



# On the Necessity Defense in a Democratic Welfare State: Leaving Pandora's Box Ajar

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## Abstract

The necessity defense is barely accepted in contemporary Western case law. The courts, relying on the opinion held by the majority of legal scholars, have reduced its margin of application to practically zero, since in the framework of contemporary welfare states, there is almost always a “legal alternative.” The needy person who acts on their own behalf, regardless of whether they save an interest higher than the one they injure, does not show due deference to democratic legal solutions and procedural channels. This article aims to contest this abrogative interpretation of the necessity defense and to outline the limits of its legitimate scope. Even in welfare states, there are actions in a necessity scenario that neither question the legal decisions of the democratically elected legislature nor make a mockery of established procedural channels.

**Keywords** Criminal Law · Necessity defense · Subsidiarity requirement · Welfare state · Civil obedience

## 1 Introduction

Traditionally, the necessity defense, also known as the “choice of evils” defense, has been conceived of in Western jurisdictions as the main gateway of ethics or morality to positive criminal law.<sup>1</sup> According to this view, the necessity defense (as justification) allows the judge to declare a certain behavior, despite its formally constituting a crime, to be in accordance with the law.<sup>2</sup> A significant number of legal scholars argue that the necessity defense maximizes social welfare by allowing a crime to be

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<sup>1</sup> In this vein, see e.g., Martin (2005), p. 1546. From a legal-sociological point of view, see also Bannister/Milovanovic (1990), pp. 180–181.

<sup>2</sup> Norrie (2014), pp. 214–216.

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committed where the social benefits of the crime outweigh the social cost of failing to commit it (utilitarian approach). Others locate the foundation of the necessity defense in the pre-political duties of solidarity among human beings (deontological approach). Underlying both approaches<sup>3</sup> is the idea that the criminal law should reflect morality and that an act that is considered morally permissible (or obligatory) cannot under any circumstances be considered a legal wrong.<sup>4</sup> Therefore, the central and most problematic requirement of the defense is the “balance-of-harm requirement”—that is, the requirement to establish whether the harm prevented is greater than the harm caused by acting on grounds of necessity. This discussion, however, merely reflects the deep disagreement in moral theory. Once it has been decided whether what the needy person does is morally right or wrong—or, in other words, whether or not the needy person has saved the greatest interest—the question of whether an act should be justified under criminal law is automatically resolved. In Thorburn’s words, “the criminal law theorist’s main task when making sense of justification defenses, it seems, is to read the current literature in moral philosophy and to take careful notes.”<sup>5</sup>

Shaun P. Martin points out that, because “[t]he legislative and executive branches could not be entirely trusted to do what was right,”<sup>6</sup> the necessity defense operates as an indispensable corrective tool of the positive criminal law when a gap exists between the beliefs of the legislative or executive branch on the one hand, and the widely shared sense of justice on the other. Unlike consent or self-defense, the necessity defense has, according to this view, a profoundly revolutionary dimension, and it operates as a powerful transforming instrument, a vehicle for social change.<sup>7</sup> It expressly permits individuals to ignore even validly enacted laws in order to act in the manner that is deemed fair in a particular case, making the judge an ad hoc legislator.<sup>8</sup> To the extent that it allows political, economic, ethical, or moral arguments that are not positivized to enter into the law, some authors have even seen in this legal institution a “Trojan horse.”<sup>9</sup> It not only makes the conflict between formal and substantive rationality evident but also resolves it in favor of substantive justice, demystifying the principle of the rule of law.

According to this “moralistic approach”, the necessity defense protects against positive law a sort of natural private right that people would have in the state of

<sup>3</sup> For discussion of both approaches, see Coca-Vila (2018).

<sup>4</sup> In this vein, see, e.g., Duff (2009), p. 266; Bergelson (2012), p. 290.

<sup>5</sup> Thorburn (2012), pp. 6–7: “The debate is little more than a repeat of the same discussions from the moral philosophy literature about moral justifications.”

<sup>6</sup> Martin (2005), p. 1542. Similar, Schulkind (1989), pp. 91–92.

<sup>7</sup> Martin (2005), pp. 1544–1547, 1563: “Such a defense is not only doctrinally revolutionary, but also provides a practical means to ameliorate a wide variety of systemic evils—hunger, homelessness, inadequate medical care, and other inequitable resource allocations—that are systemically (but perhaps not individually) accepted in American society.” In a similar vein, see Norrie (2014), pp. 214–215; or Cammiss/Hayes/Doherty (2021), p. 9.

<sup>8</sup> Kadish/Kadish (1973), pp. 124–127.

<sup>9</sup> Bannister/Milovanovic (1990), pp. 181, 194.

nature and whose abrogation no legislative body could compel.<sup>10</sup> As soon as the necessity defense is regulated in penal codes, this institution serves as the perfect bridge between morality and positive law to which the advocates of an inclusive legal positivism cling.<sup>11</sup> It is the legal mechanism to ensure that criminal law and morality always go hand-in-hand. From this point of view, it is easy to understand the recognition by the *Reichsgericht* in 1927 of the legitimacy of practicing abortion—a ruling based on a “supralegal” necessity defense<sup>12</sup>—that is, a necessity defense asserted even though at the time it was not enshrined in criminal legislation. It is likewise easy to understand, from the same point of view, the recognition in the continental criminal law scholarship of the justification of the famished theft<sup>13</sup> or even the justification of the commission of criminal acts in the context of protest activities and civil disobedience in the Anglo-American case law.<sup>14</sup>

However, during the twentieth century, two profound changes took place that contributed to a radically different approach to the necessity defense in contemporary criminal law scholarship and case law.<sup>15</sup> The first major change involved the rise of the welfare state—the development of a massive public institutionalized response to need. Aid ceased to be sporadic acts of solidarity between kind-hearted human beings and instead became the focus of an institutionalized program whose execution is primarily the responsibility of public officials. The second major change involved the democratization of the welfare state in the West. The design of the welfare state—the extent to which the problem of need is alleviated, the quantity of resources dedicated to the problem, and the distribution of those resources—is decided upon through democratic channels; it is up to the legislature or, as the case may be, the executive, to decide how much tax revenue is allocated to various programs that address need (e.g., social security, healthcare, aid to developing countries), as well as to decide how those funds are distributed. In short, conflict resolution is democratized.

Thus, the necessity defense, as a private way of addressing need, becomes a highly irregular legal institution. In the framework of a welfare state in which public officials are called upon to deal with social need in accordance with democratically established programs, justifying a criminal offense by calling upon the necessity defense becomes much more complex. Put succinctly, the private person acting in a necessity scenario questions the competence of the democratic legislature to manage the need, arrogating to themselves in the specific case the power to decide

<sup>10</sup> In this vein, see Greco (2022); Bergelson (2012), pp. 294–295; Martin (2005), p. 1546; or Arnolds/Garland 1975, p. 293.

<sup>11</sup> On inclusive legal positivism, see Moreso (2001); or Pastor Muñoz (2022), pp. 12–13.

<sup>12</sup> RGSt 61, 252; 62, 137. About this “pioneering” decision, see Lenckner (1986), pp. 645–648; or Fletcher (2000), p. 794.

<sup>13</sup> Paredes Castañón (1989), p. 117; or Silva Sánchez (2018), pp. 88–89.

<sup>14</sup> On the necessity defense as justification in cases of civil disobedience, see, e.g., Cammiss/Hayes/Doherty (2021); Brownlee (2012), Ch. 6; or Levitin (1987). On the necessity defense as instrument for political “direct action,” see Gardner (2005).

<sup>15</sup> On the evolution in the way need is addressed, see Luhmann (2005), pp. 169–186.

(and execute) something whose management is reserved primarily to the state and the public officials who act on its behalf.<sup>16</sup> In continental criminal legal systems, in which the acceptance of the necessity defense falls to professional judges who are not democratically elected but who are instead appointed, the irregularity in terms of political legitimacy of the necessity defense is even more evident. How can we explain that a professional judge can declare an action that the democratically elected legislature considered to be a crime to be in accordance with the law?

Thus, it is not surprising that modern interpretations of the necessity defense advocate its de-moralization while emphasizing the primacy of legal solutions and public procedural channels for addressing need. In particular, an important strain of the criminal law scholarship and a significant number of courts subtract weight from the comparison of evils when interpreting the justification, now giving a central role to the subsidiarity (or “no legal alternatives”) requirement.<sup>17</sup> A private citizen cannot validly assert a necessity defense when the conflict has already been resolved by the democratic legislature or there is a procedural channel governing the conflict in question. Given that in today’s welfare states there is almost always either a legal solution or an institutionalized means of dealing with any given need,<sup>18</sup> the necessity defense has lost most of its traditional scope, becoming a bygone legal institution. Indeed, the criminal courts systematically reject the justification in even the most relevant cases in which a necessity defense is asserted today: the commission of crimes by persons suffering extreme poverty, in particular the crimes of drug trafficking and the squatting of unoccupied houses.<sup>19</sup> Regardless of the fact that it can hardly be considered immoral for a mother to occupy an empty property in winter with her child, and that she is indeed threatened by an evil greater than the one caused by the occupation, the assertion of the necessity defense is consistently denied on the grounds that there is a public housing system.<sup>20</sup> And this same line of reasoning is the one that leads many scholars to reject the necessity defense as an excuse, too.<sup>21</sup> A woman who traffics drugs to pay for a medical operation that will save her child’s life is therefore neither justified nor excused. The Pandora’s box of the necessity defense, as it has been described by Alan Norrie, is thus conveniently closed.<sup>22</sup>

My aim in this article is to critically review the absolutization of the principle of the primacy of legislative and procedural solutions that has occurred widely

<sup>16</sup> This is stated clearly in Martin (2005), pp. 1539–1546.

<sup>17</sup> Essential reading here is Pawlik (2002), pp. 218–235, from the continental literature. Fletcher (2000), pp. 793–798, from the Anglo-American literature, is also fundamental.

<sup>18</sup> Keller (1989), pp. 318–320, rightly points this out.

<sup>19</sup> In the Spanish context, see Martínez Escamilla (2006) for discussion of the first case and Coca-Vila (2022) for discussion of the second. On the harms and injustices of homelessness, see Jenkins/Brownlee (2022); or Essert (2022).

<sup>20</sup> In the English case law, see, e.g., *Southwark London Borough v Williams* [1971] 2 All ER 175 at 179.

<sup>21</sup> Defending the primacy of legal decisions and procedural channels for dealing with need in the field of excuses (i.e., when necessity is invoked as excuse), see Pawlik (2003), pp. 305–306; or Palermo (2019), pp. 355–364 (arguing that even the person unjustly sentenced to life imprisonment cannot be excused by the necessity defense for a prison escape).

<sup>22</sup> Norrie (2014), Ch. 8, p. 236.

in scholarly and judicial considerations of the legal requirements of the necessity defense. This, as I will show, leads de facto to a wrong abrogative interpretation of the necessity defense both as justification and as excuse. I begin in Sect. 2 by setting out the foundations and by describing the practical consequences drawn in criminal law scholarship from the primacy of the legal conflict solutions and procedural channels for addressing need. This will allow me to show in Sect. 3 that, although it is indeed a mistake to conceive of the necessity defense as a direct pipeline for morality into the decisions of the legislature, that conclusion cannot lead to a systematic denial of the necessity defense. Nor can it be assumed that the legislature has foreseen and resolved by law or regulation every conceivable conflict; nor can it be assumed that the mere existence of a procedure automatically grounds the duty of the needy person to tolerate any output of that procedure. There are, in short, certain deviations from legal solutions and public channels that cannot be considered to be a challenge to the primacy of the democratic legislature. Therefore, my aim in this article is to flesh out the contours of the public law conception in order to show that accepting the premises of the “rule-of-law centered” approach does not lead to the abrogation of the necessity defense as a justification.<sup>23</sup> There is a (limited) space for resorting to the necessity defense in a manner which is not contrary to the principle of the primacy of legal and procedural solutions. Moreover, as will be seen, in exceptional circumstances, rejecting the necessity defense as a justification does not necessarily mean also rejecting it as an excuse.<sup>24</sup> In Sect. 4, I conclude my analysis.

## 2 The Necessity Defense as a Jurisdictional Usurpation

### 2.1 The Primacy of the Legal Solutions and Procedural Channels

In the framework of an archaic state in which the struggle against need is a matter for individuals’ solidarity, positive law lacks democratic legitimacy, and criminal law aims to vindicate pre-political rights and condemn moral wrongdoing (“moralistic approach”), the appeal of the necessity defense as a legal institution is understood in the academic literature as obvious.<sup>25</sup> Once it is proven that the needy person carries out a morally correct or morally obligatory action<sup>26</sup>—either because it maximizes social utility or because it reflects an adequate balance of prepolitical

<sup>23</sup> I thank an anonymous reviewer for pressing me to clarify this point.

<sup>24</sup> I assume according to a widespread opinion that there are two different forms of the defense of necessity. One is justificatory, that is the actor commits no offence because the conduct was “the right thing to do.” The other is excusatory, where although the actor’s conduct is recognized as involving the commission of a criminal offence, the law excuses the conduct either as a concession to human frailty or imperfection; or to the fact that the State itself is (politically or even legally) co-responsible for the needy person’s situation. For details, see below 3.5.

<sup>25</sup> On how the evolution of the state model affects the way we address situations of need, see Luhmann (2005), pp. 169–186.

<sup>26</sup> This has traditionally been the main dispute in criminal law doctrine: how to determine which action is morally correct or morally obligatory in a specific case. For discussion on that, see, e.g., Neumann (2014), pp. 587–592.

solidarity rights—the justification of the conduct (conduct that prima facie constitutes a legal wrong) is arguably uncontroversial. The judge’s recognition of the justification merely perfects an unfinished positive law in the context of a state that lacks the mechanisms to systematically address need and whose rules lack democratic legitimacy.

Things, however, look very different today. For one thing, addressing need has long ceased to be a matter left to the discretion of private citizens acting out of a sense of charity. In the framework of today’s welfare states, the fight against need is presented as an essential state task, much like policing or national defense.<sup>27</sup> Under the “social provision” model, it is the state that, through a range of institutional social policies or programs (unemployment insurance, healthcare, public education, housing, etc.), is primarily responsible for insuring all of its citizens against some of the major evils (sickness, accidents, homelessness, etc.). Need is no longer seen as a sporadic phenomenon to be solved on a case-by-case basis by individuals but as the object of a wide range of public programs that public officials administer on behalf of the state. For another thing, in the framework of today’s democratic states, the resolution of conflicts of interest and the regulation of social programs are the primary functions of democratic parliaments (or democratically legitimized administrative agencies). Questions such as how to harmonize the interests of, for example, a mother and a fetus in the case of conflict; how much tax revenue ought to be allocated to addressing various needs; and how these funds should be distributed are all essentially political problems to be solved by our democratic representatives in the parliamentary chambers. In the framework of contemporary societies that are characterized internally by deep-seated cultural and normative differences, only a logic of procedural legitimization such as the democratic one would allow for the peaceful resolution of the most serious conflicts of rights and the harmonious construction of a system for dealing with need.<sup>28</sup>

Thus, contemporary criminal law scholarship argues that it is the function of the state to deal with need,<sup>29</sup> particularly when it comes to systemic social needs (e.g., food, healthcare, housing).<sup>30</sup> It is therefore the obligation of all citizens to accept this primacy and submit to democratically adopted decisions and procedural channels, even when these are detrimental to their interests or do not represent a just solution. Criminal law and, in particular, the system of justifications cannot be constructed apart from this fundamental principle. This becomes evident as soon as a “moralistic account” of criminal law is abandoned in favor of a “public-law account.”<sup>31</sup> If the

<sup>27</sup> On the socialization of the fight against need, essential reading is Luhmann (2005), pp. 176–180. See also Kuhnle/Sander (2010), pp. 61–70. In the criminal law literature, see also Pawlik (2002), pp. 218–220, or Chiao (2019), pp. 6–11.

<sup>28</sup> In this vein, see Waldron (2006), pp. 1364–1376; Dennis (2009), p. 47; Thorburn (2012), p. 9.

<sup>29</sup> Fletcher (2000), pp. 792–793; Gardner (1991), pp. 132–133; or Dennis (2009), pp. 45–47.

<sup>30</sup> On non-contingent basic needs and the possibility of addressing them by way of the necessity defense, see Brownlee (2012), Ch. 6.

<sup>31</sup> On these two conceptions of the criminal law, see Thorburn (2011); (2012); or Chiao (2016); (2019), pp. 1–101. Both defend the “public law” account.

“criminal law provides an enforcement mechanism for a jurisdiction’s legal rules, regardless of the substantive content of those rules,”<sup>32</sup> it is clear that any departure from the public program to address need is anomalous, irrespective of the moral character of the conduct.<sup>33</sup> “On a public law conception, the central function of the criminal law is not to vindicate independently existing moral relationships but to contribute to making the rule of law possible.”<sup>34</sup> Taking it to the extreme, as Vincent Chiao points out, “[f]or a great many decisions, it is more important that people coalesce around a particular rule of conduct than it is that they choose the ‘right’ one.”<sup>35</sup>

Consequently, in the framework of a democratic welfare state whose criminal law is essentially called upon to ensure compliance with democratically approved laws, the necessity defense appears to be a profoundly irregular institution with enormous potential to undermine the process of democratic decision-making.<sup>36</sup> It should be tolerated only to the extent that the conduct carried out by the needy person does not call into question the primacy of the democratic channels of containment of need. As Youngjae Lee points out, “The legislative will takes priority over dictates of morality when they conflict, and the necessity defense should be understood as a way of supplementing legislation, as opposed to a general all-purpose policy of not punishing individuals who do the right thing all things considered.”<sup>37</sup>

## 2.2 The Duty to Tolerate Necessity-Motivated Harm as a Quasi-Public-Official’s Duty

Traditionally, as I pointed out in my introduction, the necessity defense has been founded on an intersubjective understanding of solidarity. The flip side of the right of interference that the needy person exercises in a necessity defense scenario is the duty (of solidarity) to tolerate this interference by another citizen.<sup>38</sup> Practically no one—in continental criminal law scholarship—questions that duties of solidarity unite citizens and that the infringement of these duties deserves to be criminalized; only the ultimate basis of such bonds remains controversial.<sup>39</sup> While for some the duties of solidarity are based on pre-political bonds,<sup>40</sup> others base them

<sup>32</sup> Chiao (2016), p. 23.

<sup>33</sup> Decoupling moral justification and criminal justification, see Berman (2003), pp. 11–13.

<sup>34</sup> Chiao (2016), p. 24.

<sup>35</sup> Chiao (2016), p. 24. In a similar vein, see Thorburn (2012), pp. 7–8.

<sup>36</sup> It is irregular in a double sense. On the one hand, it authorizes a private individual to carry out a public function. On the other hand, it is based on the principle of solidarity, alien to the liberal logic of Western legal-criminal systems. Regarding this second sense, see Coca-Vila (2018), p. 66.

<sup>37</sup> Lee (2009), p. 140.

<sup>38</sup> In fact, the duty to tolerate interference under a necessity scenario is the same duty that compels one to (actively) rescue. These are two manifestations (active and passive) of the same duty of solidarity. Therefore, the infringement of the duty to tolerate (in a necessity scenario) should be punished as the infringement of the general duty to rescue. For discussion of the duty to tolerate interference under necessity scenarios, see Silva Sánchez (2007), pp. 29–43.

<sup>39</sup> Something different applies to the Anglo-American discussion. For discussion on that, see e.g. von Hirsch (2011).

<sup>40</sup> Baldó Lavilla (1994), pp. 63–69.

on contractual reasoning close to that which explains the insurance contract: a self-interested individual would agree to tolerate another individual's interference under a necessity scenario in order to have the same recourse to the same means of dealing with a potential emergency situation in the future.<sup>41</sup> Finally, many authors base such duties on utilitarian reasoning: the citizen was called upon to tolerate a harmful action in a necessity scenario if the action maximized the interests at stake from a holistic social perspective (efficient breach of the criminal code).<sup>42</sup>

Nevertheless, the emphasis on the primacy of democratic channels for restraining need has also brought with it a radical change in the way in which the duty of solidarity underlying the necessity defense is founded. According to this view, the nexus of solidarity is no longer intersubjective but institutional.<sup>43</sup> In other words, citizens are not connected to one another by any legal bond of solidarity. As far as the containment of need is concerned, citizens already comply with the requirement to pay taxes to the state, which must deal with the emergency situations of its citizens. The needy person, therefore, can only demand that the state help them to overcome their need. How, then, can one explain a defense that authorizes a citizen to interfere in the legal sphere of another citizen without the other's consent? According to Steven J. Heyman and Michael Pawlik, the citizen who must tolerate the conduct in a necessity scenario does so by promptly assuming a quasi-public-officer role.<sup>44</sup> In other words, the duty to tolerate interference in a necessity scenario is a quasi-public-official's duty: a duty that falls to the citizen when public officials are not able to perform it. That is to say, the owner of the cabin that is to be occupied by the mountain climber in danger of freezing to death does not tolerate the interference as a citizen but rather as a representative of the community forcefully recruited to substitute for the state when the latter is unable to punctually fulfill its task of combating need. In the same way that the state resorts to civilians to face a war when the professional military is not enough, the state resorts to citizens to fight the need when its officials fail in such a mission. From the above, it follows logically that the person who has tolerated the necessary action has a right of redress against the state, in whose place they were forced to serve.<sup>45</sup> In a similar vein, Malcolm Thorburn states that the person acting in a necessity scenario assumes a state's jurisdiction *pro tem*, invoking a power that belongs to the state when no properly authorized state officials are available to deal with the situation.<sup>46</sup>

Understanding the necessity defense in this way means that this justification loses all its groundbreaking power. It is not an instrument of direct social change but a purely supplementary mechanism for the execution of the pre-established public

<sup>41</sup> Merkel (1995).

<sup>42</sup> Hruschka (1979).

<sup>43</sup> For a helpful analysis of this turn, see Robles Planas (2012).

<sup>44</sup> See Heyman (1994), pp. 738–750, although in relation to the duty to rescue; or Pawlik (2002), pp. 103–124, 179–181. According to these views, the institutionalization of solidarity excludes additional, interpersonal duties of solidarity.

<sup>45</sup> Heyman (1994), pp. 748–749; or Pawlik (2012), pp. 9–10.

<sup>46</sup> Thorburn (2019), pp. 408–409; (2012), p. 17; (2011), pp. 34–36; (2010), pp. 442–443; (2008), pp. 1118, 1126.



program for combating need.<sup>47</sup> Thus, the necessity defense does not amend positive law according to any supra-positive standard of justice but instead simply authorizes citizens to step in when the state is unable to fulfill its mission. In the words of Larry Alexander, “It is a provision in aid of legislative intent, not in derogation of it.”<sup>48</sup> In short, the needy person, according to Vera Bergelson, does not defy the law but acts “on behalf of the public, pursuant to an unwritten legislative mandate.”<sup>49</sup>

### 2.3 Subsidiarity as a Central Requirement of the Necessity Defense

Once the link between moral justification and the necessity defense is broken, and it is assumed that the citizen who tolerates the action in a necessity scenario does so as a quasi-public-official addressing a concern of the general public, the center of gravity of the defense ceases to be the requirement of the weighing of interests or evils at stake. Even when a person in danger saves an interest (far) superior to the one they harm, the act will not be justified if it usurps the primacy of the legal solutions or institutionalized channels for addressing need. The central requirement of the defense becomes, then, that of “subsidiarity,” or the “exhaustion of legal alternatives.”<sup>50</sup> Regardless of the morality or amorality of the action attending the outcome, it cannot be justified when it does not fulfill the “subsidiarity requirement”—that is, when it involves a departure from the will of parliament or from a procedural channel intended to limit this kind of necessity.<sup>51</sup> Thus, in the conflict between material and procedural justice, the latter would enjoy absolute priority: if there is a democratic legal solution or a procedural channel, there is no reason of material justice that can justify the breach of the letter of the law.<sup>52</sup>

The requirement of subsidiarity is interpreted—both in modern legal scholarship and in broad sectors of continental case law—in a very strict manner. First, it is not possible to justify by the necessity defense an act that entails resolving a conflict differently from the way it is resolved in a constitutional text, in the law, or in any administrative regulation.<sup>53</sup> This means, for example, that torture cannot be

<sup>47</sup> Greenawalt (1989), pp. 288–290; or Lee (2009), p. 140.

<sup>48</sup> Alexander (2005), p. 637.

<sup>49</sup> Bergelson (2012), p. 296.

<sup>50</sup> Unlike what usually happens in continental criminal codes, Sect. 3.02. of the Model Penal Code expressly regulates this requirement: “(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself 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 the 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.”

<sup>51</sup> See Lee (2009), p. 140.

<sup>52</sup> Although in the continental discussion some authors view the existence of legal provisions or procedural channels as an element to be considered in the weighing of evils (see Roxin/Greco [2020], pp. 861–865), it is generally assumed that this is an all-or-nothing requirement: if the needy person does not respect the subsidiarity requirement, there is no justification at all. See, e.g., Wilenmann (2017), pp. 600–601. From the Anglo-American literature, see also Martin (2005), p. 1586.

<sup>53</sup> Fletcher (2000), pp. 793–794; Alexander (2005), pp. 637–638.

justified in Spain under any circumstances—not even for the purpose of inducing a kidnapper to disclose where his victim is being held (ticking-bomb scenario)—since it is generally prohibited in Article 15 of the Spanish Constitution.<sup>54</sup> And the same applies to a bank employee who misappropriates €1,000 from a bank to save a child in danger of dying in an extremely poor country. Since the size of the international-development-aid budget is determined by the budget law passed by parliament, the contemporary “Robin Hood” cannot rely on the necessity defense.<sup>55</sup> For the same reason, a parent who, to alleviate the terrible pain suffered by his child, steals a drug not covered by public health insurance due to its high costs cannot rely on the necessity defense: the fact that the drug does not appear on the applicable list of covered drugs contained in an administrative regulation automatically implies that the will of the democratic legislature is that the needy person should abide such pain.<sup>56</sup>

Second, the subsidiarity requirement also entails, according to the “public-law approach,” that the necessity defense cannot be recognized when a needy person acts outside of the procedural channels that have been established to deal with the specific need in question.<sup>57</sup> Where a law or government regulation delegates the solution of the conflict to public officials who must decide within the framework of a procedure, the citizen will never act justifiably if they do not abide by that procedure, irrespective of whether it is highly regulated or minimally regulated, and whether it grants the public officials a wide margin of discretion or a narrow one. Therefore, the person who follows the established procedure but is denied their request cannot rely on the necessity defense as a justification for the subsequent criminal act. Think of the person who applies for but is denied public housing; they cannot justify their act of squatting by relying on the necessity defense. The fact that the state has assumed the role of providing public housing means that any private action outside the procedure cannot be justified.<sup>58</sup> For the same reason, a doctor who illegally obtains confidential medical records in order to reveal important irregularities at a clinic cannot justify their actions by invoking the necessity defense; a judicial investigation is the responsibility of public authorities, not of private individuals.<sup>59</sup>

According to this approach, the material fairness or unfairness of the outcome of the proceedings is irrelevant.<sup>60</sup> A person who has been wrongly convicted in the context of a fair trial cannot justifiably escape from prison but must resort to procedural recourse, even if that entails a long stay in prison.<sup>61</sup> From this perspective, a person who, instead of receiving authorization to carry a weapon to protect themselves, acquires it illegally is not justified under the necessity defense. Even if authorization would have been granted if they had applied for it (hypothetical

<sup>54</sup> Molina Fernández (2000), p. 241.

<sup>55</sup> Pawlik (2002), pp. 221–222; or Thorburn (2012), p. 10; (2011), p. 33.

<sup>56</sup> I take the example from Jakobs (1993), p. 427.

<sup>57</sup> Keller (1989), pp. 317–319.

<sup>58</sup> In this vein, see Pawlik (2002), p. 228, fn. 212; or Coca-Vila (2022).

<sup>59</sup> Ragués i Vallès (2015), pp. 21–23.

<sup>60</sup> Thorburn (2011), p. 34: “No matter how virtuous our conduct, the law will not grant us a justification if we are usurping someone else’s authority to do it.”

<sup>61</sup> Neumann (2017), marginal no. 119.

authorization), their act remains a (non-justified) legal wrong. And the same applies, of course, to the doctor who, while fulfilling all the other legal requirements for performing an abortion in accordance with the law, violates the requirement to perform it in an “authorized” clinic. Their act cannot be justified by the necessity defense. Not even formal breaches of procedure by public officials affect the citizen’s duty to respect the primacy of the institutionalized channel. This applies both to cases in which the official acts in an irregular manner and to those in which they do not act at all.<sup>62</sup> The person who, due to a corrupt official who does not process their application out of personal hatred, must endure long delays in getting approval for public housing cannot legally resort to squatting but must instead resort to legal means to resolve the problem.

This interpretation of the subsidiarity requirement is based on a proceduralist interpretation of the legal interests protected by the criminal law and the necessity defense as a justification.<sup>63</sup> As Pawlik points out, “The idea of ‘pre-state’ given ‘legal goods’ [Rechtsgüter]—namely, those constituted independently of the specific state guarantees—is a fiction without heuristic value under the conditions of modern societies. *Legal goods* owe their existence first and foremost to the state’s *legal order* as a freedomoriented *peace order*.”<sup>64</sup> For example, a physician who performs an abortion under circumstances in which the material criteria to which the legislature links the possibility of doing so are met (e.g., there is a danger to the life of the mother and the abortion is performed within the first 14 weeks of the pregnancy), but who does not respect a purely formal requirement (e.g., that the abortion be performed in an “authorized” clinic), would be committing a legal wrong equivalent to that committed by one who does not respect a material requirement. The life of the fetus qua legal good is, in short, also configured by strictly formal requirements. According to this view, the usurpation of state jurisdiction is a necessary and sufficient condition to ground the legal wrong and to deny a justification by the necessity defense.<sup>65</sup>

From these premises, it is not surprising that the necessity defense lacks practically all relevance in continental jurisprudential praxis. Given that contemporary welfare states address a broad range of emergency situations, it is now practically impossible to find an area that is not under the jurisdiction of the state. Everything is (hyper-)regulated and/or proceduralized,<sup>66</sup> with the result that—leaving aside absolutely exceptional cases in which the state is not in a position to punctually fulfill its mission in the face of a classical risk (think of the private individual who steals a car to take a deathly ill person to the hospital when it is impossible to call an

<sup>62</sup> Erb (2020), p. 1852; Pawlik (2002), p. 230.

<sup>63</sup> Thorburn (2011), pp. 33–34; or Pawlik (2002), pp. 227–228, fn. 212.

<sup>64</sup> Pawlik (2002), pp. 229–230, fn. 215 (the translation from German is mine, emphasis in the original).

<sup>65</sup> Thorburn (2011), p. 41.

<sup>66</sup> Keller (1989), pp. 318–320. On hyperlexis as a (normal) feature of modern administrative states, see Chiao (2021), pp. 130–131.

ambulance due to lack of cellular-network coverage)<sup>67</sup>—any necessity-motivated act appears to be an unacceptable questioning of the state jurisdiction. This is especially true when it comes to dealing with systemic social needs such as poverty and lack of housing.<sup>68</sup> And this strict interpretation of the subsidiarity requirement not only prevents the general recognition of the necessity defense in a large number of cases but also, in the same way and on the same grounds, prevents the acceptance of the necessity defense as an excusatory defense (i.e., duress) in the eyes of many scholars. A citizen who deviates from the legal decision or the procedural channel cannot be excused—not even when the act saves an interest clearly superior to the one it harms.<sup>69</sup>

### 3 The Legitimate Scope of the Necessity Defense

#### 3.1 The Primacy of Democratic Decisions and Institutionalized Channels for Combating Need

Those criminal law scholars whose interpretations of the necessity defense consider the principles of democracy and the primacy of legal solutions and procedural channels are right. First, the democratic legal provisions and procedural channels for dealing with need are essential in any state based on the rule of law, especially when it comes to assessing the justification of a criminal offense. Accepting a justification means admitting that the offender acts in accordance with the law, that they have a right (or at least a privilege) to take the action in question, and that the rest of the citizens must tolerate (i.e., have a duty to not interfere with) the conduct of the needy person.<sup>70</sup> Respect for the legal solutions and procedural channels is even more important in areas of strong moral controversy.<sup>71</sup> Consider, for example, the great diversity of opinions that surround the question how the evils at stake in decisions about abortion and euthanasia ought to be weighed. The democratic character of the norms that resolve such intricate conflicts, given its constitutionality, is sufficient reason alone for compliance, even when the law is objectively deficient or

<sup>67</sup> Here again, one might ask whether the state's decision to invest a sum of money in ambulances that will not be sufficient to create a network of ambulances omnipresent throughout the state's territory is not already a democratic decision that should preclude recourse to the necessity defense. Proponents of the strict approach to the notion of subsidiarity reject this (see Pawlik [2002], p. 220), but their reasons for carving out this exception to an otherwise strict application of the subsidiarity requirement remain unclear.

<sup>68</sup> For most of the contemporary scholars, the permanent nature of a given need would be irrefutable proof that it is within the mandate of the state to address that need. Critically, however, see Brownlee (2012), Ch. 6. Others claim directly that social need is not an evil that can be covered by the necessity defense, thereby reducing the scope of the legal concept of evil. See, e.g., Neumann (2014), p. 596: “[social needs] belong to the general risks of life and may (or may not) be dealt with by claims against the social state.”

<sup>69</sup> In this vein, see Palermo (2019), pp. 355–364.

<sup>70</sup> On the systematic consequences of justifying an act, see, e.g., Schopp (1998), pp. 16–20, 40–54.

<sup>71</sup> See Tomás-Valiente Lanuza (2009), pp. 100–101; or Molina Fernández (2000), p. 234.

incompatible with the standards of justice held by the needy person or by most of the citizens.<sup>72</sup>

Second, where it is the state that guarantees, through public systems, rights to receive certain social services—especially where the systems involve the public distribution of scarce goods—respect for such systems appears to be a legitimate obligation not only on the grounds of their democratic provenance but also and in equal measure for reasons of fairness.<sup>73</sup> In Ulfrid Neumann’s words, the necessity defense cannot be “an instrument for restructuring the social distribution of assets.”<sup>74</sup> Although the democratic legitimacy of the procedural output may be less than that of a law directly passed by parliament, respect for a given public system is a necessary condition for a shared enjoyment of the rights and interests granted by that system. Someone who steals from a bank to buy vaccines to send to developing countries may be acting in a morally acceptable way,<sup>75</sup> but they are arrogating to themselves a power that does not rightfully belong to them. The same disdain for democratically established solutions is demonstrated by a private individual who, instead of using the national organ-donor system, unlawfully takes possession of an organ as it is being transferred to the hospital where it was to be implanted. Such acts, in addition to being unfair to other potential recipients, jeopardize the foundations of a public system that allows the state to guarantee a certain level of positive rights to its citizens when distributing scarce resources.

The primacy of democratic legal decisions and procedural channels for combating need explains why the necessity defense cannot be interpreted as a general tool for disobeying the law through recourse to a supra-positive morality. Thus, recourse to this justification that entails a manifest questioning of the aforementioned primacy of democratic and institutionalized ways of addressing need is generally forbidden, regardless of whether the needy citizen or broad sectors of society like or dislike the legal solution being questioned.<sup>76</sup> As Lee rightly points out, there is no room for the necessity defense when people take the law into their own hands.<sup>77</sup> Or, in the words of Malcolm Thorburn, “A private citizen who tries to take matters into her own hands when state officials are available to take charge of the situation is branded a vigilante and treated as a criminal without justification.”<sup>78</sup> To be clear: I do not argue that there is a moral duty to obey all democratically approved laws or all the decisions adopted by public officials regardless of their content, nor that a

<sup>72</sup> For discussion of this point, see Schopp (1998), p. 173; Markel (2012). Whether a democratic decision-making body makes epistemically better decisions than an enlightened few can be left here aside. On the epistemic theories of democracy, see e.g. Madsen (2021), p. 14–17.

<sup>73</sup> Pawlik (2002), pp. 226–230.

<sup>74</sup> Neumann (2014), p. 596.

<sup>75</sup> Or perhaps not if the weighting of interests also takes into account the future and aggregate effects of allowing property infringements of this kind. The question of whether in the weighing of interests by the necessity defense only the interests directly affected in the particular case should be weighed (act utilitarianism) or also those to be expected in the future as a result of the generalization of the justified act (rule utilitarianism) is a controversial issue. For discussion on that, see, e.g., Joerden (1991).

<sup>76</sup> For detailed discussion on the state’s right to rule, see Thorburn (2020), pp. 53–57.

<sup>77</sup> Lee (2009), p. 141. In a similar vein, see Tomás-Valiente Lanuza (2009), p. 31.

<sup>78</sup> Thorburn (2011), p. 36.

person who acts without legal justification acts without moral justification as well. Instead, I sustain a more modest thesis valid for the realm of the (criminal) law: the option of resorting to the necessity defense as a legal justification is conditioned by respect for legal decisions and the procedural channels established regarding how to deal with the specific situation of need to be overcome.<sup>79</sup>

The primacy of democratic legal decisions and procedural channels for combating need also means that the necessity defense cannot be used as a political tool, no matter how morally worthy the plan of action or political goal might be: neither civil disobedience nor political protest can be justified by the necessity defense when they involve the commission of criminal acts.<sup>80</sup> Protection against bad laws should come not through the nullification of democratically enacted legislation by professional judges but through the established democratic process for changing the law.<sup>81</sup> The disobedient, in short, has no right to change the law through recourse to the necessity defense.<sup>82</sup> The requirement of subsidiarity thus precludes justifying protesters who prevent pregnant women from having lawful abortions,<sup>83</sup> as well as those protesters who commit crimes (breaking and entering, coercion, etc.) to force the government to change its policy on climate change<sup>84</sup> or to stop producing nuclear energy.<sup>85</sup>

However, as I will argue, it does not necessarily follow from the foregoing that the necessity defense must lose all of its practical relevance in contemporary welfare states. On the one hand, it is wrong to deny the necessity defense any capacity to operate as a gateway to justice in positive law, reducing it to a mere formula for empowering a private individual to assume a specific public function that is already

<sup>79</sup> I am thankful to an anonymous reviewer for pressing me to clarify this point.

<sup>80</sup> It is quite another matter to excuse (i.e., refrain from punishing), punish leniently, or not to prosecute those who commit a politically motivated crime or those who engage in direct or indirect civil disobedience as a response to state injustice. For discussion on the moral distinctiveness of conscientious (uncivil) disobedience from ordinary criminality, see, e.g., Wong/Chan (2022). An excellent overview of the debate on the criminal law consequences of civil disobedience in Delmas (2019); and Bennett/Brownlee (2021). While some authors defend to excuse such offenders for their wrongful act [see e.g. Brownlee (2012)], others advocate a justification defense since acts of civil disobedience are not (morally) wrongful violations of the law [Lefkowitz (2016)]. Finally, some authors claim that civil disobedients deserve the same punishment as others who breach the same laws. See e.g. Greenawalt (1987).

<sup>81</sup> For discussion on this, see Kadish/Kadish (1973), pp. 120–140.

<sup>82</sup> Once the moralistic approach to the necessity defense has been abandoned, this justification can be clearly distinguished from civil disobedience as an excuse or even justification. While the necessity defense serves to enforce the existing law when the state cannot guarantee it, civil disobedience, as a way of breaking the law publicly and openly, is practiced to persuade the public to change certain laws or policies.

<sup>83</sup> For a detailed discussion of the preemption of legislative authority by abortion-clinic protesters, see Boxerman (1990), p. 686: “The legislature has made a choice of values between the mother and the fetus which the court cannot overrule.”

<sup>84</sup> Greenawalt (1989), pp. 301–303. In contrast, see Long/Hamilton (2019). See also Garcia-Gibson (2022), who claims that the undemocratic character of some climate protests is not a decisive objection against them given the extremely serious threat to basic rights of it.

<sup>85</sup> For a different opinion, see Cohan (2007), p. 143: the decisive factor should not be that legal alternatives exist but that, given their effectiveness, it is reasonable to resort to them.

regulated. Where there is no legal solution to a conflict, it is wrong to falsely assume one in order to reject the justification. Rather, it is vital to recognize that there is room to complete the positive law through the necessity defense. On the other hand, it is equally wrong to impose to the needy person an unlimited duty to tolerate the need when a procedural channel exists regardless of how it works. Thus, as George P. Fletcher points out, “there must be some provision for distinguishing between cases in which the individual properly overrides the legislative judgment and those cases in which deference is required.”<sup>86</sup>

### 3.2 Typical Risks and Atypical Risks

Although contemporary welfare states assume a large number of responsibilities in the fight against need, it would be chimerical to think that every conceivable conflict and emergency situation has already been planned for and solved by the democratic legislature or the government through its regulations. Neither the silence of the legislature concerning a particular risk nor the mere factual impossibility of the state’s limiting a particular need can be interpreted as irrefutable evidence that the legislature wants the needy person to bear his misfortune. Rather, it is essential to distinguish—in a fair manner—between typical risks, which are those that the legislature or the executive has considered when regulating (or not regulating) a given conflict situation, and atypical risks, which are those that the legislature or executive has not taken into consideration when regulating the conflict in question, either because the risks appeared in the interim (i.e., were not known to the policymakers at the time the conflict was considered) or because the legislature or executive did not intend to respond to a particular need.<sup>87</sup> For example, the risk posed to the mental health of a mother by the prohibition of abortion (without special cause) after the first 14 weeks of gestation was already considered by the legislature when it prohibited abortions after 14 weeks.<sup>88</sup> The risk that, as a consequence of a pandemic, there will be no bed available in a hospital to allow for an abortion to be performed, however, is an atypical or unforeseen risk.

The necessity defense cannot be validly invoked when the risk encountered by the needy person (or a third person acting on his behalf) is a typical risk. In the context of my previous example, a doctor cannot justify performing an abortion after 14 weeks by invoking the psychological risk to the mother. This risk has already been considered by the legislature, and the individual cannot resolve the conflict in an alternative way. The question which risks have been foreseen and which have not is surely a complex one, because it is not at all easy to determine in general and accurately the legislative intent.<sup>89</sup> The necessity defense may be invoked in cases of

<sup>86</sup> Fletcher (2000), p. 793. In the same vein, see also Molina Fernández (2000), p. 236.

<sup>87</sup> See Ormerod/Laird (2021), p. 390: “the judge must determine whether the defence is implicitly excluded by the terms of the legislation. This will require the judge to examine the policy objectives underpinning the legislative scheme.”

<sup>88</sup> Fletcher (2000), p. 794.

<sup>89</sup> The controversial legal-interpretation theory question of what is meant here by legislative intent—the historical intent of the legislature that passed the law or regulation (historical intentionalism) or, instead, the (purported) objective rational will of the law at the time of its application—can be left aside. For discussion on legal-interpretation theory, see Greenberg (2021).

high uncertainty regarding whether the legislature foresaw the risk but not where the legislator's decision is clear, either because it derives without controversy from the text of the law or from the parliamentary documentation to pass the law. Ultimately, the responsibility to parse whether the needy person has respected the principle of subsidiarity lies with the judge who must apply the justification.<sup>90</sup> In those situations where the offender errs on the legislative intent and acts therefore wrongfully, it will still be possible to exempt or mitigate her responsibility on the ground of a mistake about the scope of a justificatory defense (indirect mistake of law).<sup>91</sup>

In my opinion, the above-mentioned conclusion should hold true even if the public's support for the value assessment that inspired the legislator's solution has changed over time.<sup>92</sup> Although the changes over the years in the composition of the legislature may diminish the democratic legitimacy of the legal solution,<sup>93</sup> a law that is not revoked at the time a judge has to decide a case that hinges on it is still a legally valid solution that must be respected. The fact that most people now believe that allowing intensive animal farming is wrong does not detract from the fact that the farmer who complies with the applicable regulations (adopted in the past) has the right that no one who releases his animals in order to prevent their suffering be justified by the necessity defense (or any other justificatory defenses).

However, this does not mean that an action that deviates from the legal solution and is taken in the face of a typical risk can never be justified by the necessity defense. This is feasible in two scenarios. First, it should be possible when there is a contradiction between laws of the same rank that leads to a situation of legal uncertainty.<sup>94</sup> When it is obscure how the legislature aims to deal with a given conflict situation, there is no reason to place the risk of error on the needy. Under such a scenario, a person whose conduct safeguards an interest that clearly outweighs the injured interest, assuming the rest of the defense requirements are satisfied, may validly claim justification. By way of example: if an article of the procedural law authorizes a private individual to make a non-violent arrest of a fugitive and another

<sup>90</sup> Conversely, the judge's interpretation of the legislative intent may be questioned. However, in a State governed by the rule of law, it is up to the judges to determine whether the affected party has respected the requirement of subsidiarity. That the judge's notion of justice may condition her decision regarding the legislative intent is plausible, but this is not a problem exclusive to the interpretation of the requirement of subsidiarity but a general problem of judicial interpretation theory.

<sup>91</sup> An unavoidable mistake of law, that is, one that the agent could not overcome with reasonable effort, leads to full exemption from criminal liability. On the ignorance of the law as an excuse, see e.g., Husak (2016), Ch. 2. The mistake of law as an excuse applies not only to the case in which the offender does not know that the act is prohibited but also to the case in which the offender believes that her act *prima facie* wrongful is permitted by a justification. The latter is what happens when it is impossible for the needy person to know whether the risk he wants to avoid has been foreseen by the legislator in a particular law (mistake about the existence of a justificatory defense). For discussion on errors that occur in the context of general defenses from a continental criminal law point of view, see e.g., Bohlander (2009), pp. 75–76.

<sup>92</sup> For a different opinion, see Molina Fernández (2000), pp. 237–238.

<sup>93</sup> On the relevance of the loss of parliamentary support for a law adopted by a past parliament (that is, the loss of parliamentary support for a law after the composition of the legislature has changed) to the assessment of the law's constitutionality, see Ferreres Comella (2021), pp. 204–213.

<sup>94</sup> Molina Fernández (2000), pp. 236–237.



precept limits the right of arrest to police officers, a citizen who causes damage to property in order to arrest a fugitive can validly invoke the necessity defense when they are charged with a property crime. Her offense does not flout democratic decision-making processes. The second scenario under which there is no reason to reject the necessity defense for action taken in the face of a typical risk is when the law or regulation from which the needy person departs is blatantly unconstitutional.<sup>95</sup> Deviating from such a legal solution does not imply questioning the primacy of the democratic legislature, because, in a rule-of-law state, the powers of the legislature and the executive are limited by the constitution and fundamental rights. And this applies even before the rule has been declared unconstitutional by the constitutional court.<sup>96</sup> A person who escapes from a police station after being arrested under a new legal rule authorizing—in violation of a constitutional provision—detention without time limit can justify his escape with the necessity defense. There is no mandatory deference to laws that are undoubtedly unconstitutional.<sup>97</sup> As Cynthia Farina points out, in this way, the necessity defense already regains a certain transformative potential: the judge who acquits the prisoner in our example subtly exerts pressure on parliament or government to remedy situations and amend laws that are contrary to the constitution.<sup>98</sup>

When the risk is atypical, the necessity defense can be validly invoked as a general rule. If the legislature did not contemplate the act at the time it approved the rule regulating similar conflicts, recourse to a necessity defense does not make a mockery of the primacy of the legal solution to the conflict. Such situations arise not only because the legislature is not infallible but also because circumstances change over time, meaning that there must necessarily be risks not contemplated in the legislation. For instance, the father who, to save his son, steals a recently developed drug that does not yet appear in the catalog of drugs covered by the state does not resolve a conflict against the will of the legislature.<sup>99</sup> Here, as opposed to someone who sells cannabis to an ill person who wants to use it to minimize his pain, the father can validly call upon the necessity defense to justify his act. The risk faced by the father and his son is atypical, unlike the risk faced by those prevented from

<sup>95</sup> On the theory of “constitutional necessity,” see Farina (1979), pp. 347–360: a prisoner who must endure intolerable conditions in prison that render his punishment cruel and unusual—and therefore contrary to the Eighth Amendment to the U.S. Constitution—may justifiably escape.

<sup>96</sup> It is one thing for a law that has not been declared unconstitutional by the competent court to be binding, but it is quite another for a person who departs from a legal solution that is clearly unconstitutional to be justified by the necessity defense.

<sup>97</sup> I am aware that this exception is subject to slippery-slope criticism. What does it mean that the rule is blatantly unconstitutional? In my opinion, the exception should be limited to those cases in which the law violates an express constitutional mandate. When in doubt, it is obligatory to respect the law and wait for its assessment by the competent constitutional court. When a high court deems a law constitutional, citizens have the duty to respect the law and accept their punishment in case of infringement.

<sup>98</sup> Farina (1979), p. 350.

<sup>99</sup> Obviously, if the legislature subsequently decides not to include the drug in the list of covered drugs, this means that stealing the drug to save one’s son is no longer a justifiable act. The right to act in a necessity scenario lapses as soon as the legislature assesses the applicable risk and decides whether and how to address it.

using cannabis for medical purposes, which is well known to the legislature when it decides not to legalize this drug.<sup>100</sup> To reject the necessity defense in such cases would mean imposing on the affected person a duty to tolerate his need until the legislature decides. Because of the primacy of democratic solutions, however, this cannot be required. The only thing that is legitimately required of citizens is to respect the democratically established legal solutions.

In any case, the legitimate scope for the necessity defense cannot be removed by assuming blanketly that all the imaginable risks have already been foreseen by the legislature. Particularly problematic are the interpretations *a sensu contrario* that completely foreclose recourse to the necessity defense. For example, the fact that the legislature does not allocate 100% of the national budget to providing for mountain rescue systems cannot be interpreted as meaning that it wants the mountaineer to freeze to death rather than enter someone else's cabin. The legislature may also foresee that certain risks would be better dealt with through the necessity defense on the grounds that that is the most efficient solution in those cases.<sup>101</sup> Setting limits on the budget of a national rescue system is not equivalent to denying that some actions can be justified by the necessity defense. Therefore, the necessity defense must also be recognized after large-scale disasters, where the rescue tasks are too pressing, and numerous and public officials are unable to respond adequately.<sup>102</sup>

### 3.3 Malfunctioning and Unsatisfactory Procedures

Should a necessity defense also be denied when the legislature has not resolved the conflict but has left its resolution in the hands of public officials within the framework of procedure (regardless of whether the procedure is highly regulated or minimally regulated)? In principle, and for the same reasons mentioned above, the provision of a procedural channel also precludes recourse to the necessity defense. However, the mere existence of a procedure vaguely linked to the situation of necessity does not *ab initio* preclude recourse to the defense. A first distinction must again be made here between typical risks—that is, risks contemplated by the legislature when providing for the institutionalized procedure—and atypical risks. Conduct that occurs in the face of atypical risks—risks that the procedure was not intended to manage—can be justified by the necessity defense. For example, the defense could be validly invoked by someone who, because a pandemic has strained the medical system and made it impossible to get a timely sick note from a doctor, falsifies a sick note in order to avoid getting fired. The departure from the procedural channel in this case does not constitute a violation of the subsidiarity requirement.

The justification cannot be rejected *en bloc* and without exception when the risk in question can be averted through a specific process either. Here, it is essential to operate in a much more fine-grained manner and to distinguish between those

<sup>100</sup> Ormerod/Laird (2021), p. 390: “the use of cannabis on an individual basis conflicted with the purposes and effect of the legislation.”

<sup>101</sup> See Alexander (2005), pp. 638–639.

<sup>102</sup> On the defense of necessity in large-scale emergency situations, see Finn (2016).

procedures that function correctly and those that do not. When the procedure functions correctly—that is, when it responds suitably to the legislative intent—the needy person must abide by the process and will not be able to justify a parallel solution to the conflict, even if the procedure does not satisfy his particular interests or even if we may consider the outcome unjust. Let me be clear on this: what is crucial is not the outcome of the procedure itself but whether the procedure responds to the will of the democratic legislature that has configured it.<sup>103</sup> For example, someone who waits on the organ-transplant waiting list under the standard organ-allocation procedure must wait his turn, even if the wait involves serious physical or psychological suffering. To forge a medical certificate or to corrupt public officials in order to gain access to an organ can therefore never be justified—not even when the offender is in danger of death. Such conduct not only brings into question the legitimacy of the state’s system of distributing organs according to democratically established criteria but is also unfair to all who wait patiently for their turn.<sup>104</sup>

When the procedure in question functions improperly,<sup>105</sup> however, the necessity defense cannot be denied on the grounds that it circumvents the primacy of the public procedural channels. In short, determining whether the necessity defense should be rejected requires scrutinizing the effectiveness of the system dealing with the need.<sup>106</sup> One consequential type of dysfunction is when public officials willfully violate their duties (i.e., engage in corruption) or violate constitutional duties of protection.<sup>107</sup> Imagine, for example, the corrupt public official in charge of housing allocations who illegally trades housing allocations, or the judge who, blatantly abusing his margin of discretion, does not issue a protection order for a person threatened by a dangerous criminal organization. The fair citizen who is not willing to pay the bribe—and thus cannot get public housing—can justifiably occupy an empty apartment or the like. And the same goes for the person who, denied a protection order in the manner described, resorts to the black market to obtain a weapon: her crime of illegal possession of a weapon may be justified. Against this conclusion, it will be said that there are also institutionalized (secondary) channels provided to solve the problem of corrupt officials or officials who violate their duties. A citizen can always turn to the police or the public prosecutor’s office to report such acts. In my opinion, when these secondary channels are also ineffective—that is, when they exist only in theory—the justification cannot be denied. If the state fails in its mission, the

<sup>103</sup> See, however, Silva Sánchez (2018), p. 89; or Paredes Castañón (1989), p. 125. Both authors give greater weight to the outcome of the procedure than the approach advocated here.

<sup>104</sup> I leave aside here the question whether the illegal attainment of a preferential position on the list to the detriment of other patients constitutes an injury or even homicide, or just a form of corruption. On this problem, see, e.g., Schneider/Busch 2013.

<sup>105</sup> Against the common presumption of a perfectly functioning democratic state by courts, see Cammiss/Hayes/Doherty 2021, p. 16.

<sup>106</sup> In similar vein, see Thorburn (2011), p. 36, fn. 49: “In cases where it is absolutely clear that the officials are unwilling to perform their legal duties, the law might also grant a justification to a citizen who takes matters into her own hands.”

<sup>107</sup> See Bock (2019), pp. 573–575.

burdens of the necessity scenario that the legal solution or procedure was designed to limit or prevent should not be borne by the citizen victim of the state's failure.<sup>108</sup>

The necessity defense can also not be rejected when the output of the process does not correspond to the legislative intent articulated in the rules underlying the process—that is, when there is an internal inconsistency between the legislative intent and the procedure that exists for the realization of that will.<sup>109</sup> This will happen, basically, when there are not enough funds to carry out the will of the legislature. For example, a person whose right to housing is expressly recognized by law but who sleeps on the street for many months due to the inability of the competent public service to provide them with housing may have their occupation of property justified.<sup>110</sup> With this act, they do not arrogate to themselves a jurisdictional power, nor do they question the primacy of the institutionalized channel for the resolution of a conflict; rather, they simply carry out the legislature's will. The same is true of the prisoner who, after asking the prison and judicial authorities for protection from the constant abuse to which they are subjected by other inmates but receiving no protection, chooses to escape to avoid being assaulted or raped.<sup>111</sup> This fact may bring into question the stability of the prison system, as does the fact that the prisoner remains in prison as a victim of serious crimes, but in no way can it be considered a way of questioning the primacy of democratic solutions to conflicts—at least not in the framework of a state that recognizes the fundamental rights of its prisoners.

### 3.4 Should Formal Departure from a Procedural Channel Preclude Recourse to the Necessity Defense?

What happens to the needy person who, instead of using the procedural channel, acts in a necessity scenario by averting the danger in the same way as they could have if they had in fact used the public procedure? By way of example: A politician receives a serious death threat. Instead of going to the police, they buy a gun on the illegal market and use it to defend themselves that same night. Can the crime of illegal possession of a weapon be justified by the necessity defense? It can hardly

<sup>108</sup> It is true that the property owner who is called upon to bear the costs of the state's failure is also treated unfairly. In my opinion, however, it is fairer for the costs to be borne by the owner of the empty apartment than by the citizen who lacks a home because they are not willing to pay the bribe to the corrupt official. The property owner, in turn, would have to be compensated by the state—the actor actually responsible for the situation of need.

<sup>109</sup> For a related discussion, see Yaffe (2009), pp. 381–382; or James (2014), pp. 38–39.

<sup>110</sup> Thus, what is decisive in resolving the controversial cases of occupation of real estate is not whether the public procedure guarantees a right to immediate housing but instead what the legislature intended. When the legislature's intent is effectively to guarantee housing to everyone immediately, occupations in the face of the ineffectiveness of the procedure can be justified by the necessity defense. For discussion on the statutory duty to house the homeless, see Jenkins/Brownlee (2022), pp. 5–6. When, on the other hand, the law recognizes only a right to participate in a housing-distribution system, it is not possible to validly assert a necessity defense.

<sup>111</sup> For discussion on this, see, e.g., Dolinko (1979). Against justification in such cases on the basis of the consequences for the system, see Greenawalt (1989), pp. 299–301.

be said that the act itself constitutes a moral wrong, at least if we look at the comparison between the injured interest (the public procedure) and the protected interest (life). However, by not getting police protection, the politician, in their act, might well be regarded as exhibiting civic arrogance,<sup>112</sup> thus making the justification of their offense highly problematic. In my opinion, such offenses cannot be justified, even if it can be proved that the weapon would have been delivered to them if they had used the procedure. Allowing the justification here would mean taking away the state's power to decide who bears arms. This same reasoning explains, for example, why the crime of helping someone to illegally enter a country—imagine an activist who helps a refugee in mortal danger to illegally enter another country—cannot be justified. Here, again, we are dealing with an act that brings into question the competence of the state to decide a policy that it has legitimate authority to decide—in this case its immigration policy. Such an act cannot be justified, even if the foreigner would have had his right to enter the country recognized if they had applied for asylum through the asylum procedure.<sup>113</sup>

Does the same apply to crimes that protect classic legal interests (e.g., life, physical integrity...) whose protection has been proceduralized?<sup>114</sup> Can a doctor who performs an abortion in a clinic that is not officially accredited (that being a legally necessary condition for the acceptance of the abortion) be justified by the necessity defense? Let us imagine that the clinic is well equipped and meets safety standards such that the pregnant woman does not run any atypical risks to her health. I would argue that the act cannot be justified. Whether a legislature might choose to establish a lenient punishment for doctors who perform abortions in unauthorized clinics is another matter.<sup>115</sup> In any case, neither a formal crime of this kind nor the crime that protects the life of the fetus can be justified by the necessity defense if formal requirements for the legal practice of abortion have been set. In both cases there is a legal decision and a procedure that must be followed. To deviate from it is to call into question the competence of the state to decide under what conditions morally controversial actions are authorized.

<sup>112</sup> On civic arrogance as a foundation for the criminalization of hybrid *mala quia prohibita* offenses, see Duff (2002), pp. 103–104. This argument has been discussed in the debate on civil disobedience: this would be wrong to the extent that the disobedient neglects the democratic ideal of lawmaking as a collective enterprise, claiming to understand better what the public good requires than do their fellow citizens. For discussion on this, see Delmas (2019), pp. 172–173. On the concept of epistemic arrogance, see Madsen (2021), pp. 10–13.

<sup>113</sup> For discussion on this, see Abramenko (2001).

<sup>114</sup> I am referring to those interests—such as the life of the fetus— whose legal protection depends not only on material criteria, but also on a series of essentially formal requirements (e.g., place where the abortion is performed, person performing the abortion, fulfillment of information duties). On procedural (criminal law) justification, see, e.g., Hassemer (1994).

<sup>115</sup> See Tomás-Valiente Lanuza (2009), pp. 147–148. For the contrary view, see Saliger (2010), pp. 612–613; or Pelz (1995), p. 306: the conduct being punished would no longer be the harming of a legal interest but rather the infringement of a competence rule. For those who, like Thorburn ([2011], pp. 32–35; [2020], pp. 57–58, 62), believe that criminal law protects precisely these rules of jurisdictional distribution, this objection is clearly unpersuasive.

### 3.5 Excusing the Offender When the Subsidiarity Requirement is Violated?

As I pointed out in the introduction, many criminal law scholars argue that the subsidiarity requirement applies in the same form when it comes to excusing the offender whose in question conduct occurred in an emergency scenario (i.e., when it comes to the necessity defense as an excuse, or the excuse of duress).<sup>116</sup> In other words, when there is a public system of housing allocation, a person who occupies a vacant house to avoid sleeping on the street not only acts unjustifiably but also cannot even have his act excused. According to this view, this principle is of utmost importance when central institutions of the state are at stake: the unjustly convicted prisoner not only would be unjustified in escaping from prison but also could not even be excused for his act.<sup>117</sup>

I cannot deal in depth here with the difference between justifications and excuses, nor with the highly controversial foundations of necessity as an excuse.<sup>118</sup> Although both justificatory and excusatory legal defenses result in the defendant's acquittal, the distinction has both theoretical and practical interest. Accepting an excuse does not mean authorizing the needy person to carry out such conduct (no right or privilege is granted), nor does it mean imposing on third parties the duty to tolerate and not interfere with her wrongful act.<sup>119</sup> Accepting a justification does imply both. The only thing that the state does by excusing a crime is refrain from imposing punishment either in response to a situation of exceptional motivational pressure as a concession to human frailty or imperfection, or in response to the fact that the state itself is (politically or even legally) co-responsible for the needy person's situation. While recognizing a justification means *de facto* changing the law (since the citizen has a genuine right to carry out the justified act and therefore a claim against the third person that should accept the preservatory act), excusing her only means denying the legitimacy of censuring the offender for an act declared wrongful. Accordingly, it is wrong to interpret the requirement of subsidiarity in the same way in the field of justifications and excuses.

Of course, excusing a crime not only has consequences in the bilateral state–offender relationship but also indirectly affects the victim, who is no longer protected by an effective punishment. Therefore, excusing on necessity grounds must also be legitimized in the eyes of the victim.<sup>120</sup> However, in many cases in which the justification is denied due to lack of subsidiarity, it will be possible to exonerate the offender while also taking the victim's rights into account. Think, for

<sup>116</sup> See, e.g., Pawlik (2003), pp. 305–306.

<sup>117</sup> See Pawlik (2003), pp. 305–306 (unwilling to admit even a reduced sentence). Similarly, see Palermo (2019), pp. 358, 363 (although establishing differences between the importance of the procedural channel and its degree of effectiveness).

<sup>118</sup> Interested readers can consult Neumann (2014), pp. 604–606.

<sup>119</sup> In fact, it is possible to react in self-defense against merely excused conduct. Conversely, it is not possible to react in self-defense against justified acts. For a comprehensive account of the practical consequences of the justification statement, see Bohlander (2009), pp. 78–79; or Neumann (2014), pp. 586–587.

<sup>120</sup> Hörnle (2019), pp. 218–219.

example, of the person who occupies a house to avoid sleeping on the street. The (political) coresponsibility of the state incapable of guaranteeing such a basic social need delegitimizes—from both a political and a moral point of view—the state’s authority to punish the offender, even if the owner of the house sees his property rights indirectly eroded.<sup>121</sup> The owner may have a right to prosecution of the crime, even a right against the state to obtain a statement about the wrong of which it has been the victim, but she has no right to have the offender found guilty.<sup>122</sup> Especially in victimless crimes, it seems mandatory to excuse the offender when the state is the actor (politically) responsible for the failure that leads to the situation of need. A person who has been unjustly convicted and is not acquitted through the legal channels can validly assert the necessity excuse when they cause non-serious injury to a prison officer in order to escape.<sup>123</sup> And something similar applies in the case of crimes co-determined by a situation of abuse. The offender who brings drugs into a country in order to pay for a life-saving medical procedure for a relative does not act in accordance with the law (i.e., does not act justifiably), but his drug trafficking crime ought to remain unpunished (i.e., be excused). Preventive needs should not make us lose sight of the fact that, in reality, such offenders are victims of a crime of trafficking in human beings.<sup>124</sup> Their act is surely unlawful, but the state lacks legitimacy to punish the victim of a grievous crime that it is unable to prevent.

## 4 Conclusion

In the framework of a democratic rule-of-law state, the necessity defense ought not be used as a tool to oppose the will of the democratically elected legislature. Not only can it not be used to circumvent legal solutions to conflicts but it also cannot be validly invoked when the state has provided a procedural channel to avert the need in question. The primacy of legal solutions and procedural channels is essential, especially in view of the fact that when a judge or jury recognizes a necessity-defense justification for an act, the agent is not only exempted from punishment but also accorded a right (not a mere privilege) to take the action in question under the circumstances in question. Everyone may help the agent who acts justifiably, and no one can prevent the justified action. Thus, the necessity defense can be invoked neither to justify acts of civil disobedience nor as a way of justifying political protests that involve the commission of crimes.

<sup>121</sup> On excusing based on the state’s (political) co-responsibility for the emergency, see, e.g., Tadros (2009), pp. 404–409; Robles Planas (2011); Silva Sánchez (2018), pp. 106–112. In the case of the occupation of (public) real estate in particular, see Beade (2016), who denies the moral status of the state to punish.

<sup>122</sup> See Coca-Vila/Irarrázaval (2022), p. 65, fn. 51. For discussion on the (moral) right of the victim to see their victimizers punished, see, e.g., Alm (2019).

<sup>123</sup> In this vein, see also Hörnle (2019), p. 880. In my opinion, since the prison officer is also not—personally—responsible for the state’s error, only minor injuries to his physical integrity can be excused. Their life must be protected by the threat of effective punishment in the case of attack on it.

<sup>124</sup> Silva Sánchez (2018), p. 90, fn. 225.

However, the primacy of legal solutions and institutionalized channels does not have to result in the de facto derogation of this justificatory defense. In this article, I have attempted to overcome the dichotomy between a purely moralistic and a purely formalist (rule-of-law-centered) conception of the necessity defense. As part of this attempt, I have argued that it must be recognized that even in today's welfare states, there are conflicts that are not legally resolved. In the face of atypical risks not foreseen by the legislature when it adopted its rules for resolving a given conflict, recourse to the necessity defense should remain available, since using the necessity defense in such cases calls in no way into question the primacy of the democratic legislature or executive. I have argued, further, that the formal existence of a procedure does not unavoidably preclude valid recourse to the necessity defense. When the functioning of the procedure deviates radically from the legislature's intent, either because of structural deficiencies or because of irregularities in the execution of the procedure that are attributable to public officials, the needy person's act may be justified by the necessity defense. Nor can such an act be considered an unfair act or an act of civic arrogance; rather, it should be considered the realization of the legislature's intent. Finally, I have argued that rejecting a justificatory necessity defense claim on the grounds of a breach of the subsidiarity requirement need not also mean rejecting an excusatory necessity defense claim (i.e., the invocation of the necessity defense as excuse, or the excuse of duress) for the same act. In situations of exceptional motivational pressure or when it is the state that is responsible for the conflict, it is legitimate—with regard to both the state-offender relationship and the interests of the victim of the crime—to excuse the offender.

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## Declarations

**Conflict of interest** I have no conflicts of interest to disclose.

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