MIRANDA FORSYTH*

THE DIVORCE OR THE MARRIAGE OF MORALITY AND LAW?: THE DEFENCE OF NECESSITY IN PACIFIC ISLAND COUNTRIES

‘Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were held to be by law an absolute defence of it.’¹

I INTRODUCTION

The defence of necessity, also known as duress of circumstances, the ‘choice of evils’ defence or situational duress, has become more widely used in many common law countries in the past decade, including those in the Pacific Island region. The defence, at its most basic, is an argument that committing the crime was the only way the defendant had to avoid a greater evil. It has often been raised in cases arising out of sudden and urgent emergency, such as in *Perka v The Queen*² where a ship laden with cannabis had to come to harbour in Canada to avoid being shipwrecked by a storm. However, it has also arisen in cases where there has been time for deliberate and considered reflection, such as the decision in *Re A (Children) (conjoined twins)*³ to separate conjoined twins in the knowledge that the operation would cause one to die, but permit the other to live, in

* Senior Lecturer, University of the South Pacific, Emalus Campus, Vanuatu.

¹ *The Queen v Dudley & Stephens* [1884] 14 QBD 273, 287.

² [1984] 2 S.C.R. 232.

³ [2000] 4 All E.R. 961.

circumstances where both would die if the operation was not performed. Currently, the boundaries of the defence are still relatively undefined in many countries, both inside and outside the region. This is in part due to the fact that any exercise in trying to de-limit them raises many of the most controversial and difficult issues in criminal law. These include the relationship between law and morality; the role of the courts in deciding ethical dilemmas; whether any particular value is absolute; the differences between justifications and excuses; and whether desirable ends can ever justify illegal means. As Morgan comments, 'the defence of necessity represents a microcosm of the jurisprudential issues which underlie nearly all criminal defences.'⁴

Some of the issues arising from a consideration of this defence, such as whether killing an innocent person can ever be justified or excused, also arise in the context of the defence of duress by threats ('duress'). The distinction between necessity and duress depends in large part on the formulation for each in the particular jurisdiction concerned. In the USA, Canada and Australia, the fundamental difference lies in the source of the danger: duress involves threats to kill or cause harm by human agents, whereas necessity is a threat caused by circumstances.⁵ However, in the Pacific islands region, duress is often limited to a threat made to kill or grievously harm a defendant (not a third party) if he or she does not carry out a crime.⁶ The issues surrounding it are therefore much more directly concerned with the extent to which a defendant is entitled to kill or hurt other people and property in order to save him or herself, whereas the defence of necessity can involve more altruistic motivations, such as saving other people or even the environment, as discussed below.

There is an ongoing controversy at both national and international levels about whether or not the defences of duress and necessity should be available for murder. Kai Ambos comments that the

⁴ Edward Morgan, *The Defence of Necessity: Justification or Excuse?*, 42 *University of Toronto Faculty Law Review* 165–166 (1984).

⁵ Kai Ambos, *Other Grounds for Excluding Criminal Responsibility*, in: Antonio Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary* (Vol. 1) (2002), 1003, 1025.

⁶ For example, section 16 of the *Penal Code* [Cap 17] (Fiji) provides: 'A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury do not excuse any offence.'

‘opposing positions of (traditional) common law on the one hand – against a complete defence – and ‘civil law’ on the other – in favour of a complete defence under certain conditions – cannot be reconciled.’⁷ This debate was highlighted in the ICTY case of *Prosecutor v Dražen Erdemović*,⁸ which involved a soldier charged with crimes against humanity by killing approximately 70 Muslim men and children as a member of the Bosnian Serb army. He argued that he had tried to avoid taking part in the shootings but had finally agreed after being threatened with death. There was a difference of opinion by the judges in the Appeals Chamber on whether the defence was available, with the majority concluding that duress is not a defence to murder.

Despite the momentous question that they were called upon to decide, however, it has been argued that their Honours failed to address some of the fundamental issues raised by the case, such as whether duress is a justification or an excuse, and what limitations there should be on the defence.⁹ Arguably the jurisprudential confusion demonstrated in the judgments of the majority and the minority is also present in the current wording of the test for duress/necessity in Article 31 of the Rome Statute.¹⁰ The discussion in this paper, which articulates the differences in rationales for excuses and justifications, and the consequences in terms of the formulation of the tests for necessity, may therefore also bring some clarity to the issues raised in the *Erdemović* judgment and other related international cases, and assist in any future debate about the reformulation of the defence of duress/necessity in the Rome Statute.

Part II of this paper discusses the current Pacific regional legislative and common law basis of the defence of necessity. It demonstrates that there is currently a great deal of uncertainty about the existence of the defence, its elements, and its jurisprudential basis. It proposes that a uniform defence of necessity should be adopted by all countries in the region, especially as this would help to promote the development of a

⁷ Ambos, *supra* note 5, 1012.

⁸ *Prosecutor v Dražen Erdemović*, ICTY (Appeals Chamber), judgment of 7 October 1997, judgment and separate opinions of the various justices available at <http://www.icty.org/case/erdemovic/4> (*Erdemović* Appeal Judgment).

⁹ Luis E. Chiesa, Duress, Demanding Heroism and Proportionality: The Erdemović Case and Beyond, *Pace Law Faculty Publications*, Paper 404, (2007), <http://digitalcommons.pace.edu/lawfaculty/404>, 4.

¹⁰ The Rome Statute of the International Criminal Court (1998). For support for this argument see Chiesa, *supra* note 9, 15–16. See also Ambos, *supra* note 5, 1040.

Pacific Island based body of case law. The third part of the paper is concerned with developing such a defence. It examines the ethical and policy issues involved with this defence within the framework of the republican theory of criminal justice developed by Braithwaite and Pettit.¹¹ On the basis of this theory, which sees an essential link between moral blameworthiness and criminal culpability, it argues that there should be two distinct defences: one of justified necessity and one of excused necessity, as both these defences serve different jurisprudential requirements. It then considers whether the standard used in the two tests should be an objective one or a subjective one, and discusses the validity of various limitations on the two defences, such as the requirement of imminent peril, its availability for murder and exclusion of self-induced necessity. It also addresses the question of whether the defences should be codified and argues that they should be. Finally, it presents a formulation of excused necessity and justified necessity that reflects the arguments advanced throughout the paper. The issues that are raised in the discussion, and the final tests themselves, are relevant well beyond the regional context as they address fundamental questions regarding criminal responsibility.

II THE DEFENCE OF NECESSITY IN PACIFIC ISLAND COUNTRIES TODAY

The Pacific Island countries region includes Micronesia, Polynesia, and Melanesia and covers the area from the Marshall Islands in the North to Tonga in the South.¹² Despite the considerable differences in criminal legislation throughout the region, a comparative exercise such as is conducted in this paper is useful because it assists in the development of a more cohesive approach to criminal law in the

¹¹ John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990).

¹² The countries in the region are: the Cook Islands, Federated States of Micronesia, the Republic of Marshall Islands, Papua New Guinea, Fiji Islands, Kiribati, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, and Vanuatu. With the exception of Tonga, all the countries in the region were colonised by western powers. From the 1960s until the 1980s political developments ensured the majority of these countries became independent sovereign states; however they all retained legal systems based on the English common law model. See Don Paterson, Jennifer Corrin Care and Tess Newton Cain, *Introduction to South Pacific Law* (1999), 5.

¹³ Stanley Yeo, *Compulsion and Necessity in African Criminal Law*, 53(1) *Journal of African Law* 90 (2009).

region. Although, unlike in Africa,¹³ there has not been an agreement amongst the Pacific Island Countries that the criminal law should be uniform, such an aim would make a great deal of sense. The factors that support this aim are: a shared English common-law background; the continuing importance of customary law; common limited resource issues; general lack of effective and well-resourced Law Reform Commissions; shared difficulties with providing access to justice for rural communities; historical and cultural ties; a jointly owned Law School at the University of the South Pacific;¹⁴ a regional electronic legal publishing institute;¹⁵ a shared Christian value system; and similar human rights provisions in Constitutions. Despite the undoubted differences that exist, these common features arguably provide a sound basis for starting to move towards the development of a Pacific Islands criminal jurisprudence.

2.1 *The Defence in Legislation*

All jurisdictions in the region set out their substantive criminal law in criminal codes.¹⁶ There are three major groupings of such codes. The first comprises those of the Cook Islands, Niue, Samoa, Tonga, and Tokelau, which take as their model the New Zealand *Crimes Act*. The second group comprises the codes of Fiji, Kiribati, Nauru, Papua New Guinea, Solomon Islands, and Tuvalu, which follow the Queensland *Criminal Code* (also known as the ‘Griffith Code’).¹⁷ Currently the defence of necessity is not provided for in any of the criminal codes in these two groups, although the defence of duress by threats is. The third category comprises two former US colonies, Republic of Marshall Islands (RMI) and Federated States of Micronesia (FSM), whose codes are based on the United States (US) Model Penal Code.¹⁸ In most of these codes (each state in FSM has

¹⁴ The Federated States of Micronesia and Papua New Guinea are excluded from this joint ownership.

¹⁵ The Pacific Islands Legal Information Institute. See <http://www.pacilii.org>.

¹⁶ Although these are not true codes in the sense of being completely independent of the common law, this terminology is often employed in the legislation itself and will be used here.

¹⁷ This second group of codes has many identical provisions, demonstrating at least an historical uniform approach.

¹⁸ *Laion v. FSM*, 1 FSM Intrm. 503, 511 (App. 1984).

its own criminal code) there are currently only a few capacity defences specified, and no reference to duress or necessity.¹⁹ However, RMI has a draft Criminal Code that, if passed, would be the first code in the region to codify the defence of necessity. The proposed section is copied verbatim from the US Model Penal Code.²⁰ The final country in the region, Vanuatu, has a code that does not fit into any of these three groups, nor does it specify a defence of necessity, although it does have one of compulsion.²¹

2.2 *The Defence at Common Law*

The question of whether the defence is available at common law in the various countries depends in large part upon the relationship that each group of codes has with the common law.

2.2.1 *The First Group*

The New Zealand group of codes explicitly leaves room for the common law to supplement the substantive law on defences, and thus the defence is potentially available in all these countries. It has been explicitly recognized in Samoa and Tonga.

¹⁹ The exception is the National Code of FSM which does provide a defence of duress in §301A(5). However, since 1991, the National courts only have jurisdiction over crimes that are inherently 'national' in nature ((see Article IX, Section 2 of the *Constitution*, and confirmed in see *In re Extradition of Jano*, 6 FSM Intrm. 93, 102 (App. 1993)). It is therefore unclear whether this defence could be used for the bulk of the criminal offences that are covered by the state codes.

²⁰ Section 3.02. Justification Generally: Choice of Evils.

- (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or herself 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 this 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 or her 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.'

²¹ *Penal Code* [Cap 135] (*Vanuatu*), section 26.

The first case of necessity in the region is the Samoan case of *Stehlin v Police* [1993] WSCA 5. In this case the appellant was charged with possession and cultivation of cannabis. He argued that the defence of necessity applied because for some 16 years he had been suffering from a stomach ulcer and the only way he could relieve the pain and discomfort of the ulcer was the smoking of cannabis. The Supreme Court first addressed the question of whether the defence exists as part of the law in Samoa. Justice Sapolu examined the English and Canadian authorities on the defence and established that it exists at common law, although he did not comment on whether it is an excuse or a justification. His Honour therefore found that the defence was part of the law of Samoa by virtue of section 9 of the *Crimes Ordinance 1961*.²²

The court adopted the *Perka* test which sets out a three-part test: the requirement of imminent peril or danger; the accused must have had no reasonable legal alternative to the course of action he or she undertook; and there must be proportionality between the harm inflicted and the harm avoided. His Honour held the defence failed as it had not been established that the defendant had 'no other reasonable alternative response... to relieve his stomach pain other than the smoking of marijuana.' One basis for this finding was that the defendant had been advised that his stomach pain could be relieved by stopping drinking alcohol, but he had not done so. However, his Honour did observe that in his opinion the defence 'is available in appropriate although limited circumstances, to a charge of cultivation or possession under the Narcotics Act.' Unfortunately, he did not expand upon these circumstances.

The decision was appealed to the Court of Appeal which upheld it. In dismissing the appeal, the court made the same finding about other means of avoiding the pain as had the trial judge and also referred to the requirement in *Perka* of circumstances of urgency or emergency, holding:

We cannot accept that deliberately cultivating cannabis over a substantial period, perhaps even over a period of years, could possibly be said to fall within it in any circumstances that we can visualise.²³

²² *Crimes Ordinance 1961*, section 9: 'All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Ordinance or under any other enactment, except so far as they are altered or are inconsistent with this Ordinance or any other enactment.'

²³ *Perka*, *supra* note 2.

In addition, the court noted that there was a large amount of cannabis grown and harvested, which in itself pointed towards a use other than purely personal.

The issue arose again in the case of *Police v Apelu* [2004] WSSC 8 which was concerned with the issue of abortion. In that case, the court approved *Stehlin* and cited a passage from *R v Latimer* [2001] 1 SCR 3 which elaborates on the defence of necessity set out by Dickson in *Perka*. It held that the defence did not apply to the case because the wording of the offence itself provided a defence for abortion where it is necessary for the preservation of a woman's life or health.²⁴ His Honour observed:

It will, therefore, not be necessary to call in aid the common law defence of necessity to make lawful what is already made lawful by the statute itself. Necessity only applies to excuse an act that is unlawful, not an act that is lawful by statute.

It is hard to understand whether his Honour is categorizing the defence as a justification or as an excuse. He appears to treat it as a justification by stating that it is able to 'make lawful' what would otherwise be unlawful conduct. However, he also states that it applies 'to excuse an act that is unlawful,' thus categorizing it as an excuse.

His Honour then considered whether the defence would have been satisfied in any event in relation to one count of unlawfully using an instrument with intent to procure a miscarriage contrary to the *Crimes Ordinance*. His Honour had already found that the abortion had been carried out solely because of the woman's limited resources for raising another child and not to preserve her from serious danger to her physical or mental health. He held that the defence of necessity was not made out as there was no peril to anyone that was on the verge of transpiring, or virtually certain to occur. The requirement of imminence was therefore once again a limiting factor.

In the same year as *Apelu*, the defence was also raised in *Lolohea v Police* [2004] TOSC 29, a decision of the Tongan Supreme Court. The case involved two prisoners who escaped from prison because they claimed they were being subjected to treatment amounting to torture. The particular treatment was to be handcuffed in an exposed 'sunning' cell where they were at the mercy of mosquitoes and the ele-

²⁴ His Honour arrived at this conclusion by interpreting the word 'unlawful' in the section outlawing abortion to require the prosecution to show that the abortion was not necessary to preserve the life or health of the woman.

ments.²⁵ They were released only for short periods to have their meals and to go to the toilet, but were not told how long they would be cuffed and were not given access to a lawyer despite repeated requests. These punishments were not authorized by the prison regulations. After 36 hours or so of this treatment they both escaped and went into hiding. At first they tried to see the Minister of Police, but his residence was heavily guarded, and then the Chief Justice, but found that he was travelling abroad. They therefore waited for the Chief Justice to return and when he did, they wrote him a letter about what had happened and turned themselves into the prison authorities on the same day.

The prisoners were charged with escaping and were convicted by the Magistrate and sentenced to two months imprisonment. They appealed on the basis that the punishments given to them were unlawful and that they were therefore justified in breaking out and escaping from prison.

The Tongan Supreme Court found that the punishments had been unlawful. It then turned to the question of whether the defence of duress of circumstances was available. It made no mention of the fact that this defence is not provided for in the legislation, or that this was the first time the defence had been used in the jurisdiction. Rather, Justice Ford referred to an *Archbold* entry concerning duress of circumstances and a quote from *R v Howe* [1987] 1 All ER 771 that was concerned by duress of threats. His Honour held that the defence had been made out, noting that '[t]o his credit, Crown counsel does not seek to dispute the application of the defence of duress of circumstances in the present case.' No legal test for the defence was proposed. The basis for the decision appears to be the finding that the punishments the appellants were subjected to 'were both extreme and unlawful.'

This case appears to have established that the defence of duress of circumstances exists in Tonga. However, it provides no guidance as to the circumstances in which the defence may be used in the future. This means that future courts may either confine it strictly to its facts (which even so would seem to provide a defence for every prisoner

²⁵ One was cuffed in a lying position, on his back, by his wrists and his ankles, to a piece of pipe running about 18 inches above the floor. The other had both his wrists cuffed above his shoulders, behind his back, so that he was obliged to stand up.

who escapes after being maltreated²⁶), or use it to expand the defence.

2.2.2 *The Second Group and Vanuatu*

In contrast to the first group, the Queensland Code based group are closer to true codes in that the model they are based on was designed to make the common law redundant, and therefore leave no room for resort to common law defences. Colvin states '[t]he Griffith model... seeks to deal comprehensively with justifications, excuses, and other defences. There is no general provision preserving a role for the common law in this respect and the courts have declined to imply any such role.'²⁷ However, a recent Solomon Islands case suggests that, even in this group, the courts may recognize the common-law defences of necessity.

The events of *Luavex v Regina* [2007] SBCA 13 took place in 2000 during the ethnic tensions in Solomon Islands.²⁸ Both the defendant, his followers and the victims were members of the Bougainville Revolutionary Army (BRA), known locally as the Black Sharks, and said to have been engaging in acts of violence and causing fear in the local people. The defendant had received orders from a BRA leader outside Solomon Islands to suppress the violence and disorder that was being caused by the Black Sharks. Therefore, early one morning the defendant took a group of men to the hotel room where the victims were sleeping and they shot and killed four men. The defendant was found guilty of murder by the High Court and appealed to the Court of Appeal on numerous grounds, including the defence of necessity.

²⁶ This is a common problem throughout the Pacific Island countries where there are large prison populations. See for example: *Naga v Commander, Republic of Fiji Military Forces* [2009] FJHC 68; *Michel v Government of the Republic of Vanuatu* [2003] VUSC 133; Don Paterson, *Confidential Report to the Government on the Disturbances at Stade Prison* (2009) (Vanuatu). A 2009 report states 'In some countries of the Pacific, torture and ill-treatment are a common occurrence, while in others, it occurs less often. Sometimes laws do not adequately protect detainees, other times practice does not respect the rights of detainees due to lack of training and lack of accountability measures in place and working.' United Nations Office of the High Commissioner for Human Rights, Regional Office for the Pacific, *A Region-Wide Assessment on Laws on the Prevention of Torture and other Ill Treatment of Detainees* (2009), 1.

²⁷ Eric Colvin, *Criminal Responsibility under the South Pacific Codes*, 26 Criminal Law Journal 98, 102 (2002). In relation to Vanuatu he similarly argues that it 'appears also designed to be comprehensive in its coverage of justifications, excuses and other defences.'

²⁸ See Miranda Forsyth, *Duress as a Criminal Defence in Solomon Islands*, 11(2) Journal of South Pacific Law (2007) <http://paci.org.vu/journals/JSP/L/index.shtml>.

In dealing with this claim, the first issue for the court was whether the defence exists in Solomon Islands. The court was very clear that there is no express provision in the legislation recognizing this defence, and noted that:

Like many of the other criminal codes in the Pacific, Africa and elsewhere, the purpose and effect of these codifications is to preclude resort to the common law for the purpose of determining questions of criminal responsibility.

However, the court then went onto accept 'as plainly arguable' that the substance of the common law defence 'may' have been preserved through the presence of the word 'unlawful,' or derivatives of it, in sections defining elements of offences such as murder or manslaughter. This statement was supported by reference to section 3 of the *Penal Code* that provides that it is to be interpreted in accordance with the principles of legal interpretation prevailing in England, and that 'expressions used in it shall be presumed... to be used with the meaning attaching to them in English criminal law.' The court did not expand further upon this reasoning, but the argument appears to be that if an action by the defendant can be justified, then it will not be unlawful, and so an element of the offence will not have been made out. This reasoning depends upon categorizing the defence of necessity as a justification rather than an excuse, because the latter will not make unlawful criminal conduct lawful; it will merely excuse it.

The court then discussed what the defence is and whether it could be applied on the assumption that it is available, without answering this question definitively. It set out the three part test formulated by Brooke LJ in *Re A*, that (i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; and (iii) the evil must not be disproportionate to the evil avoided. His Honour held that the first element was not satisfied. The inevitable and irreparable evil to be avoided was said to be the violent attacks by the Black Sharks on the people of Gizo. One factor to support this allegation was that at that time the police were not armed and the Black Sharks were. The court accepted that during that time law and order had broken down. However, it noted that there was no precise evidence about the extent to which the individual victims were engaged in any criminal activities in Gizo and stated:

It does not follow that the four victims of these killings were personally responsible for that state of affairs, or that their behaviour was so disruptive and dangerous to other

people in Gizo that the only available method of stopping it was by killing one or all four of those individuals without allowing them to speak in their defence. Throughout history, the activities of self-appointed vigilante groups have been notorious for killing the wrong people at the wrong place and time.

This case leaves a number of questions unanswered with regard to the availability of the defence in Solomon Islands and the other countries in this group. The court very deliberately refused to hold definitively that the defence does exist, and has not provided any guidance to future courts about how to deal with this question. However, if the same reasoning used by the court is accepted in future judgments, the availability of the defence is limited to those offences that contain the word ‘unlawful’ as part of their elements.²⁹

2.2.3 *The Third Group*

In RMI and FSM the issue about whether common law defences are part of the law has not been provided for by the legislature or dealt with by the courts. However, the common law is defined by the Constitution of RMI to be part of the law,³⁰ and it was also held in *RMI v. Waltz*³¹ that the court should apply the common law in the absence of any Constitutional or legislative or customary principle to the contrary. This suggests that the common law defence of necessity may well be found to apply in RMI. However, the Constitution of FSM does not include the common law as a source of law and so it seems unlikely to be available.³²

2.3 *Summary of Defence of Necessity in the Region*

This review of the use of the defence of necessity in the region³³ is instructive in a number of respects. First, it demonstrates that the

²⁹ See, for example, unlawful wounding (s229) and unlawful poisoning (s230).

³⁰ 1 MIRC 102, the definition of ‘law of the Republic’ includes at subsection (b) (viii), ‘the common law.’

³¹ 1 MILR (Rev.) 74, 77 (1987).

³² The Constitution of FSM provides, in section 10, that: ‘Court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia. In rendering a decision, the court must consult and apply sources of the Federated States of Micronesia.’ This suggests that unless there is a specific legislative provision, then the defence does not exist.

³³ It should be noted that the doctrine of necessity in civil law has also been the subject of much judicial scrutiny in the context of Bainimarama’s claim that the coup he led in Fiji was lawful on the grounds that it was necessary: see *Qarase v Bainimarama* [2008] FJHC 241 <http://www.paclii.org>; *Qarase v Bainimarama* [2009] FJCA 9.

defence is arguably available in a common law form in all countries in the region, although its availability is restricted to certain crimes for countries in the second group of countries. Second, in each of the three countries where the defence was introduced, there was no reference to case law from other jurisdictions in the region. Rather, the development of the defence was based either upon suggestions made by counsel or research done by the judge in reference to cases from England and Canada. This illustrates the fact that despite the increasing ability of judges and counsel in the region to access decisions from other Pacific Island countries (thanks to the development of the Pacific Legal Information Institute database)³⁴, the convention of looking outside the region for legal precedent still remains. The consequence of this is that the development of the law in each country has gone ahead in different directions, as shown by the fact that three different approaches to the defence were used in the cases discussed above. By not referring to other regional judgments, the courts are missing out on valuable opportunities to work together to develop laws that are most suited to Pacific circumstances. The third observation is that there has been no judicial attention paid to the question of whether the defence is an excuse or a justification, although as discussed below this is an essential jurisprudential question.

The second part of this paper is concerned with developing a proposed approach to the defence of necessity that could be used by all jurisdictions in the region. If the test used in each country is roughly the same, this will make it much easier to use case-law from other countries in the region to develop a body of Pacific criminal jurisprudence. Such case-law is likely to have more relevance and legitimacy for Pacific Island citizens than laws that have been imported from outside the region.

III THE FUTURE OF THE DEFENCE OF NECESSITY

3.1 *A Legal Theory for the Defence*

There seems to be general agreement that a defence like that of necessity is required to deal with the overbroad nature of criminal law, as one form or other of the defence has been around in the common law world since Francis Bacon's *Maxims* in the 16th

³⁴ <http://www.pacilii.org>.

century.³⁵ The appeal of the defence arises in part because of the ease of imagining situations where our human instincts recoil at the thought of imposing criminal liability. An example of this is evoked by Justice Dickson in *Perka* of an alpinist who, on the point of freezing to death, breaks into a remote mountain cabin. The difficulties, however, arise when we try to consider *why* criminal liability should not be imposed in those circumstances, whose standards should be used in judging the actions required in the circumstances, and what limits there should be on the defence. These difficulties become more pronounced when we question the difference between the alpinist's situation and that of a homeless person who breaks into an abandoned house to escape from freezing to death on the street. Could we not argue that the homeless person is in fact *less* morally blameworthy than the alpinist who, presumably, must have accepted the risk of freezing in deciding to pursue such a sport? How does the law determine which circumstances are legitimate reasons to break the law and which are not?

To assist in addressing the ethical and policy issues raised by developing a test for necessity, it is helpful to situate the discussion within a theory of criminal justice. The following analysis draws upon Braithwaite and Pettit's republican theory of criminal justice, whose appeal lies in its comprehensiveness, humanity, and common sense.³⁶ The essence of this theory is that the criminal justice system should be targeted towards maximizing the dominion of individuals. This notion involves a positive conception of liberty – not just the negative right to be left alone, but also the notion that all citizens have equal rights to fully enjoy their liberty, and that the law has a role to play in promoting this enjoyment.³⁷ The four principles upon which this theory is based are parsimony (less, rather than more, criminal justice activity), checking of power, reprobation (criminality should be subject to disapproval in the community) and reintegration (the criminal justice system should assist in healing those who have been hurt by crime or punishment). To date, its authors have not specifically applied their theory to defences, and so it will be necessary to extrapolate from the basic framework they have developed.

³⁵ Michael Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 Tulane Law Review 191, 200 (2008).

³⁶ Braithwaite, *supra* note 11, 16–20.

³⁷ *Ibid.*, 61–69.

Reference to the republican theory of criminal justice helps to determine one of the questions at the heart of the debates about the defence of necessity, namely the relationship that should exist between law and morality. The theory is especially needed because to date there has been very little regional case-law dealing directly with this issue. The only reported case to discuss it is the recent Fijian case of *State v Kuru* [2009] FJHC 98. In this case, a woman walked into a police station with a sack containing cannabis and asked to go to prison to avoid further physical and emotional abuse from her husband. She had resorted to this action because every time she had reported the abuse to the police she had been made to return to her husband. The court discharged her without conviction, stating 'I cannot impute a moral blame on you because of the circumstances of your offence.' The court in this case made it clear that moral blame is a requirement of criminal liability.³⁸

The republican theory of criminal justice also sees an essential link between moral blameworthiness and criminal culpability. This does not just mean that only the morally blameworthy should be convicted of an offence. It also means that, as Braithwaite and Pettit argue 'the criminal law should give moral guidance to the community'³⁹ and that '[t]he criminal justice process should always seek to be a communicative process that engages the defendant in moral discourse.'⁴⁰ Adopting a republican view of the defence of necessity, therefore, would mean adopting an approach that encourages members of the community to make morally responsible choices,⁴¹ and only convicts those who are morally blameworthy.

3.2 *Should the Defence of Necessity Be a Justification or an Excuse?*

The first question to address in determining the role of the defence is whether or not it should be a justification or an excuse. This is a significant and heavily disputed issue both in the context of this defence and also the defence of duress.⁴² A justification defence is one that, if made out, means that the act committed was lawful, whereas an excuse concedes the unlawfulness of the act but allows punishment

³⁸ Of course this judgment poses other difficulties in that the decision did not in fact assist the woman in her desperate situation.

³⁹ Braithwaite, *supra* note 11, 127.

⁴⁰ *Ibid.*, 128.

⁴¹ *Ibid.*

⁴² Chiesa, *supra* note 9.

to be avoided or diminished. Alldridge states that 'the basis of a claim of justification is that it speaks to the act, a claim of excuse to whether the actor is properly regarded as responsible for it.'⁴³ As discussed in Part 1, in some Pacific countries necessity has been categorized as an excuse and in some as a justification. This uncertainty of categorization is a consistent trend throughout the world.⁴⁴

The distinction between justification and excuse is important for several reasons. First, as will be discussed below, the theoretical foundation of the defence affects important questions about its operation and limits, in particular the question about whether or not a subjective or objective test should be used. Second, the distinction is necessary because if a particular action, such as torture, is justified under certain circumstances, then it gives credibility to justifying an *ex ante* policy supporting it. However, if it is simply excused, then this lends no support to such a policy.⁴⁵ Third, it is relevant for the doctrine of complicity, because an accomplice could still be liable for the crime if the principal is excused from liability, but could not be if the principal was justified as the act would have been lawful. Fourth, it will have an impact upon the sentencing of a defendant because it is possible that an excuse may only be partial and therefore still require a sentence, whilst a justification defence leads to complete acquittal. Finally, the distinction may have some consequences for civil suits following a criminal action.⁴⁶ This is because if an action was justified then a defendant will not be liable in civil law for any harm done, but if the defendant is merely excused then he or she may still be required to pay compensation for any harm caused to another's property or person.

This paper argues that excused necessity and justified necessity serve different roles in the criminal justice system, and that both

⁴³ Peter Alldridge, The Coherence of Defences, [1983] *Criminal Law Review* 665, 665.

⁴⁴ See for example Paul B. Schabas, *Justification, Excuse and the Defence of Necessity: A Comment on Perka v. The Queen*, 27 *Criminal Law Quarterly* 278 (1984); Jonathan Burchell, *Heroes, Poltroons and Persons of Reasonable Fortitude – Juristic Perceptions on Killing Under Compulsion*, 1 *South African Journal of Criminal Justice* 18 (1988).

⁴⁵ Jens Ohlin, *The Bounds of Necessity*, 6 *Journal of International Criminal Justice* 289, 295 (2008).

⁴⁶ Burchell, *supra* note 43, 25.

should be adopted in the region to develop a more republican type of criminal law.⁴⁷

3.2.1 *The Case for a Justified Necessity Defence*

The argument for having a justified necessity defence is essentially that it recognizes that sometimes a decision *not* to obey the law is a legitimate moral choice, and therefore the criminal law should not impose a moral sanction of blameworthiness on a person who has made such a choice. An example of such a situation, of particular relevance to the region, may be if prisoners escape from a structurally unsound prison during a violent earthquake.⁴⁸ If the defence were a justification, the court could hold that in such circumstances the evil of breaking the law on escape was outweighed by the greater good of saving lives, and that therefore no crime had been committed.

Accepting the defence as a justification means accepting that the court's role is to articulate and to balance competing values and come to a decision about where the balance should lie, or at least the range of legitimate responses. Both academics and the judiciary have been reluctant to give the courts such a role, particularly in regard to cases where there must be a balancing between one life and another or many lives, such as in the *Erdemović* case. In *Dudley & Stephens* Lord Coleridge argued '[w]ho is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured?'⁴⁹ Justice Dickson, who gave the leading judgment in *Perka*, also argued that the defence should not be a justification because to hold that 'ostensibly illegal acts can be validated on the basis of their expediency' would require courts to 'assess the relative merits of social policies underlying criminal prohibitions,'⁵⁰ which, he argues, is not a

⁴⁷ To the best of my knowledge, the only country in the world with both excused necessity and justified necessity presently codified in its criminal legislation is Germany (sections 34 and 35 StGB). However, some common law countries may have one form of necessity codified and the other in common law: see, for example, the *New Zealand Law Commission Report 73*, 'Some Criminal Defences with Particular Reference to Battered Defendants' (2001), at 76 that states: 'Codification of the defence of duress of circumstances is not intended to affect the separate defence of necessity that is described by Lord Justice Brooke in *Re A (Children) (conjoined twins)*. If such a defence exists in New Zealand it should be preserved by section 20 of the Crimes Act 1961.'

⁴⁸ See Amnesty International, *No Safe Place for Prisoners* (1998).

⁴⁹ *Dudley & Stephens*, *supra* note 1, 287.

⁵⁰ *Perka*, *supra* note 2, 248.

role that 'fits well with the judicial function.'⁵¹ Ohlin similarly argues that the balancing of interests is inappropriate where human life or dignity is concerned, and that conduct that infringes some deontological constraint should always be unlawful.⁵²

However, applying the republican ideal of the law as a provider of moral guidance to the community,⁵³ we can argue that such a role is an appropriate one for the courts, even, or perhaps *especially*, in those cases that involve balancing one life against another. As Berger argues, at the heart of all defences 'is a set of normative evaluations about the way in which it is appropriate for people to act.'⁵⁴ By articulating these evaluations and discussing the legitimacy or otherwise of various emotions and values, the courts provide an important public forum for airing ethical and public policy concerns, and for identifying the types of moral choices individuals can be expected to make by virtue of their membership in a particular community. Although often presenting difficult challenges for the judiciary, there is currently no other more suitable forum for dealing with these issues, especially in the Pacific Islands region where the process of legislative law reform is very slow or non-existent and civil society groups few and far between. The process of explicitly weighing the competing choices also requires the court to enter into a dialogue with the particular defendant about their choices, thus supporting the role of the law as a moral educator, and also the principle of reprobation.⁵⁵ The consequence of not articulating these competing values and emotions is that the underlying assumptions concerning their legitimacy, whether they are more or less important, or good or bad, are hidden. Berger argues that adopting a more 'judgmental' approach to criminal defences would make the law more transparent and accurate:

We are far less able to identify the norms and status hierarchies implicitly at play in the law of criminal defences when our vision is obscured by the opacity of moral involuntariness. If they cannot be identified, they cannot be criticized, challenged or reformed. A more transparent idiom would allow debate and contestation on what we understand to be desirable reactions to legitimate social norms. This is good. It is

⁵¹ *Ibid.*

⁵² Ohlin, *supra* note 45, 300.

⁵³ Braithwaite, *supra* note 11, 127.

⁵⁴ Benjamin Berger, *Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences*, 51 McGill Law Journal 110 (2005).

⁵⁵ Braithwaite, *supra* note 11, 88.

good because it allows the law to ferret out regressive social structures, and it is good because it keeps the law sensitive to the evolution of social norms.

Moreover, the process of balancing one interest against another is an essential part of social life. All positive rights have limits to them, at least to the extent that they cannot be exercised so as to unreasonably infringe upon the rights of others to exercise those same rights (in other words, to limit the dominion of others). It is for this reason that I would argue that the defence of necessity, and also duress (contrary to the majority in *Erdemović* and the House of Lords in *Howe*⁵⁶), should be available for the crime of murder. Cases of necessity sometimes present the stark reality that, literally, one person must die so that another can live. Asserting as does Ohlin,⁵⁷ that we cannot balance one life against another, or that it can never be right to kill an innocent human being since a rule infringing this maxim would violate the ‘special sanctity that the law attaches to human life,’ as did the majority in *Erdemović*,⁵⁸ may result in death for both as would have been the case in *Re A*. In any event, as Michael Bohlander points out, referring to an example such as abortion, the common law has already ‘subscribed to the idea that it may be permissible to take a human life.’⁵⁹

Accepting the defence as a justification also entails acceptance of the fact that in some situations there are higher values than that of literal compliance with the law.⁶⁰ If the choice to break the law is only excused and not justified, then the message being relayed to the public is that the law *should* always be followed (although failure to do so may not always be punished if excused necessity is available). Not only does this tend to decrease the legitimacy of the law (it would be

⁵⁶ *R v Howe and Others* [1987] 1 All ER 771.

⁵⁷ Ohlin, *supra* note 45, 300.

⁵⁸ *Prosecutor v Drazen Erdemović*, Joint Separate Opinion of Justices McDonald and Vohrah, para. 71 (available online at <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>).

⁵⁹ Michael Bohlander, *Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes – Taking Human Life and the Defence of Necessity*, 70 *Journal of International Criminal Justice* 148 (2006). See also Ambos, who argues ‘it can be said – on the basis of Nill-Theobald’s study – that modern common law... no longer absolutely excludes duress in the case of the killing of innocent persons’, *supra* note 5, 1044.

⁶⁰ Benjamin Berger, *A Choice Among Values: Theoretical and Historical Perspectives on the Defence of Necessity*, 39 (4) *Alberta Law Review* 848 (2002), 85, quoting Glanville Williams.

hard for a member of the public to support a law that would require all prisoners to remain in mortal danger in an earthquake), it separates questions of obedience to the law from morality, the precise danger, as Berger points out, that so concerned Lord Coleridge.⁶¹ On the other hand, recognition of this fact, as pointed out by Glanville Williams, the author of the necessity provision in the US Model Penal Code, enables the legal system to 'encourage actors to reduce social harms by engaging in rational choice among evils.'⁶²

Finally, a pragmatic reason for having a justification defence of necessity is that it allows the courts to provide an opinion about whether a particular course of action would be legal or not, as for example occurred in the case of *Re A* and also in a very similar case the following year in Australia in *State of Queensland v Nolan & Anor* [2001] QSC 174. Both cases involved the court being required to rule upon the question of whether doctors would break the criminal law by performing an operation to separate conjoined twins in the knowledge that it would kill one of the twins but most likely save the life of the other. If the operation was not done, both twins would have died. However, the parents opposed the operation on religious grounds. Unless the defence was available as a justification, the court could not have made such rulings because, as was explicitly stated in the *Nolan* case, '[t]he court cannot authorize the commission of an unlawful act, particularly a criminal act.'⁶³ The utility of courts being able to make such decisions is that it facilitates all citizens in making the choices they consider to be morally correct, rather than complying with the law out of fear of negative consequences.

Although it is likely that the defence of justified necessity will be made out only rarely, its presence in any legal system is an important guarantee against the overbroad application of the criminal law.

3.2.2 *The Case for an Excused Necessity Defence*

It is argued below that the defence of justified necessity must necessarily employ an objective test in determining the legitimacy of the choice to break the law to pursue some other goal. As a result, such a defence would offer no assistance to a defendant who sincerely believed that his or her choice was the correct one in the circumstances as they appeared to him or her, when the court finds that

⁶¹ *Ibid.*, 860.

⁶² Hoffheimer, *supra* note 35, 222.

⁶³ *State of Queensland v Nolan & Anor* [2001] QSC 174, <http://www.austlii.org.au>, para. 26.

objectively the choice was not reasonable. Therefore, a defence of excused necessity is necessary to deal with situations where the defendant's choice cannot be justified, but yet imposing full criminal liability would be unjust in the circumstances.

An example of such a situation may be imagined by reference to the case of *State v Kuru* discussed above. Suppose the woman, sent back to her abusive husband once more, finally murders him, believing that this is the only way she can escape from his victimization. A court could never justify this murder as being a morally legitimate choice, but a strong sense of compassion suggests that she should be excused from criminal liability.

In many countries throughout the world the defence of necessity is classified as an excuse. For example, in *Perka* the court clearly states that it is an excuse, and this was confirmed in *Latimer*. As Jonathan Burchell argues, the 'intrinsic jurisprudential nature of an excuse has not been clearly identified.'⁶⁴ However, the rationale adopted in *Perka* and in many other countries where it is classified as an excuse, is that the defendant's free will to act is so constrained by the circumstances that any action could not be said to be truly voluntary. The same type of reasoning was used in the Nuremberg case law, where the defence of necessity was 'applicable in situations in which the actor's freedom of will and decision were limited to such an extent that the attribution (imputation) of certain criminal results appeared unjust.'⁶⁵ In these situations the defendant's act is viewed as wrong, but the defendant is excused because the law charitably views him as not culpable. This involuntary or compulsion type rationale was Bacon's original justification for the defence.⁶⁶ Ohlin argues that 'the infringement of personal autonomy is at the heart of excused necessity. What matters is that some cause intervenes to obstruct a lawful individual's autonomy and causes him to commit, through compulsion, an unlawful act.'⁶⁷

However, although this paper argues that there should be a defence of excused necessity, it submits that this basis for the defence is unconvincing in two respects. First, the defendant is not truly acting in an involuntary way, as he or she is always exercising a degree of choice no matter how difficult the circumstances. To deny

⁶⁴ Burchell, *supra* note 44, 26.

⁶⁵ Ambos, *supra* note 5, 1005.

⁶⁶ Hoffheimer, *supra* note 35, 241.

⁶⁷ Ohlin, *supra* note 45, 299.

the option of choice, in a way, is to deny the possibility of heroes. Moreover, for excused necessity, the courts are holding that the choice was the wrong one (otherwise it would be justified). It seems doctrinally unsatisfactory to find a defendant can be excused from behaving in a legally wrong fashion on the basis that it was the only choice he or she could make. Second, this approach is based on the idea that the defendant's rational thought process is clouded by what Ohlin describes as 'a great swell of emotion that builds up inside' the defendant and makes him feel he or she cannot do otherwise.⁶⁸ Surely, however, whether or not a defendant's rational mind is impeded by the emotions of the moment depends very much upon an individual reaction to the situation. Some people will no doubt choose to break the law in certain circumstances in a cool and logical way, but it is hard to see why this should make them more or less culpable than if they had completely lost their head. So, if the moral or normative involuntariness basis for the excuse is discarded, can its existence be justified in any other way? There are three, more convincing, bases.

First, there is the utilitarian argument propounded by Glanville Williams, that 'the defense should be available when a defendant believed an act was necessary, because, given such a belief, the law lost its ability to deter even when the actor was mistaken.'⁶⁹ This rationale supports the republican presumption of parsimony. Second, and perhaps more importantly, it appeals on the basis that we should not punish a person for doing what any (even if not morally courageous) person may have done in the same circumstances as the defendant believed him or herself to be. This was the rationale used by Sir Samuel Griffith, the drafter of the Griffith Code, whose notes on the draft section providing the defence of 'sudden or extraordinary emergency' state:

This section gives effect to the principle that no man is expected (for the purposes of the criminal law at all events) to be wiser and better than all mankind. It is conceived that it is a rule of the common law, as it undoubtedly is a rule upon which any jury would desire to act. It may, perhaps, be said that it sums up nearly all the common law rules as to excuses for an act which is *prima facie* criminal.⁷⁰

⁶⁸ *Ibid.*

⁶⁹ Hoffheimer, *supra* note 35, 218.

⁷⁰ Explanatory notes to Model Criminal Code. http://www.ag.gov.au/www/agd/agd.nsf/Page/Modelcriminalcode_Chapter1and2-GeneralPrinciples (accessed 1 July 2009).

A similar argument is made by Burchell who states that 'it is not the function of a temporal system of criminal law to punish a person for failing to attain the pinnacle of ethical behaviour.'⁷¹ The essential difference of this approach to that of justified necessity can be seen by contemplating Lord Coleridge's finding in *Dudley & Stephens* that we should convict as criminal a man who does not give up his life for another. Having two defences allows us to say that such a man may be excused for not doing so on the basis that this is what any of us might do in the circumstances, but he may not be *justified* in not doing so.⁷²

Third, it could operate as a way to express understanding of the defendant's actions given his or her predicament. Luis Chiesa argues that duress should be characterized as an excuse on a similar basis, that he calls the 'understandable choice' theory.⁷³ It also permits a scaling of the criminal liability to fit the defendant's moral blameworthiness. In this respect it is useful to note that an excuse may diminish, rather than completely remove, liability, and so it is more flexible than a justification defence that is necessarily all or nothing.

To conclude this section, a potential argument against providing for excused necessity must be countered, namely that it is not required because any mitigating factors may be taken into account by a judge during sentencing. There are a number of reasons why the defence is required regardless. First, there are a number of offences that have mandatory sentences in the region, and judges are also required to follow sentencing guidelines from previous cases that may limit their discretion in the minimum penalty they can impose for a particular offence. Second, leaving the matter to the discretion of the sentencing judge is problematic because judges often do not specify precisely the reasons for arriving at a particular punishment, and therefore the opportunity for public education is lost.⁷⁴ Third, being a purely discretionary matter also makes it vulnerable to appeal.

⁷¹ Burchell, *supra* note 44, 34.

⁷² The court held in *Re A* that 'the absolute prohibition of murder does not apply if the victim is already designated by fate or by the circumstances, and is not chosen as an alternative to anyone else.'

⁷³ Chiesa, *supra* note 9, 36.

⁷⁴ For example, in the case of the exorcism decision in New Zealand discussed above, the judge gave community based sentences. However, there was public discontent with the decision because of allegations that this was due to the race of the defendants, illustrating the problems with not having a clearly stated jurisprudential reason for a lighter punishment: <http://www.stuff.co.nz/national/crime/2762095/No-appeal-on-exorcism-sentences-Crown>.

Finally, the availability of an excuse defence gives a judge a far greater degree of flexibility in determining a sentence that matches the defendant's moral blameworthiness, thus supporting the republican principle of parsimony in sentencing.⁷⁵

3.3 *Should the Test Be Objective or Subjective?*

The issue of what standard should be used to judge the existence and the magnitude of the threat and the legitimacy of the choice of the defendant to break the law is a vexed issue in seemingly every jurisdiction.⁷⁶ This is demonstrated by the complicated blends of subjective and objective approaches that the courts, legislature and academics have suggested. For example, in *R v Latimer* the court proposed a 'modified objective standard' that would involve 'an objective evaluation, but one that takes into account the situation and characteristics of the particular accused person.' The court, however, failed to specify which of these characteristics can be legitimately considered and which cannot.⁷⁷ Stanley Yeo also proposes a hybrid test that takes into account 'such of the accused's characteristics as might affect the gravity of the threat to him or her.'⁷⁸ A different approach is adopted in the US Model Penal Code that uses a subjective test to judge the gravity of the danger and an objective test to assess the legitimacy of the decision to break the law.

It is suggested that these complicated formulations stem in part from the fact that in all these jurisdictions there is only one type of necessity defence, and yet owing to lack of clarity about whether it is an excuse or a justification, it is being required to act as both. However, as the jurisprudential basis for each is quite separate, one cannot be made to perform the role of the other by tweaking the proportions of objectivity and subjectivity. Thus, one advantage of having the two different defences is that it allows us to consider which standard best serves the purposes of each defence.

This paper argues that a purely objective standard should be used for justified necessity. This is because this defence requires the court to balance relative evils by reference to values and standards of the

⁷⁵ Braithwaite, *supra* note 11, 124.

⁷⁶ See for example Paul Guy, *R v Latimer and the Defence of Necessity: One Step Forward, Two Steps Back*, 66 Saskatchewan Law Review 485, 493–499 (2003); see also Yeo, *supra* note 13, 94–97.

⁷⁷ *Ibid.*, 496.

⁷⁸ Yeo, *supra* note 13, 96.

society as a whole. It is the very process of doing this that makes the defence so useful, as it allows the court to expose those values in a very public way, thus providing moral guidance to the community. The question of how the court finds these values is a difficult one, especially given that necessity cases raise the thorniest ethical dilemmas. A related question for the Pacific Islands region is whether the values used should be those, perhaps more aspirational values, of the educated urban dwellers (and therefore the judiciary) or those of the majority of rural inhabitants whose lives are still very much grounded in customary ways. This is a particularly difficult question given that expatriate judges still sit in most courts in the region, although this is certainly a diminishing trend. The gap between these sets of values may in some instances be quite wide, in particular on issues concerning the legitimate treatment of women and children.

Despite these difficulties, the process of uncovering (or perhaps developing) these values and standards is an important part of the process of building a body of autochthonous regional criminal case-law. This is why it is so important that it is done by judges from the region rather than from England, Canada and elsewhere. Further, in some countries the courts can seek guidance from assessors,⁷⁹ or juries⁸⁰ and can also use the fundamental rights provisions in the constitutions and the principles in international conventions that have been ratified by particular states,⁸¹ as well as clear policy directives in legislation. The challenge for the judiciary is to find a balance between making the law so removed from the current values of society that it loses its reprobative function (this would happen if people could dismiss it as being 'foreign law' and therefore not morally significant) and maintaining its function as a protector of the more vulnerable in society (in the Pacific Islands context this includes, in particular, disabled people, children, women, and homosexuals). The courts in the region have demonstrated on many occasions that they are up to this challenge.⁸²

⁷⁹ Fiji, Samoa and Solomon Islands (although in practice they are not used in Solomon Islands).

⁸⁰ Tonga and Cook Islands.

⁸¹ These are conveniently set out in the Pacific Islands Treaties Database: <http://www.paclii.org/pits/>.

⁸² For example, *President of the Republic of Vanuatu v Speaker of Parliament* [2008] VUSC 77 (finding the Family Protection Bill constitutionally valid) and *Loumia v Director of Public Prosecutions* [1986] SBCA 1 (finding the customary policy of pay-back contrary to the guarantee to life in the Constitution).

The standard for excused necessity is far more difficult to determine. There must be some element of subjectivity in it to justify a separate defence, but the question is how much. There is a concern that making the test purely subjective would give free rein to any regressive attitudes that exist in any society. Such a standard raises the specter of excusing the defendant who argues that he honestly believed it was necessary to hit his wife or child to teach them to obey (a wide-spread belief in the region),⁸³ or the anti-abortionist who honestly believes he must kill a doctor known to perform hundreds of abortions a year. Another problem with a purely subjective standard is that it would be different from the standard for the defence of mistake, which must be both honest and reasonable in all jurisdictions in the region (apparently with the rationale that making an unreasonable mistake is, itself, criminally culpable).

Various proposals have been suggested to grapple with the dilemma of how to make the test subjective enough to make it seem fair, but yet to keep some control over it so as not to let the defendant be the judge of his or her own cause. In the US Model Penal Code⁸⁴ for example, as mentioned above, a subjective test is used to judge the gravity of the danger and an objective test to assess the legitimacy of the decision to break the law. In practice, however, it is hard to see how these two can be separated. Take for example the case of a defendant who believes in sorcery and is certain that his wife is possessed by devils and must be exorcised or else the curse will persist. In the process of the exorcism, which involves flushing out the spirits with water, he accidentally drowns her.⁸⁵ If a defence of necessity were pleaded, it would be very difficult and artificial for the court to take into account the defendant's subjective belief in sorcery for the purpose of determining the existence of the threat, but not for the purpose of determining the legitimacy of the response to it, as the two are intrinsically linked: how can a proportionate response to a danger be assessed independently of the defendant's belief in that danger?

⁸³ Miranda Forsyth, *A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (2009) ANU ePress, http://epress.anu.edu.au/kastom_citation.html, 13–16.

⁸⁴ This is the same as the proposed one for RMI set out *supra* note 20.

⁸⁵ This is based on the facts of a true case in New Zealand. The five defendants were convicted of manslaughter but sentenced to community sentences only: *The Queen v Rawiri & Ors* (Unreported, High Court of New Zealand, CRI 2007-032-5294, 14 August 2009, Simon France J).

Another alternative is the suggestion proposed by Yeo of using a hybrid test of an accused's reasonable belief as to the existence of the threat. He suggests that we take into account 'such of the accused's characteristics as might affect the gravity of the threat to him or her.'⁸⁶ He argues that '[b]y recognizing the [defendant's] personal characteristics, society is acknowledging that it cannot realistically expect more of a person than to act in conformity with circumstances as they reasonably appear to him or her.'⁸⁷ A similar approach was adopted by the Canadian Supreme Court in *Latimer* as discussed above. However, this approach does not in fact support Yeo's aims because it is essentially still an objective test. This is because it still tries to use a reasonable person standard to judge a person whose actions are impelled by what may be very unreasonable beliefs: there can be no 'reasonable response' to a threat of sorcery. The test is therefore still expecting a person to act in accordance with rational values, rather than excusing them from acting as they honestly believed was necessary in the circumstances. A further difficulty with the reasonableness requirement is that it is in precisely the kinds of situations that this defence will arise, that everyone is likely to act in ways that are irrational and unreasonable. A final problem with such a test is that there is the real risk that much of the argument will be about which particular characteristics should be taken into account, as often occurs in provocation cases, rather than dealing directly with the issues involved.⁸⁸

The proposed way forward suggested here is to make the test almost entirely subjective, with some limitations on it to guard against its potential misuse. The rationale for having a subjective test is that it supports the three bases upon which the defence is based. First, if a defendant honestly believed there was no other option other than to break the law, the law serves no deterrent function and thus punishing such a person would be an unwarranted intrusion on their liberty.⁸⁹ Second, it is fair because it means that we do not punish a person from doing what any person may have done in the extreme circumstances the defendant honestly believed him or herself to be in (bearing in mind that we cannot always expect people to act reasonably in times of great stress). Finally, it is a way of showing

⁸⁶ Yeo, *supra* note 13, 96.

⁸⁷ *Ibid.*

⁸⁸ Such characteristics were not specified in *Latimer*. See the discussion of this in Guy, *supra* note 76, 495–498.

⁸⁹ Applying the republican presumption of parsimony.

empathy for the defendant's predicament, and distinguishing the criminal liability of a person who has only broken the law as a desperate last resort to avoid a greater threat, with that of a person without such a reason for their actions.

However, in recognition that this standard could lead to the defence being abused by excusing violence toward those who are most vulnerable in society, the following limitations could be imposed. First, there could be the requirement that the threat amounts to grave harm, as judged from an objective standpoint. This ensures that there is community recognition that the harm sought to be avoided is real, and thus is an important check on those who may otherwise harm the vulnerable (for example, this would mean that it could not be used to justify the killing of a woman by a radical Islamic fundamentalist on the grounds that she had brought dishonour to her family in some way).

Second, the defendant could be required to demonstrate that the decision to act, taking into account the basis of his or her belief in the threat, its magnitude and the belief that there was no other way of averting the harm, was made in a responsible manner to the best of his or her ability. This requirement ensures that the defendant did not just leap to a particular conclusion or course of action in an erratic or unpardonably ill-considered manner. This supports the principle that the law should require people to make responsible choices even in extreme circumstances to the best of their ability, but stops short of requiring them to be reasonable.

Third, the defendant must prove that he or she believed that the harm of committing the crime was less than the harm that was avoided. This reverse of the usual onus of proof in criminal cases for these three elements is appropriate because it is the defendant who is best placed to demonstrate such subjective beliefs, and requiring the prosecution to disprove them beyond reasonable doubt would tip the balance too far in favour of the defendant.⁹⁰ The standard of balance of probabilities should be used, as beyond reasonable doubt is too onerous. In proving this to the court, it should become clear whether or not the defendant was truly in a desperate situation.

Fourth, the defence should not be available for a defendant whose sole justification for their action is that the state law is wrong. To allow this would be an impermissible attack on the rule of law. This would mean that those who oppose laws that legalise abortion, or

⁹⁰ A precedent exists for such a reversal of the burden of proof for the defence of insanity throughout the region.

euthanasia, for example, could not use the defence of necessity to excuse them from killing those who conduct such abortions.⁹¹

A final limitation on the defence is that it could be one that diminishes criminal liability, rather than necessarily being a complete defence. The concept of diminished responsibility in this broad context appears in the *Vanuatu Penal Code* for the defences of compulsion, coercion, provocation and a type of insanity.⁹² Section 23 provides 'wherever criminal responsibility is diminished by law, the punishment shall be mitigated at the discretion of the Court.' Such a provision effectively gives the judge a free hand at sentencing and removes the problem of any mandatory sentencing requirements. It means that the judge, who through the trial process should have come to a real understanding of the defendant's true motivations, will ideally be able to apportion criminal responsibility with the defendant's moral culpability. In some circumstances this may result in a charge of murder being reduced to manslaughter and, in others, for the defendant to be discharged without conviction.

The acceptability of this approach can be tested on a hypothetical fact situation likely to occur in the region.⁹³ A defendant honestly believes that there is a sorcerer in his village who is killing small children including his own. He goes to his chief and several meetings are held, but the deaths continue and the chief finally declares that he is helpless. Two out of the defendant's three children are now dead. He goes to the police, but they tell him that they cannot prosecute the sorcerer without proof.⁹⁴ He therefore kills the sorcerer. He is charged with murder. Applying the test outlined, the defendant may argue that the first requirement is met as the death of small children is a grave harm. Second, he will need to show, in a responsible manner and to the best of his ability, that he formed the belief that the victim was a sorcerer and responsible for the deaths. He could arguably do this by leading evidence about the strength of the belief in sorcery in his society and customary practices of uncovering black magic.⁹⁵ He

⁹¹ They would be prevented from killing those who commit illegal abortions because they had a legal option available, namely reporting the operators to the police.

⁹² Sections 26, 27, and 25, respectively.

⁹³ See Bernard Narokobi, *In search of a Melanesian Jurisprudence*, in: Peter Sack and Elizabeth Minchin (eds), *Legal Pluralism* (1986) 215, where the author discusses such cases in which he sat as a judge and his response to them.

⁹⁴ For a summary of the law in the region regarding sorcery see Miranda Forsyth, 'Sorcery and the Criminal Law in Vanuatu' (2006) *LAWASIA* 1.

⁹⁵ *Ibid.*, 10–12.

will also need to demonstrate that he tried every option to stop the sorcerer (namely by going to his chief and to the police). Finally, he would need to argue that the evil avoided was greater than the crime of murder (countless future innocent deaths against the killing of an agent of death).

Depending on the strength of his evidence, it appears that a defendant could satisfy this test. This would mean that a judge could diminish his culpability to manslaughter or an even lesser crime, depending on his reaction to the defendant's evidence. Although some may find such an outcome abhorrent, as on one view a totally innocent man has been murdered, such an outcome would be a satisfactory one in a republican criminal justice system. This is because by finding that the defendant was criminally liable, although excused from full punishment, the court can educate the public by sending the message that the killing was wrong. However, the decision would also recognize that the defendant's moral culpability was significantly reduced by the fact that he acted in good faith to save the life of his last remaining child. It thus finds a balance between recognizing and giving weight to strongly held social beliefs and practices (necessary if society is going to recognize the state law as legitimate) and yet also allows the courts to provide moral guidance, and hopefully also initiate debates that will lead to social policies designed to eliminate such harmful beliefs.

3.4 *Should There Be a Requirement of Imminence of the Threat?*

The requirement of an imminent threat is present in many common law and legislative tests throughout the world. In *Perka* there is a reference to 'imminent peril,' and another formulation is 'sudden or extraordinary emergency.'⁹⁶ Although this latter formulation appears to draw a distinction between circumstances that are sudden and those that are extraordinary, the requirement that both are an

⁹⁶ See for example the Australian Model Criminal Code provision that provides: Sudden or extraordinary emergency 10.3 (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.(2) This section applies if and only if the person carrying out the conduct reasonably believes that:

- (a) circumstances of sudden or extraordinary emergency exist; and
- (b) committing the offence is the only reasonable way to deal with the emergency;
and
- (c) the conduct is a reasonable response to the emergency.

'emergency' arguably makes imminence essential for both these circumstances.

The basis of the imminence requirement is grounded in the moral involuntariness basis for excused necessity discussed above. The rationale is that it is only imminent threats that would cause the defendant's mind to be so overcome with emotion that his or her autonomy to act is conscribed. A 'cooling off' period would suggest that the defendant had been able to master his or her will once more and so is not able to rely on the defence. However, once this rationale for the defence is rejected, this justification for the imminence requirement disappears. Another rationale for the requirement is that if a threat is not imminent, then people have time to turn to the authorities for help. However, the requirement that all other legal options for averting the threat have been tried, can be part of the test, without needing to have the disadvantages of the imminence requirement.

There are two such disadvantages. The first is that it may cause the focus of a particular case to be on whether or not that requirement is satisfied, rather than on the substantial issue of whether or not the action was justified or whether the defendant should be excused. An example of this occurring is the Canadian case of *Latimer*. In this case the father of a fourteen year old, seriously mentally and physically disabled girl who lived a life of chronic pain was asphyxiated by her father who had learnt from a doctor that a planned operation in two weeks time was likely to worsen, rather than improve, her level of pain. The court based its finding that there was no defence available, *inter alia*, on the ground that the threat was not imminent, but rather 'an obstinate and long-standing state of affairs'⁹⁷ and therefore lacked the 'necessary air of reality' to meet this requirement. This issue detracted attention from the court's role in engaging with the real issues of balancing the relative evils faced by the defendant and dealing with the policy issues they raise, in this case, euthanasia. Paul Guy points out that *Latimer's* comments during and after his trial suggest that his primary motivation was not to respond to clear and imminent peril, but simply to end his daughter's perpetual suffering.⁹⁸ It may have been more satisfying for all the parties concerned if the court had been able to deal directly with the father's concerns, even if in the end it had to rule that regardless of the circumstances, the current value system of Canadian society would find the option of

⁹⁷ *R v Latimer*, [2001] S.C.R. 3, para 38.

⁹⁸ Guy, *supra* note 76, 500.

euthanasia not to be legitimate. This would have supported the republican argument that:

The criminal justice process should always seek to be a communicative process that engages the defendant in moral discourse. At its best it would argue with her as a rational agent who is shown respect through reasoning over the responsible exercise of her dominion (Duff 1986). That promises to be the most reprobative as well as parsimonious response to criminal activity. Punishment should supply citizens with moral reasons for choosing not to engage in crime; and it requires respect for the capacity of citizens to make morally responsible choices.⁹⁹

The second problem is that it would make the defence unavailable for all circumstances where the threat is present and inevitable but not imminent, such as in the medical cases discussed above.¹⁰⁰ Thus we saw that in both *Stehlin* and *Apelu*, one of the grounds the court rejected the defence was that the threat was not imminent. Presumably if the English Court of Appeal had been required to apply an imminence test in the case of *Re A*, they would not have been able to make the finding they did. It is unnecessary, and potentially even dangerous, to require a defendant to wait until a threat is actually imminent, if it is one that is certain to arise in the future. It is hard to see what use would be served, and that a lot of damage could be done, for example, in making a doctor wait until a mother is on the verge of death before aborting her baby when he knew several months before that making her keep it would kill her, or waiting until the heart of the stronger twin was on the point of faltering before allowing the operation to proceed in *Re A*. Such a requirement would not support the goal of encouraging people to make morally responsible choices; rather it would tend to force them into a situation of waiting until the last possible moment before averting the impending evil, and thus potentially being required to commit a greater evil than if they had dealt with the threat earlier.

Support for the suggestion that the requirement of imminence is not required comes from Lord Goff's comments in *In Re F* [1990] 2 AC 1 in the context of his dealing with an application for a doctor to

⁹⁹ Braithwaite, *supra* note 11, 128.

¹⁰⁰ For an overview of the application of the necessity defence to medical cases in England see Alan Reed, *Necessity: Supply of Cannabis for Medical Purpose*, 69 The Journal of Criminal Law 466 (2005). For a similar overview in relation to Australia, see David Heilpern and Georgia Rayner, *Drug Law and Necessity*, 22(4) Alternative Law Journal 188 (1997).

sterilize a mentally disabled 30-year-old woman without her consent. He stated:

Emergency is however not the criterion or even a pre-requisite; it is simply a frequent origin of the necessity which impels intervention. The principle is one of necessity, and not of emergency.

In the proposed formulation of the necessity defence set out in the conclusion, the imminence requirement is dispensed with, but the test requires that the threat sought to be avoided must have been inevitable, and that no other means could have been used to avert it, thus making sure that the defendant thought that the threat was a real and inevitable one.

3.5 *Vigilantism and Weak States and the Defence of Necessity*

It may be argued that allowing a defence such as necessity to exist in a country where the rule of law is not strong will be tantamount to legalizing vigilantism. This is because it may be easier for a defendant to argue that they had no other option than to break the law in circumstances where they are unable to rely on the state to enforce the law in order to protect them. Unfortunately this is not uncommon in many countries in the region, particularly outside the urban centers, and also where there is civil unrest. This issue arose in the case of *Luavex v Regina* where the murders took place in the context of a breakdown of law and order. The approach that the court took in that case demonstrates that a court can satisfactorily take such factors into account in deciding where the balance between competing evils lies. Moreover, it is only fair for a court, in undergoing its balancing exercise, to deal honestly with the reality faced by the particular defendant, and not to hide behind the pretence that the state can adequately protect its citizens if it cannot. Not to do so may result in a defendant being failed twice by the same system.

3.6 *Self-induced Necessity*

Another possible limitation is to make the defence not available to defendants whose own conduct has caused the situation of necessity to arise. This would encourage people to avoid putting themselves in situations where there is no option but to break the law. It also reflects the greater moral culpability of a person who has created his or her own predicament, compared with a person who had no responsibility for causing the circumstances in which they found

themselves. Finally, it is consistent with recent decisions in relation to duress that exclude the defence for voluntary members of illegal organizations.¹⁰¹

3.7 *Should the Defences Be Codified?*

The final question is whether the defences should be codified or left as common law defences. Arguments against codifying them are that they will undermine the deterrent function of the law; that it is unnecessary given broad prosecutorial discretion; and also that it may be difficult to achieve statutory precision. However, as argued above, the extreme circumstances in which the defences will arise means that they are unlikely to have any effect on the deterrent function of the law. Leaving the issue to prosecutorial discretion is unsatisfactory because the law provides no guidelines to prosecutors on how to exercise their discretion.¹⁰² Consequently, decisions about whether or not to prosecute may be made on the basis of the prosecutor's own moral value system. It would also mean that such important decisions are made in private and are hence difficult to challenge. Finally, any concerns over statutory precision in the region can be met by the argument that at least if the defences are codified after a great deal of thought and debate, this makes it likely that the test arrived at will be more considered than that generated by the judiciary given their limited time and resources. Bohlander goes so far as to argue that leaving it to the courts to decide the guidelines for necessity is 'equivalent to an abdication of responsibility' that could damage the public's trust in the clarity of the law on the following basis:

There are limits to what the criminal law, and more to the point, the courts can do to help in setting up guidelines for human behavior. What is necessary is a line that is as bright as possible in order to allow the citizen and the state to prepare for such ethical emergencies and guide their actions without the risk of becoming criminally liable.¹⁰³

¹⁰¹ *R v Cawa* [2005] SBHC 18 <http://www.pacii.org>; *Kejoa v R* [2006] SBCA 6 <http://www.pacii.org>; *Kelly v R* [2006] SBCA 21 <http://www.pacii.org>.

¹⁰² See also Bohlander, *supra* note 59, 149 who argues: 'What would be the guidelines against which a prosecutor is to exercise his discretion? Would these guidelines not themselves have to mirror the very questions that are so vexing in the substantive law?'

¹⁰³ *Ibid.*, 159.

In addition to clarifying the existence and the scope of the defences,¹⁰⁴ a final advantage of codifying them is that it gives all countries in the region a chance to adopt a uniform approach to the defences. This in turn would facilitate the development of a body of case law in which there could be cross-fertilization from one jurisdiction in the region to another. This may assist in working towards the development of a more autochthonous Pacific Islands jurisprudence.

IV CONCLUSION

In order to draw together all the threads in this paper, two proposed formulations of a justified necessity and an excused necessity defence are set out below. As argued above, two tests are required because justified necessity and excused necessity rest on different jurisprudential bases and both are needed to promote the ideals of a republic system of criminal law. The tests do not provide for an imminence requirement because such a requirement only serves to detract attention from the balancing exercise that is at the heart of the defences. The tests do, however, provide other limitations on the defences and these are: breaking the law must have been the last option; the threat avoided must have been inevitable; the threat avoided must have amounted to grave harm (this formulation indicates the threat must be serious, but is deliberately wide enough to include threats to the defendant and to others and also to animals and the environment. It also moves away from the ill-defined and archaic concept of 'evil' and the requirement that the harm be 'irreparable' because this will be a factor in the balancing process anyway, and having it as a specific requirement may exclude situations such as where someone trespasses onto another's property to put out a fire); they cannot be used if another defence is available; they cannot be used to challenge the correctness of a particular legislative policy; and they are not available if the defendant was significantly to blame in creating the threat of grave harm. The two formulations of the necessity defence presented in this paper, which neither require heroism nor deny the possibility of it, may be used

¹⁰⁴ These were considered to be the rationale for codifying the defence in New Zealand: see Law Commission Report 73 *Some Criminal Defences with Particular Reference to Battered Defendants* (2001), 75.

both within and outside the Pacific Islands region. They serve as one possible approach to the dilemmas raised in various notorious criminal cases around the world, such as *Latimer*, *Re A* and *Erdemović*.

Justified Necessity

Proposal

- (1) A person is not criminally responsible for conduct that is only done to avoid grave harm, provided that:
 - (a) The harm could not otherwise be avoided;
 - (b) The harm sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;
 - (c) Neither this code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
 - (d) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.
- (2) Subclause (1) does not apply to a person who knowingly and without reasonable cause has by their own actions significantly contributed to the threat of grave harm.

Excused Necessity

- (1) A person's criminal liability may be diminished for conduct that is only done to avoid grave harm, provided that:
 - (a) The person honestly believed that the grave harm could not otherwise have been avoided;
 - (b) He or she can prove, on the balance of probabilities, that the basis upon which his or her belief in the existence and magnitude of the threat of harm, and the necessity to break the law, was arrived at, was made in a responsible manner to the best of his or her abilities;
 - (c) He or she can prove on the balance of probabilities that he or she honestly believed that the threat sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;

- (d) Neither this code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
 - (e) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.
- (2) Subclause (1) does not apply to a person who knowingly and without reasonable cause has by their own actions significantly contributed to the threat of grave harm.