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Defence of Duress: Rethinking the Exception of Murder under Section 94

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ABSTRACT

Duress as a defence has been a contentious one for decades now. Under section 94 of the Indian Penal Code, murder and offences against the state are exceptions under the defence of duress. This paper discusses the moral and legal standing of such an exception. Certain jurisdictions in Australia have granted the defence of duress in a case of murder contradicting the age-old rationale that no person is allowed to take the life of another. This high moral standard attached to the defence of duress gives rise to the 'victim-victimizer' paradox. A person under duress is expected to display the quality of 'heroism' by sacrificing his own life to save that of another whereas in every other aspect of criminal law a person is only held to the standard of a 'reasonable man'. The paper argues that although acquitting the accused under such circumstances may widen the 'moral-legal' gap, the defence od duress must be accepted to reduce the crime of murder to culpable homicide.

I. INTRODUCTION

Duress in the Indian context is provided under section 94 of the Indian Penal Code which states: "nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death will be a consequence." Murder and offences against the State are exceptions under this section, therefore duress cannot be used as a defence by the accused when offences of such nature are committed. Blackstone defined duress as "threats and menaces which induce a fear of death or other bodily harm, and which take away, for that reason, the guilt of many crimes and misdemeanors."[2] The defence of duress has remained unaltered for over 150 years since its inception yet little progress has been made to elucidate the proper limits of this defence.[3] Under duress, the accused must prove that he did not of his own accord, expose himself to the constraint. Thus, a man on the point of starvation cannot plead his hunger as an excuse for

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[2] 4 William Blackstone, Commentaries on the Laws of England (1965)
[3] Stanley Yeo, Duress Under the Indian Penal Code: Insights from Malaysia and Singapore, 51 Journal of the Indian Law Institute 494 (2009)

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theft.[4]

The learned jurist, sir Matthew Hale wrote on the issue of duress and murder after distinguishing between the law applicable in times of peace and war.[5] He stated: "If a man be menaced with death, unless he will commit an act of treason, murder, or robbery, the fear of death does not excuse him, if he commit the fact. Again, if a man be desperately assaulted and cannot otherwise escape, unless to satisfy his assailant's fury, he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought to rather die himself than kill an innocent."

It is this justification that many judgements in English courts have relied upon and created the rule of exempting murder from duress. This rule is now the conventional rule in most common law countries. The present paper discusses arguments for and against this rule substantiating the same with the background and historical overview of the rule.

Our moral institutions fall strongly on the side of the defendant when the harm he has been threatened with is larger compared to his criminal conduct.[6] We empathise with the defendant who has been coerced into committing a criminal act against his will. In such cases we believe that the man's conduct is justified: for example, if a man was coerced into committing theft in order to save his own life, we will believe that committing the offence was acceptable. However, the dilemma arises when a person, under compulsion, takes the life of another on account of threat of instant death.

The rationale behind the exception of murder under duress lies in the explanation that no man has a right to sacrifice the life of another to save his own.[7] In such a case, according to section 94 of the IPC, the accused will be convicted for murder owing to mere human nature of valuing one's own life over that of another. Only those who possess the quality of heroism will give up their own life to save that of another, consequently, the law has to question whether such an unconventional quality of heroism can be applied to every individual compelling him to comply with a higher standard than that demanded from an average person.[8] The foundation of the defence of duress is based on the precept that one should not be held liable for the crimes he commits due to factors beyond his control. Duress and necessity are similar in the sense that the accused is coerced into committing a crime in order

[4] K D Gaur, Criminal Law Cases and Materials 90 (9th ed. 2019).
[5] Matthew Hale, History of the Pleas of the Crown (1678) I, 50.
[6] Vera Bergelson, Duress is no excuse, 15 Ohio State Journal of Criminal Law 396 (2018)
[7] Queen v Dudley and Stephens, [1884] 14 QBD 273.
[8] Supra note 2 , at 91

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to mitigate circumstances that maybe beyond his control, the difference between the two lies in human intervention- duress requires a direct human threat where as necessity stems from a threat of a non-human origin.[9]

Criminal law seeks to eliminate moral ambiguity[10] by distinguishing between the victim and the victimizer but the paradox arises when a person under duress takes the life of another. Here, the victimizer is also the victim but in this particular case the defence of duress pleaded by the accused will not be upheld. Determining the morality of human nature of choosing one's own life over that of another and subsequently convicting the accused for behaving in such a manner seems to place a greater burden on him than on the actual perpetrator of the crime. Yet, the law has evolved based on the apprehension that exempting a crime as heinous as murder might involve the risk of an increase of terrorism with its potential for forcing innocent persons to commit crimes.[11]

The research question of the present paper lies in investing whether the law relating to defence of duress should be upheld for an offence as grave as murder. Research objectives include determining the morality of exempting murder under section 94 of the Indian Penal Code and analysing the implication of reforming section 94 to cover murder. The common law rule that duress cannot be a defence to murder has been challenged in the commonwealth over the recent years.[12] After ignoring the recommendation of the Victorian Law Reform Commission, Vitoria created statutory defences of duress and necessity and made them available as a complete defence to the offence of murder.[13]

The purpose of this paper is to delve into the reform of the defence of duress over the past few decades in different countries and understand better whether the moral backing for exempting murder under the defence still holds true.

II. ANALYSIS

Historical overview of the defence of duress in murder:

Sir William Blackstone distinguished between positive crimes and natural offences. He stated that threats which induce fear take away the reason of guilt from many crimes particularly

[9] Kenneth Arenson, The Paradox of Disallowing Duress as a Defence to Murder, 78 Journal of Criminal Law 65, 67 (2014)
[10] Joshua Dressler, Exegesis Of The Law Of Duress: Justifying the excuse and Searching for its Proper Limits, 62 S. Cal. Rev. 1331 (1989)
[11] R v. Howe, [1987] 1 All ER 771
[12] In Britain, D. P. P. v. Lynch [1975] 1 All E. E. 913; in the West Indies, R. v. Abbott [1975] All E.R. 913; in Australia, Harding [1976] V.R. 129; Brown and Morley [1968] S.A.S.R. 467; Darrington v. McGauley [1980] 1 V.R. 353: in Canada, Paquette 30 C.C.C. (2d) 417 (1976)
[13] Victorian Law Reform Commission, Duress, Necessity and Coercion, Report No. 9 (1980) 7; Crimes Act 1958 (Vic), ss 9AG, 9AI.

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those created by the law of society which can be excused by the society. The issue arises when a person violates the "law of God" or commits a natural offence. In such cases the magistrates or judges are mere executioners of divine punishment, even if a man is violently assaulted and has no other option than killing and innocent, this fear of force shall not acquit him of murder.[14] Most judgements pronounced over the years incorporated this reasoning when convicting the accused who committed murder under duress. The law today is the same as it was in the 17th and 18th century. One of the leading cases which considers the question of the defence of duress in murder is Tyler and Price.[15] The facts of this case are as follows: the accused men were members of an armed gang whose leader was a lunatic named John Thom. Thom shot a constable's assistant who was sent to arrest him and the two accused threw the wounded man in a ditch. During the trial the two accused invoked the defence of duress as an excuse for participating in the murder. They contended that the only reason they continued to remain in the gang was because of the fear of personal violence. Lord Denman opined that duress could not be accepted as a defence to murder. He said:

"…the law is that no man, from a fear of consequences to himself has a right to make himself a party to committing a mischief on mankind…it cannot be too often repeated, that the apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal."

This judgement has been used as precedent in the following cases considering similar situations. But what is important to understand is that the generality of Lord Denman's remark should be limited to the facts of the particular case. In the present case, the two accused were a part of an armed gang, and the defence od duress clearly states that those who voluntarily expose themselves to the constraint cannot plead the defence of duress. Secondly, if Lord Denman's words are applied to each case of duress then none of the crimes will be excused under this defence.[16] Thus, this case does not conclusive establish that duress is not a defence to murder. In another case R v. Howe and Bannister[17], the accused were charged with two counts of murder and one count of conspiracy to murder. Them along with two other men has attacked and killed Elgar. The house of Lords unanimously opined duress can never be a defence to murder. Lord Hailsham, in writing for the majority, contended that the rule of duress and murder stems from the concept of "reasonable man and average courage" represents that when a person is faced with two threats one against his own self or another,

[14] Supra note 1
[15] (1838) 8 Car. & P. 616.
[16] Smith and Hogan, Criminal Law 143 (2nd ed. 1969)
[17] (1987) A.C. 417, 432

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whichever choice he makes is considered to be the lesser of the two evils. But, when the case is that of murder, no reasonable man would take the life of an innocent to save himself. Lord Hailsham said:

"In such a case a reasonable man might reflect that one innocent human life is at least as valuable as his own or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils. Instead, he is embracing the cognate but morally disreputable principle that the end justifies the means."

Further, Lord Hailsham opined that:

"[p]rovocation … is a concession to human frailty due to the extent that even a reasonable man may, under sufficient provocation temporarily lose his self-control [sic] towards the person who has provoked him enough. Duress … is a concession to human frailty in that it allows a reasonable man to make a conscious choice between the reality of the immediate threat and what he may reasonably regard as the lesser of two evils."

In both cases human frailty is cited as a reason for the commission of a crime but in duress the only difference is that a reasonable person can justifiably conclude that whichever crime he commits is the lesser of the two evils.

The conviction was appealed and the case went to the Court of Appeal where the court upheld that duress should not be accepted as a defence to murder. Here, the Lord relied on the judgement passed in D.P.P v. Lynch[18] where the accused had chauffeured terrorists to a place where they killed a policeman. Lord Lane observed:

"…duress is open as a defence to a person who is charged with aiding and abetting murder…the actual killer does not have the defence available to him."

The stand taken by Lord Lane is contentious. He distinguished between secondary and primary principals in murder. One of the majority judges opined that a distinction between the two should not be made. Secondly, the dissenting judge believed that there was no reason to not extend the defence of duress to all degrees of murder. The probability of a complete acquittal and life imprisonment should not depend on such pedantry.[19]

In Queen v. Abbott[20] the question of whether duress was available as a defence to the primary principal was in direct consideration. In this case again, the committee decided to pass a legislation against accepting a plea of defence by the primary principal in murder. The Lords

[18] (1975) A.C. 653
[19] H.P. Milgate, The Killer Who Acts Under Duress, 45 Cambridge Law Journal 185 (1986)
[20] (1982) 1 W.L.R. 294

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held in the Howe case that as an effect of the Abbott and Lynch dictums duress was allowed to be extended to murder to a secondary party to murder, but a primary party does not get this benefit. These cases taken together are not easy to interpret. Four out of seven judges involved in these cases were against drawing a distinction between primary and secondary parties to murder. Furthermore, it has been observed that five of the seven judges in Lynch would have accepted the plea of duress by the primary party to a murder had the matter come to them subsequently.[21] Such landmark case laws are expected to set precedents for future cases where such questions of law arise, but it is submitted that none of these judgements provide clarity on the issue at hand. Consequently, the Lynch judgement was overruled. The Lordships observed that the past judgements had distinguished between primary and secondary parties in murder but such a distinction could not remain a part of English Law, thus they contended that the defence of duress should never extend to the offence of murder.

The common law rule of murder under duress is not based not any theoretical grounding but on the moral dilemma of whether the law should absolve a person who commits the offence of murder in order to save his own life. The reason for the existence of such a dilemma is the necessity that law feels to maintain sanctity of life over all other considerations.[22]

The first case in which the rule was challenged was in Brown and Morley[23] wherein the dissenting judgement of Bray C.J. contended that duress could be accepted as a defence in a charge involving murder. He pointed out that the common law was progressively moving towards covering more and more offences under duress. Extending the defence to murder depends on the moral judgement of the court which the judges can make depending upon the particulars of a case.

In India, according to section 94 of the Indian Penal Code, duress can never be a defence to murder. There is a lack of jurisprudence on this question of law as such cases have barely appeared in the Indian Courts. The Indian law has thus followed the lead of other common law countries who have denied the defence of duress to murder for centuries now.

Moral Evaluation of Exempting Murder under Duress:

One of the most widely accepted arguments for rejecting the defence of duress under murder is that no man can take the life of an innocent to save his own. The law has evolved to hold each person to such a high standard of human behaviour making it synonymous with

[21] H.P Milgate, Duress and the Criminal Law: Another About Turn by the House of Lords, 47 Cambridge Law Journal, 67 (1988)
[22] M. Sonarajah, Duress and Murder in Commonwealth Criminal Law, 30 International and Comparative Law Quarterly, 662 (1981)
[23] (1968) S.A.S.R 467

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heroism. Lord Hailsham writing in majority had observed:

"I have known in my own lifetime of too many acts of heroism by ordinary human beings of no more than ordinary-fortitude to regard a law as either 'just or humane' which withdraws the protection of the criminal law from the innocent victim and casts the cloak of its protection upon the coward and the poltroon in the name of 'a concession to human'."[24]

The problems with this argument are that, firstly, there is extraordinary burden placed on a person to be a hero, a duty that criminal law cannot impose. We can stand by and watch a child drown without drawing any liability owing to our non-performance in trying to save that child. Criminal law at every step judges by the standard of a reasonable man even if the question arises from the defendant's own positive conduct. But the hypocrisy of criminal law is exposed when it comes to duress. Here, the standard of judging is the quality of heroism that every individual is expected to possess.

Lord Coleridge in Dudley v. Stephens[25] observed that the duties that the law sometimes imposes on human is unattainable:

"To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it . . . We are often compelled to set up standards we cannot reach ourselves and to lay down rules which we could not ourselves satisfy."

In all situations other than duress, the law has strived to maintain standards which are capable to be met by a reasonable man. If a woman and her child are kidnapped and held at gunpoint, and the woman is asked to shoot another child in order to protect herself and her own child, it is not illogical to assume that the woman will shoot the other child. Although, predicting a percentage of people who will sacrifice their own life as well as their child's, it is safe to presume that most, if not all, will protect themselves and their own while sacrificing the life of another. It is only right to believe that this will be the act of a reasonable man and men should not be held at a standard higher than this.

The counsel for the defendant in the Goliath[26] case effectively argued against this unattainable standard by observing:

"In so far as public policy is relevant to the question whether the defence of compulsion is available on a charge of murder, the law, particularly the criminal law, should not be applied as if it were a blue-print for saintliness but rather in a manner in which it can be obeyed by

[24] Supra note 16
[25] (1884) 14 Q.B.D. 273
[26] 1972 (3) S.A.L.R 1 at 6

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the reasonable man."[27]

It is absurd for the law to assume that an ordinary man is a hero, and "when a third person's life is at stake even the path of heroism seems obscure."[28] Blackstone's justification of denying the defence of duress in murder was that murder is an offence against the law of God but such reasoning does not resonate with the ideologies of our secular age. As argued by Hall, the drive for self-preservation is irresistible- thus holding a man liable for murder under duress is unreasonable. Hobbes theory is more relatable in this day and age, he argued:

" If I doe it not I die presently; if I doe it, I die afterwards; therefore, by doing it, there is time of life gained."[29]

To a person driven by self-preservation, future punishment is no deterrent. It is only natural for a person to delay his death by wanting to make it out of the present situation alive. It is human tendency to do everything in their power to survive and asking a person to overcome such tendency and showcase his qualities of heroism is, frankly, unreasonable. The law can display its disapproval strongly enough effectively by convicting the accused for manslaughter instead of murder.[30] The Model Penal Code, on the other hand, strongly disagrees with the exception of murder under duress and makes duress available as an absolute defence in all cases including murder where the accused "was coerced by the use, or the threat to use unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist."

Professor Glanville Williams argued that the law should not a priori exclude any specified offences form the acceptance of a defence and suggested that while considering the defence, the judge should weigh what the accused has done and what he has avoided doing. In case of a disproportion between the two, the defence must not be made available.

Thus, although, the argument of the murder duress dilemma appears to attach the sanctity of human life with disallowing the defence of duress in murder, it fails to anticipate situations where the coerced actor kills an innocent to protect a greater number of people than just himself, such as, his family. The argument of heroism then does not hold true in such cases which is why murder should not be outrightly excluded from the defence of duress.

The Victorian Law Commission Report argues that a distinction should be made in cases of

[27] Compare Victorian Law Reform Commission's Working Paper No. 5 at para. 2. 55: ".... the criminal law should not be applied as if it were a blueprint for saintliness but rather in a manner in which it can be obeyed.."
[28] Herbert Wechsler and Jerome Michael, A Rationale of the Law of Homicide, 37 Col. L. Rev. 703 (1937)
[29] Thomas Hobbes, Leviathan 157 (1651)
[30] R. S. O'Regan, Duress and Murder, 35 Mod. L. Rev. 603 (1972)

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murder- one where death is caused intentionally and other where the coerced actor gave way to the threats. The following considerations can be made in determining the cases where the coerced actor will only have a partial defence to duress:

i) where the bodily injury has been caused intentionally and death is a consequence of such injury

ii) injury is caused in furtherance of a felony involving violence

iii) "Where he causes death by an act of violence done to a person whom he knows to be an officer of justice acting in the execution of his duty or a person assisting him, and done with the object of preventing lawful arrest or detention (or done to a person known to be acting to suppress an affray or apprehend a felon)"

Professor Williams suggested a test which will help to establish defence as a duress in murder. This was a three-pronged test:

1) where the coerced actor takes the life of an innocent to protect the lived of more than one person

2) where the killing is not intentional

3) "where the accused's part in the killing, though sufficient for complicity apart from duress, was nominal or minor, and particularly where his resistance while resulting in his own death, would not have saved the victim."

It has also been previously argued that duress should not be a defence to murder since it is too uncertain. Lord Mackay contended that the definition of duress was too ambiguous to allow it as a defence to a murderer. But, uncertainties in duress apply to almost all crimes yet they are covered under duress. If rape is covered under the defence of duress then why is murder excluded?

III. CONCLUSION AND SUGGESTIONS

In R v. Howe and Dudley v. Stephens, the Lordships urged exclusion of murder from duress to maintain sanctity of life and uphold the close relation between law and morality. It has been argued that if murder is covered under duress it would lead to an absolute divorce of law and morality as those who kill innocent people would be given a free pass under this defence. But, if we accept that killing of innocents is always impermissible, many other defences under the Indian Penal Code would have to be rethought. Denying a coerced actor, the defence of duress in all cases of murder even though, a justification for the same exists would also lead to a divorce of morality and law. In such cases, morality is given precedence over

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the law, as every individual is held to a standard higher than that applicable to a reasonable man.

Provocation under IPC is accepted as a defence in murder but duress is not. A man who loses self-control after being provoked and commits murder of either the provoker or of a third party, is excused but one who has no other choice but to take another's life is convicted. There seems to be no justifiable reason for such distinction. This anomaly has been addressed in several jurisdictions across the world, and a certain number have also accepted duress as a defence to murder if it is invoked successfully. A person who kills under duress is less blameworthy than one who kills in cold blood after being provoked.

It is submitted that the suggestions of the Model Penal Code to make duress an absolute defence in murder may be too unrealistic to incorporate in criminal law after decades of denying duress in murder. However, lawmakers should consider admitting duress as a partial defence to murder reducing murder to culpable homicide. Any ordinary citizen would attempt to preserve his own life rather than protecting another, it is due to this natural human tendency that the quality of heroism should not be applied to every individual. A reform to section 94 must be contemplated and an amendment to the same must come to effect. A new exception to section 300 ought to be introduced, reducing murder committed under duress to culpable homicide. Certain qualifications for accepting defence of duress in cases of murder are:

i) Provisions should be made to allow the defence only in cases where the threat to the coerced actor is equal to or greater than the harm of the offence committed. This would eliminate any question of disproportionality.

ii) The threat to the coerced actor must be a credible threat, that is he should anticipate that the threat is immediate and that he has no real opportunity to seek help.

The justification of this defence involves a proper balance between moral understanding and criminal law. This flexibility is an essential element in indicating a general awareness and appreciation of the amiable relationship between morality and law. It is important for us to question our obedience to unjust laws because under certain circumstances like the law presently debated, may lead to morally undesirable results.

In conclusion, the plea of duress in case of murder is a choice between two evils. The defence should be accepted in cases where the threat involved causes an apprehension of harm to limb or body and this evil outweighs the moral evil associated with the threat. On the other hand, the defence should not be accepted in cases where the moral evil is greater

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than the evil associated with the threat to the coerced actor.

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