

## **Affirmative Defense of Necessity: Legal Foundations, Scope of Application and Criterion of Balance of Interests**

Chih-Jen Hsueh\*

### **Abstract**

The recognized law theory based on the principle of prevalent interests takes article 24 of the criminal law as an affirmative defense. It starts off utilitarianism, views individuals as the vehicle of country or society, which doesn't conform to the principle of individual autonomy. Not only that, this concept also blurred necessity and other affirmative defenses, and makes the criterion of balance of interests indeterminate. Therefore, this article starts off the principle of individual autonomy, distinguishes aggressive and defensive necessity. Aggressive necessity based on the principle of solidarity obligation and defensive necessity combined the responsibility of disturber and solidarity obligation. This article will clear the application scope of necessity and the criterion of balance of interests. First of all, the legal foundation of necessity is social solidarity obligation, so it only applies to the interpersonal interests conflict. As for the conflicts of the personal interior, should apply to the affirmative defense of commitment of the victim. On these grounds, in the cases of arbitrary medical treatment and preventing others to suicide can only apply to the affirmative defense of commitment of the victim, but in the cases of assisting in suiciding, if the purpose of article 275 of the criminal law is the public interest of forbidding murder, as this public interest conflicts with the patient's interest of reducing the pain, in this situation, there is a possibility to apply to an affirmative defense. Secondly, criterion of balance of interests of necessity should be classified. The aggressive necessity applies to the substantial prevalent criterion, and defensive necessity only applies to proportional criterion. In extreme cases, a homicidal act can be legalized by applying to the defensive

---

\* Associate Professor, College of Law, National Taiwan University.

E-mail: cjhsueh@ntu.edu.tw

necessity. The above points are not only the guidelines of article 24 of the criminal law but also show that we should legislate the aggressive and defensive necessity separately.

**Keywords: Necessity, defensive necessity, aggressive necessity, the principle of prevalent interests, solidarity obligation, the responsibility of disturber, justifiable defense, euthanasia, offense of homicide**