

The Determination of Excessive Defense by Judicial Practice and Its Rethinking – Based on an Analysis of 722 Criminal Judgments

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Abstract: Concerning the determination of excessive defense, the main problems are the judicial practice of determining excessive defense only based on the result of harm inflicted on a perpetrator; identifying excessive harm generally as an intentional crime; limiting the scope of exemption from punishment of excessive defense relatively narrowly as well as repeated appraisals and indirect punishments. For the improvement of judicial determination of excessive defense, the following efforts should be made. First, from the perspective of ex ante, determining the necessary limits as the standard of whether the act of defense was necessary to stop unlawful infringement. Second, paying due attention to the influence of the awareness of defense on the form of culpability and in general circumstances determining excessive defense as a negligent crime. Third, giving sufficient consideration of the extent to which the possibility of anticipation decreased when the defender was faced with unlawful infringement and expanding the scope of exemption from punishment for excessive defense. Fourth, avoiding repeated appraisals and indirect punishments by analyzing the factual grounds and essential foundations of the circumstances of lesser or greater punishments.

Keywords: excessive defense; determination by judicial practice; necessary limits; awareness of defense; deductions and exemptions from punishment

All circles of society pay significant attention to cases involving legitimate defense. From the “Case of Deng Yujiao” which took place in 2009 to the “Case of Yu Huan” which happened recently, judiciary authorities, experts from the academic cycle, and ordinary people hold different opinions as to what constitutes

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a legitimate defense, an excessive defense, or a common crime regarding the circumstances where defenders cause injury and death to perpetrators while stopping unlawful infringements. Concerning determination of excessive defense, it is widely believed by academic cycle that the tendency toward “consequentialism” seriously exists in juridical practice, that is, once serious injury or death is caused by a defender to a perpetrator in the process of stopping unlawful infringements, it will be determined that the defense constitutes excessive defense, instituting the crime of intentional injury.^① However, according to the existing research, scholars mainly tend to judge the thinking mode, method, and preference of juridical departments through individual cases, but fail to make empirical analysis using multiple samples. In order to investigate the problems existing in determination of excessive defense by the practical departments, I have made a detailed analysis of 722 cases determined to be excessive defense which were issued before April 1, 2017 on China Judgements Online and classified the issues into three parts; judgments of the act of defense “noticeably exceeds the necessary limits and causes great harm,” determination of the form of culpability of excessive defense, and determination and consideration of factors for deductions and exemptions for excessive defense.

1. Basic conditions of the samples

I used “excessive defense” and “cause of criminal action” as key words to search on the China Judgements Online website and found 6,603 results. By screening the results I found there were 722 criminal judgments under which 798 offenders were determined to have used excessive defense.

The following table lists the number of cases by year.

Year	Number of cases	Proportion
2001	1	0.14%
2003	2	0.28%
2005	2	0.28%
2006	3	0.42%
2007	1	0.14%
2008	5	0.69%
2009	4	0.55%
2010	4	0.55%
2011	10	1.39%
2012	20	2.77%
2013	56	7.76%
2014	219	30.33%
2015	214	29.64%
2016	172	23.82%
2017	9	1.25% ^②

① Zhang, 2013; Zhou, 2017; Lao, 2015; Chen, 2015; Wu, 2012.

One particular concern is, after judgment of second instance for “Case of Yu Huan,” related principal of the highest judicial authority wrote an article to rethink the practice based on “consequentialism” in practice. Shen Deyong. (2017, June 25). How do we apply to legitimate defense system. Retrieved from <http://www.court.gov.cn/zixun-xiangqing-48882.html>.

② Search time of this statistic starts from March 10 to April 1. It’s important to note that the judgments of different places on China Judgements Online are issued at different time. Decisions made for some cases are earlier, however, judgments are issued later. Therefore, it is hard to avoid omitting a few judgment of cases in 2016 and cases with decisions made before April 1, 2017 in this search.

The number of cases by Regions

Region	Number of cases	Proportion
Beijing	7	0.97%
Tianjin	3	0.42%
Hebei Province	19	2.63%
Shanxi Province	20	2.77%
Inner Mongolia Autonomous Region	14	1.94%
Liaoning Province	10	1.39%
Jilin Province	12	1.66%
Heilongjiang Province	16	2.22%
Shanghai	7	0.97%
Jiangsu Province	33	4.57%
Zhejiang Province,	62	8.59%
Anhui Province	24	3.32%
Jiangxi Province	13	1.80%
Shandong Province	48	6.65%
Henan Province	23	3.19%;
Hubei Province	24	3.32%
Hunan Province	33	4.57%
Guangdong Province	78	10.80%
Guangxi Zhuang Autonomous Region	37	5.12%
Hainan Province	6	0.83%
Chongqing	4	0.55%
Sichuan Province	37	5.12%
Guizhou Province	23	3.19%
Yunnan	63	8.73%
Tibet Autonomous Region	5	0.69%
Shaanxi Province	37	5.12%
Gansu Province	23	3.19%
Qinghai Province	19	2.63%
Ningxia Hui Autonomous Region	4	0.55%
Xinjiang Uygur Autonomous Region	6	0.83%

Seen from the data, there are more cases of excessive defense determined in Guangdong Province, Yunnan Province and Zhejiang Province.

Crime categories and the number of people involved in each category – four crime categories and 798 criminals

Crime categories	Number of criminals	Proportion
Crime of intentional homicide	15	1.88%
Crime of intentional injury	773	96.87%
Wherein: causing minor injury	101	12.66%
Causing serious injury	427	53.51%

Crime categories	Number of criminals	Proportion
Causing death	245	30.70%
Crime of negligent causing the death of another person	3	0.38%
Crime of negligent causing serious injury of another person	7	0.88%

The distribution of penalties

Sentence	Number of criminals	Proportion
Fixed-term imprisonment of over 10 years	2	0.25%
Fixed-term imprisonment of 7–10 years (inclusive)	39	4.89%
Fixed-term imprisonment of 5–7 years (inclusive)	42	5.26%
Fixed-term imprisonment of 3–5 years (inclusive)	66	8.27%
Fixed-term imprisonment of 1–3 years (inclusive)	364	45.61%
Fixed-term imprisonment of less than 1 year (inclusive)	164	20.55%
Limited incarceration	30	3.76%
Supervision without incarceration	6	0.75%
Exempted from punishment	85	10.65%

Regarding the application of probations, among the 558 criminals sentenced to limited incarceration or a fixed-term imprisonment of less than one year 303 applied for probation, accounting for 54.30%, and accounting for 37.97% among the 798 criminals. According to the data, most (81.33%) criminals were sentenced to fix-term imprisonment of less than three years (inclusive) of lesser criminal penalties.

2. Determinations on the act of defense “noticeably exceeds the necessary limits and causes great harm”

According to Article 20 (2) of Criminal Law, it mainly depends on the act of defense “noticeably exceeds the necessary limits and causes great harm” to judge whether excessive defense was used. Through analysis of the 722 criminal judgments, I found that there are mainly two circumstances used by the practical departments to make determinations of whether that the act of defense “noticeably exceeds the necessary limits and causes great harm.” First, excessive defense is determined only in accordance with the results of harm caused by the act of defense. The court directly points out that the act of defense belongs to “noticeably exceeds the necessary limits and causes great harm” after the fact that the perpetrator was caused to be dead for defense. There were 601 cases of this kind, accounting for 83.24% of all cases. Of these cases there were 35 which especially pointed out that the serious results were caused by defenders with weapons. Second, by taking several factors into consideration, it was determined that the act of defense belongs to excessive defense. There are 121 cases of this kind, accounting for 16.76%. Of these there were 36 cases in which the strength of unlawful infringements was considered for judging whether the act of defense was excessive. There were 35 cases which required continued investigation and infringements by defenders after unlawful infringement was weakened or lost as grounds for determination of excessive defense. There were 35 cases

which held “no weapons” being used by perpetrators as an important factor for determination of excessive defensive. There were 32 cases which made simple comparison of results caused for unlawful infringements or possibly caused for unlawful infringements in general and determined that there was a great disparity, thus excessive defense was established. There were 13 cases in which defenders did not adopt available mild defensive ways, thus excessive defense was established. Finally, there were 8 cases which took non-urgency of unlawful infringement as a consideration^① for determination of excessive defense.

2.1 Rethinking the problems

Excessive defense is determined by judiciary authorities in accordance with the degree of harm caused by defenders. By judicial practice, judiciary authorities judge whether the act of defense “noticeably exceeds the necessary limits and causes great harm” based on the final results of harm caused by the act of defense. However, the practice of consequentialism has apparent problems, which are worthy of rethinking.

2.1.1 Identification of “the necessary limits”

There were three main views concerning the theoretical understanding of the “necessary limits” of legitimate defense. The first was the essential theory which took the objective actual needs of effectively stopping unlawful infringements as the necessary limits for defense. It was thought that as long as the defensive measures were necessary to stop unlawful infringements, even though harm caused by the act of defense exceed harm possibly caused by unlawful infringements, it cannot be considered that the necessary limits were exceeded. The second was the basic adaption theory which insisted that it was necessary to make comparisons on means, intensity and results of acts of defensive and unlawful infringements to judge whether the legitimate defense exceeded the necessary limits. If they were basically commensurate with each other the necessary limits were not exceeded. The last was equivalency theory, which claims that the judgment of the necessary limits for legitimate defense should be based on the demands of stopping unlawful infringements and there was no great disparity^② existing in aspects of means, intensity and results between acts of defense and unlawful infringements. Wherein there was a disagreement between purposes of the basic adaption theory and the legitimate defensive system, thus few people stood for the basic adaption theory. The equivalency theory was a general theory that combined views of the essential theory and the basic adaption theory. Recently, scholars have strongly advocated the essential theory.^③

Courts determined that the act of defense noticeably exceeds the necessary limits and causes great harm only based on the results of injuries and harm in most cases, and further determined that excessive defense was constituted. The practice of consequentialism went further than the basic adaption theory, which had completely deviated from the legislative intent of legitimate defense. According to Article 20 (1) of Criminal Law, legitimate defense is an act made by citizens to stop unlawful infringements to avoid harm to themselves, others or states as well as harm to public interests. Accordingly, it is obvious that the necessary limits of legitimate defense shall be determined based on actual demands for stopping unlawful infringements

① Although these consideration factors were classified in the paper, different factors were interactively affected in specific cases, the judges determined defenders to have excessive defense by taking different factors into consideration. For instance, no weapons held by defenders possibly mean that unlawful infringements “do not seriously endanger personal security;” strength of unlawful infringements will affect the comparison of acts of defense and results caused by unlawful infringements; weakness and loss of unlawful infringements possibly mean that infringements are not urgent, or strength is decreased, or there are mild defense ways; etc.

② Gao & Ma, 2016, p. 135

③ Chen, 2016; Lao; 2015

and the protection of legal interests and rights.^① In addition, from the perspective of the legislative evolution on excessive defense in Criminal Law, the change of expressions, i.e., “undue harm caused by the act of defense exceeding the necessary limits” stipulated in the old Criminal Law, “noticeably exceeds the necessary limits and causes great harm” stipulated in the new Criminal Law, clearly shows that a legitimate defense is encouraged and the identification of an excessive defense is strictly limited in the legislation, thus the essential theory conforms to the trend of change. Also, Article 19 (2) of the Opinions on Legally Handling Cases involving Crimes of Domestic Violence issued by the Supreme People’s Court, the Supreme People’s Procuratorate, the Ministry of Public Security, and the Ministry of Justice on March 2, 2015 clearly points out that “to determinate whether the act is defense ‘noticeably exceeds the necessary limits’ shall be made by comprehensive judgment based on the demands of stopping and protection of defenders from unlawful infringements containing domestic violence...” In brief, legislative intent, legal evolution and attitudes of the highest judicial authorities show that judgment on the necessary limits of legitimate defense should take demands for stopping unlawful infringements as the standard. However, the practice of consequentialism prevents citizens from stopping unlawful infringements or protecting legitimate rights and interests by legitimate defense to a considerable extent, thus resulting in the legislative purpose of legitimate defense without realization. But does this really mean that the judgment on the necessary limits of legitimate defense is completely guided by the essential theory rather than considering the great disparity in means, intensity and results between the act of defense and unlawful infringement as in the general theory?

It depends on how to interpret “great disparity” here. One view was to understand the differences concerning means, intensity and results between the act of defense and unlawful infringement in the context of “basic adaptation.” If the act of defense and unlawful infringement were not basically commensurate, it was thought that there was a “great disparity,” thus excessive defense was established.^② However, defenders have to use fierce methods which are more powerful than the infringements to protect themselves from unlawful infringements.^③ If excessive defense are determined in these extreme situations, the defenders rights will be deprived in fact. A practice like this is not only in contradiction to common sense but also deviated from the original purpose of the legitimate defensive system. However, such concern was confirmed by some practices of juridical departments. According to the statistics, there were 32 cases which made simple comparisons on the results caused by unlawful infringements or possibly caused by unlawful infringements in general and determined that there was a great disparity, thus excessive defense was established. However, the so-called “great disparity” was understood in the sense of “basic adaptation” in quite a few cases. For instance, injuries caused to perpetrators by defenders in the process of stopping unlawful infringements constitute minor injuries, while injuries caused to defenders by perpetrators do not constitute minor injuries, but the court confirmed that there was an obvious disparity between injuries caused to perpetrators and injuries caused or possibly caused to defenders, thus determined that an excessive defense was established.^①

Another view was that the “great disparity” between so-called acts of defense and unlawful infringements in terms of means, intensity and results mainly referred to the situation that damages possibly caused to

① Zhang, 2016, p. 211; Chen, 2016, p. 122

② Ma, 1999; Supreme People’s Court Criminal Justice Trial 1 & 2

③ Zhang, 2016; Chen, 2009

perpetrators by acts of defense were extremely significant while damages caused by unlawful infringements were extremely slight. For instance, the defender shot the perpetrator who just stole a chicken. In this case, the defender shall be prohibited from taking defensive measures that could cause death.^② From the perspective of the theory of Criminal Law in foreign countries, discussion on the “need” for legitimate defense in the German Criminal Law community and the “equivalence” of legitimate defense in the Japanese Criminal Law community were also aimed at solving this issue, that is, whether or how to limit the right to legitimate defense if unlawful infringements were extremely slight but the results of the act of defense may be extremely significant, theoretically, for which the basic conclusion was that the defensive rights of the defenders shall be restricted.^③ It can be noted that the limit of defensive rights is appropriate under the circumstance of “great disparity” existing between acts of defense and unlawful infringements in this sense. On one hand, in the case of legitimate defense, though the protections of the legal interests of perpetrators was greatly decreased, his legal interests in life were worthy of being protected, which could not compare similarly to extremely low-cost properties.^④ On the other hand, the State still retained a minimum of unity for unlawful infringements implemented by perpetrators when the nature and the degree were slight, and defenders were not allowed to kill perpetrators in these situations.^⑤ Although the requirements for “need” or “equivalence” of a legitimate defense were not stipulated in Criminal Law like those in Germany and Japan, legitimate defensive rights of the defender shall still be limited in case of the existence of “great disparity” when unlawful infringements are extremely slight but material injuries may be caused by acts of defense to perpetrators.

In summary, the practical departments have a clear and only results-oriented tendency for the act of defense that “noticeably exceeds the necessary limits,” which deviated from the legislative purpose of legitimate defense. The understanding of the “necessary limits” of legitimate defense shall be based on the actual demands of stopping unlawful infringements. As an exception, legitimate defensive rights of defenders shall be limited in cases where the “great disparity” in unlawful infringements were extremely slight but serious injuries caused by acts of defense to perpetrators exists. For all the 722 criminal judgments, what most of the defenders were faced with were atrocities or injuries made by perpetrators. Situations of “extremely minor” unlawful infringements were very rare.^⑥ Therefore, for the determination of excessive defense, it is urgent for the practical departments to establish the idea of understanding the necessary limits of legitimate defense by using the actual needs of stopping unlawful infringements as a standard to judge whether the act of defense apparently exceeds the necessary limits.

2.1.2 Understanding of “great harm”

In all 722 criminal judgments, the injuries that were caused to perpetrators by acts of defense were injuries that were caused to bodies or lives. In terms of personal injury, it is generally acknowledged that “great harm” in paragraph 2 of Article 20 of Criminal Law refers to the material injury or death of illegal

① No. 0128 [2015], First, Criminal Division, Laizhou; No. 0241 [2015], First, Criminal Division, Liangzhou.

② Zhang, 2016, p. 211; Chen, 2015

③ Roxin, 2006, pp. 696–701; Nishida, 2013, p. 146; Matsubara, 2014

④ Chen, 2015

⑤ Chen, 2016

⑥ There were only a few cases of unlawful infringements belong to the situation of minor injuries, referring to: No. 00104 [2015], First, Criminal Division, Badong; No. 00077 [2014], First, Criminal Division, Tianshan; No. 00312 [2013], First, Criminal Division, Lianhu. Nevertheless, they shall be further combined with whether damages may caused by such the act of defense to the opposite side are extremely serious to judge whether there is “great disparity” between act of defense and unlawful infringement.

perpetrators.^① However, among the 798 criminals previously mentioned, 101 were judged to have committed the crime of intentional injury by causing slight injury to perpetrators by excessive defense, accounting for 12.66%. In other words, in these cases, the courts considered minor injuries that were caused to perpetrators by excessive defense as “great harm.” This indicates that the practical departments have a different understanding of “great harm” than the theorists. Still, the fact that the practical departments regard slight injury as “great harm” is not reasonable.

First, from the perspective of systematic interpretation, “great harm” shall refer to a serious injury or a more serious result. According to Article 20 (1) of Criminal Law, a legitimate defense is an act which “causes an injury to illegal perpetrators.” According to the three-level criminal theory system, any act that can be discussed in illegality levels is an act according with constitutive requirements. While according to the four-element criminal theory system, reasonable acts must have objective conditions for a certain crime in terms of form. Only when the “injury” done to illegal perpetrators because acts of defense meet certain requirements of a crime in forms, shall it be discussed whether it belongs to a legitimate defense, otherwise the acts can be directly considered decriminalized for not meeting the objective conditions of a certain crime. Therefore, that an act of intentional injury accords with the constitutive requirements of a crime of willful and malicious injury in terms of forms is the precondition to judge whether it belongs to legitimate defense. For a crime of willful and malicious injury, based on judicial practice and general theory, it is considered that only when an act of intentional injury causes a slight injury, or a more serious result, can it be judged as a crime of willful and malicious injury.^② Hereby, when an act of defense does an injury to perpetrators, “injury” in paragraph 1 of Article 20 of Criminal Law refers to a slight injury or a more serious result; only when an act of defense causes a slight injury or a more serious result can it be taken into a discussion of legitimate defense. But if ‘injury’ in paragraph 1 of article 20 of Criminal Law is understood as a slight injury or a more serious result, then “material injury” in paragraph 2 of Article 20 of Criminal Law shall refer to a serious injury or a more serious result, otherwise the difference between “great harm” and “injury” cannot be distinguished, the difference between the results of excessive defense and that of legitimate defense cannot be defined, and it belies the trend in the changes of legislation from “causing undue injury” in the old Criminal Law to “causing material injury” in the new Criminal Law. Moreover, according to relevant judicial interpretations, “a serious casualty accident happens” in such similar crimes as crimes of negligently causing a serious accident refers to “causing one or more deaths, or material injury to three or more people.”^③ Hereby in view of the coordinated relations of the statute, “Material injury” in paragraph 2 of Article 20 of Criminal Law shall be defined as a material injury or a more serious result.

Second, from the perspective of the fact that punishment can be decreased or exempted when excessive defense happens, “great harm” shall also be defined as a serious injury or a more serious result. It is generally acknowledged that the basis of the fact that punishment can be decreased or exempted when excessive

① Lao, 2015; Zhang, 2016, p. 212; Li, 2016; Wang, 2000; Zhao & Liu, 2001

② Article 29 of the Provisions on the Public Security Organ’s Handling of Cases Involving the Crime of Injury issued by the Ministry of Public Security on December 27, 2005; Guidance Suggestion on Suspension of Punishment for Common Crimes on December 23, 2013 as well as suggestions on suspension of punishment for “the crime of intentional injury” in Circular on Implementation of Amended Guidance Suggestion on Suspension of Punishment for Common Crimes issued on March 9, 2017 issued by the Supreme People’s Court.

③ Article 6 of Explanation on Several Issues on Applicable Laws for Handling with Criminal Crimes of Harms Caused to Production and Security jointly issued by the Supreme People’s Court and the Supreme People’s Procuratorate on December 15, 2015.

defense happens lies on the reduction of illegality and responsibility.^① In terms of the reduction of illegality, one view is that though the defense is excessive, it protects its legitimate interest, thus reduction of illegality exists within limits.^② While another is that because of the necessity of defense (an unlawful infringement is existing), the necessity of protecting the perpetrators is decreased, which reduces the degree of illegality due to excessive defense.^③ Both of these views consider that the degree of illegality due to excessive defense is lower than that of a simple infringement of legal interests. In other words, the degree of illegality due to excessive defense causing a slight injury is lower than that due to a simple intentional injury causing a slight injury. In this case, if a slight injury includes “great harm” in paragraph 2 of article 20 of Criminal Law, which means an act causing a seeming slight injury (the actual degree of illegality of the act is lower than a slight injury) will be convicted and punished, there will be contradictions between this and the fact that juridical practice defines the starting point of conviction of a crime of willful and malicious injury as a slight injury or a more serious result. In a nutshell, the degree of illegality due to excessive defense is lower than that of a general infringement of legal interests, and the two cannot be treated equally. Only when “great harm” is defined as a serious injury or a more serious result can the fact that the degree of illegality due to excessive defense accords with the requirements of the degree of illegality due to intentional injury made by juridical practice be guaranteed in general.

Moreover, that “great harm” is defined as a serious injury or a more serious result is accepted by the highest judicial organs. Paragraph 1 of Article 19 in Opinions on Legally Handling Cases Involving Crimes of Domestic Violence published by the Supreme People’s Court, the Supreme People’s Procuratorate, the Ministry of Public Security and the Ministry of Justice on March 2, 2015 says that, “if an act of defense causes a serious injury or death of a perpetrator and noticeably exceeds the necessary limits, it belongs to excessive defense, which shall be charged with the criminal responsibility, but punishment can be exempted or decreased.” In addition, when explaining the grounds of decision for the “intentional injury case of Zhao Quanhua,” the criminal adjudication tribunal of the Supreme People’s Court made it clear that, “great harm is not equal to general injury. So-called great harm shall be in the limit of not causing personal material injury, a serious injury or a more serious result included before there is no clear relevant judicial interpretation.”^④ Thus, in terms of the definition of “great harm,” the standpoint of the highest judicial organs is very clear that “great harm” refers to an injury causing a serious injury or death to an illegal perpetrator.

In a nutshell, from the perspective of systematic interpretation, substantial consideration or the attitude of the highest judicial organs, “great harm” in paragraph 2 of article 20 of Criminal Law shall be defined as a serious injury or a more serious result. However, whether it means that if a self-defender causes a serious injury or death of a perpetrator when stopping an unlawful infringement, that act of defense causes “great harm?” It is concerned with the understanding of the relationship between “noticeably exceeds the necessary limits” and “causes great harm.” One view is that “noticeably exceeds the necessary limits” and “causes great harm” are the two paratactic elements to define excessive defense. “Great harm” refers to a serious injury or a more serious result, when an act of defense causes serious injury or death of perpetrators, it means having

① Jescheck, 1996, p. 478; Yamaguchi, 2011, p. 133

② Zhang, 2016; Yamaguchi, 2011, p. 133

③ Nishida, 2013, p. 149

④ Supreme People’s Court Criminal Justice Trial 1&2, Criminal Justice Reference, 2004, p. 104.

caused “great harm.” According to this view, in the process of an act of defense, there exists such conditions as noticeably exceeding the necessary limits but not causing great harm or not noticeably exceeding the necessary limits but causing great harm.^① Another view is that “noticeably exceeding the necessary limits” and “causing great harm” are unified, and there is no so-called condition of noticeable exceeding the necessary limits but not causing great harm, only when causing great harm, the problem of noticeably exceeding the necessary limits can exist; there is no condition as so-called “means is excessive” while “result is not excessive” or “means is not excessive” while “result is excessive.”^②

By contrast, the first view just regards “great harm” as a quantifiable and operable element in terms of the judgment of legitimate defense and gives it a static and formalized definition. But in my opinion, we should interpret the nature of “great harm.” There are both connections and differences between “great harm” in paragraph 2 of Article 20 of Criminal Law and “harm” in paragraph 1. Paragraph 1 of article 20 of Criminal Law is about legitimate defense, while “harm” in the sense of legitimate defense does not belong to illegality, so “harm” in this paragraph can only be understood formally. However, paragraph 2 of article 20 of Criminal Law is about excessive defense, which is illegal in nature, and the illegal degree has reached the degree that deserves to be punished by Criminal Law; meanwhile, though excessive defense is generally illegal, it exists the reduction of illegality, and the law shall only consider the excessive illegality of the act. In this sense, material injury shall be understood in the sense of “excessive illegality.” If an act of defense does not exceed the necessary limits, or just slightly exceeds the necessary limits, and though serious injury of a more serious result occurs, the act is not illegal, or the illegal degree is relatively too low to reach the degree that deserves to be punished by Criminal Law, and that result shall not be understood as “great harm.” According to the grounds that punishment can be exempted or decreased when excessive defense happens, if the injury is just slight injury, and the seeming injury has just reached the standard for punishment, the act cannot reach the degree that deserves to be punished after the reduction of illegality; while if the injury is serious injury or death, and the act of defense noticeably does not exceed the necessary limits, although the seeming injury is serious, the act cannot reach the degree that deserves to be punished after reduction of illegality. Acts in these two conditions shall not be regarded as “great harm.”

In summary, in the judgment of some cases regarding excessive defense, the practical departments have a biased understanding of “great harm.” First of all, “great harm” means causing perpetrators serious injury or death, but if the act of defense does not apparently exceed the necessary limits that result of serious injury or death is not the “great harm” in paragraph 2 of article 20 of Criminal Law. Only when the act of defense “noticeably exceeds the necessary limits” and causes perpetrators serious injury or death, shall it be regarded as having caused “great harm.”

2.1.3 Exploration from the perspective of determination

In the determination by the judicial practice, the judicial authorities mainly determined acts of defenses “noticeably exceeding the necessary limits and causing great harm” as excessive defenses based on the results of acts of defenses. In terms of the perspective of judgment, they “judged the act of defense based on whether it ‘noticeably exceeded the necessary limits’ from the perspective of judgment and on the basis of objective

① Lao, 2015; Guo & Hu, 2002

② Zhang, 2016, p. 212; Chen, 2016, p. 173; Li, 2016, p. 141

facts identified afterwards.”^① From the point of view of reason, the reason why the practical departments used that standard to judge the “necessary limits” is that they did not strictly distinguish the judgment of “noticeably exceeding the necessary limits” and “causing great harm,” and judged the “great harm” instead of the whole act. But “causing great harm” means that the result of great harm occurs, so whether “having caused great harm” can only be judged from the ex-post perspective. Therefore, the judgment of “noticeably exceeding the necessary limit” can only be from the ex-post perspective.

However, the judgment of whether an act of defense exceeded “the necessary limits” from the ex-post perspective is not in accordance with the legislative purpose of legitimate defense. As mentioned above, legitimate defense is the act that citizens have taken to stop unlawful infringement to avoid damages caused to their own, others’, nation’s or public profits. In other words, in the context of legitimate defense, what is considered first is “how to safeguard lawful rights and interests when citizens are faced with unlawful infringements, rather than how to protect the interests of perpetrators hand and foot.”^② Because of this, when judging whether an act of defense “exceeds the necessary limits,” the standard of judgment shall be whether the act of defense is needed to stop the unlawful infringement. In the premise of insisting on the “theory of necessity,” the judgment about necessary limits can only be the act, rather than the result of the act. Because the defender is an average person instead of a prophet, a 100-percent accurate prediction cannot be made about the things which will happen in the future. And the perspective of judgment afterwards is out from the possible understanding of the specific circumstance when the defender (an average person) is conducting an act of defense, which can easily be judged as excessive defense. This kind of afterthought puts the defenders at risk of excessive danger and is easy to place them in a dilemma, bearing unlawful infringement without causes or facing the risk of being criminalized because of counterattacking unlawful infringement (excessive defense). It will also decrease the cost of illegality of perpetrators and encourage the arrogance of potential perpetrators, which is not cost-effective in terms of general prevention and criminal policy.^③

Also, in the judgment of the necessary limits, the judgment of whether significant difference exists between the act of defense and unlawful infringement shall be from the perspective of acting. That is, what is judged here is whether an extreme difference exists between the dangerous result which may be caused by an act of defense and the degree of the possible injury caused by the unlawful infringement. Here is related to the judgment of the danger of act, rather than the contrast of the danger of result..

The judgment of “noticeably exceeding the necessary limits” and “causing great harm” shall be strictly distinguished. The former is ex-ante judgment, while the latter is ex-post judgment. The judgment of “noticeably exceeding the necessary limits” shall be made independently, while the understanding of great harm” shall be practical, and it shall take into consideration that whether the injury is caused by the fact that the act of defense “noticeably exceeds the necessary limits.”^① Only when an act of defense noticeably exceeds the necessary limits from the perspective of ex ante and causes great harm from the perspective of result afterwards can it belongs to excessive defense.

2.2 Improvement suggestions

① Lao, 2015

② Chen, 2009.

③ Lao, 2015

Based on these analysis and conclusions we can state that the judiciary authorities are heavily dependent on consequentialism for determination of “noticeably exceeds the necessary limits and causes great harm.” Judiciary authorities did not start with the perspective necessary for stopping unlawful infringements to understand the “necessary limits” and tended to make ex-post judgments and their understanding of “great harm” was too formalized and lacked practical rationality. Where by juridical practice the idea in urgent need of being determined is to understand “the necessary limits” of legitimate defense from the ex-ante perspective by taking actual demands on stopping unlawful infringements as the standard by which to judge whether acts of defense exceed the necessary limits.

Regarding the specific contents of the necessary limits of legitimate defense, theoretically, it is thought that “necessary defense refers to the lightest defense and is not related to direct risks to self harms among the various appropriate defense methods available for selection.” It is divided at all three levels. First, the act of defense is appropriate in that it can stop unlawful infringements. Second, the act of defense is the lightest means of defense. If there were lesser defensive means available then the act of defense was not necessary. Third, the defender needs to conduct defense without risk. In case there are milder defensive ways, but the defender will directly bear the risk of an unsuccessful defense, then it is not necessary for the defender to take the lesser defensive way.^② It is necessary to take into consideration that there are better defensive schemes available for one citizen with the same ability and conditions of the defender under the circumstance when judging the defensive limit.^③ If there is no better choices, it will not be said that the act of defense by the defender noticeably exceeds the necessary limits. Specifically, factors of the following aspects can be combined in the practical operation to judge whether the act of defense is necessary:

2.2.1 Intensity of unlawful infringements

For larger intensity of infringements by perpetrators, defenders tend to need to adopt more drastic defensive ways with greater intensity. Special attention shall be paid to the ex-ante perspective to judge the intensity of unlawful infringements, that is, harm generally caused by unlawful infringements rather than actual results caused shall be considered. In most cases, unlawful infringements did not cause apparent harm to defenders at last, however, this doesn’t represent that unlawful infringements were not serious, it exactly shows that acts of defense are successful.

A variety of factors can be integrated to judge and determine the concrete intensity of unlawful infringements. Whether perpetrators hold weapons can be functioned as one important index for reference. According to the statistics, there were 353 cases in which perpetrators held weapons to make unlawful infringements among the 722 criminal judgments, wherein, there were 128 cases in which perpetrators held knives to execute unlawful infringements. In these cases, especially for the occasion where the perpetrator held a knife, the defender must adopt more decisive and intense defensive ways if s/he wants to stop the

① In other words, in the context of legitimate defense, the circumstance does not exist, where the necessary limits are not apparently exceeded, but serious injuries are caused, but the circumstance exists, where the necessary limits are apparently exceeded, but serious injuries are not caused. For instance, a police who went home at night after his duties were finished, with seeing a thief entering his courtyard over the wall, he instantly took out his gun and aimed at the head of the thief. However, the thief was not shot with bullet passing his ears for deviation made by the police. From the ex-ante perspective, Party A has other lesser methods to stop unlawful infringement, and it is completely unnecessary to shoot the thief, thus the act “noticeably exceeds the necessary limits;” however, no actual results of injuries are caused by the shooting act of Party A with causing no “great harm” (Lao, 2015, pp. 1324–1348; Wang, 2000, p. 197).

② Roxin, 2006, pp. 674–675.

③ Chen, 2015

unlawful infringement, such as fighting back with a knife, otherwise it would be difficult for the timely stopping of unlawful infringement. Moreover, if unlawful infringements cannot be stopped the first time then the defender will likely be faced with more serious infringements. Under the circumstance, an act of defense that causes injuries and deaths to perpetrators is likely not to exceed the necessary limits. For another example, the degree of unlawful infringement is likely to be gradually weakened as the defender fights back against constant infringements and the defender may have the condition to choose milder defensive ways. There was a small quantity of cases (35) by the judicial practice in which it was taken as the grounds for determination of excessive defense that the defender continued to pursue and infringe upon the perpetrator after the infringements had weakened or stopped.^①

What is noteworthy is that although there were some cases (36) in which the intensity of unlawful infringement was considered for judging whether the act of defense was excessive, there were still some cases (25) in which it was taken as the factor for consideration that the unlawful infringements “did not seriously endanger personal safety.” The unlawful infringements faced by defenders were thought not to be a “violent crime seriously endangering personal safety” as stipulated in Article 20 (3) of Criminal Law while the act of defense constitutes excessive defense if death is caused to the perpetrator. However, According to Article 20 (3) of Criminal Law, the act of defense causing injuries and deaths to the perpetrator does not belong to excessive defense when faced with violent crime seriously endangering personal safety, which does not mean that the act of defense cannot cause serious injuries and deaths to perpetrators which is in conformity with the meaning of Article 20 (3). The kind of judgment logic in the practice seriously misinterprets the relationship between Article 20 (3) and (2).

2.2.2 Degree of urgency of unlawful infringements

The defender tends to have no time or chance to find mild defensive ways when faced with extremely urgent unlawful infringements and has to take the possible and most intense defensive means based on the situation. It tends to be a strict requirement for understanding “on-going” unlawful infringements. Through appraisal the degree of an infringement tends to be urgent for all on-going unlawful infringements. This is supported by the statistics. There were only a few cases (around 8) in which the courts determined that the existing unlawful infringements were not especially urgent.

2.2.3 Strength contrast

Compared with being faced with unlawful infringements by one person, it is hard to deal with infringements by several people. According to the data, among all 722 criminal judgments, there were 407 cases in which defenders were faced with unlawful infringements made by more than two people, wherein, there were 154 cases in which defender was faced with unlawful infringement by more than two perpetrators with weapons, 380 cases was one defender faced several perpetrators. Under the circumstance, only by adopting very intense defensive methods can defenders effectively stop infringements by several perpetrators. However, the practical departments did not take into special consideration the influence possibly caused by different strengths of both parties when considering defensive limits. In some cases the courts affirmed that excessive

^① In some cases, on the hand, it was determined that unlawful infringements by perpetrators had been stopped and perpetrators had lost the ability to execute unlawful infringements or perpetrators had been subdued, on the other hand, it was affirmed that continued chasing behaviors by defenders belonged to excessive defense. In this sense, being excessive in quantity is not completely rejected to be recognized in juridical practice.

defense existed in cases where perpetrators were killed by defensive acts even though they had pointed out that defenders were faced with infringements made by several perpetrators in urgent conditions without any other choice. This is typical of the extreme consequentialism that is carried out during judgments of “the necessary limits.” Of course, even though perpetrators execute unlawful infringements with tools, tools can be taken away during a fight, then the strength and degree of urgency of an unlawful infringement and the strengths of both sides are likely to change. At this time, the possibility for defenders to use mild defensive ways can be observed. In practice, there were a few of cases (17) in which changes of infringement intensity, degree of urgency and strengths of both sides after tools were taken away were considered to determine whether excessive defense was constituted by defenders.

2.2.4 Defensive capacity and means

If the defender is obviously stronger than the opposite side, the defender is likely to have access to more defensive means. In case the opposite side does not execute infringements with tools and cause minor harms and the defender has tools, the defender is likely to have the chance to select mild defensive ways also infringements. When there are several people jointly fighting against unlawful infringements, the defensive pressure on everyone can be decreased and more mild combined ways of defense for stopping unlawful infringements can be used. According to the statistics, there were 34 cases in which defenders stopped unlawful infringements without being armed while there were 688 cases in which defenders stopped infringements using tools. There were 538 cases where defenders fought against perpetrators with knives. However, it shows that in most cases, defenders with weapons for defense are likely to result in excessive results to some extent. While it is hard for defense with weapons to “noticeably exceeding the necessary limits and causing serious injuries,” even this cannot have obvious defensive results. It is normal for defenders with weapons to create occasions where excessive defenses occur. Additionally, conditions of common defenses by several defenders occurred in 52 cases, however there were 23 cases in which the number of perpetrators was larger than the number of defenders. Defensive measures executed by several defenders does not mean that it is easier for defenders to fight against perpetrators, for which the actual strength contrast of both sides needs to be taken into consideration. Finally, when defenders have predicted the unlawful infringements and made preparation, it can be determined whether defenders made mild selections for defensive measures. However, what calls for special attention is not to equate weapons held by defenders with advanced preparations made by them, or further determine that the preparation constitutes an excessive defense or is directly determined as exchange blows. According to the statistics, in most cases defenders were not clearly conscious about unlawful infringements and tended to use weapons or tools readily available to execute defensive options. Only in a few cases (about 20), were defenders aware of unlawful infringements possibly executed by the opposite side, and prepared weapons for defense in advance.

2.2.5 Judgment on extremely minor infringement

As previously mentioned, the necessary limits of legitimate defense shall be judged in accordance with “necessity-ism” in general, however, by way of exception, the right of self-defense for defenders shall be limited under the condition when the results that the infringements may cause are extremely minor and the results that the defensive methods may cause are extremely serious. Theoretically, there is no especially clear statement on varieties of “extremely minor” unlawful infringements. The only thing that is not controversial is that defenders cannot cause serious injuries or deaths to perpetrators for protecting properties with extremely

cheap values, which are stolen by perpetrators. In addition, acts containing abuse, pushing and shoving, as well as slapping, are likely to be considered. For this, it can be considered from two aspects of nature and the degree of unlawful infringements, and the right to self-defense of defenders can be appropriately limited for unlawful infringements (excluding thefts of special types, such as pick pocketing) without great loss in values and quantities of properties under two and three hundred yuan. In addition, acts containing one-time or extremely short-time pushing and shoving, slapping, abuse and detention also can be regarded as extremely minor unlawful infringements. However, it is improper to determine these acts as extremely minor unlawful infringements if they are executed by perpetrators continuing for a long time. Instead, appraisal of the unlawful degree of such acts should be increased for accumulated acts.^① Moreover, it should be required to make ex-ante judgments on determining whether an unlawful infringement is extremely minor. Some acts may have a low degree of infringement but might possibly evolve or develop into acts of serious unlawful infringement and should not be evaluated as extremely minor. Finally, it is improper to determine multiple unlawful infringements simultaneously executed containing acts of detention, abuse, slapping, etc. or executed in a short time as extremely minor. Instead, a combined appraisal should be made for these unlawful infringements. Such judgments need to combine factors containing severity, possibility for aggravation, duration and superposition of several unlawful infringements to comprehensively judge whether unlawful infringements are minor. If no extremely definite conclusion can be drawn, unlawful infringements cannot be determined as minor.

2.2.6 Other factors

There are other factors affecting the judging limits of defense in specific cases. For instance, environments of infringements. When faced with unlawful infringements in a narrow and small space at night, defenders cannot accurately know defensive alternatives, strengths and parts hit due to limited light and space.^② Another instance, perpetrators who are drunk and execute unlawful infringements although the infringements are weak in force and urgency.^③ At the moment, it can be conclusively considered that there exists mild defensive ways.

With regard to judging whether acts of defense “noticeably exceeding the necessary limits and causing great harm” it is necessary to consider more appropriate and milder defensive ways for defenders to use at the time from the ex-ante perspective and combining factors in many ways to judge which acts of defense are necessary for stopping unlawful infringements. Analysis on these common factors and presentation of some inappropriate judgment methods will assist the judiciary authorities in setting up a correct concept of judgment in the determination process of excessive defense and increase accurate and proper determinations.

3. Confirmation of the culpability form of excessive defense

Theoretically, there were different views on the form of culpability of excessive defense. It was thought

① Zhou, 2017

② No. 00274 [2015], First, Criminal Division I, Qiandongnan; No. 00023 [2015], First, Criminal Division I, Ka; No. 00095 [2015], Final, Criminal Division I, Foshan; No. 00141 [2014], First, Criminal Division I, Longkai; No. 00249 [2016], First, Criminal Division I, Suzhou; No. 00007 [2016], First, Criminal Division I, Guangdong; etc.

③ No. 00620 [2015], First, Criminal Division I, Kaili; No. 00436 [2013], First, Criminal Division I, Laiyang; No. 000021 [2015], Final, Criminal Division I, Longkeni; etc.

that the form of culpability was only restricted to negligence and indirect intention according to the mainstream views.^① There were some views that the form of culpability of excessive defense contained direct intention as well, while other views were that the excessive defense was only caused by negligence.^② There were still other views that the form of culpability of excessive defense was intention.^③ However, views were generally that excessive defense was caused by negligence, and only caused by intention under special conditions.^④ Perpetrators were killed or injured through the acts of defense in all statistical cases, however, attitudes towards defense used by defenders causing injuries and death were determined to be negligent or intentional by judicial practice and were polarized by judicial practice. Among the 798 criminals determined to have used excessive defense, there were 263 that killed the perpetrators and of these 15 who did so intentionally (i.e., offence of intentional homicide), accounting for 5.70%. There were 248 criminals who were determined to be negligent in causing the deaths of perpetrators (containing circumstances of crimes of negligent causing the death of another person and intentional injury causing the death), accounting for 94.30%. Among the 535 criminals that caused serious or minor injuries to the opposite side, there were 528 who were determined to have done so intentionally, accounting for 98.69%. There were only 7 who were determined to have committed negligent crimes, accounting for 1.31%. In the view of the judiciary authorities, deaths caused by most defenders were due to negligence while most injuries were intentional.

3.1 The form of culpability for injuries

It was widely believed in the juridical practice that defenders intentionally used excessive defense. However, this view is inappropriate in that it has not fully understood the “intention” in Criminal Law.

First, it is inconsistent with the stipulation of Criminal Law on intention. According to Article 14 of Criminal Law, an intentional crime refers to an act committed by a person who clearly knows that his act will entail harmful consequences to society but who wishes or allows such consequences to occur. Based on this, for constituting criminal intentions, the actor needs to know the occurrence of results and know that his act will entail harmful results to society.^⑤ However, in the context of excessive defense, the act of defense is illegal (entailing harmful results to society) because it apparently exceeds the necessary limits and causing great harm. Therefore, only defenders are aware that their acts of defense apparently exceed the necessary limits, they are likely to realize that their acts of defense will entail harmful results to society, thus committing an intentional crime. According to the theory of Criminal Law and juridical practice, it was required that defenders had defensive consciousness for excessive defense. Although defenders with defensive consciousness know what results might occur, they often think their acts of defense are necessary for stopping unlawful infringements, while it is hard for them to know that their acts of defense have exceeded the necessary limits, which is harmful to the society, thus the intentional crime is hard to commit. By contrast, it tended to be affirmed that defenders were acting intentionally and that they knew the results of the harm

① Gao & Ma, 2016, p. 136; Chen, 2016, p. 183

② Zhang, 2016; Chen, 2011; Zhou, 2016

③ Professor Li Hong thought that the form of culpability of excessive defense was intention; professor WANG Zhengxun thought that the form of culpability of excessive defense only could be indirect intention. What called for special attention was that defenders clearly knew that their acts of defense possibly exceeded the necessary limits with causing material injuries in the context of excessive defense; based on the fact, he further thought that the form of culpability of excessive defense only could be indirect intention (Li, 2016, p. 141; Wang, 2000, p. 194).

④ Lao, 2015; Zhang, 2016, p. 213; Zhang, 2016, p. 1845

⑤ Gao & Ma, 2016, p. 108; Chen, 2016, p. 180; Lao, 2015

they caused while in the juridical practice the impact of defensive consciousness on intention was ignored. The formalized understanding of intention is inconsistent with the stipulation of Article 14 of Criminal Law on intention.

Second, it conflicts with other acts in the judicial practice. First, regardless of common theories and judicial practice, it is required that defenders have the defensive consciousness for establishment of legitimate defense; the context of excessive defense is no exception. If defenders have no defensive consciousness, it tends to be determined that they hit each other, neither a legitimate defense nor an excessive defense is established. However, if intention is only understood formally, defensive consciousness has no influence on the form of the defender's liability, then what's the meaning of defenders being required to have a defensive consciousness in the occasion where excessive defense occurs? According to the formal understanding of intention, haphazard excessive defense and even occasional establishment of haphazard defense should be generally affirmed in practice. However, the aforesaid statement was denied both by experts of the practice and common theories. Next, it is inconsistent with the standpoint for determining the form of culpability of imaginative defenses in practice. When explaining the judicatory ground of one case where death was caused by an imaginative defense, the criminal adjudication tribunal of the Supreme People's Court definitely pointed out that "intention stated in the theory of Criminal Law cannot be equated and confused with the intention in the theory of psychology. Although an imaginative defense is an intentional act, its intention is based on a mistaken understanding of the objective fact that actors think that they execute legitimate defense against unlawful infringements. Actors do not know that harmful results are caused to the society by their acts, moreover, they think that their acts are legal and justifiable. While criminal intention takes the precondition that actors clearly know harmful results are caused to society by their acts. Therefore, intention of imaginative defenses can only be explained psychologically, which cannot be determined as a criminal intention."^① The practical department determined intention based on essentialism with regard to the form of culpability of imaginative defenses. So there is no reason to make formalized understanding of intention in the context of excessive defense.

By looking deeply into the cause, a formalized understanding of the intention is possibly connected with the traditional theoretical system of crime. In light of the traditional theoretical system of crime, crime is determined from four aspects, i.e., subject, counterpart, subjective aspect and objective aspect, while legitimate defense is an exceptional cause of excluding a crime. During determination on the subjective aspect of a crime, it mainly depends on whether actors know the results that will occur or have the intention to execute acts, thus deciding whether actors have intentions. After it is determined that actors meet the conditions for committing one crime according to the aforesaid four elements, it should be taken into consideration whether the situations where crimes that can be excluded for legitimate defense exist. If not, the actors have, or will, commit crimes. At the proceeding stage of crime determination, that is, during the determination of the subjective aspect of a crime, the only situation to be taken into consideration is whether the actors knew harm would be caused in the context of legitimate defense. While it can directly confirm that actors constitute intentional crimes, legitimate defense is not established at the later stage of crime determination, in addition, there is no space for further confirming the form of culpability. Under the mode of determination, the criminal intention

① Supreme People's Court Criminal Justice Trial 1 & 2, Criminal Justice Reference, 2001

of defenders tends to be determined at the first stage in the context of excessive defense, thus defensive consciousness is impossible to affect determination on the form of culpability of defenders. This was proved by the descriptive approach on the form of culpability of excessive defense in the practice. In all 722 cases, there were two patterns for courts to determine that defenders committed intentional crimes: the first pattern was to directly point out the intentions of defenders for the results of injuries and deaths, thus an intentional crime was committed, then the statement was separately made by taking excessive defense as a circumstance of sentencing. There were 470 cases in which the pattern was adopted for determination, accounting for 65.10%. The second pattern was to point out that the act of defense by defenders constituted excessive defense, thus committing an intentional crime. There were 230 cases in which the pattern was adopted, accounting for 31.86%. For the two patterns of determination, especially for the first pattern, we can clearly see that courts determined intentions only in the light of actors' understanding of the results of injuries and deaths under the theoretical system of crime, while excessive defense was only taken as a circumstance of sentencing and defensive consciousness was impossible to cause an effect on judgment of intentions, for which determination of intentions could only be a formalized judgment in the context of excessive defense.

It is apparently incorrect to generally determine that excessive defense caused injuries as intentional crimes in practice. Theoretically, the practice with formalized understanding on intention is inconsistent with Article 14 of Criminal Law on intention. According to the juridical practice, it has conflicts with the requirements in practice on defensive consciousness and treatment with imaginative defenses. Therefore, we should fully understand the influence of the defensive consciousness of defenders. The form of culpability of defenders is negligent for most cases of excessive defense. Only when defenders hope to allow or cause harm by clearly knowing that their acts of defense "noticeably exceed the necessary limits," can defenders commit intentional crime.

3.2 The form of culpability in death results

As mentioned above, the understanding of intentions for cases of excessive defense should be substantialized. Only when defenders hope for or allow harm to be caused by clearly knowing that their acts of defense "apparently exceed the necessary limits," defenders will commit intentional crimes. The standard equally applies to cases when deaths are caused by excessive defense. According to the statistics, most excessive defense cases resulting in deaths of perpetrators were determined as intentional injury by causing death, that is, the results of deaths was due to the negligence of defenders. Superficially, the practice seems to be in line with the essential determination on intentions. However, through careful research, it can be found that although the judiciary authorities determined that the practice resulting in death by defenders was negligent, they did not determined that defenders negligently caused the deaths, instead, they affirmed that defenders had intentionally inflicted harm causing death. Potential misunderstanding on intentional injuries is contained therein, thus I conduct a discussion based on the following two circumstances.

Situation One, from the ex ante perspective, it is not excessive for the act of defense to result in injuries (serious injuries), while it is excessive for it to result in the deaths of perpetrators. Under the circumstance, defenders indeed consciously hurt perpetrators, and negligently cause deaths to perpetrators. However, the harm is the legal act by taking legitimate defense as the ground, which is not the counterpart negatively violated Criminal Law. Accentuated results caused by the harm, which is the fact of causing death, is precluded by Criminal Law. Therefore, liability for negligence of the defenders can only be claimed for

deaths caused as the results. In other words, intention as the form of culpability is the intention for unlawful infringements, however, in the context of Situation One, the results of harm have been legalized, which cannot function as the counterpart of intention.^① Intention of defenders for the legal result is just a kind of intention psychologically without criminal significance. The flip side of that coin is, if defenders are determined to commit intentional injury causing death, it means that if an act of defense results in serious injuries without causing death, defenders will still commit the crime of intentional injury. Because intentional injury causing death aggravates the crime of intentional injury, under the condition of no accentuated results, defenders constitute the fundamental offense. However, causing serious injuries in the context of Situation One belongs to legitimate defense that does not exceed the necessary limits, thus it cannot claim the criminal liability of defenders. In other words, on the surface, “accentuated results” of causing death occur in Situation One, actors seemingly should commit the aggregated consequential offense of the crime of intentional injury. In fact, there is no so-called fundamental offense (because it has been legalized), thus it is not the real aggregated consequential offense, which cannot commit intentional injury by causing death.

Situation Two, from the *ex ante* perspective, causing serious injuries constitute excessive defense, however, the final act of defense results in the deaths of perpetrators. Under the circumstance, results of serious injuries caused by defenders are grounds for the courts to make negation assessments according to Criminal Law. With combining the aforesaid logic for determination on intention of excessive defense, it can be assumed that defenders can be determined to commit intentional injury causing death only when they clearly know that their acts of defense apparently exceed the necessary limits without possibly resulting in injuries and they do not clearly know the results will cause deaths. Defenders clearly know that their acts of defense will possibly result in the deaths of perpetrators, but they do not realize that the acts of defense noticeably exceed the necessary limits, or do not clearly know that the perpetrators are harmed to the point of death. Also, because they do not realize that their act of defense noticeably exceeds the necessary limits, they can only commit the crime of negligent homicide. By making a comparison of the two situations, for deaths caused by excessive defense, only when the results of the serious injuries involved results from excessive force, and the defenders knew the results would be serious injuries without knowing the results would bring deaths, and realize that acts of defense noticeably exceed the necessary limits, do they commit the crime of intentional injury causing death. Therefore, it is very rare for defenders to commit the crime of intentional injury causing death in cases of excessive defense resulting in deaths. The reason why defenders were determined to commit the crime of intentional injury and causing death in many of the cases where deaths were caused by excessive defense in juridical practice lies in the formalized understanding of intention and unconsciously taking into consideration the legalized intentional act of causing harm for evaluating criminal fact in the judicial practice, thus the conclusion that defenders committed the crime of intentional injury causing death was obtained.^①

In general, in the context of deaths caused by excessive defense, for judging the form of culpability of defenders, it is required to, first confirm the fact of foundations for liability imputation, consider whether defenders know occurrence of the fact, and finally take account of whether defenders realize that acts of defense apparently exceed the necessary limits. Not only should the formalized understanding of intention be

① Chen, 2011

avoided, but taking legalized results as grounds for the understanding of intentions should also be avoided.^②

3.3 Handling of correlation problems

Determination of the form of culpability of excessive defense is involved when defenders commit intentional crimes or negligent crimes, moreover, it will have a joint effect on the determination of other problems.

3.3.1 Determination of recidivism

According to Article 65 of Criminal Law, the precondition for defenders to commit recidivism is that the earlier crime and the new crime must be intentional crimes by criminals possibly committing another crime punishable by fixed-term imprisonment or a greater penalty. Among all 798 criminals, there were 25 who were given a greater punishment as recidivists. However, based on the aforesaid analysis, if intention in cases of excessive defense is essentially understood by emphasizing the influence of the awareness of defense on the determination of intention, some defenders will likely be determined to commit negligent crimes. If so, they will not be determined as recidivists or be given a heavier punishment.

3.3.2 Determination of joint crime

For most cases of excessive defense, one defender was attacked by several perpetrators in most situations, however, in few cases there were possibly several defenders jointly committing acts to stop unlawful infringements. If excessive results occur in the occasion where there are several defenders, it is required to determine whether the result was caused by one defender, several defenders, or all defenders. According to the statistics, in all 722 cases, there were 31 cases where several defenders were determined to constitute a joint defense. In light of the traditional theory of Criminal Law, joint crime in our country mainly refers to intentional crime, under the precondition, if it is required to make a determination on joint crime constituted by all defenders, joint criminal intention by all must be confirmed. However, the consciousness of causing harm to perpetrators which is involved in defensive consciousness does not contribute to criminal intention. It cannot affirm that defenders were intentionally committing a joint crime just because they are conscious of a joint defense. Based on the aforesaid essential understanding of intention, only when all defenders know that acts of defensive force noticeably exceed the necessary limits and have an intention liaison can they be determined to have committed a joint crime by jointly having criminal intention, thus the excessive results were caused by all defenders.

In summary, there were a large number of excessive defenses being determined as intentional crimes in the juridical practice, the reason for which was that the judiciary authorities formally understood intentions and did not attach importance to the influence of defensive consciousness on the determination of defense. If importance is attached to the influence of defensive consciousness on the determination of defense, it can be

① Lao, 2015

② Names of crimes for related specific circumstances where deaths are caused for excessive defense can be summarized as follows: if the result of series injuries is not excessive, then defenders only need to be responsible for deaths; wherein, actors clearly know that the act of defense apparently exceeds the necessary limits and possibly causes deaths to perpetrators, actors will commit the crime of intentionally killing; if defenders do not clearly know the result of deaths or do not realize that the act of defense apparently exceeds the necessary limits, they will commit the crime of negligent homicide. Secondly, the result of series injuries is excessive, then defenders shall be responsible for the result of deaths and serious injuries; wherein, if defenders clearly know that the act of defense apparently exceeds the necessary limits and possibly causes deaths to perpetrators, defenders will commit the crime of intentionally killing; if defenders clearly know that the act of defense apparently exceeds the necessary limits and possibly causes injuries to the opposite party, however, defenders do not clearly know the result of deaths, they will commit intentional injury causing death; if defenders clearly know that the act of defense will cause deaths to perpetrators, but they do not realize that the act of defense apparently exceeds the necessary limits, or they do not know the act of defense will cause deaths to perpetrators, realize that the act of defense apparently exceeds the necessary limits either, they only commit the crime of negligent homicide.

assumed that defenders commit negligent crimes in most cases of excessive defense. Only if they hope for or allow results to occur even though they clearly know that their acts “noticeably exceed the necessary limits,” can they commit intentional crimes.

4. Confirmation of deductions and exemptions of punishment for excessive defense

According to the statistics presented at the beginning of this article, most criminals were sentenced to fixed-term imprisonment of less than three years (inclusive) or lesser punishments, wherein application the rate of probation was also higher than that for general crimes.^① Of course, for specific cases it was required to take excessive defense into consideration for circumstances of sentencing. In addition, there were many other circumstances of sentencing. Among the 798 criminals, based on circumstances of deducted punishment, there were 380 who voluntarily surrendered themselves, accounting for 47.62%; 245 who confessed, accounting for 30.70%; 234 who were involved in victims’ negligence, accounting for 29.32%; 452 who were involved in compensation made to perpetrators, accounting for 56.64%; and 370 who were involved in understanding by victims or victims’ relatives, accounting for 46.37%. There were also some circumstances in which lesser punishments were given, for instance, there were 130 criminals who acknowledged their guilt, accounting for 16.29%; 80 who showed repentance, accounting for 10.03%; 50 who were involved in a first offence, accounting for 6.27%; and 19 who were involved in a casual offence. The circumstance of cases caused by private contradictions was considered for the measurement of punishments for 48 criminals, accounting for 6.02%. Based on circumstances of heavier punishment, there were 25 who were given greater punishment for recidivism, and 38 who were given greater punishment for holding weapons or causing material injuries with weapons, 8 who were given greater punishment for previous convictions, and 5 who were given greater punishment for no compensation to victims.

Through analysis of the punishments for excessive defense and relevant considerations, I found that there are problems concerning three aspects:

4.1 The application rate for exemption from punishment is extremely low.

Among the 798 defenders, there were 85 defenders who were exempted from punishment, accounting for 10.65%; among these 85 defenders, there were 44 who caused minor injury, 32 who caused seriously injury and 9 defenders who caused death. If the circumstances for minor injuries caused from the act of defense were excluded from the circumstances of excessive defense according to the above discussion. Under circumstances of serious injuries caused for excessive defense, there were only 7.37% of defenders who were exempted from punishment, while there were only 3.42% defenders who were exempted from punishment under circumstances of death caused by excessive defense. If circumstances of voluntary surrenders, confessions, victims’ negligence, compensation and understanding, which widely existed in circumstances of exemption from punishment, were taken into consideration, it could be said that there were fewer cases where the punishment of defenders was exempted for excessive defense or by giving major consideration to excessive defense.

① Zhang, 2013

To be objective, there are several reasons that excessive defense was less applicable to exemption from punishment.^① The important reason is that judiciary authorities did not accurately master deductions and exemptions of punishment for excessive defense, especially on grounds of deductions and exemptions of punishment. As previously mentioned, reasons for deductions and exemptions of punishment for excessive defense mainly lie in alleviated unlawful infringements and decreased liabilities. Combined with stipulations of Criminal Law in our country, acts which apparently exceed the necessary limits by causing great harm constitute excessive defense, for which unlawful infringements causing excessive defense can be alleviated, but they cannot be extremely minor after being alleviated, otherwise, it is impossible that acts which “noticeably” exceed the necessary limits by causing “serious” harm constitutes an excessive defense. In this sense, simple deductions of unlawful infringements cannot completely provide grounds for exemption from punishment for excessive defense. Therefore, reduction of liabilities shall be considered, that is to make a further statement for the cause for exemption from punishment for excessive defense from the perspective of reduction on the possibility of anticipation. It is generally acknowledged that it is hard for defenders to avoid having nervous moods or of being terrified, afraid and rattled in the context of excessive defense, while when these nervous moods are strong, the possibility for anticipating defenders to take appropriate acts of defense will be greatly decreased, then their responsibility degree is decreased and weakened, thus they should be exempted from punishment.^② The scope of exemption from punishment for excessive defense should include extremely strong psychological changes generated for defenders who are faced with unlawful infringements shall be considered, which could greatly reduce the possibility of anticipation, thus reducing the degree of responsibility of defenders in a stressed condition.^③

However, in consideration of the determination by the judicial practice, judiciary authorities did not show special concern for the nervous conditions of defenders when they were faced with unlawful infringements. Even in a few cases (24), the courts knew that the situations at the time were very emergent where defenders were highly nervous and even panicked, but they did not largely deduct punishment given to the defenders, not to mention any exemptions from punishment. Therefore, during measurement of crime punishments, special attention should be paid to the nervous conditions of defenders when they are faced with unlawful infringement to determine the deduction degree of responsibility of defenders and properly determine extent for deductions of punishment, even exemption from punishment.^①

4.2 Problems of repeated appraisal

Among the 798 defenders, there were 234 defenders who were given lesser punishment for the existing fault of victims. What is thought-provoking is why the circumstance of sentencing for fault of victims is so frequent in the context of excessive defense. Through analysis of these cases I determined that one of the important reasons lies in the fact that perpetrators executing unlawful infringements are taken as the grounds

① For instance, if a large number of circumstances which should be determined as circumstances of negligence are determined as circumstances of intentional crimes, responsibility assessment made for defenders is improved, to a certain extent, the probability for defenders to be exempted from punishment is decreased; for another instance, too much attention is paid to materiality of results in the determination process of excessive defense, the probability of application to exemption of punishment is directly excluded usually for serious injuries caused for the act of defense in the context where deaths are caused for excessive defense.

② Jescheck, 1996, p. 478–491; Yamaguchi, 2011, p. 134

③ Of course, if the kind of strong mental changes cause that defenders are completely not anticipated making appropriate the act of defense, defenders will not constitute crimes for losses of the possibility of anticipation. (Li, 2016, p. 141.) In this sense, circumstances that exemption from punishment for excessive defense corresponds to are circumstances where the possibility of anticipation of defenders is greatly decreased without being lost completely.

for determining fault by victims in the judicial practice. Indeed, based on crime types, excessive defense also belongs to a crime with faults of victims,^② however, when deductions and exemptions of punishment are made for excessive defense according to Criminal Law, the effect of unlawful infringements executed by victims on illegality and responsibility for the act of defense have been taken into consideration. The fact that victims first execute unlawful infringements the effects on criminal responsibility of defenders have been taken as grounds for deductions and exemptions of punishment for excessive defense, which are reflected in Article 20 (2) of Criminal Law. In this case, if it is based on the fact of determining fault of victims and giving lesser punishment for defenders, that is to make repeated appraisal^③ of the effect of punishment from the same aspect with regard to the same fact. Therefore, the circumstance of fault of victims does not apply to reductions of punishment^④ for defenders under the condition of deductions and exemptions of punishment for excessive defense. Of course, if there are other circumstances of fault by victims besides on-going unlawful infringements, excessive defense and negligence of victims are applicable^⑤ at the same time.

Another typical phenomenon of repeated appraisal is to take normal conditions of crimes as the circumstances of crimes calling for a heavier or lesser punishments. According to the statistics, there were 38 defenders who were given heavier punishment for defense with weapons. However, weapons cause intentional injuries, especially representing the normal condition of intentionally hurting another person by causing serious injury. When appraisal is made on acts causing serious injuries or deaths, the circumstance of defense with weapons has been evaluated. In any case, even though defense with weapons contributes to accentuated intentional injuries, it is the normal condition of excessive defense. Because most defenders are faced with unlawful infringements executed by several perpetrators or perpetrators with weapons, normally it is possible to have excessive force result only when defenders have weapons, because it is very hard for acts by defenders that are “noticeably exceeding the necessary limits and causing great harm” without weapons. According to the statistics of the 722 criminal judgments cases of defense with weapons accounted for 95.29% (688 cases), wherein, cases of defense with knives accounted for 74.52% (538 cases). In this sense, defense with weapons is the normal condition of excessive defense. When defenders are determined to commit excessive defense, the accompanying circumstance of defense with weapons shall be considered; if a heavier punishment is given for defense with weapons, it belongs to repeated appraisal. Of course, if injuries caused by defenders with weapons to perpetrators are more serious, such as injuries and disabilities of a serious grade, then the injuries shall be considered during selection on statutory sentence.^① However, punishment is determined in accordance with severity of injuries instead of circumstances of defense with weapons. Even so, if the severity of circumstances of injuries and disabilities has been considered during determination of benchmark

① Shen Deyong, 2017, June 25th; In addition, what calls for special attention is that, in the light of sequential order and restrictive relation of law of liability and prevention, if defenders are determined to be exempted from punishment according to excessive defense, then even through defenders have circumstances of crimes calling for heavier punishment, which have effect on law of prevention, such as previous convictions, punishment given to defenders only can be exempted, which cannot be accentuated. (Zhang, 2014, p. 430)

② Chen, 2016, p. 184

③ There were few judgments in practice in which the problem had been recognized. They definitely pointed out that repeated evaluation could not be made for excessive defense and faults of victims, reference: No. 00315 [2016], First, Criminal Division I, Guizhou 0512; No. 00029 [2015], First, Criminal Division I, Yanshan, Yunnan; No. 00058 [2015], First, Criminal Division I, Weifang; No. 00260 [2014], First, Criminal Division I, Lishan, Anshan; No. 00146 [2013], Final, Criminal Division I, Chongqing; No. 00171 [2013], First, Criminal Division I, Yanshan, Yunnan.

④ Of course, the excessive defense cannot be degraded as faults by victims, thus heavier punishment is given to defenders. (Zhang, 2013) By contrast, make comparison between the first instance judgement and the second instance judgement of related cases, refer to: No. 00033 [2016], First, Criminal Division I, Shandong 15; No. 00151 [2017], Final, Criminal Division I, Ming;; No. 00144 [2015], First, Criminal Division I, Ming; etc.

⑤ No. 00151 [2017], First, Criminal Division I, Shandong 15; No. 00029 [2016], First, Criminal Division I, Shandong 15.

punishment, then no heavier punishment should be given to defenders based on the circumstance, otherwise, it is repeated appraisal as well.^②

According to the statistics, there were few cases (5) in practice where no compensation made by defenders was considered for circumstances of heavier punishment. However, no compensation by defenders for losses of victims is normal and because of this if defenders make compensation lesser punishment will be given. Therefore, if defenders do not make compensation, heavier punishment cannot be given. In addition, for some cases, the courts regarded the first offense (50 cases) and casual offence (19 cases) of defenders as circumstances of lesser punishments, however, the first offense and casual offence were normal conditions of crimes and because of this defenders committing recidivism or having previous convictions were likely to be given heavier punishments. Therefore, it is proper to consider first offense and casual offence as circumstances of lesser punishment.

4.3 Problems of indirect punishment

Indirect punishment mainly refers to punishment given for the act and result which are involved in one crime, even though they are not counterparts of punishment originally. Indirect punishment violates the crime punishment legal principle of taking the protection of human rights as its basic tenet, which not only has made Criminal Law lose the function of limitation on judicial power, but also caused punishment under no limitation.^③

In the light of juridical practice and popular theory of our country, intentional injury causing minor injuries does not constitute a crime. For specific cases, if actors intentionally harmed others and caused minor injuries, they would not be punished criminally but would only be given security punishment. For some cases of excessive defense, faced with unlawful infringements by several perpetrators, defenders tended to cause injuries and deaths to one perpetrator or several perpetrators besides causing minor injuries to other perpetrators. There were 49 cases where minor injuries caused to perpetrators by the acts of defense were counted as grounds for final conviction appraisals or judgments of excessive defense. It is clear that if minor injuries are taken as measurement grounds for conviction or judgments of excessive defense, finally defenders are determined to have excessive defense and constitute crimes, then minor injuries must be the important grounds^④ for heavier punishment given to defenders. However, intentional harm causing minor injuries does not apply to criminal punishment for not contributing to a crime. If minor injuries are considered in the circumstances of a crime for a heavier punishment they are involved in excessive defense, and occur along with other more serious punishment circumstances. It is equivalent to having punishment sentenced essentially for the act. This is typical indirect punishment. Besides, there were some cases where acts of defenders caused financial losses to perpetrators, however, even though the amounts of financial losses did not reach the starting point of the criminal amount of related property crimes (crimes of intentional harm to properties), the courts considered it as a circumstance of a crime calling for heavier punishment given to defenders, this is an apparent indirect punishment.^①

① No. 00153 [2016], First, Criminal Division I, Guangdong 153.

② Zhang, 2014

③ Zhang, 2014, p. 264.

④ By judicial practice, based on the implementing rules on guidance suggestion on discretion of punishment by the Supreme People's Court issued in Beijing, Shanghai and Chongqing, minor injuries were taken as grounds for crimes calling for heavier punishments.

In addition, indirect punishments shall be specially avoided for minor injuries in the aspect of excessive defense. When faced with joint infringements by several perpetrators, defenders may cause serious injury or death to one perpetrator and cause minor injuries to other perpetrators. For instance, Person A fought back with a knife when he was hit by Persons B, C and D, causing serious injury to Persons C and D and minor injury to Person B. Even if the act of defense by Person A was determined to constitute excessive defense for causing serious injuries to Persons C and D, it was still inappropriate to impose the criminal liability or accentuated punishment on Person A for the minor injury that he caused to Person B. Although causing minor injuries to others shall be sentenced in cases of normal intentional assault, based on the aforesaid analysis, the act of defense causing minor injuries to perpetrators does not meet the requirement of “great harm,” thus criminal liability shall not be imposed. It is not exceptional when facing joint attacks by multiple perpetrators. The act of fighting back by Party A shall not be considered as the excessive defense or the circumstance for accentuated punishment for Person A (for the excessive defense to Person C and D) just for what Person A did to Persons C and D was determined as the excessive defense while the unlawful infringement by Person B to Person A appeared at the same time with what Persons C and D had done to Person A.^② If no attention is paid to this point, it means that the defender is more vulnerable to cause the excessive defense for stopping joint infringements by multiple perpetrators than stopping that of one person, which is to say conversely that committing crimes in gangs is encouraged. The form of culpability for the result of the minor injury by the defender should also be considered even if an accentuated punishment is considered to be imposed on the defender for the minor injury, to say the least. A truth could be implied based on the my analysis that all the harm results are frequently caused by negligence of the defender; while causing others minor injuries by negligence is not affirmed as the crime in accordance with Article 235 of Criminal Law. Therefore, in most cases, acts of defense causing minor injuries shall not be considered as a circumstance for serious punishment, it would be indirect penalties otherwise.

Finally, rethinking is required on the practice that excessive defense causing deaths in practice is commonly determined as the intentional infliction of bodily injury resulting in death. According to the above analysis, if the results of serious damages involved in cases where excessive defense results in deaths are not excessive, then determining defenders committed intentional infliction of bodily injury resulting in deaths is equal to reincorporating legalized facts into the crime appraisal and investigated criminal responsibility of defenders. Such practice, strictly speaking, is not an indirect punishment, but a more serious direct punishment than direct punishment based on legalized facts, which seriously violates the crime punishment legal principle and shall be strictly prohibited.

In summary, for reductions of punishment for excessive defense, the main problem existing in determination by judicial practice is that the application of exemptions from punishment is strictly limited, while there are obvious repeated appraisals and indirect punishments concerning mastery of circumstances for sentencing. The underlying reason is that the judicial authorities have not paid enough attention to grounds for reductions of punishment for excessive defensive, nor have they seriously considered the substantial reasons for circumstances for decreased or accentuated punishment, but merely applied these circumstances

① No. 00143 [2015], First, Criminal Division I, Fanchang.

② By the judicial practice, judges were aware of this point, referring to: No. 00336 [2014], First, Criminal Division I, Funan; No. 00110 [2013], Final, Criminal Division I, Liuzhou.

mechanically.

5. Conclusion

Through collation and analysis of relevant cases, I observed that there are three main problems regarding excessive defense handled by the judiciary authorities. First, in terms of the determination of whether the act of defense “noticeably exceeds the necessary limits and causing great harm,” the tendency toward consequentialism apparently existed, which made the determination of excessive defense less rigorous, resulting in some legitimate defenses being determined as excessive defenses. Second, in terms of the judgment of the form of culpability for excessive defense, the understanding of the term “intention” was too formalized, which caused a large number of excessive defenses to be determined as intentional crimes. Third, no deeper concerns were given to grounds for reductions and exemptions of punishment for excessive defense, which led to a very narrowed applicable scope for impunity of the excessive defense. Furthermore, there were still some dogmatic acts on the relative circumstances of suspension of sentence, which resulted in the duplicative assessments and indirect penalties. From the perspective of the purpose of regulations of justifiable self-defense, through my analysis, I think that the following aspects need to be improved in terms of determinations of excessive defense in judicial practice. First is that the necessary limits shall be judged according to the “essential theory” and determination of the justifiable or excessive defense shall be subject to whether it was necessary for stopping unlawful infringements. Second, with respect to the judgment of the form of culpability for excessive defense, importance shall be attached to the influence of “intention” by the defensive consciousness, of which criminal negligence by defenders shall be affirmed under the general situation. Third, regarding the reasons for highlighting the reductions of punishment for excessive defense, defenders shall be exempted from punishment in cases where there is a significant decrease in the possibility of committing the crime. Fourth, for the application of the relative circumstances of sentencing, the analysis on factual grounds and essential foundations of circumstances of heavier or lesser punishment shall be emphasized.

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