

Analysing principles of self defense in law philosophy essay



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All the defenses only have an evidential burden i. e. the defendant (D) has the burden of raising the defense with evidence in order to make it a live issue but the prosecution has burden to negative the defense.

(2) Origin

All the defenses have their origins in common law and are common law defenses.

(3) Full Defense

All the defenses offer a complete defense i. e. if the defense is accepted D is acquitted.

(4) Intoxication

In the application of all the defenses, any evidence of voluntary intoxication is irrelevant since D has made himself incapable of assessing e. g. the reasonable use of force, threats etc in the defenses hence he is culpable.

II. Contrast

(1) Generality

There is no general defense of necessity but self-defense, duress by threats and duress of circumstances are general defenses.

(2) Application

Self-defense is defense to all crimes while duress by threats and duress of circumstances apply to all crimes except murder, attempted murder and

some forms of treason. The defense of necessity operates on a piecemeal basis but it can never be a defense to a charge of murder.

(3) Statutory backing

Some statutes expressly provide for the defense of necessity while there is no statutory backing for the remaining defenses.

(4) Defendant's characteristics

The defendant's characteristics are irrelevant in self-defense and the defense of necessity but in duress by threats and duress of circumstances the jury in deciding whether a reasonable person in such a condition might have been impelled to do what D did could consider D's age, sex, pregnancy or any recognized mental illness.

(5) Test

The test of self-defense is a subjective one in that D must be treated according to the facts D actually believed them to be regardless of whether or not it was objectively reasonable. However, the reasonableness of the belief was material to the question of whether it was actually held or not.

For duress by threats and duress of circumstances, there is both a subjective and objective element. The first limb (subjective) asks whether D was compelled to act as he did because of the circumstances he honestly believed he would die or be seriously physically injured. The second limb (objective) questions whether a person of reasonable firmness sharing D's characteristics would have responded in the same way to the

threats/circumstances. In order to apply the defense of necessity, the court needs to be satisfied that D acted reasonably and proportionately in order to avert the greater evil.

(6) Mistake

With respect to self defense, duress by threats, duress of circumstances and necessity the question is what the defendant actually believed even if he was mistaken. But the belief must nonetheless be a reasonable belief in the case of duress by threats, duress of circumstances and necessity. For self defense, the belief does not have to be a reasonable one but the more unreasonable the belief the less likely it is that it was actually held.

(7) Limitations

Self-defense can only be used as a defense for the purpose of defending D himself/herself, his/her property or another person's while in duress by threats and duress of circumstances both must have an immediate threat/harm of death or serious physical injury and the threat/harm must be directed towards the commission of the particular offense. Moreover, the threat/harm can be directed against D, his/her immediate family or someone close.

Although the defense of necessity has not been completely rejected yet its application appears in the most trying circumstances and there must be pressure from an extraneous event.

In order to successfully plead the defense of self-defense, the force used must be in response to an immediate and particular threat, not in relation to <https://assignbuster.com/analysing-principles-of-self-defense-in-law-philosophy-essay/>

a future time. In determining the reasonableness of force, the court will consider its proportionality, whether D demonstrated an unwillingness to use force and whether the force was used in the heat of the moment. In duress by threats, the defense will fail if D voluntarily exposed himself to the threat. While in duress by circumstances, the defense will not apply if the commission of an offense is merely the result of D's own subjective thought processes and emotions.

Question 2

I. Introduction

Although only of academic concern, Walker LJ in *Re A (Children)* made it clear that these 'defenses' were actually either regarded as justifications or excuses in Criminal law.

II. Analysis

Self-defense and necessity is viewed in the eyes of the law as conduct which is justified. The circumstances are such that the court recognizes that it was fitting and right for the defendant (D) to act as he did thus he is not criminally liable.

Duress, by threats or circumstances, is normally viewed as providing D with an excuse for what is, on the face of it, criminal conduct. From a legal perspective, even though D has committed an offense but since D only did so because of a forceful external influence, human or non-human, D was left with no other alternative but to act as required. D's action is not applauded yet the law understands thus such an act is excused.

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The main difference between justifications and excuses is the evaluation of D's act from a moral point of view. A justified act e. g. use of reasonable force in a lawful arrest is morally correct but robbing a bank in response to a threat of death, for example, which is prima facie against the law nonetheless D's act is excused, taking into account the threat, allowing him to avoid criminal liability.

At the micro level, a number of finer distinctions are also seen. Firstly, an excusable act may be resisted by another but in relation to justifiable conduct the person threatened may not do so. Secondly, excused conduct causes harm to society and unlike an act which is justified parties other than the excused D remain guilty. Lastly, with regards to an excusatory act all the facts must be known but in a justified conduct D ought to be allowed to rely on facts although he was unaware of at the time of conduct.

III. Conclusion

Although from a theoretical point of view it is not right to describe these concepts as 'defenses' yet in practicality it makes little difference whether D is excused or justified since the end result of both is the same i. e. D is acquitted.

Question 3

I. Duress of circumstances and Necessity

Duress of circumstances is a defence of necessity in all but name. The judiciary is fearful in the abuse of the defence recognizing that defendants could simply use the defence of necessity as a veil to cover their true

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criminal intentions, claiming that the lesser evil was chosen and on that basis they should be exonerated.

The application of the defence of necessity has generally been restricted by the courts throughout common law jurisdictions. In fact the English courts have essentially used 'duress of circumstances' as a means to cover cases that would otherwise come within the scope of necessity. Though it is argued that the defense of necessity is necessary in certain exceptional cases e. g. medical cases yet asserting a defense which operates on a cases by case basis and whose exact boundaries are indefinable it brings a degree of uncertainty into the law.

Moreover, the defence of duress of circumstances is capable of dealing with exceptional and difficult cases in a way that necessity may not be and by allowing necessity to co-exist with duress of circumstances it may in fact inhibit the development of a broader defence of necessity. Thus, I propose that the defense of necessity should be subsumed under the defense of duress of circumstances.

II. Duress

Murder

The murder exception rule in the defence of duress is inconsistent both with the human instinct of self preservation and the underlying rationale for the defence which acts as a concession to human frailty. Moreover, the ability of jurors to assess adequately a defence of duress in cases of murder

particularly in the light of the strict definition of the defence only makes the

case stronger for removing the exception. The defense acts as an excuse not
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a justification so although heroic behavior is met with great merit in Criminal law yet the failure to achieve should not be met with punishment from the state.

Threat

Duress ought to be available even for threats of a lesser harm than death or serious physical injury provided that the harm threatened exceeds the harm resulting from the commission of the offense i. e. balance of harms. This is because a number of threats although not of a physical nature are still sufficient to overcome the powers of human resistance and the law should recognize that. But this reform can only be properly considered along with the question of shifting the burden of proving duress presently lying on the prosecution onto the defendant since it would become too easy for the defendant to escape liability.