

## *Original Paper*

# Analysis of the Guiding Opinions on the Application of the Justifiable Defense System According to Law

Shiting Su<sup>1</sup> & Huanting Chen<sup>1</sup>

<sup>1</sup> Guangxi University, Nanning, China

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### ***Abstract***

*China's Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security on September 3, 2020 jointly issued the "guidance on the application of legitimate self-defense system according to law" (hereinafter referred to as the "Guiding Opinions"), the "Guiding Opinions" of the social four sides in the handling of legitimate self-defense cases in the balance of the situation of each side of the word has played an effective role in determining the score to stop the dispute. However, while refining the conditions of self-defense, there are also problems such as incomplete regulation of the listed factors, and thus in the future, it is necessary to improve the Guidance Opinions, in order to make it more reasonable to serve the practice and the interests of the people.*

### ***Keywords***

*self-defense, guidance, judicial application, judicial interpretation*

## **1. Breakthroughs of the Guiding Opinions**

For the provisions of the existing self-defense system, the practical and theoretical circles that are not detailed enough, and there are a number of controversies, so on September 3, 2020, the supreme people's court, Supreme People's Procuratorate, the ministry of public security jointly issued the "on the application of the legitimate defense system according to law, the guiding opinion". The opinion upholds the original intention of the legislation, from the general requirements, work requirements and specific application of the three aspects of how to play the value of self-defense system to make guiding provisions. Among them, the general requirements and work requirements of the two aspects of the provisions have been more specific and perfect, this paper will not repeat; specific application of the provisions (including the elements of self-defense as well as special defense content) constitutes the basic content of the "Guiding Opinions", which still exists more can be explored, the following will be around the basic content of the specific development of the discussion.

### *1.1 The Guiding Opinions of the Elements of Progressive Content*

1.1.1 Progress in Causal Conditions-Adding New Standards for the Determination of “Unlawful Infringement” “Wrongful intrusion” as a measure of the cause of self-defense conditions, its determination for the final establishment of self-defense plays a pivotal role. The Guiding Opinions add detailed guidelines for the determination of “unlawful infringement”, which is conducive to the judicial authorities to grasp the cause conditions of the system in a reasonable, accurate and legal manner.

First, expand the scope of application. For a long time, due to China’s criminal law does not define “unlawful infringement”, which leads to many judicial organs in dealing with the case habitually will be the “unlawful infringement” stand in the position of personal injury judgment, and the origin of the property of the unlawful invasion of little Evaluation, limiting the scope of application of self-defense; Secondly, for the theoretical community has been hotly debated whether the unlawful intrusion includes illegal acts, due to the lack of a unified standard, resulting in the judiciary in many cases, often results-oriented judgment, overly strict censure of the defender’s behavior. Therefore, the Guiding Opinions emphasize that unlawful infringement includes not only infringement of personal safety but also infringement of property safety, and not only criminal acts but also unlawful acts;

Second, clear face minors committed “unlawful infringement” of the correct response standard. Previously, there are many scholars have different views on the issue of criminal liability capacity of the wrongdoer, such as Jakobs believes that for obviously no responsibility for the wrongful invasion can not be justified defense; H. Mayer believes that can only be liable and intentional wrongful invasion of defense (Li, H., 2007, pp. 72-76). However, the Guiding Opinions firstly recognizes that “unlawful infringement” in China should be judged from an objective perspective, and secondly, it has well solved the problem of how to balance the protection of different legal interests (i.e., citizens’ legitimate rights and interests of the vulnerable groups): on the one hand, if an adult whose life is about to be infringed upon is asked to do nothing in the face of a minor, then it is not possible for him to defend himself against a minor. On the one hand, if the adult whose life is about to be infringed upon is required to be indifferent in the face of a minor, then it will be against the original intention of the self-defense system, and the incapacity for criminal responsibility should never be a gold medal; on the other hand, the preconditions of the Opinions reasonably consider the problem of the disparity between the strength of minors and that of the adults, and first of all, carry out a reasonable education and persuasion, which is more conducive to making the criminal law play a role in safeguarding the psychological health of minors, and giving them sufficient opportunity to change their ways and mend their ways. The regulatory role.

Thirdly, based on the hotly debated cases in society, it has responded to areas that are difficult to deal with. On the basis of clarifying that “unlawful aggression” should not be limited to violent crimes, the expression “may be exercised in self-defense” was made in relation to such criminal acts as unlawfully restricting another person’s personal freedom, unlawfully intruding into another person’s home, obstructing safe driving, and endangering public safety. Such as unlawfully restricting the personal freedom of others is the response to the cheering case of the first and second trial dispute, the court of first

instance to the defendant “holding a knife to the victim does not have the meaning of self-defense of unlawful aggression” and other reasons for non-short-term control of the personal freedom of others, such as debt collection excluded from the “unlawful aggression” outside the scope of “until”. outside the scope, until the guiding cases, the promulgation of the Guiding Opinions will be non-violent crimes and other behavior back to the right track of the reasons for self-defense.

“Justifiable defense to have the reality of unlawful aggression as the basis, the real existence of unlawful aggression is the cause of justifiable defense” (Zhang, M. K., 2016). Is the watershed of the application of the system of self-defense, and therefore a reasonable grasp of the conditions of the practical needs, is the source of justice.

#### 1.1.2 Progress in Time Conditions-Changing the Recognition Standard of “In Progress”

Firstly, the determination standard of the usual starting point has been changed. Because our country on the beginning of self-defense time previously not expressly provided, so the judicial organs generally take to say for the judgment standard, but to say also means that the unlawful invasion must be the implementation of the act to be able to defend, and for the non-implementation of the act is also due to the legal framework and into the defensive behavior as “pre-defense” of the dilemma. Therefore, the opinion of a change in the viewpoint of the hand, the use of comprehensive for the yardstick (generally to the hand as the standard of judgment, special circumstances to the direct face of the standard (Zhao, B. Z., 1996) to judge the beginning of the wrongful invasion.

Secondly, it specifies the determination of the time of the end of the wrongful infringement. The Guiding Opinions adopt more ink to list out the circumstances of the determination of the end time of the wrongful infringement. The content and the beginning of the time to maintain the logical consistency of the wrongful infringement is suspended or temporarily stopped, but there is still a realistic possibility of continued infringement is not the end, both recognized the state of danger belongs to the category of “in progress”. In the case of Kunshan Long, Haiming Yu in the fight with Mr. Liu snatched the machete, take the initiative to cut, stabbing each other; to be Mr. Liu was injured and ran to the car, Haiming Yu continued to chase and cut ..... There are views that the unlawful invasion in Haiming Yu grabbed the machete after the end, in Haiming Yu and then the implementation of the behavior of the aftermath of the defense. The provisions of this opinion thoroughly respond to the case of doubt, indicating that even if the machete grabbed by the machete does not mean that the unlawful invasion has ceased, because Mr. Liu in the machete in the hands of the machete is still continue to fight with, and the injury was running to the car hiding tools, at any time there is a risk of continuing the unlawful invasion, therefore the pursuit of the machete in line with the demand for self-defense. Secondly, it proposes a Operational standards, that is, when the wrongdoer determines that he is incapable of infringing or gives up, he is able to determine that the wrongful infringement has ended. Finally, the content also addresses the special circumstances of property cases, responding to the phenomenon that society is prone to exclude property-based wrongful invasions.

Thirdly, the general knowledge of the public has been fully taken into account. The special feature of the time requirement is to consider the identity of the judge, emphasizing the need to stand in the position of the person in question and the dangerous situation, such as the aforementioned case of Haiming Yu, “there are opinions that” the view is the mistake of not starting from the perspective of the victim; secondly, the special feature lies in the treatment of the special group of people based on the excessive fear of improper counterattack behavior. The second special is to deal with special groups of people based on excessive fear of inappropriate counterattack behavior, the subjective and objective principle of appropriate care.

#### 1.1.3 Progress in the Conditions of the Target-Clarification of the Wrongdoer

For the defense of the wrongdoer, the theory is less controversial, but there is still a vague question of whether or not to include the perpetrator’s accomplices, and whether or not to counterattack against minors, mentally ill people. The “Guiding Opinions” firstly clarified the wrongdoer including abettor, including the view of complicity, enhanced in the “outnumbered” in the case of the defense of the rights of the wings; Secondly, whether it can be against the criminally irresponsible person, the restriction of the criminally responsible person counterattack, the document made the neutralization of the provisions of the previous wrongdoer including minors, the purpose and logic of the document is consistent. The purpose and logic of the document is consistent. For example, in the Supreme People’s Procuratorate guidance case 45, although nine minors infringement intensity is not the same, but Chen can still be against any one of the counterattack, regardless of whether it is the implementation of the perpetrator, minors.

#### 1.1.4 Progress in the Conditions of the Intent-Clarify the Intention of Defense and the Boundaries of Mutual Assault And Battery

In practice, the judgment of the intent to defend is to determine whether self-defense can be established a major difficulty, part of the judiciary arbitrary and habitual thinking will be infringed upon after the return fire behavior is recognized as mutual assault, denying the application of this situation of self-defense, which is the “Guiding Opinions” before the introduction of the judicial alienation of legitimate self-defense and the main reason for judicial deviation (Liu, K., 2020, p. 84). Therefore, the promulgation of this opinion solves many common problems, including the two sides in the process of beating, one side is in hot pursuit, can the other side have room for defense? When one party suddenly increases its intensity, will the other party be able to counterattack? If the strength of the two sides is very different, the disadvantaged party will be able to exercise defense, and so on. Such as 2018 Fuzhou Yu Zhao case, in the fight between Mr. Li and Yu Zhao behavior, Mr. Li fault in the first and belongs to the first party, hit Yu Zhao two punches and caused physical damage to him, the means of over-aggressive; Yu Zhao after the hands of the party to fight back directly, and did not take any tools, so it does not belong to the intention of righteousness and courageousness after the transformation into a situation of intentional injury, with a justified intent of defense.

### 1.1.5 Progress in the Limit Conditions-Supplementary Explanation of “Obviously Exceeding the Necessary Limit” And “Causing Significant Damage”

This limitation includes the behavioral elements of obviously exceeding the necessary limit and causing significant damage to the results of the elements, both practical and theoretical, on the determination of the two themselves and their relationship has a very different differences. The introduction of the document not only makes it clear that the behavioral elements to be considered in a comprehensive manner, but also emphasizes the degree of the results of the elements to reach the degree of death, serious injury, further limiting the determination of the space of the excessive self-defense; and for the relationship between the two, before the theory and practice have complementary to the one and non-interference in the dichotomous point of view, the “Guiding Opinions” on the issue of the clear use of the one, that is, must be established at the same time in order to consider the two Excessive defense. As mentioned earlier in the case of Yu Zhao, Fuzhou prosecution based on the disparity between the results of Yu Zhao and Li’s injuries and determined that Yu Zhao’s actions exceeded the necessary limits and could not be established in self-defense. The prosecution’s initial decision is to take the dichotomy of the point of view of judgment, there is only the suspicion of result theory.

## 1.2 *The Specific Application of Special Defense*

### 1.2.1 Basic Content

The Guiding Opinions in its main part of the form of 4 articles on the specific application of special self-defense, as follows:

Firstly, refinement of the contours of “homicide”. The Guiding Opinions stipulate that, in addition to the use of lethal force, if, although no murder weapon or lethal force is used, the unlawful assault has seriously endangered the safety of a person, or posed a serious or imminent danger to him or her, in terms of the number of subjects, the part of the body struck, and the strength of the blow, the assault may be recognized as an “act of homicide”. Secondly, determination of the nature of “homicide, robbery, rape, kidnapping”, the four aforementioned referring to the act, the means. Thirdly, to refine “other violent crimes that seriously endanger personal safety”, the document follows the general statement that “other and homicide, robbery, rape, kidnapping are one and the same”, and points out that “other” should be Violent crimes in which there is a sufficient risk of serious injury or death, or violent crimes that cause serious injury or death. Fourthly, clarified the relationship between special defense and self-defense, the act caused death or injury to the unlawful aggressor, if not obviously exceed the necessary limit should also be recognized as self-defense, the content of the limit conditions of self-defense once again emphasized that “obviously exceed the necessary limit” and “cause significant damage”. “need to be established at the same time”.

### 1.2.2 Progress-Refinement of the Identification of Violent Criminal Acts That Seriously Endanger Personal Safety

Regarding violent acts that seriously endanger personal safety, China’s criminal law stipulates that a defender who causes serious injury or death to the wrongdoer as a result of such acts shall not be held

criminally liable. On this basis, the Guiding Opinions further refine the laws on “murder”, “homicide, robbery, rape, kidnapping”, “other violent crimes seriously endangering personal safety” and “other violent crimes seriously endangering personal safety”. “Determination, to enhance the practice of operability, and reflect our legislative tendency to safeguard vulnerable groups”.

Such as “murder, robbery, rape, kidnapping” refers to the behavior rather than the crime, that is, it does not need to reach the degree of already seriously endangering personal safety. 2018 fir yang farmer’s wife Mr. Zhou, in Mr. Xu forcibly pushed her to the ground and intends to have sex with her, Mr. Zhou, although after the use of a pill box hose to strangle her, but her behavior meets the defense Demand, because Mr. Xu behavior has constituted a serious threat to personal safety of rape, and therefore can establish special defense, according to law is not criminally liable.

## **2. The Inadequacy of the Guidance Regulation**

Admittedly, the introduction of the “guiding opinions” is undoubtedly the former tied up in the justified defense system pulled down the altar, improve the efficiency of the application of the system and practical operability; but its relative to the original intention of the legislation of justified defense, there is still a need to make corrections, and the need for timely modification, correction, which leads to a large number of judicial organs arbitrarily apply the document, too much discretion, and ultimately deviate from the original legislative intent, and fairness and justice. Gradually drift away from the fairness and justice.

In the author’s view, the “Guidelines” regulation is mainly reflected in the cause of the conditions of “unlawful infringement”, specifically as follows:

### *2.1 The Theory Is Not Self-Consistent, Resulting In Different Standards in Practice*

In the document on the determination of “unlawful infringement”, the opinion emphasizes that the scope of unlawful infringement should include illegal acts and criminal acts, and according to the principle of consistency, the “minors” in the latter part of the content of the article should refer to those who have the ability to commit unlawful acts and those who have limited criminal responsibility capacity. The term “minor” in the latter part of the article should refer to a person who has the capacity to commit an unlawful act. Therefore, this also means that the unlawful invasion must not be in criminal liability without the person under the control of the implementation, thus will be less than 12 years of age of minors and completely unable to identify, control their own behavior of the mentally ill in the implementation of unlawful invasion outside the subject, ultimately leading to the judicial practice from the cause on the application of justified self-defense rate is reduced.

Furthermore, the above provisions on “unlawful infringement” and the defense object of “knowing that the aggressor is criminally irresponsible” logic can not be consistent, if the subject of unlawful infringement can not be criminally irresponsible, then how to such a Defense object? Therefore, the relevant lawmakers need to carefully consider the response to this issue.

The author believes that the issue can be special instructions, when the behavior of criminally irresponsible persons objectively meet the illegal elements, can be established unlawful infringement. Comprehensive affirmation of minors and other irresponsible person infringement of the defensible, both theoretical rationality and realistic possibility: first, with the legitimate defense system of criminal legislation in line with the original intention. The purpose of the establishment of criminal law is to make up for the deficiencies in the protection capacity of state organs, so as to safeguard the legitimate rights and interests. If arbitrarily deny the incapable person's infringement behavior, it is obviously contrary to the original intention (HASHIJAWA Takashi, YOSHI Gangsu, & LI Shiyang, 2011, pp. 95-101); Second, conform to the legal nature of self-defense. As a pure defense of legal interests, the author believes that there is no need to sanction the crime generally put forward the same high requirements. In other words, the establishment of a crime requires subject-object consistency, does not mean that does not establish a crime must also subject-object consistency (Joshua Dressler, translated by Wang Xiumei et al., 2009); Third, is conducive to the realization of the function of criminal law crime prevention. In the case of incapacitated persons, even though they may be exempted from legal punishment because of their age, mental state and other reasons, this is only based on the incapacitated person's inability to understand the legal significance of his or her actions and make provisions, and the inability of the perpetrator to understand the normative significance of his or her own actions does not mean that he or she cannot recognize the facts of his or her actions. Therefore, the above problem can be solved through the concept of "unlawful" and "illegal" appropriate separation to solve the conflict and tension between the theory of self-defense and the theory of unlawfulness, which also helps to realize the coordination of the theory system of self-defense (Cui, X.-X., & Zhang, B., 2020, pp. 31-39).

## 2.2 "Unlawful Infringement" Ignores Illegal Behavior in Scope

Compared with the previous criminal law, the scope of "unlawful infringement" in the "Guiding Opinions" is undoubtedly expanding the identification criteria, no longer overly harsh on the defender. But the document stipulates the "unlawful infringement" scope of the lowest grade for the violation of personal or property rights of the illegal behavior.

Admittedly, the legitimate defense behavior can not be implemented against the lawful acts, which is undoubtedly the opposite of the lawful acts for the non-legal acts, non-legal acts in addition to illegal acts, but also includes a state of neither legal nor illegal acts, that is, illegal acts, and the "Guiding Opinions" did not make provisions for the state of the act, will be excluded in the behavior of "unlawful infringement of the The Guiding Opinions do not provide for this behavioral state, excluding this type of behavior from the scope of "unlawful infringement". Based on this, the judicial authorities in dealing with this type of case will give rise to many problems, such as the face of pushing and shoving, whether the victim can be counterattack, etc.; At the same time, due to the lack of uniform standards, the judicial authorities in the adjudication of cases are also prone to appear in the same case of different judiciary chaos.



### 2.3 “Significantly Minor Unlawful Infringement” Caused By Misinterpretation

The more significant changes and additions to the “Guiding Opinions” in Article 10 on the abuse of the right to self-defense provisions, although the legislative intent of the legitimate self-defense system at the same time also limit the excessive counterattacks, but the opinion in the regulation at the same time, there are still logical contradictions, excessive criticism of the defenders and many other problems, so that was used to avoid the provisions of social brawl now in the eyes of the judiciary, but has become a restriction on the rights of citizens. But has become a restriction of the citizens’ rights of the shackles.

Opinions of the abuse of the right of self-defense provisions expressed as “for significantly minor unlawful invasion, the perpetrator can be identified in the case, the direct use of sufficient to cause serious injury or death to stop the way, shall not be recognized as an act of self-defense. Unlawful intrusion is caused by the perpetrator’s gross negligence, the perpetrator can use other means to avoid the infringement of the situation, but still intentionally use enough to cause serious injury or death, shall not be recognized as an act of self-defense.” Here the existence of the error is more obvious:

First, the grasp of “significantly minor wrongful injury” is wrong. The document with “significantly slight wrongful injury” to express, also means that first of all the behavior must meet the opinion before the cause of the conditions described in the “wrongful injury” requirements, on this basis will involve the behavior whether to reach the degree of significant slight discussion; and According to the codification logic of the text system, the main content of the second part of the Guidance ranges from Article 5 to Article 10, each of which should be juxtaposed. However, Article 5 of the document clearly stipulates that the cause of justifiable defense can be established is the existence of unlawful invasion, in other words, in the face of unlawful invasion, no matter what degree, the defender has the right to counterattack, but Article 10 of the opinion also stipulates that for the “significantly minor unlawful invasion”, the perpetrator can not be recognized as justifiable defense in a certain way under certain conditions to stop it. Recognized as self-defense, so the views of the actor to stop “significantly minor unlawful intrusion” taken in different kinds of behavior, whether they can be established in self-defense disagreement. In other words, the defender in the face of unlawful invasion and the implementation of a certain counter-attack behavior, its counter-attack behavior also exists due to the failure to meet the conditions of the circumstances of the situation of self-defense can not constitute the possibility, it is this possibility, resulting in the misinterpretation of the judicial organs.

Second, “Significantly slight”, “recognizable” and other standards are not specific enough. Since the use of the expression “significantly minor”, it also means that the wrongdoing is a matter of priority, but the opinion does not belong to what kind of behavior is minor, significantly minor for a clear division; Secondly, for how to judge the perpetrator at that time fully equipped with the ability to “can identify”, the document lacks clear standards; The document lacks clear standards; The document lacks clear standards. Secondly, for how to judge the perpetrator was fully “recognizable” ability, the document lacks a clear standard; similarly, “direct use of the foot to cause serious injury or death,” without any specific instructions, the judiciary in accordance with the practice is easy to fall into the principle of



absolute weapon reciprocity, only the results of the misunderstanding of the theory.

2020 happened in Nanning, Guangxi a defense case is enough to illustrate the above problem: the beginning of the year a night of 23:00 pm, the defense Wu will be driving the net car parked in Nanning a downtown area near the purpose of standby unit issued by the ride single; at this time coincided with the drink victim Mr. Liang asked to take Wu's net car to leave, but both sides because of the ride problem triggered dispute; in the process of the dispute, Mr. Liang went to car Driver's side, reached into the window slapped Wu, and take away its glasses, Wu immediately from the car other driver's seat out of a car steering wheel lock out of the car; get out of the car, in the Mr. Liang sustained punching and kicking, Wu swung the steering wheel to Mr. Liang, the first time by Mr. Liang with his hands to block away, the second hit the head after they dialed the phone for help, and ultimately caused Mr. Liang serious head injuries. In this case, both levels of court that Wu's behavior meets the conditions of the abuse of the right of defense, and ultimately to intentional injury crime, for the following reasons: 1) the judges of the second trial that Mr. Liang's punching and kicking behavior of the degree of infringement is limited, in other words, they believe that the Mr. Liang's punching and kicking behavior will not be Wu's right to life and health of the infringement of the "significantly minor unlawful intrusion" And Wu not only use enough to cause death or injury to the steering wheel lock as a counterattack tool, but also to Mr. Liang important parts of the smash, so Wu's counterattack behavior naturally also has the reasonableness of intentional injury, belongs to the "direct use of sufficient to cause serious bodily injury or death to stop the way". But I think: ① the court in the "guidance" under the guidance of the "punching and kicking" behavior into the "significantly minor unlawful intrusion" degree. But whether the punching and kicking is significantly minor unlawful injury is debatable, punching and kicking also has light and heavy, and Mr. Liang in the case of physical intoxication, his own can not be fully recognized, control their own behavior, the court by what standards to judge its punching and kicking infringement must not be enough to threaten the life safety of Wu? Moreover, Mr. Wu get off to stop Mr. Liang behavior of the trigger is Mr. Liang snatched Wu Mou glasses, Mr. Liang Mr. Wu do not know how to resist the way to forcefully take away their property, and put under their control, in line with the elements of the crime of robbery, so Mr. Wu counterattack meet the need for self-defense can not be denied; ② the contractor judge ignored Mr. Wu in this case the justification for self-defense basis. Punching and kicking is suspected of provoking trouble, is a typical illegal behavior, which also means that it can be defended within the scope, so Wu has the right to fight back; 2) the case judges that the driver Wu still "can recognize" ability, the reason is that they believe that Wu's car parked on the side of the road in a neighborhood, and the surrounding area is a downtown area, Wu can identify the wrongdoing, the driver can recognize the wrongdoing, the driver can identify the wrongdoing. Wu can recognize that the wrongdoing is not yet serious and urgent. The author believes that this judgment exists one-sided, Mr. Wu face of unlawful intrusion should not be in a position to ask for help to others as whether or not to be able to fully recognize each other's behavior for "significant slight unlawful intrusion" standard, if the surrounding are old or old age of women, even if Mr. Wu can to the surrounding people for help, they can not do

anything. There is nothing to do, so in determining whether the defender can recognize the other side of the unlawful intrusion is slight, should focus on the danger to the victim itself whether it endangered the safety of his life. That is, the standard of the ordinary person in the perspective of the defender means that when judging the urgency of the unlawful intrusion, the defender's perspective should be taken as the defender's perspective, and at the same time, the standard of the ordinary person should be adopted.

Therefore, the above regulatory error of the Guidance will lead to many problems, including triggering the judiciary from the result of reverse deduction of the subjective intent of the defender, and to a certain extent, cut the integrity of the case. In the case of the author believes that the two judges in the "guidance" on the abuse of the right of defense under the guidance of the vague, from the absolute weapon of reciprocity or only results of the consequences, reverse error identified Wu's intent of defense: the case of the second trial of the contractor judge that, in the face of only punching and kicking Mr. Liang, Mr. Wu repeatedly with the steering wheel machine to hit each other important parts of the body, his behavior has exceeded the defense should be With the proper intention, with the purpose of private anger. However, the author believes that the judge did not incorporate Wu's defense process into the judgment: 1) Mr. Liang's punching and kicking behavior has continuity, after Wu's first counterattack behavior, Mr. Liang exists and want to go up to Wu's continuous behavior, so Wu's counterattack is on the continuity of Mr. Liang's attack on the behavior of the instinctive response; 2) in Wu's steering wheel holding the attack for the first time, Mr. Liang was able to use his hands to block away, which is Sufficient to show that Wu's counterattack strength is not large, there is no so-called "direct use of sufficient to cause serious bodily injury or death" to stop; 3) in Wu's second counterattack with the steering wheel, see Mr. Liang's head bleeding immediately after the call for emergency medical services, indicating that Wu's to Mr. Liang's only for the purpose of stopping unlawful invasion, and is not Malicious retaliation.

Inadequate regulation of the Guidelines affects not only the judicial trial process, but also the negative guiding effect on society. First of all, from the trial, the judge's free interpretation of the margin is too large, easy to lead to the judicial practice of the trial standard is not uniform, can't play out the system's defensive role, at the same time undermining the judicial authority. Secondly, from the social aspect, it not only binds the citizens to safeguard the legitimate rights and interests of the courage and will, but also to some extent affects the public's values, to the above case as an example, 2 levels of the court's decision in summary, no doubt in encouraging drunkenness provocation, but also in the warning of the defense of the need to be cautious of the counter-attack, in this way, it is not conducive to the promotion of the correct concept of the rule of law. Therefore, in view of the above problems, the author believes that the first paragraph of the Guiding Opinions can be the abuse of the right to self-defense of the first paragraph of the content of the meaning of the actor in the stopping degree of significantly less serious unlawful invasion, should try to take the strength, intensity, means of counterattack in a lighter way.

### 3. The Remaining Problems of the Guidance

In China's judicial practice, the problem of the difficulty of determining legitimate self-defense has a long history (Chen, X. L., 2017, pp. 89-104).

Some relevant scholars have searched the 1,200 cases of justified defense from 2014-2019 and found that among the reasons for cases that were not judged to be justified defense, the number of cases that did not satisfy the subjective elements was as high as 713, which became the main reason for the difficulty of the determination of justified defense (Ren, H., 2020), and therefore the subjective determination guidelines in the system of justified defense are in urgent need of unification. However, after the introduction of the "Guidance", did not put the regulation of the elements on the agenda, did not clarify the application of the standard of defense consciousness, and did not properly clarify the relationship between the sense of defense and intentional injury, so that a large number of cases of self-defense because of intent to injure and be treated as a crime to combat. At present, the standard of self-defense consciousness of self-defense and the relationship between self-defense consciousness and subjective intent are controversial in theory and judicial practice.

The essence of the right of self-defense can be set up when civil rights are infringed upon, the state in the emergency time is too late to relief through the means of public power and give citizens the right to self-protection in the form of violence, the establishment of self-defense of the unlawful invasion of the view should meet the "urgency" of the conditions. The practice of unlawful aggression "urgency" of the determination of the ambiguity, directly leading to the application of self-defense is overkill, and the introduction of the "Guidance" and the issue has been avoided.

In summary, the legitimate defense system needs to be resolved, the Guiding Opinions have not been involved in the problem is mainly manifested in the standard of self-defense consciousness and its relationship with the subjective fault, unlawful invasion of the "urgency" determination of the standard problem.

#### 3.1 On the Defense Consciousness Standard Problem

Defense consciousness is reflected in the subjective attitude of the defender in the act of stopping the unlawful invasion, but on the defense consciousness should take what kind of measurement standard problem, there are different views in theory and practice, and the "guiding opinions" also avoid dealing with the problem.

##### 3.1.1 Different Views on the Theory

The doctrine of criminal law for the content of the defense awareness of the existence of two-level and three-level theory of differences, and in order to defend the awareness of the elements of self-defense is necessary can be divided into defense awareness, the purpose of the defense said and defense awareness don't say.

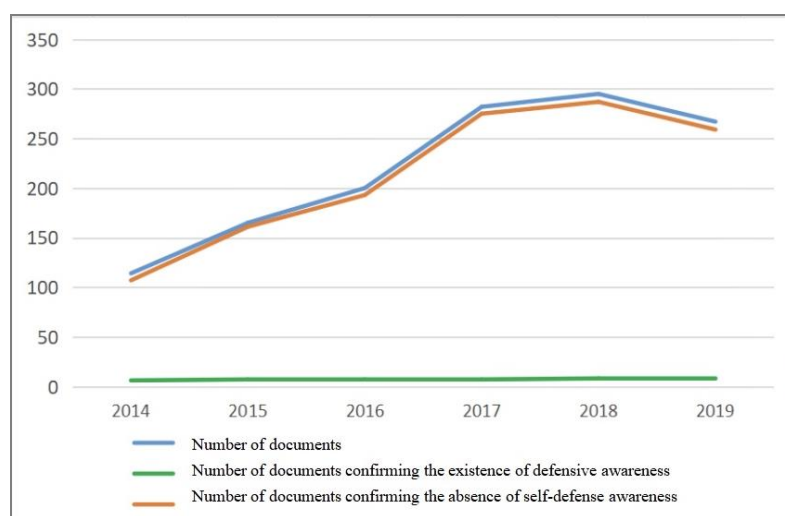
Bi-level theory represented by Professor Chen Xingliang, which believes that the defense consciousness is a psychological state, originated in the defender is aware of a wrongful invasion is being carried out, out of the public, the protection of the rights and interests of myself or others and determined to stop the

wrongful invasion (Chen, X. L., 2017), from the viewpoint of the bi-level theory firstly, the defender is required to realize that there is a wrongful invasion is being carried out, and secondly, produce the corresponding will of defense; three-level theory represented by Professor Wei Jiang, which The assertion of defensive intent by the defensive awareness, defensive purposes, defensive motives composed of three parts (JIANG Wei, 1988), that is, the perpetrator has recognized that unlawful invasion is occurring, which triggered a strong desire to stop the unlawful invasion, and then in the drive of the motive to produce the maintenance of legal rights and interests of the ultimate purpose. The author believes that the subjective determination in judicial practice is inherently difficult to prove, the motive of defense is the deeper cause of the purpose of defense, if the determination of self-defense also need to verify the purity of the motive, is tantamount to the defender to “forced” the dilemma of the situation, both a waste of judicial resources, but also compression of self-defense. Establishment of space, therefore, the three-class theory is unfair.

Defense consciousness do not say, for the establishment of self-defense defense consciousness is not necessary, as long as the actor objectively implement the defense behavior, realize the effect of defense is justified self-defense (Shang, K. H., 2022), and defense awareness of the point of view is the opposite, scholars advocating the point of view that, on the basis of defense awareness, the defender once the will to counterattack the ongoing unlawful invasion, then he is the defense consciousness, without in-depth investigation of the defense, and the defense of the will to counterattack the wrongful invasion, and the defense of the will to counterattack the wrongful invasion. Consciousness, and no need to look deeper into the will of defense in the deeper protection of the state, society or personal interests of the part, even if only the existence of the unlawful aggressor's intent to injure, can not be denied the existence of its sense of defense (Li, H., 2007, pp. 63-75); The purpose of the defense that the Japanese scholars of Kusano panther Ichiro, scholars advocating the view that the sense of defense must be both awareness of the defense and the complete will of the defense to be fully embodied out of the protection of the interests of the law and the implementation of defensive behavior. The act of defense must be committed out of the protection of legal interests, otherwise, it cannot be considered as having the sense of defense. But compared to other, another Japanese scholar Otsuka Ren Professor does not agree to change the point of view, he believes that the existence of the defender's purpose of defense is not a necessary condition for the establishment of self-defense, the defender in the ability to realize the reality of the existence of unlawful invasion, only need to have to avoid unlawful invasion of the state of mind can be (Otsuka, J. Feng, 2003). The author believes that the defense awareness that more can play out the value of the self-defense system, it is not demanding the defender must have a complete defense will, but to make the defense awareness of the key to the determination of the defense consciousness, in the reduction of the reasoning content of the will of the defense at the same time, but also enhances the operability of the judicial trial, thus reducing the risk of practice disorders.

### 3.1.2 Practice Generally To the Purpose of Defense as the Standard

Due to the lack of unified defense consciousness determination standard, in practice, the judge can only through the defender's defense awareness, defense behavior and defense results of reasoning judgment. At the same time to observe the relevant scholars statistical defense awareness of the case data, it is not difficult to find that in the six years after 2014, the number of cases that can be identified as the awareness of defense almost did not increase with the increase in the total number of cases (as shown in Figure 1) (Ren, H., 2020), and from the "Huan Yu case" guiding case reasoning, China's judicial practice to identify the theory of defense awareness The general theory is the purpose of defense theory (Zeng, Y. X., 2019, pp. 112-128).



**Figure 1. Number of Decision Documents and Determination of Awareness of Defense**

The result of the application of the purpose of defense doctrine is obvious, and it has continuously contributed to the low application rate of the self-defense system. In practice, the judge requires the defender to have a complete and pure will to protect the society, other people or their own legitimate rights and interests, but the actual situation is that normal people in the face of danger can only react out of instinct, and the rational thinking required by the purpose of defense theory has a certain degree of fantasy in this case. The purpose of defense as a standard of defense consciousness or not, easy to make the judicial process into the many uncertainties interfere with the situation, affecting the independence of the judiciary, but also difficult to ensure the high quality of the results of the case.

### 3.2 The Relationship between Sense of Defense and Subjective Intention

The blurring of the boundaries between mutual fighting and self-defense before the introduction of the Guiding Opinions was, to a certain extent, due to the fact that the judicial authorities did not reasonably grasp the relationship between the sense of defense and subjective intent, which led to the miscarriage of justice in many cases of legitimate self-defense, and the punishment of innocent people.

For the same is a form of self-defense behavior of defense, the traditional theory of criminal law is generally believed to be only indirectly intentional or negligent state of mind, and denied the existence of direct intentional space, the reason is the purpose of self-defense and direct intentional criminal purpose can not exist at the same time in the process of a subjective consciousness of the behavior, in other words, the mainstream viewpoints are advocated that self-defense consciousness and subjective intent does not intersect. But the author's position is different: the relationship between subjective intent and wrongdoing should be a necessary but not sufficient condition, that is, direct intent is not necessarily mutually exclusive with the sense of defense, for the following reasons:

### 3.2.1 Theoretical Basis

Defense consciousness and subjective intent are both composed of cognitive and volitional factors. First, in the cognitive factor, defense consciousness refers to the defender to realize that the wrongful invasion is occurring, and subjective intent refers to the actor to foresee that his act will produce the harmful consequences of harming the society, from this point of view, a defender does not lose the ability to foresee that his act will produce the harmful consequences of harming the society just because he has realized that the wrongful invasion is occurring, so the two are in the realm of cognitive factors and there is a Therefore, in the field of cognitive factor, there is a possibility of coexistence of the two. Secondly, in the factor of will, the sense of defense refers to the psychology of the defender who wishes to stop the ongoing unlawful invasion so as to save the public interest, other people or his own rights from being infringed upon, whereas subjective intent refers to the mental attitude of wishing or indulging in the emergence of the damaging results caused by one's own behavior, thus it is observed that: 1) it is only in the case of the unlawful aggressor being injured by a minor injury or more that the defender is liable to become a defendant to be brought to the court and, in the space where the degree of minor injury is not met To meet the light degree of space, the defender can not be sued, in other words, the defense consciousness and subjective intent have coexisting space; 2) in the case of the unlawful aggressor suffered more than light damage, as long as the results of the defense is attributed to the subjective intent of the defender, and its sense of defense to give a negative evaluation, which is also not too strong. Based on the above two points, in the field of will factor defense consciousness and intentional injury also exists in the possibility of coexistence. Therefore, to sum up, in theory, the sense of defense and subjective intent, including direct intent, can be parallel under the same subjective will, as shown in Table 1 below.

**Table 1. Comparison between Defensive Awareness and Subjective Intent**

Subjective Attitude	Cognitive Factor	Will factor	
Awareness of Defense	The unlawful intrusion is taking place	Wish to stop the ongoing unlawful invasion Protecting the rights and interests of society, others and oneself	
Intentional harm	Anticipating the harmful consequences of one's actions	Wishing or letting harm to society occur	
Coexistence	√	Unlawful aggressor < light injury: √	Unlawful aggressor ≥ slight injury: not necessarily
		Not to censure the defender's will to defend: √	

### 3.2.2 Basis in Practice

Take the most representative Jiangsu Kunshan anti-killing case in recent years as an example. Once the Kunshan Long case occurred, it triggered heated discussions among the criminal law academia and the public. In the case, Haiming Yu grabbed the knife after Hailong Liu for a number of counterattacks, 7s cut Hailong Liu 5 knives, and then in the pursuit of Hailong Liu many times in the flinging, hacking, it can be seen, Haiming Yu's self-defense behavior in the subjective, it must be with have foreseen that its behavior will produce the results of the harm to the community, but still hope that the damage results or let the psychological state of the damage results, that is, subjectively with a direct intent, and also has a will to stop Hailong Liu's wrongful behavior. Therefore, from the final judgment in the results of self-defense, the judicial authorities both in recognition of the consciousness of self-defense, also recognized the subjective attitude of criminal intent, so in the case, the will of defense and subjective intent can coexist.

In the face of unlawful invasion, to safeguard their legitimate rights and interests, it is inevitable that there will be injury intention, because the defender only in a certain way to the other side of the threat or damage, in order to let the other side to realize that the defender has the possibility of harming themselves, and then to let them know the difficulty of backing off, and ultimately to achieve the maintenance of the community, other people, or the legitimate rights and interests of their own purpose, the process can be displayed as "unlawful infringement - to counter the unlawful infringement - the unlawful aggressor may be injured or injured - the unlawful aggressor to know the difficulty to retreat --Stopping the unlawful infringement - Safeguarding legitimate rights and interests".

Therefore, only through the legislation, the formal documents of the unification, in order to make the standard of defense consciousness more clear, three-dimensional, reduce the so-called has reached the degree of "cleanliness" of the purity of the sense of defense of the demanding (Chen, X., 2016, pp. 53-73), in order to better curb the phenomenon of limiting the scope of the establishment of self-defense.



### *3.3 The Relationship between Sense of Defense and Subjective Intention*

“Urgency” as a quantitative element of the judgment of unlawful infringement, should become the exercise of the right of defense based on the substance, which is the logical interpretation of the criminal legislation of self-defense of course, but also the new era of the development of the theory of rights shall not be abused the basic requirements. In order to regulate the exercise of the right of self-defense, the “urgency” of the judgment standard must be unified norms. At present, China’s legislation still lacks the definition of “urgency” basis, so in practice, often triggered by self-defense overkill results. The following author will be “Huan Yu intentional injury case” as an example to illustrate the above problems brought about by the judicial organs of the same case with the impact of different judgments.

#### *3.3.1 Judgment That Denies the “Urgency” of the Unlawful Intrusion*

In practice, by the judicial authorities because of the “urgency” and can not establish self-defense case, there are many cases based on illegal detention such as unconventional causes of the reasons. In Huan Yu’s intentional injury case, the court of first instance held: “Although his personal freedom was restricted at that time, and he was verbally abused and insulted by the other party, but in the case that the other party did not use tools and the police station had already been called out, the defendant, Huan Yu, and his mother’s right to life and health were infringed upon in a lesser degree of danger, and there was no urgency of defense, so Huan Yu did not have any urgency of defense when he stabbed the victim with the sharp knife. Justifiable defense in the sense of the premise of unlawful infringement” that the decision that there is no urgency of defense.

Some commentators believe that this conclusion denies the existence of unlawful intrusion in this case, and therefore denies the existence of the defensive nature of Yu Huan’s behavior. The judgment affirmed the existence of insulting words and deeds and restriction of personal freedom in the process of debt collection, but also considered that the actual danger of personal infringement is small, there is no urgency of defense (Chen, X. L., 2017, pp. 89-104, p. 178). But the author thinks that the point of view has metaphysical, because the degree of unlawful infringement is light or not, can defend or not, should not affect the establishment of the unlawful infringement itself.

#### *3.3.2 The Judgment That Affirms the “Urgency” of the Unlawful Intrusion*

In Huan Yu’s intentional injury case, the second instance judgment also gave affirmative comments on the “urgency” of the unlawful injury, and pointed out that at the time of the crime, Mr. Du and others had illegally detained and verbally abused and pushed and shoved her mother, and that even though the police arrived at the scene quickly, when Huan Yu’s mother attempted to evacuate the hospitality hall with the police, Mr. Du and others came forward and prevented her from doing so, and the police were not allowed to leave. Although the police arrived at the scene quickly, when Huan Yu’s mother tried to follow the police to evacuate the reception hall, Mr. Du and others came forward to stop her, and Huan Yu pressed forward even though she had already been warned with a knife, and Huan Yu stabbed with a knife only when his life was actually threatened, so he was considered to have acted with a certain degree of precautionary necessity.

The court of first and second instance of the case had a different determination of the “urgency” of the unlawful intrusion. The court of first instance held that after the reception of the police, Huan Yu and his mother had the possibility of seeking help from the public authorities, and therefore the unlawful intrusion was not urgent. In the aforementioned case of Nanning net car driver Mr. Wu, the court of first and second instance held that Mr. Liang did not have the urgency of the unlawful invasion because Mr. Wu was in the downtown area and was able to ask for help; while the court of second instance in the case of Huan Yu’s intentional injury grounded its “urgency” view on a more specific point of the unlawful invasion. The point of view based on more specific and detailed. But even though the case of the court of first and second instance ruled that the results are very different, but for the two to identify the “urgency” of the objective criteria is difficult to find, so the author believes that the practice of unlawful intrusion of the “urgency” of the suspicion of man-made limitations.

The Guiding Opinions will avoid the impact of the problem will continue, the judiciary for unlawful aggression “urgency” judgment is also very easy to fall into the objective environmental factors of the appendage (Zhang, H. C., 2021, pp. 101-107), and ultimately can not really play the role of self-defense system to balance the relationship between public power and the right of citizens to self-defense.

#### **4. Conclusion**

In the context of the “Guiding Opinions”, we should correctly treat the conditions of justifiable self-defense in accordance with the law, and cultivate a good social atmosphere; justice should be clearly distinguishable between right and wrong, adhere to the human feelings, law and reasoning, and to promote fairness and justice, avoid the emergence of the “whoever makes trouble who is reasonable!”, “who died or injured who has reason” tendency. However, the Opinions are still debatable, to explore the role of self-defense system, only at the same time to grasp the detailed, clear cause, time, object, purpose and limit conditions, “unlawful aggression” to add a new standard, change the “ongoing”, in order to better respond to the social issue of concern, and to promote the integration of the judiciary and the public sentiment.

Therefore, in order to let the law for the justified defense, it is necessary to “Opinions” in the reasonable play benefit at the same time, keep abreast of the times, face the high and frequent problems, from the root to activate when the system of self-defense, and truly for the people to use!

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