

practice.

Prof. TETSUO KATO
Minebea Co., Ltd.
JUNKO SHIBATA

4. Criminal Law

A case to determine whether the defense of necessity is allowed with respect to the act of killing under duress.

Decision by the Ninth Criminal Division of the Tokyo District Court on August 26, 1996. Case No. (wa) 186 of 1995. A case of homicide. 1578 *Hanrei Jihō* 39; 921 *Hanrei Taimuzu* 93.

[Reference: Criminal Code, Articles 37, 60 and 199.]

[Facts]

The accused X had once been a follower of the AUM Shinrikyo religious cult, whose founder was Y. X resigned from the cult and had no contact with it. Since X's mother M suffered from Parkinson's disease, she had been receiving treatment in the hospital affiliated with the cult, which was located in an establishment administered by AUM. X became acquainted with Z, who had once been a follower of AUM and had worked as a pharmacist in the hospital. Z insisted that the treatment methods of the hospital would make M's illness worsen. Z exhorted X to remove M from the hospital.

At about 3:00 a.m. on January 30, 1994, X and Z stole into the building administered by the AUM cult for the purpose of rescuing M. They tried to take M out, carrying her in their arms. But they were unfortunately detected by devotees of the cult on their way. Though X and Z resisted the devotees by using tear gas spray, etc., both of them were ultimately taken captive. With handcuffs on their wrists and with packing tape on their mouths, X and Z were taken to a meditation room the construction of which was suitable for keep-

ing them incommunicado. They were made to sit in front of the founder, Y, there. Although the packing tape was removed, they were kept in handcuffs. They were confined in the room, surrounded by nearly ten leading members of the cult who worshipped Y as the supreme being. Y declared that their hostile conduct against the cult should be punished. Y said that X was the victim who had been lured and deceived by Z. Then, Y ordered that X should obey the religious dogma of AUM and take on killing Z. Naturally none of the leading members objected to it. X was engaged in a delaying action by keeping silent. Then, Y threatened that X himself would be killed unless X killed Z. And Y urged X to do so, saying that X could be free to go home if X finished it. X confirmed that the performance of Y's order would set him free, and finally consented to killing Z. X put packing tape over Z's eyes, covered his head with a vinyl bag and sprayed tear gas into it. As Z breathed with difficulty and wriggled violently, some of the leading members pressed Z down. In compliance with Y's direction, X wound rope around Z's neck and continued to squeeze his throat. As the result, Z was suffocated to death.

In this case, the prosecutor asserted as follows: (i) At the time of X's act, there was no impending danger to X's life, and X's act did not satisfy the requirement of "no alternative means" which is required for the defense of necessity, because X had not attempted sufficient alternative measures to avoid killing Z. X immediately took Z's life to avert a present danger to his own bodily freedom, however the action was remarkably imbalanced with regard to the harm avoided and the harm caused. In addition, the reasonableness of the compelled act is negated. Therefore, X's killing of Z is regarded as neither an act committed out of necessity nor an excessive act committed out of necessity; (ii) Under the facts and circumstances of this case, there existed a fair expectation that a lawful act should have occurred; (iii) X should be punished for homicide based on a conspiracy with the founder, Y, and the leading members of the cult.

On the other hand, his counsel insisted on X's innocence for the following reasons: (i) X had never conspired with Y and the leading members; (ii) X's act is justified as necessity, because there was no alternative means to avert the present danger to X's life other than

killing Z; (iii) Under the circumstances in this case, X could not be reasonably expected to disobey Y's order and refuse to kill Z. Therefore, X should be excused for his act even if the killing of Z is unjustified and wrongful.

[Opinions of the Court]

The accused is found guilty. He is hereby sentenced to three years' imprisonment with forced labor. The execution of the said punishment shall be suspended for five years. (These sentences have not become final since the accused filed an appeal with a higher court.)

1. The Existence of a Conspiracy

X had fully perceived that the founder of AUM, Y, ordered him to kill Z as punishment for their hostile conduct against the cult. And X killed Z in compliance with Y's directions. Accordingly, it can be found that X had previously conspired with Y and the leading members of the cult to kill Z.

2. The Defense of Necessity

"Present danger" is one of the requirements for the defense of necessity under Article 37 (1) of the Criminal Code. It means the state in which a legally protected interest is actually being infringed or in which infringement of such an interest will immediately occur. "Present danger" cannot be asserted even if there is a high probability that infringement of a legally protected interest will be brought about in the near future. In a situation of conflict between two lives such as this incident, it is essential to strictly construe the requirements for the necessity defense. In the instant case, X was in handcuffs and surrounded by Y and nearly ten leaders of the cult. Y directed X to kill Z, and threatened that X himself would be killed unless X killed Z. Under such circumstances, to be sure, it can be found that there existed a present danger to X's bodily freedom. In the event that X continued to refuse the order given by Y, it is impossible to deny the likelihood that X would be killed. The fact is, however, that Y only tried to orally persuade X to kill Z. At that time, Y and the other leaders did not threaten X with dangerous weapons; therefore, it cannot be found that any "present danger" to X's life objectively existed. X's act is not considered to be

“necessity”.

3. *An Excessive Act Done Out of Necessity*

(1) X made up his mind to kill Z in order to escape from confinement. Accordingly, it is admitted that X had the will to avert danger.

(2) It is relevant whether X's act of killing was “unavoidably done” to avert present danger to his bodily freedom. To allow the defenses concerning an act done out of necessity or an excessive act done out of necessity, the requirement of an act “unavoidably done” must be satisfied. An act can be construed as “unavoidably done” only when it is found that there was no alternative means other than the actual action for averting danger and it is acceptable or tolerable in light of reason. That is, the requirement of being “unavoidably done” calls for the following two elements: 1) The action which a person actually took must be the only measure to avert the present danger (the requirement of supplementary). 2) The second is that the act of averting danger must be regarded as reasonable (the requirement of reasonableness).

1) *The Requirement of Supplementary*

Concerning the requirement of supplementary, it is not essential to assess what measures X took before his final act (*See* the above-mentioned opinion of the prosecutor). The problem is whether any means which had an actual possibility of averting the present danger existed other than X's action. He could not escape from the state of confinement by himself. He could not contact anyone outside and request the police to help him. The founder Y had already determined to settle the situation by compelling X to kill Z, and disclosed his resolution to the leaders of the cult around him. Under such circumstances, there seems to have been little probability that X would have been released even if X had asked Y to reconsider the killing of Z. In order to get out of confinement, he could not help killing Z. Therefore, the requirement of supplementary is satisfied.

2) *The Requirement of Reasonableness*

Certainly, it was the infringement of X's physical freedom that he tried to avert. However, there was a possibility of ending his life, which is not identical with any present danger to his life. In such

a context, X killed Z to avoid harm to his physical freedom. In light of reason, it is too strict to decide that X should not have acted so. Therefore, his necessitated act fulfills the requirement of reasonableness.

(3) But the harm caused is disproportionate to the harm avoided in that X took Z's life in order to avert the present risk of infringing his physical freedom. Accordingly, X's conduct is construed as an excessive act done out of necessity.

4. *Fair Expectability of Lawful Acts*

In cases where it is impossible to fairly expect a person to perform another lawful act instead of his actual unlawful one under practical circumstances, an extra-statutory excuse is allowed (*the theory of fair expectability*). However, liberal application of the theory would render norms of criminal law incompetent. The excuse grounded on the theory must be permitted only in limited circumstances. The excuse is allowed only in extreme situations, for example, where an act was objectively subject to a compulsion which the actor was psychologically unable to resist. In this case, the danger to X's life was not impending even if Y threatened that X himself would be killed unless X killed Z. Consequently, it cannot be found that X was in such an extreme state of psychological compulsion. X could have made efforts to avoid killing Z (for instance, to ask to save Z's life, to persuade Y to reconsider the killing of Z, etc.). If an ordinary person had been in X's place, he/she could have been fairly expected not to kill Z. Certainly, it is possible to diminish accountability or culpability for X's act, but impossible to excuse it completely.

[Comment]

The current case has widely been reported by the news media and especially attracted a great deal of attention as one of a series of serious cases concerned with the AUM Shinrikyo cult. Also this decision is theoretically noteworthy in that it deals closely with the defense of an act done out of necessity or an excessive act done out of necessity and the theory of fair expectability, which are the most fundamental problems related to the general rules of Criminal Law.

1. Article 37 (1) of the Criminal Code stipulates that an act done out of necessity should not be punished and that the reduction or remission of punishment may be allowed according to circumstances in case of an excessive act done out of necessity. Article 37 (1) of the Criminal Code provides that, with respect to the former act done out of necessity: An act unavoidably done to avert a present danger to life, body, liberty or property of one's self or any other person should not be punished, but only if the harm produced by such an act does not exceed the harm which was sought to be averted. That is, the prerequisites for the privilege grounded on the act done out of necessity are as follows: ① There must be a present danger to life, body, liberty or property of the actor or any other person; ② His/Her act must be unavoidably done in order to avert the present danger; ③ The harm caused must not outweigh the harm avoided by the act.

Requirement ① is generally construed to be necessary for both an act done out of necessity and an excessive act done out of necessity. It seems that the current decision adopts the same premise. In addition, this Court also regards requirement ② as common to both types of necessitated acts. Thereby, the Court requires that prerequisite ② should be satisfied to allow the reduction or remission of punishment for the latter excessive act. As a result, the Court limits latitude for excessive acts done out of necessity to cases in which only requirement ③ is unsatisfied while requirements ① and ② are fulfilled. It follows that excessive acts done out of necessity can no longer be determined to have occurred in cases where requirement ② is unsatisfied. However, the decision by the Supreme Court on December 25, 1953, 7 *Keisyū* 2631, did not restrict the range of excessive acts done out of necessity in this way. The Supreme Court approved and construed the existence of an excessive act done out of necessity when it does not rigorously meet the necessity or supplementary of actions included in requirement ②. The dominant academic opinion also supports the Supreme Court's view. Therefore, the theoretical basis in this decision is fundamentally problematic in that excessive acts done out of necessity are confined within narrow limits by requirement ②.

2. This Court examined not only whether X's killing is regarded as an act done out of necessity or an excessive act done out of necessity, but also whether a fair expectation of adherence to the law which existed at the time of his act. Under the theory of fair expectability, its existence is inquired into only after the illegality of the act is confirmed. Even if an act is determined to be illegal, the actor's accountability or culpability is negated and the illegal act is excused from the extra-statutory interpretation when he/she could not have been fairly expected to perform any other lawful act under the accompanying circumstances. The current decision accepted this doctrine and considered the possibility of excuse.

By the way, it has been vigorously debated why an act done out of necessity is not punishable, i.e., whether the defense of necessity functions as a ground for justification or a ground for excuse based on the nonexistence of fair expectation. According to precedents and current theory, the defense of necessity is one of the grounds for justification. This decision also seems to support the same view in that it distinguishes the problem of necessity from that of excuse based on the nonexistence of fair expectation. Moreover, this Court theoretically admits room for justifiable necessity even in life-versus-life (person-to-person) cases in general. However, it is very problematic to permit such a wide range of justification based on the necessity defense.

3. Concerning the present "danger" in requirement ①, the commonly accepted view renders all sorts of causes sufficient. The "danger" can be brought about not only by natural phenomena, diseases and attacks of animals, but also by lawful or unlawful acts of persons. Therefore, as in the current case, when a person threatens to infringe a legal interest of the actor himself unless he violates the interest of a third party, the present "danger" to the actor can also be found. It must then be considered whether the necessity defense is allowed or not. In Germany, it has been debated whether violating another person's interest under duress is regarded as a special form of necessity. It is called "*Nötigungsnotstand*", which is distinguished from ordinary cases of necessity ("*Notstand*"). On the other hand, in Japan, this problem has hardly mattered in academic opin-

ions. On the whole, the comprehensive concept of “necessity” includes “duress” cases. In Japan, “duress” has not held as independent position as is permitted in Anglo-American criminal law.

If an act under threat is justified as necessity, its victim (i.e., the third party) is not allowed to launch a counterattack as self-defense against it, because Article 36 (1) of the Criminal Code provides that self-defense is allowed only as a counterattack against imminent and “unlawful” aggression. When the act under threat is justified as necessity, it can no longer be an “unlawful” aggression. Therefore, from the point of view that the necessity defenses are uniformly regarded as grounds for justification, it would be deliberatively decided whether such acts under threat are allowed as necessity. Hitherto, two precedents left theoretical room to justify acts under threat, but strictly construed the practical elements of justifiable necessity. (i) The facts of the first case were as follows: The accused committed robbery since his accomplice threatened to kill him unless he took part in the offense. In that case, the Supreme Court rejected the defenses concerning an act done out of necessity and an excessive act done out of necessity, reasoning that there had been no present danger to life or limb and his act was not regarded as unavoidably or excessively done to avert the threaten of his accomplice (the decision by the Supreme Court on October 13, 1949, 3 *Keishū* 1655). (ii) The facts of the second case were as follows: The accused had been placed in confinement and demanded to produce remodeled pistols while under assault and menace by gangsters of an organized group. After he had been released to go home, he manufactured remodeled pistols under surveillance by the gangsters. In that case, the Tokyo High Court affirmed that there had been a present danger to his life, limb and liberty, etc., but rejected the accused’s claim of necessity, stating that his act was not regarded as unavoidably done (the decision by the Tokyo High Court on August 8, 1978, 29 *Tokyo High Court Keiji Hanrei-shū* 8-153). Both of these decisions came to the same conclusion, i.e., that the requirement of supplementary was unsatisfied because the acts done under threat were not regarded as unavoidably done, therefore it is noteworthy that the requirement was construed rigorously. On the other hand, the current decision ap-

proved the satisfaction of supplementary requirement concerning the act done under threat, admitting that no alternative means but to kill Z was available for X to escape from confinement. Nevertheless, this Court did not hold that the act was justified as necessity. While the Court straightforwardly construed the supplementary requirement as satisfied on one hand, it strictly limited the scope of present danger on the other. That is, this decision held that there existed a present danger to X's physical liberty, not to his life. (From this point, the Court insisted that requirement ③ was unsatisfied.) Therefore, the instant decision disallowed the claim of justifiable necessity in opposition to the above-mentioned decision (ii), which strictly construed the requirement of supplementary in spite of affirming the wide range of present danger.

4. I would like to next address some problematic points in this decision concerning the substantive contents of both the requirements for necessity and the theory of fair expectability.

(1) The Court found that there had been a present danger to X's physical liberty, but not to his life. This affected the Court's balancing of the harm avoided and the harm caused (requirement ③) and the existence of a fair expectation. It followed that both decisions came to conclusions to the defendant's disadvantage. The commentators on this case have, however, criticized this Court for denying the existence of "present" danger to the defendant's life.

1) First, according to the decision by the Supreme Court on May 18, 1949, 3 *Keishū* 1465, "present" danger means a situation where a legally protected interest is actually being infringed or where an infringement of such an interest is impending. Based on this view, the dominant academic opinion construes that "present" danger as a requirement for necessity has the same implication as "imminent" attack in the provision of self-defense. The current decision is grounded on such a concept of "present" danger, however, even though this view is relied upon, it is sufficiently possible to affirm the existence of "present" danger to life in this case, taking the following abnormal circumstances into consideration: ① The human relations within the AUM cult were extremely peculiar. For instance, the followers of the cult believed in the absolute rightness of the founder

Y's words and deeds, and even the leaders of the cult could not factually object to what Y said; ㊦ It was generally well-known that the AUM Shinrikyo cult had performed a series of dreadful crimes. Therefore, under the objective situation in which X was placed at that time, Y's statement that X himself would be killed unless he killed Z could not have been considered an idle threat. It could be found that there existed the peril that the leaders would kill X under the direction of Y if X refused to kill Z.

2) Secondly, one of the commentators asserts that "present" danger means the necessity to take immediate action in order to avoid infringement. According to this opinion, "present" danger as the requirement for the necessity defense does not indicate the same meaning as "imminent" attack in the provision for self-defense, and the meaning of the former requirement is broader than that of the latter. In Germany, such a view is generally dominant. This insists that, even if an infringement of life is not impending, the "present" danger to life can be confirmed in the case in which it would be impossible or remarkably difficult to avoid death unless a person immediately took necessary measures. The commentator who supports this view emphasizes the following circumstances in the current case: ㊦ There was a danger that X would be killed if he persistently refuse to kill Z; ㊦ In order to escape from the danger, he could not help but kill Z under the direction of Y. Therefore, the commentator came to the conclusion that there existed a "present" danger to X's life in this case.

(2) According to the decision by the Supreme Court on May 18, 1949, 10 *Saikō Saibansho Hanrei-shū* 231, an act "unavoidably done" (requirement ㊦) means that there were no alternative measures other than the action which the actor actually took to avert danger, and that the necessitated act is acceptable or tolerable in light of reason. Based on such a view, the current decision examined the reasonableness of an action to avert danger as one of the unavoidability requirements. There, the standard of reasonableness is that such an act is acceptable or tolerable in light of reason under the existing circumstances. This Court regards the requirement of reasonableness as separated from that of balance between the harm avoided and the harm caused (requirement ㊦). Moreover, according to this Court,

the possibility of infringing X's life — which is not equivalent to any present danger to his life — can be taken into consideration in the determination of reasonableness, but not in that of balance between the harms. This Court's understanding of the reasonableness requirement is highly problematic with respect to the next points. First of all, the concept of "reason" as the standard is very vague. Second, it is unclear why the possibility of infringing on life, which can be taken into account in the examination of reasonableness, should be ignored in balancing the harms. Third, even if the former prerequisite is addressed before checking the latter, and factors in favor of the accused are considered only in examining the former, this type of reasoning tends to pay mere lip service to him. As in this decision, the necessity defense would in the end be dismissed by the strict interpretation of the balance requirement. In addition, the examination of reasonableness by this Court did not affect the consideration of fair expectation as discussed below. In Japan, it has recently been debated whether independent significance should be given to the reasonableness requirement. Its validity seems to be clarified in the cases which satisfy other requirements except that of reasonableness.

(3) This Court affirmed the existence of fair expectation of lawful acts and rejected the accused's allegation concerning a bar to culpability. This point is, however, highly problematic in relation to the requirements for necessity.

1) This decision is based on the theory of an "ordinary rational person" standard, which insists that the criterion of fair expectation should be whether it was possible to expect ordinary rational persons to perform a lawful act under the existing circumstances. According to the Court, if such a person had been in the accused X's place, he/she could have been fairly expected not to kill Z. On the other hand, in examining the reasonableness requirement for necessity, this Court regarded X's act of killing as tolerable in light of reason. However, there seems to be a sort of contradiction in such a view in that ordinary rational persons could be fairly expected not to undertake the killing although the same act is allowed in light of reason, because it is also determined based on the standard of an

“ordinary rational person” whether an act is allowed in light of reason.

2) According to the Court’s statement concerning the supplementary requirement for necessity, there was no alternative means other than killing Z available for X to escape from confinement. On the other hand, this Court admitted the existence of fair expectation, stating that X could make efforts to avoid killing Z (for example, to ask to save Z’s life, to persuade Y to reconsider the killing of Z, etc.). This expresses the logic that X was still expected to endeavor to avoid killing Z in the situation where he had no choice but to kill Z so as to acquire his own freedom. But we should think it is only in the cases where such an endeavor enabled a person to abstain from killing that the existence of a fair expectation can be affirmed. In this case, the following facts seem to be significant: There was no probability that Y, who had already determined to resolve the situation by making X kill Z, would change his mind, and there was a danger to X’s life if he obstinately refused to kill Z. Here, his efforts to avoid killing Z meant a refusal to do it, and would fail to set him free from confinement. Rather, this would bring about the possibility of infringing on X’s life. Under such circumstances, it was extremely difficult for X to form a contrary motive to refrain from killing Z. Consequently, it is construed that X’s conduct is not blameworthy because the fair expectation of lawful acts is negated.

5. This current decision is the first case that squarely grappled with the problem of whether the defense of necessity should be applied to the act of killing under duress. It is highly noteworthy that this Court closely examined the requirements for necessity, however, the Court’s opinions concerning the requirements for necessity and the fair expectation of lawful acts are theoretically problematic as discussed above.

Prof. MINORU NOMURA
Assoc. Prof. (Maritime Safety University)
FUJIIKO KATSUMATA