary" acts into "involuntary" ones. Since mens rea was present, would it not be preferable to reflect the fact by a finding of guilt and a reduction in penalty? This was the view taken by Stephen in his History of the Criminal Law[22] and is the more persuasive now that the

17. Appendix, pp. 54 and 55.

18. Appendix, p. 57.

19. Appendix, p. 59.

20. [1971] 2 Q.B. 202; see Goodhart (1971) 87 L.Q.R. 300 and (1971) 121 N.L.J. 909.

21. Glanville Williams, Criminal Law (2nd ed., 1961), p. 751.

22. Vol. II, pp. 107-8.

courts have an extremely wide discretion to order an absolute or conditional discharge upon conviction. When such an order is made, the conviction is deemed not to be one for any purpose other than that of the proceedings in which the order is made, or, in the case of a conditional discharge, any proceedings brought for breach of that condition[23].

9. There is more than one answer to these contentions. If the defendant's action was motivated by the threat of overwhelming harm to him (however that harm may be defined) it would, it seems to us, be unjust to record a conviction against him at all; and, if this be the case, the question of duress is not apt to be explored in mitigation by the judge in delivering sentence but should be a matter to be taken into consideration by the jury. Furthermore, the power to grant a discharge is entirely a matter within the discretion of the courts; were there to be no general defence of duress, even if a defendant satisfied the court that he acted under duress[24], there could be no certainty that the court would grant a discharge. It is our provisional view that these considerations outweigh the argument that the discretion of the court in regard to penalties eliminates the necessity for a general defence.

10. Another argument advanced against provision of the defence is that it is not possible to regard defendants in cases of duress as morally blameless and, therefore, that a defence can never be the appropriate remedy for the duress situation. For example, in a Hudson situation, it may be argued that the defendants, in order to protect themselves from serious attacks, commit perjury with the possible result that a dangerous man is set free to commit other crimes; and that is a result from which the defendants ought not to be absolved. This is a tenable view, and it may be that the

---

23. Criminal Justice Act 1948, s. 12(1).

24. Under the present law it is for the prosecution to negative duress where there is sufficient evidence to raise the issue: see para. 27.

situation in Hudson is one which requires special consideration[25]. Nevertheless, there are, in our view, other cases where the provision of the defence is in justice desirable; and the present argument is, therefore, one of which account must be taken in formulating the limits of the defence, and ought not to be regarded as affecting the validity of the defence itself.

(c) Proposals for a revised defence of duress

(i) Should the threat be objective or subjective in character?

11. The first problem for consideration is whether the threat which is a necessary element of duress[26] is to be tested by its effectiveness in relation to the particular defendant or in relation to the reasonable man, that is, whether the test should be subjective or objective in character. Differing requirements are to be found in the present law in England and in the various Codes. The court in Hudson regarded the necessary threat as one present "in the sense that it is effective to neutralise the will of the accused"[27] at the time. Some Commonwealth Codes[28] pose the test "if he [the accused] believes that the threats will be carried out." By contrast, the American Law Institute's Model Penal Code[29] refers to "the use of, or a threat to use, unlawful force ... which a person of reasonable firmness in his situation would have been unable to resist". The Indian Penal Code[30], again, refers to threats which "reasonably cause" the apprehension of death to the person threatened.

---

25. The difficulties raised by Hudson [1971] 2 Q.B. 202 are considered further below; see paras. 19-21.
26. The nature of the threat is discussed at para. 14 et seq.
27. [1971] 2 Q.B. 202, 204, emphasis added.
28. Appendix, pp. 54 and 55.
29. Sect. 2.09(1), see Appendix p. 59.
30. Appendix, p. 57.

12. By way of preliminary observation, we make the point that, in our view, the defence of duress should be framed to reflect the opinion that it excuses the actus reus, that is, because of the threats, the defendant is not to bear criminal responsibility for doing the prohibited act. Although the defendant may act as he did through fear, he does, unlike the automaton, intend to do as he did; as we have pointed out in regard to Hudson, the defendants there intended to commit perjury, and had the choice of not doing so, albeit at the cost of possible reprisal. Since their minds must be taken to have accompanied their action in committing perjury, it is difficult to maintain that they did not have the requisite mens rea. The alternative view is that duress has the effect of negativing the mental element, but we have indicated above[31] that we do not agree with an analysis of the duress situation on that basis. It must be pointed out, however, that the Court of Appeal in Hudson seems in some degree to have accepted this latter view in referring to the defendants' will being "destroyed"[32] or "neutralised"[33], but we believe that some of the difficulties which we have found in considering that decision may be eliminated if the use of such terms is avoided in defining the elements of duress for the future.

13. Just as we consider that duress does not negative mens rea, so we provisionally take the view that the existence of the threat must be tested by reference to the defendant's belief; put shortly, if he knows what he is doing, the cause of his doing it should also be tested by reference to his own belief. This means ultimately (and subject to consideration of the other problems of definition) that the genuineness of his belief will be a matter upon which the jury will be directed to decide having regard to the circumstances of the case. It may be that in certain situations a reasonable man would realise that a

---

31. See para. 8.
32. [1971] 2 Q.B. 202, 207.
33. Ibid., p. 206.

threat to his life by another was not to be taken seriously and would not, therefore, justify him as acting under duress. On the other hand the individual circumstances of every case and the reactions of a particular individual to those circumstances cannot all be foreseen, and they may be such that the standard of the reasonable man is impossible to apply. Of course, an element of objectivity is supplied by the kind of threat required to justify raising the defence, a matter with which we deal in the following paragraphs. But in regard to the existence of the threat, it seems to us that a test of reasonableness, however framed, would serve only to penalise those of less than average understanding or judgment and, possibly, would be less easy for a jury to understand having regard to individual circumstances.

(ii) What kind of threat?

14. At present in English law it is certain only that threats to the life of the defendant or (possibly) of serious personal injury to him supply a defence and then only in cases other than murder. To this last exception some Commonwealth codes add many others[34]. Whether threats of loss of life or injury to others, threats to property or threats of economic loss, such as loss of employment, could ever suffice for duress has not been decided in this country.

15. We have indicated[35] that duress as a defence may at present be justified in cases where the defendant is faced by the threat of overwhelming harm (that is death or serious bodily injury) by another if the defendant fails to take a particular course of action and we have characterised the defence as a concession to human weakness. The defendant is permitted to raise it because, unless punishment is regarded as purely retributive, the imposition of penalties upon him for the particular course of conduct he has followed in his situation would

34. See Appendix, pp. 54 and 55.

35. See para. 3.

be valueless. Furthermore, the law retains the right to prosecute the individual responsible for causing the harm. To take a simple example, A orders D at the point of a gun to telephone B to lure him to a trap which D knows will result in injury to B at the hands of A or C. If D is charged with aiding and abetting the assault upon B, he may plead duress both because he cannot be expected to suffer his own death and because A and C are those who are most responsible for the injury.

16. We have indicated[36] that situations of necessity frequently present an individual with a choice of the greater or lesser evil and we discuss the implications of this below in the part of this Paper dealing with that defence[37].
We have considered whether a defence of duress could be framed in terms of the balancing of one harm against another, permitting it to be raised only when the harm to be inflicted upon the defendants is greater than the harm which he is obliged to do. For various reasons, however, we regard this as impracticable. In the first place, if the defence were so framed it would follow that where the defendant, to save his own life, imperilled the lives of more than one other person, the defence would be unavailable. For example if, in the illustration given in the last paragraph, D was forced by threats of injury to himself to lure B and E knowing that they are certain to have injuries inflicted upon them, then on a test involving the balance of harms, D would have no defence to a charge of aiding and abetting the infliction of those injuries. If, however, as we believe, the defence is given because D cannot be expected to endure injury in these circumstances, it is immaterial that his action results in injury to several others, and imposition of a penalty upon him would be equally without purpose. Secondly, a test involving the concept of balance of harms cannot, it seems to us, operate satisfactorily where the offences involved are of an entirely

36. See para. 3.

37. See para. 42 et seq.

different character. There is, for example, no sensible means of weighing a threat of severe injury to the person against an enforced disclosure of information contrary to the Official Secrets Act which might lead to a danger to national security. Our provisional conclusion is, therefore, that in defining the kind of threats which are the subject of duress, it must be borne in mind that the basic justification of the defence is that it is a concession to human infirmity in situations of extreme peril.

17. This conclusion leads us to take the provisional view that duress ought for the future to be available only in cases where the threat is a threat of death or of serious injury. Threats of injury to property ought, we think, to be excluded. Their inclusion would necessarily lead to some extent to examination in particular cases of the question of balancing one harm against another - of whether, for example, threatened injury to property, however great, could excuse the infliction of some bodily injury by the defendant. It might be possible to circumvent this difficulty by excluding the defence in such situations except in cases where the defendant's conduct did not involve injury to the person. But we take the provisional view that these cases should be dealt with, so far as necessary, by other means, such as the defence of necessity which we discuss in Part III of this Paper[38]. We are fortified in our provisional conclusion by the fact that defences of duress in all the Codes which we have examined[39] are confined in the way which we propose and that most, if not all, reported cases deal with threats of death or serious personal injury.

---

38. See para. 42.

39. See Appendix; other Commonwealth codes based upon the draft Code of 1879 are drafted in similar terms.

(iii) Against whom must the threat be directed?

18. Another problem in defining the type of threat required for the defence to be successfully raised is whether it must be of harm to the defendant himself or to a defined class of people (for example, the defendant's relatives), or whether a threat of harm to anyone may suffice. The first limitation is adopted by the Indian Penal Code[40], the second by the German Penal Code[41]; some Codes based upon the draft Code of 1879 leave the question open[42], but have been interpreted to include threats to persons other than the defendant[43]. Finally, yet others specifically include threats to anyone[44]. Provisionally, we consider that no limitation should be placed upon the persons against whom the threat may be made. Obviously, a threat of imminent death, for example, to the defendant's wife or children ought to suffice for the defence; but it is not, in our view, possible to maintain with confidence that it should not apply also in the case of threats to a friend of the defendant or, indeed, to someone he does not know. No rational dividing line is discernible in this context.

(iv) How imminent must the threat be?

19. The Commonwealth Codes based upon the draft Code of 1879 do not answer the question whether, for the defence to be operative, the defendant must believe that the threatened injury will follow immediately upon his refusal to comply. The Indian Penal Code, on the other hand[45], requires apprehension of

---

40. Appendix, p. 57.

41. Appendix, p. 62.

42. Appendix, pp.54-55.

43. E.g. R. v. Harley and Murray [1967] V.R. 526 where D's wife was in the custody of the threateners.

44. See Australian Draft Code and Model Penal Code, Appendix, pp. 58 and 59.

45. Appendix, p. 57.

"instant" death and the German Penal Code[46] "a threat entailing an immediate and otherwise not avertible danger". Until recently, it was thought that in English law the defence required a threat of a similar degree of imminence, but, as we have indicated, Hudson[47] extended the law by permitting the defence "even though the threatened injury may not follow instantly but after an interval"[48], provided, of course, that the threat has been operative on the mind of the accused. The decision has been followed in New South Wales[49].

20. The extension of the ambit of the defence in this way has certain obvious attractions. If, as we have suggested, the existence of the threat is to be tested by reference to the defendant's belief, the threat does not become any the less real if it is to be executed at some time in the future; furthermore, there are certain cases - and Subramaniam[50], cited by the Court of Appeal in Hudson, is one - where provision of the extended defence may seem in justice desirable. On grounds of public policy, however, it is arguable that at any rate where the threat is made against the defendant himself, this extension of duress is undesirable. In particular, it seems to us that a defence of duress is inappropriate where there is ample opportunity to seek protection between the time when the threat was made and the time when the defendant believes it will be executed. We recognise that effective protection may not be continuously available; yet it seems to us that a defendant subject to this kind of threat must always be under a duty at least to seek that protection in order to reduce the possibility of its execution and failure to do so through fear of the consequences ought properly to be a factor

---

46. Appendix, p. 62.

47. [1971] 2 Q.B. 202, following the Privy Council decision in Subramaniam [1956] 1 W.L.R. 965: see para. 6.

48. Ibid., p. 207.

49. R. v. Williamson [1972] 2 N.S.W.L.R. 281.

50. Subramaniam v. Public Prosecutor [1956] 1 W.L.R. 965 (P.C.); on a charge of possession of ammunition held that D's evidence that he had been acting for a month under duress exerted by Malayan terrorists who "could have returned at any time" should have been admitted.

in mitigation rather than a complete defence. This situation arises acutely in cases of perjury; the actual execution of threats made to witnesses has been known to occur some years after they have given their evidence. Where a person commits perjury knowing of such a possibility, and with the knowledge that police protection cannot effectively be given continuously throughout such a period, we take the provisional view that public policy requires this to be reflected in sentencing rather than in allowing a defence in these circumstances. Furthermore, perjury is not the only context in which the problem may arise; where, for example, the defendant has been instructed to leave a fused bomb in a busy place under threat of being shot at some time in the future if he fails to do so, he clearly has an opportunity to seek protection, and such pressure upon him should not provide complete exoneration. But if the defendant so acted in the belief that he was under surveillance by a sniper ready to shoot him if he disobeyed, then it is, in our view, right in principle that the defence should be available. These examples suggest that the defence should be available where the threat is of immediate harm or where, although the threat was not of immediate harm, the person threatened had no reasonable opportunity of obtaining protection.

21. There are other, connected, considerations which lead us to the same conclusion, arising again in the context of perjury. It seems to us that the ability of the courts to function properly is a factor of major importance, and for that purpose the court is empowered to subpoena witnesses to attend court, to commit for contempt in the event of failure to do so and to punish witnesses for perjury if false evidence is given. While it may be questioned whether the existence of these sanctions induces more individuals actually to give truthful evidence than they would otherwise do, it would, in our view, seem strange if this panoply of powers could be rendered ineffective simply because of the existence of a counter-threat of future harm. These considerations, however, would not arise

if the defence of duress were limited to threats of immediate death or serious injury or threats of this kind which the defendant has no means of averting through a reasonable opportunity of seeking protection, whether from the police or elsewhere. Indeed, a defence so limited would in practice nearly always exclude duress being pleaded in cases of perjury because the possibility of preventing the execution of threats would be present in all cases save where the individual making the threat is present in court, is seen by the defendant as he is about to give his evidence, and is believed by the defendant to be armed with a lethal weapon which he is prepared to use if that evidence is given.

22. Provisionally, we take the view that the word "immediate" in this context is not in need of definition. Where the threat in question is directed against the defendant there seems to us to be no difficulty in understanding its meaning; and, as the preceding paragraph has indicated, the qualification of the threat by the requirement of immediacy or of the absence of reasonable opportunity to seek protection will exclude certain cases which are at present within the ambit of the defence.

23. Somewhat different considerations arise when the threat is directed towards another, for example in cases where the threat is against a hostage held captive, to which we referred in paragraph 18. There, it seems to us that there is no necessity for a test of immediacy. In such a case the most important consideration for the defendant is clearly not that of immediate death to the hostage or the lack of reasonable opportunity to avert the threat of death or injury to the hostage by seeking protection for him, but the fact that the death or injury is avoidable only by the defendant committing the offence with which he is charged[51]. Indeed, the fact that the execution of the threat to the kidnapped wife of a defendant is inevitable, albeit delayed for a limited period, may make the pressure upon him the more difficult to resist. Our provisional view is, therefore, that in this latter context

51. See R. v. Harley and Murray [1967] V.R. 526 quoted in Hudson [1971] 2 Q.B. 202, 207.

the relevant test is whether the threat is one the execution of which is avoidable only by compliance with the demand made of the defendant.

(v) Should there be any limitations upon the defence?

24. The limitations dealt with in the following paragraphs concern particular offences to which it might be thought that the defence of duress should not apply on account of their gravity or for other reasons of policy. As we have mentioned[52], Codes based upon the draft Code of 1879 have a fairly large number of such limitations, although the Model Penal Code contains no exception of this character.

25. We believe that the desirability or otherwise of placing express limitation on a defence of duress depends upon the way in which the defence is defined. It seems to us that, were the defence to be so broadly defined as to include situations where the possibility of seeking police protection existed in the event of the defendant's non-compliance with the threat, then its availability in the case of some very serious offences might not be justified. Where, however, as we have proposed, the threat is one of immediate death or serious bodily injury, or of death or injury where there is no reasonable opportunity of seeking protection, we think that no social purpose would be served in excluding the possibility of raising the defence even where the defendant has committed murder or some serious injury. It is true that at present the law makes a possible exception in cases where the defendant has committed treason or murder as a principal[53]. And Blackstone remarked that a man under duress "ought rather to die himself than escape by the murder of an innocent"[54]. But the

52. See para. 7.

53. See Hudson [1971] 2 Q.B. 202; and see para. 4 above.

54. Commentaries, iv. 30. See generally Smith and Hogan, Criminal Law (3rd ed., 1973), p. 166.

whole basis of the defence, as we conceive it, is its recognition of the infirmity of human nature, the impossibility of requiring ordinary people to react in the manner suggested by Blackstone, and consequently the futility of imposing penalties in the circumstances. Thus, we have drawn attention in paragraph 20 to one case where the defendant might cause death or serious injury but where it seems to us right in principle that the defence might properly be pleaded, that is, where the defendant has laid a fused bomb in a busy thoroughfare in the belief that he is covered by the sniper's rifle in the event of his failure to do so. Our provisional conclusion is, therefore, that on the assumption that duress contains the elements which we have proposed in the preceding pages, no express limitation should be placed upon its availability even where the defendant is charged with murder or other serious offences.

26. Another kind of limitation to be found in some Commonwealth Codes[55] provides that the defence shall be available only if the defendant is not a party to an association or conspiracy whereby he is subject to compulsion. This means, in effect, that if the risk of duress being exerted against him was voluntarily accepted in consequence of his joining, for example, a group or association committed to violence, the defence will not be available if he is obliged to participate in criminal activity. It may be that this provision is scarcely necessary, for the defendant might well in any event be guilty of conspiracy to commit the relevant offence. But where the defendant may be liable for conspiracy, it may be thought contrary to the interests of public policy that he should be permitted to raise the defence of duress to a charge of comitting or participating in the offence itself. Although the proviso would have to be fairly widely drafted - as, indeed, are those in the Canadian and New Zealand Codes - we do not

---

55. See Appendix, pp. 54-55.

consider it to be an objection of substance to the proviso that, while aware that the association he had joined was prepared to commit criminal offences, the defendant had not anticipated the particular kind of offence which was in fact committed. On balance, therefore, we favour a limitation upon the defence which would exclude its availability where the defendant had joined an association or conspiracy which was of such a character that he was aware that he might be compelled to participate in offences of the type with which he is charged.

(vi) Burden of proof

27. It was settled in R. v. Gill[56] that the evidential burden in duress lay on the defence; that is, the defendant must adduce sufficient evidence of it to raise an issue. Having done this, it is then for the prosecution to satisfy the jury beyond reasonable doubt that the defence cannot succeed on the evidence. We do not propose that this position be changed in any way, and indeed, this provisional conclusion accords with the general recommendation of the Criminal Law Revision Committee where a defendant bears a burden of proof[57].

(d) Summary of proposals

28. The proposals for the defence of duress discussed in the foregoing paragraphs may be summarised as follows -

(i) Duress should be retained as a defence of general application (paragraphs 8-10).

(ii) The threat which is the subject of the plea of duress should be determined by reference to the defendant's own belief in its existence (paragraph 13).

---

56. [1963] 1 W.L.R. 841.

57. Eleventh Report of the Criminal Law Revision Committee, on Evidence (1972) Cmnd. 4991, para. 137 et seq., and cl. 8 of the Bill annexed thereto.

(iii) The threat must be one of death or serious physical injury (paragraph 17).

(iv) The threat may be of harm to the defendant himself or to any third party (paragraph 18).

(v) The defence should be available in cases where the defendant himself is threatened by immediate harm, or, if the threat of harm is not immediate, if he has had no reasonable opportunity of seeking police protection; but in cases where a third person is threatened, the defence should be available if execution of the threat is avoidable only by compliance with the demand made of the defendant (paragraphs 19-23).

(vi) The defence should be capable of being raised on a charge of any offence (paragraph 25).

(vii) The defence should not be available where the defendant has joined an association or conspiracy which was of such a character that he was aware he might be compelled to participate in an offence of the type with which he is charged (paragraph 26).

(viii) The burden should be on the defendant to give sufficient evidence to raise an issue on the defence of duress (paragraph 27).

III. NECESSITY

(a) Present law

29. The term "necessity" is used here to connote those situations in which "D is able to choose between two courses, one of which involves breaking the criminal law and the other some evil to himself or others of such magnitude that it may be thought to justify the infraction of the criminal law"[58]. To what extent, if at all, English law at present recognises a general defence of necessity is a matter of dispute[59], while the most recent cases also pose difficulties. In one case[60] the Court of Appeal has said that "The plea may in certain cases afford a defence ... [in] an urgent situation of imminent peril" and, while in such cases the law permitted an encroachment on private property, it never did so in cases of murder or larceny. But at about the same time the Court of Appeal denied (obiter) the existence of the defence in one situation of "imminent peril"[61] -

> "A driver of a fire engine with ladders approaches the traffic lights. He sees 200 yards down the road a blazing house with a man at an upstairs window in extreme peril. The road is clear in all directions. At that moment the lights turn red. Is the driver to wait for 60 seconds, or more, for the lights to turn green? If the driver waits for that time, the man's life will be lost .... I accept that [counsel are correct in not allowing the defence of necessity and maintaining that this goes only to mitigation]" (Lord Denning M.R.).

---

58. Smith and Hogan, Criminal Law (3rd ed., 1973), p. 157.

59. See e.g. Glanville Williams, Criminal Law (2nd ed., 1961), p. 724 et seq.; and compare Glazebrook "The Necessity Plea in English Criminal Law", [1972A] C.L.J. p. 87 et seq.

60. Southwark London Borough Council v. Williams [1971] Ch. 734 at pp. 743-4, 745-6; emphasis added.

61. Buckoke v. Greater London Council [1971] Ch. 655 at 668.

30. The defence of duress is, by contrast, as we have seen, well established in English law[62]. Perhaps the most obvious difference between this defence and that of necessity is that the harm sought to be avoided in the former always proceeds from another person's wrongdoing. Another difference is that, unlike the defence of duress which is usually related to serious crimes, necessity is in practice raised as a defence to charges of comparatively minor offences. The situation described by Lord Denning M.R. in Buckoke's case[63] is an obvious example, although it should be noted that, where there is a risk of endangering life by crossing traffic lights before they turn green, the consequences of this infraction of the law may be far from trivial. In any event, neither of these differences between duress and necessity can be regarded as an adequate juristic basis for permitting one defence to be raised but denying the other. English law, however, at present finds other means of coping with situations in which the necessity plea might otherwise have been thought appropriate. The efficacy of these means is relevant in deciding whether a general defence of necessity should be proposed for inclusion in the Code and we, therefore, review them briefly in the following paragraphs[64].

(i) Statute law

31. In some older authorities[65] the courts found that, on the proper construction of a statute, the relevant provision was not intended to apply to a case in which more harm would probably be caused by complying with the law than by contravening it. Thus the necessity plea as such was not required

---

62. See para. 4 above.

63. See para. 29.

64. In writing these paragraphs we have been greatly assisted by Mr. Glazebrook's article, noted above at fn. 59.

65. E.g. Reniger v. Fogossa (1551) 1 Plow. 1; Burns v. Nowell (1880) 5 Q.B.D. 444.

because of the manner in which the provision was construed. Conclusions so reached might be regarded as a variant of the so-called "golden rule" of statutory interpretation, that is, that a statutory provision will be so interpreted as not to lead "to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience"[66]. The "rule" has never been explicitly applied in a criminal case although a situation such as that in Burns v. Nowell[67] might have been regarded as appropriate for it. Be that as it may, the method of statutory construction under discussion now appears to be employed less frequently to achieve a just result; for example, in R. v. Kitson[68], the defendant was held to be "driving" a car while drunk, even though his evidence indicated that he did no more than steer it to a grass verge to avoid possible collision after he awoke in the car to find it moving of its own motion. If it be assumed that, in the example given by Lord Denning M.R. in Buckoke's case[69], there is no risk of injury or danger to life in crossing the traffic lights when they are red, then that example is further evidence of the strict attitude of the courts today.

---

66. Per Parke B, Becke v. Smith (1836) 2 M. & W. 191, 195; see e.g. Allen, Law in the Making (7th ed., 1964), p. 491.

67. The Pacific Islanders Protection Act 1872, s. 3 prohibited the carrying of native labourers other than as crew on board ship without a licence. This came into operation while D's vessel was at sea, and for him to have put the labourers ashore immediately would have been a greater cruelty than that at which the section was aimed; thus "the [ship] was not ... employed in the commission of any offence within [the] intent and meaning of [s. 3]": see (1880) 5 Q.B.D. 444 at 454-5 per Baggallay L.J.

68. (1955) 39 Cr. App. Rep. 66.

69. See para. 29 above; and see also para. 30.

32. The prohibition contained in many offences is qualified in varying degrees by different words which have been construed, or may be construed, to cover situations in which a defence of necessity might be appropriate. For example, the word "unlawfully" in section 58 of the Offences Against the Person Act 1861[70] was held in R. v. Bourne[71] to import the meaning expressed by the proviso in section 1(1) of the Infant Life Preservation Act 1929[72], so that a jury could reasonably take the view that a doctor acted to preserve the life of a mother if he thought on reasonable grounds that continuation of pregnancy would make her a physical or mental wreck[73]. Other and more recent statutes[74] qualify the basic prohibition with the words "without lawful excuse" or "without reasonable excuse", which permit defences to be raised successfully in situations far wider than those likely to be covered by a defence of necessity. The addition of "dishonestly" in the definition of theft[75] may have a similar effect. Thus, proof of dishonesty in theft may be negatived if, although the defendant knows an appropriation is without the owner's consent, he takes the property to avoid a greater evil, for example, to save life.

33. Some statutes provide defences in terms of what is substantially a defence of necessity, for example, section 79 of the Road Traffic (Regulation) Act 1967 dispenses with the

---

70. This makes it an offence "with intent to procure the miscarriage of any woman ... unlawfully [to] use any instrument".

71. [1939] 1 K.B. 687.

72. I.e. the prosecution must prove that "the act which had caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother".

73. While not questioning this decision, it must not be thought that we are making any judgment as to the balance of harms between termination of pregnancy and danger to the mother's health.

74. E.g. Criminal Damage Act 1971, ss. 1, 2, 3 and 5; Prevention of Crime Act 1953, s. 1; Criminal Law Act 1967, s. 4(1); Firearms Act 1968, s. 19.

75. Theft Act 1968, s. 1; "dishonestly" is defined, but not exhaustively, in s. 2(1).

necessity for fire-engines, police and ambulances to observe the speed limit in certain circumstances[76].

(ii) Common Law

34. Decisions relating to certain common law misdemeanours have been cited as proof of the existence at common law of a defence of necessity. For example, in R. v. Vantandillo[77] it was said that the necessity for a mother to carry her infected child through the streets to seek medical attention "might have been given in evidence as a matter of defence" to a charge of common nuisance by exposing a person with a contagious disease on the public highway. Such cases might, however, with equal justification be regarded merely as examples of the flexibility in allowing for special cases to be found in any body of judge-made law.

35. The principal common law discussion of the problem has centred on murder and larceny. So far as the latter is concerned, the position now remains open under the Theft Act[78]. In regard to the former, R. v. Dudley and Stephens[79] is sometimes regarded[80] as authority against the existence of the defence of necessity, although we take the view that it is not decisive on the issue. The defendants were found guilty of murder, having killed and eaten a boy after being twenty days adrift in an open boat. They were rescued four days later. In essence, the court held that the facts did not disclose a

---

76. Other examples are provided by the Abortion Act 1967, s. 5(2), the Education Act 1944, s. 39(2)(a), the Road Traffic Act 1972, s. 36(3) and the Fire Services Act 1947, s. 30(1).

77. (1815) 4 M. & S. 73 at 76 (common nuisance); see also Stratton (1779) 21 How. St. Tr. 1045 (common law misdemeanour of assault).

78. See para. 32.

79. (1884) 14 Q.B.D. 273.

80. E.g. Smith and Hogan, Criminal Law (3rd ed., 1973), p. 160.

situation of necessity which would have justified killing the boy to provide food; the defendants had not chosen the lesser of two evils, for when they killed him they did not, and could not, know that killing him would probably save their lives, or that the boy would probably have died anyway - they might have been picked up by a ship the next day or they might never have been picked up at all. "In either case it is obvious that the killing of the boy would have been an unnecessary and profitless act"[81].

(iii) Sentencing

36. The need to plead necessity as a defence is frequently bypassed by sentencing policy and related factors. Thus, firemen convicted of traffic offences committed when answering emergency calls are refunded their fines and costs "in appropriate cases" by local authorities[82], and the police for various reasons may decide not to prosecute. Moreover, as we have noted in relation to duress[83], the court has, in its discretion, power to grant an absolute or conditional discharge upon conviction for any offence other than one for which the sentence is fixed by law, and the court in granting this takes into account, inter alia, the circumstances, including the nature of the offence. The existence of this wide power may explain in some degree the scarcity of cases of necessity and the courts may well regard it as the most practical way of dealing with cases in which the factor of necessity is present.

(iv) Necessity in the Codes

37. Before considering whether a general defence of necessity is desirable, we mention briefly provisions to be found in overseas Codes. In comparison, for example, with

---

81. (1884) 14 Q.B.D. 273, 279, per Coleridge L.C.J.
82. See Buckoke v. Greater London Council [1971] Ch. 655,670.
83. See para. 8.

the defence of duress, there are relatively few examples of a general necessity defence[84]. Three, those to be found in the American Law Institute's Model Penal Code (section 3.02), the Indian Penal Code (Article 81) and the German Penal Code (section 54) are set out in the Appendix[85]. The first two, although very differently drafted, adopt a fundamentally similar approach. The Model Penal Code gives a defence if the defendant believes his conduct to be necessary to avoid a harm or evil to himself or to another, provided that the harm or evil thereby sought to be avoided is greater than that sought to be prevented by the law defining the offence charged. The Indian Code provides that if the defendant does something knowing that it is likely to cause harm, it will not be an offence if done without criminal intent for the purpose of preventing or avoiding other harm to person or property: and, explaining this provision, the Code makes it a question of fact whether the harm to be prevented or avoided "was of such a nature and so imminent" as to justify or excuse the risk of what was done, knowing that it was likely to cause harm. The illustrations make clear that the balancing of harms is implicit in the provision. The German approach makes no reference to the defendant's mental element in the conduct in question and limits the harm sought to be avoided to immediate danger threatening the body or life of the defendant or defined members of his family.

(b) Is a general defence of necessity required?

38. We have mentioned in connection with duress that the ability of the court to mitigate the penalty is not, in our view, an adequate argument to meet the case where even a formal conviction without further penalty seems unjust in principle in view of the pressures to which the defendant has been subjected.[86] Similar considerations are present in the case of

84. The historical reasons for this are summarised in Glanville Williams, Criminal Law (2nd ed., 1961), p. 724.

85. Appendix, pp. 56, 60 and 62.

86. See para. 9.

situations involving necessity; as Lord Denning M.R. observed in the example he postulated in Buckoke's case referred to in paragraph 29, "such a man should not be prosecuted. He should be congratulated"[87]. And, again as in the case of duress, because of the discretionary nature of the grant of a discharge, there can be no certainty that the defendant will in fact be discharged in every case in which, were it available, a statutory defence of necessity might be successful. In any event, the court's discretion may be restricted as it has been in regard to certain road traffic offences[88] where disqualification is mandatory unless the court thinks there are "special reasons" for not disqualifying. It may be thought better that the defendant should not have to rely on the discretion of the court in regard to sentence in a necessity situation, particularly where that discretion can operate only within the narrow limits set by "special reasons"[89].

39. Quite apart from discretionary factors relating to sentencing, certain other factors peculiar to necessity arise from the outline of the present law set out in paragraphs 31-35 which must be mentioned before assessing the desirability of a general defence of necessity. They may be summarised as follows -

(i) The case of Buckoke[90] indicates that, even if a general defence at present exists, the courts will be slow to apply it, and in many situations, as in Kitson[91], the possibility of its being available may not be adverted to at all.

87. [1971] Ch. 655, 678.

88. See Road Traffic Act 1972, s. 93(3).

89. As to the meaning of "special reasons", see R. v. Lundt-Smith [1964] 2 Q.B. 167.

90. See para. 29.

91. See para. 31.

(ii) The reluctance of the courts to assert a general defence has led to the inclusion of special provisions in some legislation[92]. Yet even these leave room for uncertainty. For example, section 30(1) of the Fire Services Act 1947 authorises members of fire brigades on duty and police constables to enter or if necessary break into premises where a fire has broken out, without the owner's consent, and do everything necessary to extinguish it. In view of the specific protection given to defined classes, it is, having regard to the courts' general attitude to the existence of the general defence, uncertain whether the protection against a charge of criminal damage would extend to off-duty firemen or members of the public going to the rescue in the same emergency.

(iii) While the qualifications upon liability represented in many offences by such words as "dishonestly", "unlawfully", "without reasonable excuse" etc. may embrace many situations in the context of those offences where a defence of necessity would otherwise be required[93], they are not appropriate to cover situations arising in other offences, which could only be dealt with by a necessity defence.

---

92. See para. 33.

93. See para. 32.

(iv) In assessing the need for the defence, account must be taken of the effect on public security and good order of allowing the defence.

40. Our provisional conclusion is that, having regard to the factors set out in the previous paragraphs, a general defence of necessity is desirable, provided that it can be framed in terms which would obviate its being invoked in extravagant and inappropriate cases. We turn, therefore, to the consideration of what should be the elements of a general defence.

(c) Elements of a defence of necessity

(i) A subjective or objective test?

41. The basis of a defence of necessity is that the defendant is faced with the dilemma of choosing between, on the one hand, not committing an offence thereby making it likely that some harm will occur, and, on the other hand, committing the offence in the hope of preventing the harm occurring. It is a defence which depends upon the conscious exercise of judgment by the defendant, and for that reason it is our view that whether or not the defence should be allowed in any particular case should depend not upon whether objectively it was necessary to commit the offence to avoid the harm, but upon whether the defendant subjectively considered that it was necessary[94]. If the defendant genuinely believed that the commission of the offence was necessary to avoid the harm that was otherwise likely to occur then the defence should be available. Of course, the reasonableness of his belief will be a matter for the court to take into account in assessing its genuineness.

94. The defence will contain an objective element also as the harm avoided must objectively be greater than that actually done. See para. 43.

(ii) Should the "balance of harms" test be used?

42. Since necessity is concerned with the avoidance of the greater evil, we suggest that, in principle, it is right that this concept should form part of the definition of the defence. In duress we have taken a different view for reasons we have explained. But in necessity situations the question is the more general one of comparing the impending harm with the harm done by the defendant - for example, saving the life and property of many people as against crossing the traffic lights at red, or saving one's entire property as against inflicting nominal economic damage upon another[95]. We see less difficulty, therefore, in a general application of the criterion of balance of harms in this context, particularly when it is recalled that in many instances the infraction of the law by the defendant may be of a trivial character[96]. But a balance of harms test of itself perhaps implies that the harm avoided may be only just, on balance, greater than the harm done; This, however, does not reflect the reality of cases in which, as we have seen, the defence of necessity might have been thought appropriate[97]. Accordingly, in order to clarify the range of circumstances in which the defence should apply, we believe some indication must be given that its use should be limited to cases where the impending harm is out of all proportion to the harm done by the defendant.

43. We have taken the view that the necessity for the defendant's action must be tested according to his belief and that the basic test of necessity should be that the harm averted was greater than the harm done. Combination of these two elements means that the test, so far as the defendant is

---

95. See Crutchley (1831) 5 C & P. 133; the report does not disclose whether the harm threatened was, in fact, purely economic.

96. See para. 30.

97. E.g. the cases referred to in para. 31.

concerned, must require the defendant to have believed that he sought to avoid a greater harm than that actually done. We consider that the jury must be satisfied that this was the defendant's belief; but we take the view that, in addition, the jury must find that the harm which the defendant thought he was avoiding was objectively greater than that actually done. This objective element of the necessity defence is to be found in both the Model Penal Code and the Indian Penal Code[98].

44. A further question which arises from our provisional acceptance of the balance of harms test is whether the defence should be entitled to lead evidence to juries upon how to decide whether a particular harm is greater than another. On the one hand, it may be thought that experience in operating defences not dissimilar to that here proposed[99] suggests that some further guidance is desirable. Thus, it would be possible to provide that as a matter of law, if the harm to be avoided involves death or personal injury, this would be a defence to a charge of an offence involving physical harm to the person (assuming that the former is a greater injury that that charged); but that if the harm involves only injury to property or some other harm this would never be a defence to a charge of causing some physical harm. On the other hand, we have already pointed out that the balance of harms test is probably less difficult of application here than it would be in the context of duress. Moreover, we are doubtful whether a further guideline such as that suggested above would work satisfactorily. While it might cover some otherwise contentious cases, there are other cases in which its operation could produce anomalous results. A sees that B's house is on

98. See Appendix, pp. 60 and 56.

99. E.g. the "public good" test in the Obscene Publications Act 1959, s. 4(1), where the jury have to weigh all the factors and decide on balance whether a book is proved to be justified as being for the public good. See R. v. Calder & Boyars Ltd. [1969] 1 Q.B. 151, 172.

fire and, in order to reach it to extinguish the flames, he is obliged to push aside C, who is bent on obstructing him. Here, the harm to be averted involves damage to property while the harm done involves a minor offence of assault. In principle, it may be thought that A ought to have a defence to a charge of assaulting C; but it seems to us doubtful whether the guidance suggested can be so framed as to meet this situation. Subject, therefore, to the sole qualification requiring that the harm avoided must be out of all proportion to the harm done, we are doubtful as to the utility of further provision defining the balance of harms test.

(iii) Against whom must the harm be directed?

45. As in the case of duress, and again in accordance with the two Codes mentioned in paragraph 43, we consider that the harm occasioning the defendant's conduct need not be directed against him; indeed, in the majority of instances cited in the foregoing paragraphs[100] the harm in question faces another. We propose that this element of the defence should not be restricted in any way.

(iv) A legislative purpose to exclude a defence of necessity

46. A provision in the Model Penal Code which we must mention[101] allows the necessity defence only if "a legislative purpose to exclude the justification claimed does not otherwise plainly appear". It is, of course, always open to the legislature to provide that a particular defence shall not operate to exclude a charge of a particular offence. Subject to consideration of possible exceptions to the operation of the defence[102] we provisionally take the view that there is no need for a provision such as that to be found in the Model Penal Code.

---

100. See e.g. paras. 31 and 42.

101. Sect. 3.02(1)(c).

102. See para. 50.

(v) Exclusion where the defendant himself has been negligent

47. A second provision in the Model Penal Code which we consider[103] states in effect that when the defendant was reckless or negligent in bringing about a necessity situation, the defence will not be available in a prosecution for any offence for which recklessness or negligence is sufficient, as the case may be. We are not certain of the ambit of this provision. Does it cover, for example, the case where, as a result of his reckless driving, A severely injures B and, in order to save B's live, A takes him to hospital and exceeds the speed limit in order to reach it as soon as possible? In this case A will be liable in any event to be charged with reckless driving or, if the victim dies, with causing death by dangerous driving, and it would, we think, be wrong to deprive him of the necessity defence in respect of the later offence of exceeding the speed limit, as the Model Penal Code appears to do.

48. On the other hand, there are situations where operation of the provision seems appropriate. For example, legislation prohibits driving onto the shoulder of a motorway: suppose that D negligently runs out of petrol and drives onto the shoulder in order to avoid obstruction of the motorway. In this instance, the provision permits D to be prosecuted for driving onto the shoulder even if he has parked there to avoid being charged with the more serious offence of obstructing the motorway, because the lesser charge arises out of his antecedent negligence in running out of petrol.

49. The essential difference between the examples given in the two preceding paragraphs is that in the example given in paragraph 47 the defendant has already committed an offence with which he can be charged when he commits a further offence in the hope of avoiding even greater harm, while in the

---

103. Sect. 3.02(2).

example given in paragraph 48 the defendant chooses which of two offences to commit, the reason for the choice arising at all being the defendant's prior negligence. We believe that a provision such as that to be found in the Model Penal Code would be useful if it were so framed as clearly to exclude the availability of the necessity defence in the latter type of case. We consider also that (as in the Model Penal Code) any such provision must be framed in objective terms to avoid the test being based upon the intent with which the defendant chose to resort to conduct which would be an offence but for the defence of necessity. We conclude that these criteria may be met by a provision on the following lines -

> "The defence of necessity does not apply where the defendant has put himself into a position where he must commit one offence in order to avoid another".

It will be noted that a provision on these lines would not exclude the defence in the accident case given in paragraph 47. A, in that case, has already committed an offence of reckless driving, and his subsequent conduct is, therefore, not resorted to in order to avoid commission of another offence. The necessity defence therefore remains available to him. It is not, however, available to D in the example postulated in paragraph 48, for there his offence of driving onto the shoulder comes about because he is avoiding the commission of the other offence of obstructing the highway brought about by his antecedent negligence. Accordingly, we put forward a provision on the foregoing lines for consideration and comment.

(vi) Should any specific offences be excepted from the defence?

50. In relation to duress[104] we have provisionally proposed that there should be no exceptions to the offences for which

---

104. See para. 25.

the defence may be available, even though the charge be murder or serious injury to the person. In that case, however, the criteria adopted for the defence, namely, that there must be apprehension of immediate death or serious physical injury, differ from those advanced for necessity.

51. The question whether necessity can ever justify the taking of human life is the most contentious to have been raised in relation to the defence, and has been productive of many examples for discussion, albeit few decided cases[105]. The cases themselves are not satisfactory; the ratio of the leading one, R. v. Dudley and Stephens[106], cannot be regarded as clear and, as we have indicated[107], may not be decisive on the issue as to whether taking of life may be justified.

52. We take the provisional view that there need be no specific exceptions to the operation of a general defence such as we have discussed. The defence requires a belief by the defendant that his conduct was necessary to avert some greater evil and a finding by the jury that that evil was, judged objectively, substantially greater than that which his conduct actually involved. Where the defence is relied upon in the case of the taking of another's life[108], the result may be thought to be unacceptable in certain cases, in which event the only remedy, in our view, is the complete exclusion of the defence in cases involving the taking of life. Provisionally, we propose no such exclusion.

---

105. The arguments are summarised and further discussed in Smith and Hogan, Criminal Law (3rd ed., 1973), pp. 56 160-164.

106. (1884) 14 Q.B.D. 273.

107. See para. 35.

108. See e.g. Illustration (a) in the Indian Penal Code, p. 56 below; and see U.S. v. Holmes 26 Fed. Cas. 360 (1842).

(vii) Other limitations upon the proposed defence

53. Provisionally we do not suggest a wide restriction upon cases in which the defence may be raised, but we have also pointed out[109] that account ought to be taken in making provision for the defence of its possible effect on public security and good order. We consider it desirable, for example, to exclude the possibility of the defence being raised in the context of political protest when the situation facing the defendant is not one which requires immediate decision on his part but rather one where he seeks by his activities to obtain results which by lawful means would require the use of legitimate means of persuasion over a longer period. In our provisional view the political activist, however desirable his aims might be, should, on grounds of public policy, not have the opportunity of arguing that necessity forces him to adopt unlawful tactics. Of course, it would be possible in this type of case for the judge simply to direct that there was no evidence of necessity and that the jury should accordingly reject the defence; but in doing so it might be objected that the judge was really resorting to public policy to exclude certain types of case, rather than giving a ruling upon the evidence raised by the defendant. We take the view, therefore, that a proviso excluding the type of case under consideration should be included if a satisfactory formula can be devised.

54. One possible means of confining the defence would be to provide that it should be raised only in situations where the defendant is confronted with a situation of emergency. In one sense, however, such a requirement could be regarded as surplusage: the very term "necessity" implies that the situation confronting the defendant is an emergency. Nothing, it might be said, requires such immediate decision upon a course of action as a situation of necessity, for if immediate

---

109. Para. 39(iv).

action is not required, there is no necessity for it. Nor would such a provision necessarily help to exclude the cases referred to in paragraph 53 since a defendant might claim that no other course was open to him at the time than the one which he in fact took.

55. We have come to the provisional conclusion that the most effective formulation would provide that the defence should not be available in circumstances where the greater harm, which the defendant alleges he was seeking to avoid by committing the offence with which he is charged, consists of the doing by some other person of an act which that person was legally entitled to do. A provision on these lines will, it is suggested, exclude the possibility of the defence being raised in cases where individuals are interrupted or obstructed in the course of their lawful business and the excuse given by those perpetrating such interruptions or obstructions is that this is the only practical means of drawing attention to, or of achieving, their aims. We are aware of the difficulties of a provision on the foregoing lines. Its eventual formulation in the Code must, we think, distinguish clearly between the defendant's intention to do the act constituting the offence and any ulterior purpose he may have had in so acting; and in this connection we make it clear at this stage that we are concerned, not with the merits or demerits of activities which might be described as "politically motivated", but only to ensure that necessity as we have provisionally defined it should not be invoked as a defence to criminal charges in connection with those activities.

(viii) Burden of proof

56. In regard to the burden of proof on the defendant when the plea of necessity is raised, we see no reason to follow a course different from that proposed in relation to duress[110].

110. See para. 27.

Accordingly, we propose that sufficient evidence should be required in support of a plea of necessity to raise an issue upon it, and that, thereafter, it should lie upon the prosecution to prove its case beyond reasonable doubt in the normal way, showing that there was no such necessity.

(d) Summary

57. Our provisional proposals in regard to the defence of necessity may be summarised as follows -

(i) There should be a general defence of necessity (paragraph 40).

(ii) It should be available where the defendant himself believes that his conduct is necessary to avoid some greater harm than that which he faces (paragraphs 41-42).

(iii) The harm to be avoided must, judged objectively, be found to be out of all proportion to that actually caused by the defendant's conduct (paragraphs 42 and 43).

(iv) The harm to be avoided need not be directed against the defendant; it may, provided always that the test in (iii) is satisfied, be directed against himself or his property or against the person or property of another (paragraph 45).

(v) The defence should not apply where the defendant has put himself into a position where he must commit one offence in order to avoid another (paragraph 49).

(vi) The defence should be available to a charge of any offence, however serious (paragraph 52).

(vii) The defence should not be available where the greater harm, which the defendant alleges he was seeking to avoid by committing the offence with which he is charged, consists of the doing by some other person of an act which that person was legally entitled to do (paragraph 55).

(viii) As in the case of duress, the burden should be on the defendant to give sufficient evidence to raise an issue as to necessity (paragraph 56).

IV COERCION

(a) Present law

58. The term coercion is used to deal with the special "duress" position which may arise in the context of the marriage relationship. At common law, the presumption was that a wife who committed a crime in the presence of her husband acted under his coercion. Section 47 of the Criminal Justice Act 1925, however, provides that -

> "Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished, but on a charge against a wife for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband."

59. The Indian Penal Code gives no special privilege to the wife; the Canadian Code (section 18)[111] appears to eliminate coercion as a special defence, as does the Model Penal Code. The New Zealand Code does not mention it although, by section 20, "all rules and principles of the common law which render

111. Appendix, p. 54.

any circumstances a justification or excuse for any act or omission, or defence to any charge" remain in force except so far as inconsistent with the Code or other legislation. The Australian Territories draft Code, however, retains an express defence in section 21.[112].

(b) Problems presented by the defence

60. While section 47 of the 1925 Act appears at first sight to be straightforward in application, it does in fact raise several problems of interpretation. The most obvious relates to the meaning of the term coercion. In normal parlance, and in many legal works, the term is a synonym for duress, and if that is its meaning here, the section does little other than put a married woman in the same position as anyone else. The parliamentary debates, however[113], make clear that coercion was intended to be wider than compulsion or duress, yet, other than as a synonym for duress, the term has never been defined by a higher court of record[114].

61. Another difficulty is presented by the interpretation of "in the presence of [the wife's] husband", which, according to old authority, permits a distinction between the situation where, for example, the husband is in the next room and comes in immediately after the commission of the offence[115] (held, not in his presence) and where he remains outside a shop within which his wife commits an offence[116] (held, within his presence).

---

112. Appendix, p. 58.

113. Hansard, House of Commons (1925) vol. 188 col. 873 et seq.

114. See, however, Pierce (1941) 5 Jo.Cr.L. 124.

115. Hughes (1813) 2 Lew. 229.

116. Connolly (1829) 2 Lew. 229; but cf. White, "The Times", 16 February 1974.

(c) Should the defence be retained?

62. In deciding whether or not the defence need be retained, it is relevant to note its history. Abolition of the common law presumption was recommended as early as 1845[117] and was proposed also in section 23 of the draft Code of 1879. Complete abolition of the defence was recommended in 1922[118] "having regard to the present unsatifactory state of the law upon the subject and to the altered status of married women..." The state of the law has not, it may be said, become less unsatisfactory in the fifty years since this first call for the abolition of the defence and, as has been indicated above, the abolition of the old presumption has only served to increase the problems of interpretation.

63. The decision whether or not to abolish the defence depends essentially upon an evaluation of whether it is appropriate to modern conditions. Relatively recently it was possible to put forward the view that "there still remains a considerable proportion of married woman who regard their husbands as their lord and master to disobey whose commands would be unthinkable."[119] We doubt, however, whether this view would command substantial support today and, in any event, we believe that the defence is not widely used today[120].

64. The defence of coercion is available neither to a daughter committing an offence in the presence of her father[121] nor to an unmarried woman in the presence of the individual with whom she lives. But duress is available to them in the

---

117. Parl. Pa. xxiv, 114, Report of Criminal Law Commissioners, 1845.

118. (1922) Cmd. 1677, the Avory Committee Report on the Responsibility of the Wife for Crimes committed under the Coercion of the Husband.

119. J.Ll. J. Edwards "Compulsion, Coercion and Criminal Responsibility", (1951) 14 M.L.R. 297 at p. 313.

120. See, however, R. v. White, fn. 116 above.

121. Assuming the daughter to be old enough to be responsible for her actions.

appropriate circumstances and, even if coercion were abolished, that defence (as we have provisionally defined it)[122] would likewise be available to married women. Where threats by the husband fall short of actual duress, she, like anyone else, would be able to plead the facts in mitigation. We take the view that this would be the correct policy for the law to adopt in future, and accordingly propose that the defence of coercion should be abolished.

V. OFFICIAL INSTIGATION AND ENTRAPMENT

(a) Present Law

65. Cases in this country involving the active participation of the police or informers in the course of the commission of an offence have varied in their results according both to the degree of participation and the nature of the offence. Thus in some cases[123] the participation has neither been recognised as a defence, nor has it had any effect upon the penalties imposed upon the defendants, although the courts have sometimes expressed disapproval of the practice of the police in obtaining evidence of the offence by appearing to take part in it[124]. In other cases, the courts have felt bound to convict because the offences concerned were of strict liability[125], even though in some instances the court again appears to have expressed disapproval because the offence would not have been committed but for the participation of law enforcement officers[126].

---

122. Para. 28.

123. E.g. Brannan v. Peek [1948] 1 K.B. 68 and Sneddon v. Stevenson [1967] 1 W.L.R. 1051.

124. See Brannan v. Peek [1948] 1 K.B. 68, 72.

125. E.g. French v. Hoggett [1968] 1 W.L.R. 94; Browning v. J.W.H. Watson (Rochester) Ld. [1953] 1 W.L.R. 1172.

126. See Browning v. Watson [1953] 1 W.L.R. 1172, 1177.

66. The courts have in recent years, however, recognised active police participation in an offence amounting to incitement in the form of encouragement as a factor in mitigating sentence. In the first type of case cited in the previous paragraph, where police activity had no effect upon the penalties imposed, it seems that, at any rate in some instances, the police went no further than making themselves available in case the defendant was minded to commit an offence. Thus in Sneddon v. Stevenson[127] the officer concerned so drove the car as to enable a prostitute to solicit him if she were so minded. By contrast, in Birtles[128] where the defendant was convicted of a bank robbery, it was taken into account in mitigation that on the evidence the police officer concerned might well have arranged to be introduced to the defendant as another criminal, might have allowed the use of his car to "case the joint" and might even have supplied the defendant with the imitation firearm which he used during the raid. The court said[129] -

> "It is one thing for the police to make use of information concerning an offence that is already laid on .... But it is quite another thing, and something of which this court thoroughly disapproves, to use an informer to encourage another to commit an offence or indeed an offence of a more serious character, which he would not otherwise commit, still more so if the police themselves take part in carrying it out."

67. The law has been yet further developed in three recent cases. In McCann[130], an appeal against a four year sentence for theft, the Court of Appeal considered it possible that the defendant might not have carried through the theft had not

---

127. [1967] 1 W.L.R. 1051.

128. [1969] 1 W.L.R. 1047.

129. Ibid., at 1049-1050.

130. (1972) 56 Cr. App. R. 359.

the opportunity of doing so been presented by the police through the intervention of an informer. There was, however, ample evidence of conspiracy and the court therefore dealt with the matter of sentence "on the basis that the defendant appeared at quarter sessions charged with conspiracy to steal rather than with the actual theft"[131]. The sentence of two years' imprisonment which the court substituted was one which it considered appropriate for conspiracy. In Foulder, Foulkes and Johns[132], where the defendants were charged with unlawful possession of drugs, evidence was given by a plain-clothes police officer that he incited the first defendant to obtain the drugs and to pass them to him; when the defendants met him for this purpose, all three were arrested. This evidence was given at a "trial within a trial" in the absence of a jury. The Deputy Chairman of Inner London Quarter Sessions agreed with the defence submission that the activity of the police went far beyound that in Sneddon v. Stevenson, and the police evidence was excluded. Upon the prosecution offering no evidence before the jury, the defendants were acquitted. In Burnett and Lee[133], L gave evidence that E, who was acting with the knowledge of the police as an agent provocateur, had urged him for a period of some 2 months to obtain forged U.S. dollar bills from B as a result of which L and B delivered 845 forged bills to E. E was not called as a witness, leaving uncontradicted L's account of how the offence came to be committed. The Court held that the evidence of guilt was inadmissible on the grounds of unfairness, and that the case should be withdrawn from the jury. It will be observed that in the first case the court was prepared to reduce the sentence to that appropriate for conspiracy (with which the defendants were not charged), that in the second, the case failed for lack of admissible evidence before the jury, while in the third, the case appears to have been

131. (1972) 56 Cr. App. R. 359, 365.

132. [1973] Crim. L.R. 45; see also (1974) 37 M.L.R. 102.

133. [1973] Crim. L.R. 748.

withdrawn because of "unfairness" rather than because of lack of admissible evidence. It seems fair to remark that all of them reached a conclusion in substance the same as that which would have been reached had a defence of police entrapment been available.

68. The most recent case of McEvilly[134], a decision of the Court of Appeal, appears to some degree to reverse this trend. A police officer H, acting on information from W, met M and W, and represented that he was willing to buy stolen spirits from M, and quantity, price and arrangements for delivery were agreed. Spirits were later stolen from a warehouse and received by M. As in Foulder, a "trial within a trial" took place as to the admissibility of H's evidence, but unlike that case, the judge ruled it admissible and M was convicted of handling stolen goods. His appeal was dismissed. The Court of Appeal said the evidence of H was admissible, and furthermore, that the evidence in Foulder and Burnett should also have been admitted. The court denied that entrapment found any place in English law and, in any event, the police activity here would not fall within such a doctrine. H received information leading him to believe that spirits were to be stolen, and there was no reason, in the court's view, why he should not have put himself forward as a willing means of disposal to bring to justice those involved. In so putting it, the court appears to have taken a view similar to that taken in Sneddon v. Stevenson[135] as to the legitimacy of police activities.

---

134. [1974] Crim. L.R. 239; the statement of facts is based on the account given in this report.

135. [1967] 1 W.L.R. 1051; see para. 66.

(b) Entrapment in other jurisdictions

69. The defence of entrapment is not recognised in Australia or New Zealand but has been recognised in the U.S.A.[136] in cases where the police, or police agents, were used as agents provocateurs. Alternative bases were suggested for the defence in these American decisions. The majority of the judges thought the defence arose when the criminal design originated in the mind of the government officers; important considerations were whether the defendant was innocent and law-abiding and whether the offence was one which the defendant would never have committed if the officers had not imspired, incited, persuaded and lured him to commit it. The minority thought the defence existed because the methods used to secure conviction could not be countenanced when they fell below accepted standards for the proper use of governmental power, in effect a rule of public policy.

70. The American Law Institute's Model Penal Code offers a formulation of this defence. It would make it available (except when causing or threatening bodily injury is an element of the offence charged) where the defendant proves that his conduct occurred in response to an entrapment. It then provides that -

> "A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offence, he induces or encourages another person to engage in conduct constituting such offence by either:
>
> (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

136. Sorrels v. U.S. 287 U.S. 435 (1932), Sherman v U.S. 356 U.S. 369 (1958); see also J.D. Heydon, "The Problems of Entrapment" [1973] C.L.J. 268, especially 278 et seq.

(b) employing methods of persuasion or inducement which create a substantial risk that such an offence will be committed by persons other than those who are ready to commit it."[137]

71. There are thus narrow limits put upon the scope of the defence, restricting its application to those who are not ready to commit the offence, but who are nevertheless persuaded or induced by a law enforcement officer to do so. This would seem to exclude the defence where the police merely make themselves available in case the defendant is minded to commit an offence; even in cases where the police take a more active part in inducing a person to commit an offence, the defence is not available if the defendant was not averse to taking part. It is at once apparent that the issue of whether the defendant was ready to commit the offence is likely to make highly relevant the character of the defendant, since whether he has participated in similar offences in the past would be relevant (whether or not he has been convicted of them). It is presumably for this reason that the Model Penal Code provides that the issue of entrapment shall be tried in the absence of the jury[138].

(c) Should a defence of entrapment be provided?

72. It must be recognised that there are many situations where in the interests of society it is right that the authorities should be able to resort to conduct which induces the commission of an offence in order to obtain the evidence to secure the conviction of those whose illegal activities might otherwise go unpunished. The commonest of such cases concern offences of selling goods in contravention of the Food and Drugs Act 1955, or the Trade Descriptions Act 1968. There are

137. Sect. 2.13(1); Appendix, p. 59-60.
138. Model Penal Code s. 2.13(2).

in addition more serious instances such as those involving corruption on the part of the police or trafficking in drugs where the chances of apprehending offenders are slender unless they can be caught committing the offence. On the other hand, it may be thought quite unacceptable to convict and punish a person for criminal conduct into which he has been deliberately led by the authorities.

73. If a defence of entrapment is to be provided, and we are undecided on the question, our provisional view is that it should be at least as narrowly circumscribed as the defence provided by the Model Penal Code which, as we have seen, requires inducement or encouragement to commit an offence by either (a) false representations to induce the defendant to believe that the proposed conduct is not an offence, or (b) use of methods of persuasion creating a substantial risk that the offence will be committed by individuals who would not otherwise have done so. In terms such as these the defence would be available only in the more reprehensible instances of police action, yet would not unduly inhibit the necessary use of informers and traps to ensure the detection of offenders otherwise difficult to catch.

74. The effect of adopting the provision in the Model Penal Code may be judged by considering the English cases referred to previously. Clearly, the officer in Sneddon v. Stevenson[139] was not guilty of entrapment under that provision. Nor did the evidence in Birtles[140] amount to an entrapment, because for all that appears, the defendant was the prime mover in the scheme, and the police officer might well have given the help he did only in order to maintain contact with the defendant and to follow the progress of events. A similar remark applies to McCann[141]. Merely presenting the defendant with the

139. [1967] 1 W.L.R. 1051.

140. [1969] 1 W.L.R. 1047.

141. (1972) 56 Cr. App. R. 359.

opportunity of committing an offence should not be entrapment. The court evidently took the same view of the conduct of the police and the informer in McEvilly[142]. On the other hand, both Foulder, Foulkes and Johns[143] and Burnett and Lee[144] may be regarded as illustrations of where the line is to be drawn. Particularly in the latter, the fact that, according to the defendant's evidence, the informer's urging had to continue for two months seems to indicate that the defendant would not have been ready to commit the offence apart from such urging.

75. It may be said that it is not necessary for the defence to be incorporated into English law, because the court will always be able to mitigate the sentence, even to the extent of granting the defendant an absolute discharge. It is common practice to mitigate punishment upon evidence that the defendant was of weak character and that he took part in the offence only because he was prevailed upon to do so by others; and from this point of view it makes no difference whether the urging was by a police officer or by somebody not connected with the police. On the other hand, in a serious case of entrapment by the police some will think it insufficient merely to mitigate the punishment. Their view would be that considerations either of justice to the defendant or of public policy in dissuading the police from such activities suggest that a complete defence should be recognised by law. Provision of a defence which will result in the defendant being acquitted would, according to this argument, be the most effective means of ensuring that the police do not gain any advantage by abuse of the process of the law.

---

142. [1974] Crim. L.R. 239

143. [1973] Crim. L.R. 45.

144. [1973] Crim. L.R. 748.

76. One possible argument against the last-mentioned considerations is that it may create practical difficulties in relation to police informers. In the normal way, a defendant may well not know that he has been trapped into committing an offence, though he may strongly suspect that this is so. His only way of finding out what he suspects will be by way of a wide-ranging cross-examination of the prosecution witnesses to discover whether an informer was involved and, if so, who he was. On the other hand, this difficulty is found equally under the present law, when the defendant seeks to prove the activities of a police informer either by way of mitigation or as in Burnett and Lee in order to exclude evidence - assuming, that is, that the latter course is still open to a defendant after the Court of Appeal's decision in McEvilly[145]. It is true that in Burnett and Lee the defendant himself had obtained evidence that E, the person who persuaded him, was a police informer. If a defence of entrapment were to be allowed it might be necessary to add a proviso that nothing in the relevant provision of the Code should affect any rule of practice relating to cross-examination designed to reveal the identity of police informants. This would mean that the defendant would not in practice have the defence unless he is in possession of the evidence without having to elicit it by cross-examination of a police witness.

77. Another possible objection to the defence is that by its very nature it puts in issue the character and previous record of the defendant who relies upon it; the admission, for example, of evidence that he had voluntarily taken part in a number of similar offences on previous occasions may be prejudicial on the issue of exactly what part he played in the offence for which he is on trial. However, where the defence is raised the defendant presumably admits that he did the act charged against him, and indeed probably admits that he had

145. See para. 68.

the mental element required. In these circumstances, it may be that there is little danger of a miscarriage of justice being caused by evidence of the defendant's previous convictions; and in any case if a defence were available, it would be for the defendant to decide, as he does at present in relation to mitigation and the exclusion of evidence, whether the defence is sufficiently attractive to make it worth while to allow this type of evidence to be given.

78. Finally, as in the case of Foulder, Foulkes and Johns[146], it may be possible to achieve the same result as would follow from provision of a defence by a rule as to admissibility of evidence gained by entrapment. The authority of the particular case mentioned must now be regarded as doubtful[147], but it remains open to provide specifically that this kind of evidence should be presented in the absence of a jury by means of a "trial within a trial"; if such evidence is held inadmissible and no other evidence is presented in open court, the defendant's acquittal will follow. It may be argued, however, that it is undesirable that decisions upon important questions of fact such as this should be taken, not by the jury after evidence heard in open court, but by the judge sitting alone. If it is thought necessary to secure proper presentation at the trial of this kind of evidence, it may therefore be that a properly framed defence of entrapment would have to be provided.

(d) Conclusion

79. Recent cases indicate that there may be some need for a defence of entrapment to be made available, but we have also shown the very substantial difficulties which the introduction of such a defence would entail. Accordingly, we would particularly welcome the views of those concerned with the practical administration of the criminal law as to whether the

146. [1973] Crim. L.R. 45.

147. See McEvilly [1974] Crim. L.R. 239, and para. 68.

problems raised by the situations discussed in these paragraphs may be most effectively dealt with by provision of a defence, or by appropriate disciplinary measures and by mitigation of penalties by the courts. Should a defence be thought desirable, we have indicated in paragraph 71 the situations with which in our provisional view it ought to deal.

VI. SUMMARY AND QUESTIONS

80. Our proposals in regard to the two main defences of duress and necessity have been summarised in paragraphs 28 and 57, and we do no more here than invite comment upon them and upon our proposal to abolish the defence of coercion referred to in paragraph 64. There are, however, various matters throughout the Paper upon which the views of recipients would be of particular value to us, and we summarise these below -

(a) Are we right in our view that the meaning of the "immediacy" of a threat in duress is not in need of further elaboration or definition (paragraph 21) and that, where the threat is to a third person, the relevant test should be that the threat is avoidable only by compliance with the demand made of the defendant (paragraph 22)?

(b) Are we right in our provisional view that there are no offences, even so serious as murder, in respect of which duress should not be capable of affording a defence (paragraph) 25?

(c) Is special provision needed to exclude the defence of duress where the defendant has

become liable to be compelled to commit an offence as a result of joining a conspiracy or association (paragraph 26)?

(d) In deciding whether the defence of necessity is available in any particular case, is some further provision such as that outlined in paragraph 44 required to indicate when as a matter of law one harm is greater than another? We provisionally reject any such provision and propose that the test be qualified only in that the harm threatened must be out of all proportion to that done (paragraph 42).

(e) Should there be any offence (e.g. murder) in respect of which the defence of necessity should not be available? We provisionally reject any such exception (paragraph 52).

(f) Does experience indicate a need for a defence of entrapment such as that outlined in paragraph 71? Arguments for and against such a defence may be advanced and we seek the views of those concerned in the practical administration of the criminal law.

APPENDIX: General defences in overseas Codes

The Criminal Code of Canada

S. 17 Compulsion by threats

A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm or arson.

S. 18 Compulsion of wife

No presumption arises that a married woman who commits an offence does so under compulsion by reason only that she commits it in the presence of her husband.

s. 24 Compulsion

(1) Subject to the provisions of this section, a person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is protected from criminal responsibility if he believes that the threats will be be carried out and if he is not a party to any association or conspiracy whereby he is subject to compulsion.

(2) Nothing in subsection (1) of this section shall apply where the offence committed is aiding or abetting rape, or is [one of the following offences, i.e. treason, sabotage, piracy, piratical acts, murder, attempt to murder, wounding with intent, injuring with intent to cause grievous bodily harm, abduction, kidnapping, robbery, arson].

Section 81 Act likely to cause harm; but done without criminal intent, and to prevent other harm

Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Explanation - It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

Illustrations (summarised)

(a) A, a ship's captain, without fault, finds that, before he can stop the ship, he must inevitably collide with vessel B containing 20 people unless he changes course; but by so doing he must risk colliding with vessel C containing 2 people, although he may clear it. If A so alters his course to avoid danger to B he is not guilty of an offence, although he may collide with C.

(b) A, in a great fire, pulls down houses to prevent it spreading, in order to save human life or property. If it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of an offence.

Section 94 Act to which a person is compelled by threats

Except murder and offences against the state punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence:

Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself, short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1: A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2: A person seized by a gang of dacoits, and forced by threat of instant death, to do a thing which is an offence by law, for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

19. Compulsion

(1) A person is not criminally responsible for his conduct when he engages in it for the purpose of saving himself or another from immediate death or grievous bodily harm, threatened to be inflicted upon him by some person in a position to execute the threats, and he believes himself to be unable otherwise to prevent the carrying of the threats into execution.

(2) The provisions of sub-section (1) of this section shall not apply to conduct by reason of which the person would be liable to be convicted for treason, murder, attempted murder, piracy, attempted piracy, grievous bodily harm or an attempt to cause such harm, nor to a person who, because he is a party to an association or conspiracy, has rendered himself liable to have such threats made to him.

20. Compulsion by Husband

A married woman is not free from criminal responsibility for engaging in conduct merely because she does so in the presence of her husband.

21. Coercion by Husband

On a charge against a wife for any offence other than treason or murder it shall be a good defence to prove that the offence was committed in the presence and under the coercion of her husband.

Section 2.09. Duress.

(1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

(2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

(3) It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under this Section. [The presumption that a woman, acting in the presence of her husband, is coerced is abolished.]

(4) When the conduct of the actor would otherwise be justifiable under Section 3.02, this Section does not preclude such defense.

Section 2.13. Entrapment.

(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage

in conduct constituting such offense by either:

(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

(b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

(2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.

(3) The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

Section 3.02. Justification Generally: Choice of Evils.

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

German Penal Code

Section 52 - Duress

1. No act constitutes an offence if its perpetrator was compelled so to act by irresistible force or by a threat entailing an immediate and otherwise not avertible danger to his own or one of his family members' body or life.

2. Within the meaning of this penal statute, family members are relatives in the ascending or descending line and in-laws, as well as adoptive and foster parents and children, spouses and their brothers and sisters, brothers and sisters and their spouses, and fiancés.

Section 54 - Necessity

No act constitutes an offence if it was committed (under circumstances other than self-defence or defence of another) in case of an emergency which is not due to the perpetrator's fault and which cannot be averted in any other way, and if it is necessary for the salvation from an immediate danger threatening the body or life of the perpetrator or a member of his family.

Produced in England for Her Majesty's Stationery Office by Swift Printers Ltd., 1-7 Albion Place, London EC1M 5RE

Dd502787 K8. 6/74

HER MAJESTY'S STATIONERY OFFICE

Government Bookshops

49 High Holborn, London WC1V 6HB
13a Castle Street, Edinburgh EH2 3AR
41 The Hayes, Cardiff CF1 1JW
Brazennose Street, Manchester M60 8AS
Southey House, Wine Street, Bristol BS1 2BQ
258 Broad Street, Birmingham B1 2HE
80 Chichester Street, Belfast BT1 4JY

Government publications are also available through booksellers

ISBN 0 11 730086 1

The Law Commission

Working Paper No 56

Criminal Law

Conspiracy to Defraud

LONDON
HER MAJESTY'S STATIONERY OFFICE
65p net

This Working Paper, completed for publication on 24 May 1974, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

This Paper is published simultaneously with a Working Paper prepared by the Criminal Law Revision Committee on Section 16 of the Theft Act 1968. For a full understanding of the interlocking problems considered by the two bodies it will be of advantage to study the two papers together. We are, therefore, sending a copy of each paper to those we wish to consult.

The Law Commission will be grateful for comments before 1 January 1975.

All correspondence should be addressed to:

J. C. R. Fieldsend,
Law Commission,
Conquest House,
37/38 John Street,
Theobalds Road,
London WC1N 2BQ
(Tel: 01-242 0861, Ext.: 215)

who will co-ordinate comments on both Working Papers.