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Why It Is Important To Continue  
Distinguishing Between Excuses and Justifications

Issue

In Report #30, Recodifying Criminal Law, the Law Reform Commission of Canada (LRC) did not classify each of the defences of clauses 3(7) to 3(16) as either a justification or excuse. The rationale of the LRC at p. 31 is that "justifications and excuses overlap and one and the same defence, for example necessity, may operate now as an excuse, now as a justification".

It is submitted that the Commission's failure to resolve the distinction between necessity as a justification and necessity as an excuse has had the unfortunate consequence of a proposal to abolish the important and crucial distinction between excuses and justifications.

In this paper we will show first that the distinction between excuses and justifications is recognized by our Criminal Code and second, by the Supreme Court of Canada. Third, we will examine the legal theoretical reasons why it is important to maintain the distinction. I would like to stress that most of these reasons are found in some of the documents mentioned in the bibliography, particularly in Fletcher's writings and in Radbruch's article.

The Criminal Code

Our Criminal Code which came into force in 1893 recognizes the distinction between excuses and justifications. Excuses are mentioned in ss. 7(3), 17, 19 and 730. Justifications are mentioned in ss. 7(3), 25, 27, 30, 31, 32(1) to (4), 34, 35, 37, 38(1), 40, 41(1), 42(1), 43 and 44. These excuses and justifications are of general application.

In addition, there are several offences which include in their definition the following words "without lawful excuse", "without lawful authority or excuse", "without reasonable excuse", "without lawful justification or excuse" and "without reasonable justification or excuse". Fortin and Viau in Traité de droit pénal général have stated at p. 292 that [translation] "the legislator uses this qualification ["without lawful excuse or justification] when they cover activities who may be lawful when considered alone but who warrant to be charged, only in the absence of a lawful reason for doing them."

In this paper we will deal only with excuses or justifications which belong in the General Part, e.g. self-defence, duress etc. and which are not mentioned in the definition of offences.

### The Supreme Court of Canada

In Perka et al. v. The Queen, [1984] 2 S.C.R. 232 at 246, a case dealing with the defence of necessity, Dickson, C.J.C., rendering the judgment for the majority, stated that a justification:

...challenges the wrongfulness of an action which technically constitutes a crime.

[The underlining is my own]

and that an excuse:

...concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not be attributed to the actor.

[The underlining is my own]

For Dickson, C.J.C., the rationale for excuses is that it is inappropriate to punish acts which are morally or normatively involuntary in the sense that the accused did not voluntarily break the law i.e. the accused lacked an adequate choice, his act being realistically unavoidable. The Chief Justice pointed out that this moral involuntariness did not concern directly the traditional concept that in order to entail criminal liability, the actions of the accused constituting the actus reus must be voluntary in the sense that they must have been under the "conscious control" of the accused.

### The Theoretical Reasons Why The Distinction Should be Maintained.

Before examining these theoretical reasons, some will say that the distinction is useless and has no practical value, as at

the end of the trial, it will not matter if the defence was an excuse or a justification as the result will be the same, the accused will be acquitted. Those who take that position may be forgetting two things. First, the General Part must be structured on a theory and secondly, a theory that works, resolves problems in practice. As Professor Fletcher has stated in "The Right and the Reasonable" (1985) 98 Harvard Law Review 950 at 958:

The distinction between justification and excuse is of fundamental theoretical and practical value. In framing a theory of liability or a rational criminal code, one would presumably inquire whether a particular defense addresses itself to the propriety of the act or to the personal culpability of the actor. Yet the distinction has gone unmentioned in most of the English language textbooks of the last hundred years.

#### A- To explain When Self-Defence is available

Self-defence is a justification that is only available against an "unlawful attack or aggression". Should self-defence be available to an innocent victim being attacked by an armed person who is a child, insane, intoxicated, acting under duress or acting under the mistaken belief that the victim is the aggressor?

The answer is yes. But why? What is the meaning of "unlawful"? The meaning of "unlawful" in self-defence means that the aggressor has committed the definitional elements of an offence against the victim and that his conduct is not justified by a justification.

The words "wrongfulness" and "attributed" used by Dickson, C.J.C. in Perka, come from the words "wrongdoing" and "attribution" used by Fletcher in his book Rethinking Criminal Law. The theory of Fletcher on criminal liability is simply the German theory of criminal liability. This theory is different from the common law theory of mens rea and actus reus.

The theory is simple. An offence requires three elements. First, the accused must commit the definitional elements of the offence (the elements found in the definition of the offence including what we would commonly call the descriptive mens rea, i.e. intention, recklessness, knowledge or negligence as applicable in the definition of the offence). Second, there must be unlawfulness. Unlawfulness is negated by a justification which provides a licence to violate the primary norm, i.e. the definitional elements of the offence. Unlawfulness can only exist and be considered, if the

accused has committed the definitional elements of the offence. A person's conduct who meets the definitional elements of the offence is conduct that is unlawful, unless that unlawfulness is negated by a justification. Since the unlawfulness of committing the definitional elements of the offence is negated by a justification, unlawfulness must be a separate element from the definitional elements of the offence. Unlawfulness is "the inconsistency of the act with the legal order as a whole" (Binavince). "The functional impact of a justification is to modify the norm by carving out a limited field where the conduct is not wrongful" (Rethinking Criminal Law at p.577). A justification, e.g. self-defence, is outside the definitional elements of the offence. The justifications are normally found in the General Part and the definitional elements of the offence are found in the Special Part. These first two elements are primarily concerned with the act.

Once the first two elements have been established, it is then necessary to determine if the harm can be attributed to the accused that is to say, if the accused can be blamed for his unlawful act. Other words used by text authors to describe this third element, attribution, are blameworthiness, fault, accountability or culpability. This third element, attribution or culpability, involves a normative analysis. The question that must be asked at the stage of attribution or culpability is whether the actor could fairly have been expected to avoid committing the unlawful act. The notion of attribution or culpability is primarily concerned with the actor. Excuses negate this third element of attribution or culpability.

Let us use a simple example to explain this theory. Supposing that the offence of assault is defined as intentionally applying force to another without his consent. The first element of the offence consists in the intentional application of force to another person without his consent. The second element consists in unlawfulness which is negated by a justification, e.g. self-defence. The second element, unlawfulness, is only considered and can only exist if the first element is established. If the evidence fails to establish that X assaulted Y because there is insufficient evidence identifying X as the person who committed the assault, it is unnecessary to decide if X acted in self-defence, if that is an issue. Once the first two elements have been established, there remains to be decided if X can be blamed for his unlawful act. This is the issue of attribution or culpability. If X has a valid excuse of duress for example [dealt with as part of the defence of necessity as an excuse under the German Penal Code], he can not be blamed for his unlawful act. Since the element of attribution or culpability is absent, the accused does not commit the offence and can not be punished. However, it remains correct to say that the accused has committed an unlawful act. It is important to remember that the issue of attribution is only considered once the first two elements have been established.

This is why self-defence is available against an attacker acting under duress (an excuse), since the attacker acting under duress has committed an unlawful act (he has committed the first two elements of an offence).

In many instances, our Criminal Code is confused as to the true meaning of a justification when it provides for example that a justification can be based on a belief itself based on reasonable and probable grounds, e.g. ss. 25(3), 31(1), 32(4), 34(2), 35(a) and 44. As Fletcher has explained in Rethinking Criminal Law (1978) at pp. 762-763:

The common law and now the Model Penal Code and its progeny interweave criteria of justification and excuse in cases in which the defending actor reasonably, but mistakenly believes that he is being attacked. These situations, which we shall call putative self-defense, are regularly called cases of justification. Assimilating a putative justification to an actual justification undermines the matrix of legal relationships affected by a claim of justification.

The problem with the Criminal Code's approach to putative self-defense is that both the putative aggressor and the person making the mistake can be justified. In logic, this is untenable: the law can not recognize that two parties fighting together are both justified in hurting the other. Only one of the two persons can be justified. This is not to say that the other person should be found guilty if his mistake was reasonable (see Part C under). As Fletcher has stated in Encyclopedia of Crime and Justice, volume 3, at p.944:

It is difficult to maintain that the defender's belief by itself creates a right to injure an innocent person. Even if the belief is reasonable, there appears to be no warrant for regarding the defendant's act as justified. Justification in cases of self-defense presupposes actual aggression, not merely a belief in aggression. The more plausible view is that the defendant's reasonable belief that he is being attacked merely excuses his injuring or killing the innocent person.

The logical solution is to treat putative self-defence as a problem of mistake. (see Part C below.) This may create problems of civil liability (see Part D below) but Parliament can legislate in this area incidental to criminal law.

### B- Liability of third parties

A justification is universal in that it is not limited to a person in particular. For example, if A is unlawfully attacked by B, it is lawful for C to intervene and defend A against B. In other words B's conduct is also justified.

On the other hand, excuses are personal to an individual. A person who helps a person commit an unlawful act cannot use the excuse of that other person as an excuse for himself since excuses as explained in Perka are based on moral involuntariness. Supposing A is threatened by B that B will kill A's son if A does not commit theft by shoplifting. If A then acting under duress proceeds to the store to shoplift and meets a stranger on the way and to whom he explains the events, the stranger is not excused if he helps A to commit theft. Third parties who assist a person acting under an excuse can not use that excuse for themselves.

To illustrate the above as to justifications, one could replace the words "has a defence other than one under clauses 3(1) to 3(4), 3(6) to 3(8) and 3(16)" in c.4(2)(b) of the Commission's Report #30 by the words "is justified".

### C- The Theory of Mistake as to Defences.

A person may commit an act erroneously believing in a situation of fact which would justify or excuse his act.

Such a mistake even if unreasonable, should bar any conviction for a crime requiring in its definitional elements intention or recklessness.

If the mistake is unreasonable (due to negligence), the following solutions could be considered in about all cases. For an unreasonable mistake as to a justification, punish the actor only for the crime of negligence, if there is one. For an unreasonable mistake as to an excuse, a) again punish the actor only for the crime of negligence if there is one; or b) statutorily mitigate the sentence.

### D- Civil Law

Since a justification negates unlawfulness, a person acting under a recognized justification should not be sued for damages

under the civil law, since he has not violated the legal norm. An exception to that rule would have to be made if justified necessity is recognized. In cases of justified necessity, the person who has suffered the damage should be entitled to sue. Parliament could legislate in this area of the civil law which is incidental to the criminal law.

On the other hand, a person who is only excused has acted unlawfully and consequently should be able to be sued for the wrong he has caused.

Our Criminal Code is largely based on the English Draft Code. In their Report on the Royal Commission of 1879, on the English Draft Code, the councillors explained at p.11, the rationale for the words "justified" or "is protected from criminal responsibility" when used in the English Draft Code:

There is a difference in the language used in the sections in this Part which probably requires explanation. Sometimes it is said that the person doing an act is "justified" in so doing under particular circumstances. The effect of the enactment using that word would be not only to relieve him from punishment, but also to afford him a statutable defence against a civil action for what he had done. Sometimes it is said that the person doing an act "is protected from criminal responsibility" under particular circumstances. The effect of an enactment using this language is to relieve him from punishment, but to leave his liability to an action for damages to be determined on other grounds, the enactment neither giving a defence to such an action where it does not exist, nor taking it away where it does. This difference is rendered necessary by the proposed abolition of the distinction between felony and misdemeanour.

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