Book Reviews

COMPULSION IN THE CRIMINAL LAW
by Stanley M H Yeo, Sydney, Law Book Company, 1990; 300pp.
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In this worthwhile and interesting work, Yeo advances the thesis that a proper analysis of criminal defences requires that a distinction be drawn between justification and excuse. He explains the distinction as follows (p506):

> A person who claims a justification acknowledges her or his responsibility for the harmful conduct but contends that it was done in circumstances which made the conduct rightful in the eyes of society ... a person who claims an excuse concedes that the harm caused by his or her conduct is greater than that which it avoids .... What an excuse does is to conclude that while the conduct was wrong, some characteristic of the act which is tested by the threatened danger makes it inappropriate for society to punish her or him.

Justifiable conduct occurs in circumstances which make the conduct commendable or blameless in the eyes of society. Excusable conduct is essentially wrongful but implies subject characteristics which are inconsistent with punishment.

By way of illustration the author selects three defences, self-defence, duress and compulsion, which he allocates as follows: self-defence is a justification, duress an excuse, and cases of necessity straddle both classes.

The bulk of the work is devoted to a close examination of these defences. Separate chapters are devoted to key elements of each defence. Chapters 3, 4, 5 and 6 deal respectively with the nature of the threatened harm, the harmful response, prior fault and the important question of the defendant's mental state.

Yeo eschews any attempt at in depth jurisprudential analysis. His stated purpose is "simply to evaluate current judicial and legal reformist thinking" (p1) in light of the theory. He sets out to gauge "the compatibility" between the law as presented by judges and law reform bodies and the theory. He declares that there can be no conclusion that judges and law reform bodies have got their law right or wrong; only that their views are compatible with or else not consistent with the theory.

In making this last point the author is somewhat disingenuous. For example, he commends the Supreme Court of Canada (*Perka v The Queen* (1985) 14 CCC (3d) 385; (1984) 13 DLR 94th) for recognising a distinction between excusatory and justificatory necessity but criticises its "reactionary" refusal to endorse "justificatory necessity" (p53). He is critical of the leading Victorian decisions (*R v Davidson* [1969] VR 667; *R v Loughnan*[1981] VR 443) for ignoring the alleged distinction between excusatory and justificatory necessity. He castigates the High Court of Australia for affirming that proportionality is not an independent legal element of self-defence (*Zecevic v DPP* (Vic) (1987) 162 CLR 645). He describes this aspect of the court's decision as "wrong" (pp110, 158).

The distinction between justificatory and excusatory necessity may be explained as follows. Justificatory necessity occurs where a person commits a lesser harm in order to avert a greater harm. Excusatory necessity occurs where despite the blameworthiness of the person's conduct, he or she is forgiven as a concession to human frailty. In other words, it is suggested that there are two distinct forms of necessity (in effect, two separate defences) which share certain central features but have important differences.

Justificatory necessity is a worrying doctrine. It is firmly utilitarian. It contains no intrinsic limits. In theory anything may be done, even killing, if done to prevent something marginally worse. It is hardly surprising that this species of necessity was rejected by the Supreme Court of Canada in *Perka v The Queen* where Dickson J said at 397:

> [N]o system of positive law can recognise any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value.

Do we need a theory at all? Yeo describes the distinction between justification and excuse as a normative theory, in the sense that it comprises an internal justifying principle upon which judges can base their decisions. He says that the criminal law should strive for coherence and argues that coherence cannot be achieved by piecemeal development. "A common principle, a theory, is required as a guide for lawmakers when analysing the law and determining the direction the law should take" (p3). An optimum theory is one "which best fits the established precedents and doctrines and which most adequately accords with the moral experience of members of the community" (p4).

Yeo advances several claims on behalf of the theory. It is said to promote consistency in decision-making, and to inform the public as to the moral basis of liability (thus fulfilling an educative role). It is said to solve certain issues relating to ancillary responsibility, admissibility of evidence, and the allocation of particular matters as between liability and sentencing. It is even argued that victims injured by excusable as opposed to justifiable conduct have a stronger claim to compensation.

The author's enthusiastic embrace of the theory stands in contrast with Professor J C Smith's more cautious approach in *Justification and Excuse in the Criminal Law, The Hamlyn Lectures* (1989). Smith argues that while the theory works well in extreme cases, it breaks down at the edges. For example, the lawfulness of resistance to an improper arrest cannot be determined simply by classifying the conduct of the arresting persons as justifiable or excusable. Nor (as illustrated by the famous case of *Dadson* (1850 4 Cox CC 358) will circumstances of unknown justification always constitute a defence as suggested by some proponents of the theory.

Another difficulty relates to the schism between moral and legal concepts of wrongfulness. It is part of the theory that excusable conduct (unlike justified conduct) is always and by definition wrongful. But this can only be in a moral sense. If a person is not liable to be convicted the most one can say is that such conduct may be morally wrong (or such as may give rise to a civil action for damages). Practical determinations of morality provide a tenuous basis for a theory of liability.

Despite these criticisms Yeo's work marks a significant contribution to the theory of defences. Readers who seek a more critical or comprehensive account of the theory of justification and excuse may pursue their studies elsewhere: for example, Fletcher, *Rethinking the Criminal Law* (1978). It is hoped that Mr Yeo will expand upon his theme and explain the relevance of the theory to the analysis of statutory defences and other shadowy areas of criminal law, such as entrapment, mistake of law, illegally obtained evidence, automatism, obedience to higher orders, unreasonable mistake of fact, and so on.

Theoretical works in the criminal law are few and far between. The tools of critical and conceptual analysis are seldom wielded in this field. The renewed interest in justification and excuse theory, which was seemingly abandoned by the common law last century, is therefore a welcome development, if only for the obvious benefits which flow from any foundational study.

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