

Practices of Justifiable defense in criminal law in China

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Abstract

The legislative value and regulatory logic of China's justifiable defense system are different from that of foreign countries. To solve Chinese problems, local remedies based on China's cultural tradition of rule of law should be the primary principle. In the essay, normative logic theories are put forward first as the basis to suggest practical applications for justifiable defense. Based on that, judicial opinions used for judicial practice by China's Supreme Court¹ are analyzed, which leads to the key part of the essay of detailed five suggestions and explanations of how to make sound justifiable defense judgment, taking factors of cautious attitude, human feelings, positive values guidance into law case handlings.

Key words: Justifiable Defense, Chinese Criminal Law, Judicial application

INTRODUCTION

A series of criminal case convictions concerning justifiable defense in China burdened too much on defenders, making the public believe that law breakers are given too many excuses to be exempted from criminal punishment, which has triggered the thinking of all sectors of society on how to standardize and reasonably apply the system of justifiable defense. How to effectively integrate and unify the legal principle reasons behind the justifiable defense cases, how to accurately explain the value basis and regulatory logic of the justifiable defense system, and how to find the balance between the theory and practice of the application of the justifiable defense system are the hot spots of current theoretical and practical disputes, which encourages the specific application suggestions in this essay.

I. Basic principles for justifiable defense

Justifiable defense is the act being exempted from crimes. Since the establishment of justifiable defense is not based on the premise that the damage caused is less than or equal to the damage avoided, criminal law theory has been discussing the justifiable basis of justifiable defense. In other words, why is it not illegal that the damage caused by the defensive act is apparently greater than the damage avoided. Germany's general theory and case law adopt the dualism of combining the principle of personal preservation with

the principle of legal confirmation. Dualism has been approved by many scholars in Japan and South Korea, and also by some scholars in China.

The principle of personal preservation refers to that the law allows individuals to take various necessary defensive protective measures, or that individuals who are attacked by illegal violations can take necessary measures to preserve themselves. This principle can be explained by the theory of social contract, which is reasonable to a certain extent. The conclusion that the infringed does not evade his obligations is generally acceptable. But the principle is not without doubt. On the one hand, the criminal laws of all countries recognize the legitimate defense for the benefit of the third party, but the principle of personal preservation cannot explain this. On the other hand, according to this principle, since no contract can make citizens give up their right to self-defense when the state cannot protect the interests of citizens, then, citizens cannot be made to give up their right to self-defense on the grounds of excessive defense. Therefore, citizens can defend against illegal infringers without limitation, so there is no possibility of excessive defense. However, such a conclusion does not conform to the provisions of criminal laws of various countries on excessive defense. The principle of personal preservation cannot be transferred to China intact. According to the principle of personal preservation, on the side of personal law, it shows that legitimate

defense is only allowed to protect personal interests, but not to protect public order or legal order itself.

The principle of legal confirmation is generally understood as that even if the legal order is violated, it cannot retreat, but it should be maintained in a serious way to show its existence. In short, legal confirmation refers to the defense of legal order, and no compromise is allowed. This is because illegal infringement not only infringes on personal legal interests but also infringes on the concept of law and the basic legal order. Therefore, legitimate defense does not need to balance interests, and the defender has no obligation to retreat. And because the legal order is ultimately to protect personal interests, everyone can fight against illegal infringement through defensive acts, and can also conduct legitimate defense to protect the interests of others.

II. Criminal law regulations for Justifiable defense

Justifiable defense is stipulated in Article 20 of Criminal Law of the People's Republic of Chinaⁱ, which says,

*Justifiable defense an act of stopping an illegal infringement in order to protect the interests of the State, the public, or the person, property, or other rights of oneself or others from the ongoing illegal infringement, which causes damage to the perpetrator, belongs to legitimate defense and does not bear criminal responsibility.*ⁱⁱ

*If justifiable defense obviously exceeds the limits of necessity and causes serious damage, criminal responsibility shall be borne, but punishment shall be mitigated or exempted.*ⁱⁱⁱ

Those who take defensive actions against the ongoing murders, killings, robberies, rapes, kidnappings, and other violent crimes that seriously endanger the personal safety, thus causing casualties to the unlawful infringers, shall not be considered as over-defensive and shall not bear criminal responsibility.^{iv}

Anyway, in the process of hearing cases involving self-defense, how can the people's court ensure that the judgment results of the case are consistent with the understanding of the public's concept of justice? Some cases involving justifiable defense had deviation or even serious misconduct in handling, e.g. defenders are being demanded too much with their defending, wrong tendencies happen now and then to give up to those who challenge legal defending behaviors, and justice stays loose with protecting interests of legal defenders.

Considering that china's legal civilization is advancing into a new era, a new understanding and higher expectation of social fairness, justice, personal rights, security, should be comprehended, and the application of the legitimate defense system should be further improved in the judicial concept and further clarified in the specific rules. To achieve the purpose, On September 3, 2020, the Supreme People's Court announced the Guiding Opinions of the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security on the Application of the System of Self-defense,^v which outlines key rules in deciding what kinds of

defenses are regarded as justifiable defenses (legal defenses) in criminal case.

III. Judicial applications of justifiable defense in China

In accordance with the Guiding Opinions of the Supreme People's Court^{vi}, the following principles in judicial justifiable defense application should be applied.

Firstly, causes and conditions of justifiable defense should be handled accurately. The premise of justifiable defense is the existence of an unlawful infringement. Illegal infringement includes not only the infringement of life and health rights but also the infringement of personal freedom, public and private property rights, which broadly include both criminal acts and other illegal acts. The improper infringement should not be limited to violence or criminal acts, but also include unlawful infringements such as illegally restricting others' personal freedom and illegally invading others' homes. The unlawful infringement includes not only the unlawful infringement against oneself but also national and public interests, e.g. defense can be exercised while illegal and criminal acts that jeopardize safe driving and endanger public safety happen such as pulling the steering wheel, beating the driver, etc. Additionally, Adults shall dissuade and stop the illegal infringement being committed by minors against other minors. If dissuasion fails, defense may be exercised.

Secondly, justifiable defense intentions should be carefully understood. Legitimate defense must be taken in order to protect the state interests, public interests, persons, properties, and other rights from unlawful infringement. Anyway, defense provocation that deliberately provokes the other party to infringe on itself with words, behaviors, etc., and then strikes back should not be considered as a defense act.

Thirdly, great attention should be paid to the time to take justifiable defense actions. The legitimate defense must be against the ongoing unlawful infringement. If the illegal infringement has formed a realistic and imminent danger, it shall be deemed that the illegal infringement has begun; If the illegal infringement is temporarily interrupted or stopped, but the illegal infringer still has the realistic possibility to continue to carry out the infringement, it shall be determined that the illegal infringement is still in progress; In the case of a property crime, if the illegal infringer has obtained property, but can recover it by pursuing, blocking or other measures, it can be deemed that the illegal infringement is still in progress; If the unlawful infringer has indeed lost the ability to infringe or has indeed abandoned the infringement, it shall be deemed that the unlawful infringement has ended. It should be kept in mind that the idea of whether the illegal infringement has started or ended has to be based on the actual situation, considering general understandings of the public, not be demanding of the defender. If the defender has a wrong understanding of whether the illegal infringement has started or ended due to panic, tension, and other psychological factors, it should be properly handled according to the principle of balance between subjectivity and objectivity.

Fourthly, who should be taken justifiable defense actions against? Apparently, justifiable defense must be conducted against unlawful infringers, but specific circumstances should also be taken into account. If several people jointly commit illegal infringement, defense can be taken against both the person who directly commits the illegal infringement and the person who jointly commits the illegal infringement at the scene. If the defender knows clearly that the infringer is a person without or with limited capacity for criminal responsibility, he shall try to avoid or stop the infringement by other means; If there is no other way to avoid or stop the unlawful infringement, or if the unlawful infringement seriously endangers personal safety, defense can also be conducted.

Fifthly, the most outstanding difficulty in deciding the critical point of “obviously exceeding the necessary limit” has always been the headache in judicial practice. According to the Supreme Court` opinions, “obviously beyond the necessary limit” should be judged based on the nature, means, intensity, degree of harm, opportunity, means, intensity, damage consequences, and other circumstances of illegal infringements, considering the comparison of forces between the two sides, based on the situation where the defender is defending, and combining the general cognition of the public. The degree of harm caused by unlawful infringement should not only be judged on the damage already caused, but also on the urgent danger and realistic possibility of causing further damage. It should not be demanding that the defender must adopt a counterattack mode and intensity basically equivalent to that of unlawful infringement. Through comprehensive consideration, it should be recognized that the defense obviously exceeds the necessary limit for those whose defense acts differ greatly from unlawful infringement and are obviously excessive.

Furthermore, it is also important to prevent the act of abusing the right of defense from being recognized as a defensive act. For an obviously minor unlawful infringement, if the perpetrator directly uses a method sufficient to cause serious injury or death to stop it, it shall not be recognized as an act of defense. If the unlawful infringement is caused by the perpetrator's major fault, and the perpetrator still deliberately uses a way that can cause serious injury or death to the perpetrator when other means can be used to avoid the infringement, it shall not be considered as a defensive act.

IV. Conclusions

In the essay, theoretical analysis and law dogmatic methodologies are applied to illustrate normative logic theories of justifiable defense, China`s criminal law rules, and practical application suggestions for justifiable defense assessment in judicial field, including handling causes, conditions, and intentions of justifiable defense, the time to take justifiable defense actions, the subject to take justifiable defense actions, and the critical point of “obviously exceeding the necessary limit”. It is hoped that sound justifiable defense judgement should be based on factors of cautious attitude, human feelings, positive values guidance, etc. to protect defenders` legal rights and to punish illegal activities in order to maintain harmonious social orders in the light of promoting Chinese legal civilization.

Reference

- i Criminal Law of the People's Republic of China (2020), Article 20.
- ii Criminal Law of the People's Republic of China (2020), Article 20, section 1.
- iii Criminal Law of the People's Republic of China (2020), Article 20, section 2.
- iv Criminal Law of the People's Republic of China (2020), Article 20, section 3
- v the Supreme People's Court (2022).
- vi the Supreme People's Court (2022).