Reflections on the Jurisprudence of Risk Acceptance in Criminal Law

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Abstract: With the continuous progress of the society, Chinese legal system is constantly improving. The theory of risk acceptance is an important part of Chinese criminal law. This paper mainly carries on the analysis and elaboration to the risk acceptance theory viewpoint.

1. Introduction

In terms of theoretical researches and specific judicial practice, there are many foreign theories and cases about risk acceptance. However, there are not many relevant studies on risk acceptance theory in Chinese criminal law. In other words, there is no legal basis for China to fit this theory. This leads to the fact that the practice and the theory cannot be combined in our country. Therefore, in general cases, the defendants should be judged as criminal liabilities in similar cases, while the defendants should not bear civil liabilities in civil judgments. The result of our country to this kind of cases is that the defendants bear the criminal responsibilities but not the civil responsibilities. The results of criminal and civil adjudication are not uniform and mutually antagonistic. Therefore, relevant scholars are required to study the basic legal knowledge accepted at risk, so that the results of criminal and civil adjudication are consistent.

The construction of Chinese legal society is deepening and comprehensive, and it plays an important role in safeguarding the country and the people, which is of great significance to the country's long-term stability.

2. Brief introduction of risk acceptance

The theory of risk acceptance of victims in China was first introduced by relevant scholars to summarize the judgments of similar cases in Japan and Germany as well as the judgments of legal experts. As different researchers have different understanding of relevant theories and differences in translation, there are differences in terms of the names and definitions of the risk acceptance of victims in China.

For example, Zhang Ruoran translated the risk acceptance of the victims into reception of danger. In his opinion, dangerous citation refers to the fact that the victim is aware of the danger that may be caused by the act of the perpetrator and the actual harm caused by the act to himself, but still participates in the act. In the cases of the results of actual harm, the criminal law is responsible for the behaviors of the actors. The flaws of this theory lie in the following points. Firstly, in terms of the direct names, the meaning of the word which translated as "reception" implies that the victim is actively exposed to dangerous behaviors, which obviously does not conform to the meaning of risk acceptance discussed. In the risk acceptance, the victims can recognize the danger caused by the behaviors, but do not contact actively. On the contrary, the realization of the danger is completely avoided. Secondly, in terms of the deep content, the theory puts more emphasis on the protection of the victims' own legal interests and the performance of the victims in dangerous behaviors, but ignores the behaviors of the victims in accepting the danger of other types of actors.

Wang Jun believed that the victims' dangerous acceptance theory can solve the problem that the victims agree to the behaviors of the actors, but he does not agree with the results brought by the behaviors. In this case, the victims' accepting behaviors have an impact on the perpetrators' imputation. The defect of this view is that even it points out the differences between the victims'

dangerous acceptance and consent, but it is still too general and not in detail. Most importantly, it does not specify the characteristics of the victims' dangerous acceptance. For example, in actual cases, the victims may not be fully aware of the danger posed by the actors' actions. In addition, according to different standards, victims' risk acceptance can be divided into many types, but there is no clear distinction in this theory. Therefore, this theory has defects in standardization, system, integrity and rigor.

Jiang Su thinks that the risk acceptance of the victim means although the victim has a clear understanding of the risk, he still actively enters into the risk, or the victim just passively realizes the risk, and then causes legal interest infringement under the joint promotion of the person and himself. This definition has its rationality on a certain level. Firstly, the "acceptance" in the name truly reflects the victims' attitude towards risk. That is to say, the victims do not hold active and subjective attitudes towards the occurrence of the actual results, nor do there exist factors such as intentional, or negligence. Secondly, the definition also distinguishes different types of risk acceptance, and points out the different USES of the victims in the occurrence of actual harm, which lays a foundation for other scholars to study this issue better. Thirdly, the definition does not only attribute the responsibility for the occurrence of the actual harm results to the actors, but believes that the results are caused by both parties, and points out the driving roles played by the victims in the occurrence of actual harm results. This theory is more likely to be accepted and recognized in specific judicial cases and related academic studies.

In the risk acceptance of the victims, since the victims recognize the dangerous behaviors of the perpetrators but refuse the actual harm results, in general, the discussion of this theory is carried out in the case of negligent crimes, and the focus of the discussion is the expression and attitude of the victims to the behaviors of risk acceptance. For example, when the result of actual harm appears, it will have an impact on whether the perpetrators are found to be illegal, as well as the legal considerations that will have an impact. In view of these topics, foreign countries and China are different. There have been different opinions on these issues in the field of criminal law theory researches in China. However, in specific judicial cases, the general attitude to this issue is not the same. In foreign countries, such as Japan, when dealing with such cases, on one hand the court takes the behaviors of the doers as the standards, and on the other hand it takes the influence of the risk accepting behaviors of the victims on the behaviors of the doers as the judgment standards. The legal basis contained in it is the corresponding self-answer. That is to say, the victims and the behaviors do not have to bear the results of other people's behaviors, only to take responsibilities for their own results.

3. Theoretical basis of risk acceptance

The impact of the victims' risk acceptance on the criminal establishment of the actors has been studied in the academic circle in Germany. On the other hand, in Japan, the acceptance of the victims' risk after the racing case has also aroused heated discussions in the both academic circle. In the case of the victims' risk acceptance, the actors' violation of the duty of care has given rise to the bad results, which obviously accord with the constitutive elements of the negligent crime. Therefore, what scholars think about is the direction of illegal resistance to explain risk acceptance. The victim consent theory was considered not applicable to the risk acceptance, so scholars demonstrated the risk acceptance from various perspectives such as self-responsibility and complicity theory.

3.1 Basic proposition of victim consent theory

The so-called victim consent theory is actually accepted by most people in the both academic circle. Some scholars pointed out that it was the concept that "legal interest subjects promise or agree to the infringement of the interests they can control". In modern society, criminal law, as a law protecting individual interests, is not necessary to protect criminal law when the victim voluntarily gives up certain interests under the control of his free will. It is even further argued that the victim's consent to the infringement of his own legal interests by others is a manifestation of his freedom. His consent should be protected by the criminal law, and the criminal law should not

restrict this freedom.

3.2 The basic proposition of self-accountability theory

The theory of self-responsibility what put forward after the victim's consent theory is thought to fail to account for the risk acceptance. Therefore, in the sense of criminal law, destroying property is not actually damage, suicide is not killing. Therefore, the victim's self-responsibility can be divided into conscious self-harm and self-danger. In the case of conscious self-harm, the victim is the center and target of the behavior, and the victim has created the unity of consciousness, behavior and result. In the case of self - danger there is no unity of consciousness, action and result.

3.3 The basic proposition of complicity theory

Professor Zhang Mingkai, a Chinese scholar, believes that none of the above theories can explain the legal theory of risk acceptance, and only the theory of complicity can explain the legal theory of it. In this view, the victim and the perpetrator in the risk acceptance jointly cause the result, so there are similarities with the joint crime. That is to say, in the risk acceptance, there also exists the distinction of who directly caused the result (the principal offender) and who indirectly caused the result (the accomplice), which also applies to the risk acceptance. According to this standard, it can be divided into self - hazardous participation and other risk based on consensus. According to the principle of accomplice's subordinate attribute, in joint crime, we should first judge whether the act of the principal criminal has the constitutive elements conformance and illegality. When the victim's negligence leads to his serious injury or death, it does not conform to the constitutive elements related to the criminal law, nor does it violate the law. Therefore, according to the principle of complicity, participation does not constitute a crime.

3.4 Other theories

In addition to the representative victim consent theory and self-accountability theory, scholars also put forward the theoretical basis for the victim's risk acceptance from various perspectives, mainly including as followed.

3.4.1 Social equivalence theory

The theory of social equivalence was put forward by Welzel, the representative of German behavioral theory of purpose. It holds that there are all kinds of dangerous behaviors in the society itself, and these behaviors are likely to result in the harm of legal interests. The illegality of certain behaviors should be negated if they are widely followed in social intercourse. However, the concept of social equivalence itself is extremely vague and difficult to define. Moreover, if the acceptance of risk cannot be regarded as an independent reason for the violation of law, but only as a so-called social equivalence judgment element, then other reasons for the violation of law, such as justifiable defense, will become one of the factors for the determination of social equivalence.

3.4.2 Negate causation or objective imputation

Some scholars argue that the causal relationship or objective imputation of the result should be negated in the risk acceptance of the victim. The Japanese scholar Yamaguchi believed that the key to solving the problem was the freedom of self-interests in danger. As the content of self-determination, even for dangerous behaviors, victims should be given freedom when they pursue for some reasons. However, it is doubtful that the actor has no causal relationship with the result. If according to Professor Yamaguchi's point of view, the act of justifiable defense is lawful, it should also negate its causality to the result. Finally, constitutive elements and illegality combine into one, which is inconsistent with its basic position.

3.4.3 Vertrauensgrundsatz

The other Japanese scholar Shinomachi also advocated the principle of trust to explain the risk acceptance. He thought that the subject of legal interests may take actions to protect their legal interests except in special circumstances. In other words, the subject of legal interests has the

instinct of self-protection, and usually takes evasive action when his legal interests are in danger. The possibility of the victim's recognizing the danger of producing the punishable degree of the perpetrator's negligence is negated, so the crime is not established. However, in the actual risk acceptance case, especially in the situation where the dangerous behavior is explicitly prohibited by the enactment law, it is difficult to say that the actor did not foresee the possibility of the result or that the actor adopted the result avoidance measures.

3.4.4 Disclaim liability

The Japanese scholar Miyamoto hashimoto has argued that dangerous acceptance can be used as a deterrent to liability. Taking the sports event as an example, in the case of abiding by the rules to produce injury results, although the rules are not followed, the result of injury caused by an external and objective behavior that is not dangerous to life can be negated as the victim agrees to deny the illegality. But the right to life is not punishable, and consent is not prohibited in the event of death or near death. It is reasonable to regard the risk acceptance as a hindrance which is not worthy of criminal punishment. However, the so-called liability hindrance is the cause, which is that the doer has to make the behavior, and the criminal law gives forgiveness to the doer. In the case of dangerous acceptance, the doer is rarely forced, so it is difficult to explain the dangerous acceptance.

From the above introduction, it can be seen that there are various theories about risk acceptance. The representative ones include victim consent theory, self-answer theory, accomplice theory and so on. From the perspective of theoretical development, the victim consent theory was first used to explain the risk acceptance, and later it was considered that the victim consent theory could not be applied to the risk acceptance, resulting in other theories.

4. Types of risk acceptance

The types of risk acceptance can be distinguished concisely through some specific cases.

A driver knew that he should drive slowly on the winding road, otherwise it would be very easy to have an accident, but he did not slow down. As a result, the car overturned into the mountain. The car was scrapped, and the driver died from his injuries.

The doctor discovered that he had accidentally caught the infection, but instead of taking proper precautions, he continued to work, causing the patients to become infected. The hospital's cleaners went to the exclusion zone after realizing they were infected.

A borrowed a syringe of heroin from B. Although B knew that heroin was a drug and harmful to human health, he still injected it and died.

The passengers asked the taxi driver to take them somewhere in the thunderstorm. The driver refused and told him he might be hit by lightning. But passengers insisted that the driver take them on a journey, and the driver was forced to travel. As a result, passengers were killed by lightning when they phoned someone.

We would analyze the above cases one by one.

In the first case, the driver was both the implementer of the action and the undertaker of the outcome. That is to say, he is both the actor and the victim. Although the driver was aware of the hazards of driving at high speeds on the road, he did not slow down, causing damage to himself and his vehicle. In this situation, the damage of the victim's legal interests is the result of his own behavior, and he has no relationship with others in law. Clearly, such cases are not the subject of criminal law.

In the second case, the cleaners had a clear understanding of their own possible risks. He was willing to go to the exclusion zone for the sake of the safety of others. The potentially serious consequences could not be imposed on the doctor, who did not force the cleaner to go to the exclusion zone.

In the third case, the person who injected the drug, knowing it was dangerous, but gave it anyway, as well as killing himself. That is to say, although the victim was aware of the possible risk brought by the behavior, he still carried it out, causing the danger to become a reality and suffering the result of legal interest damage. In this case, A lent a syringe to B, that is to say, A was involved

in the risk act carried out by B, and there was a causal relationship between the occurrence of damage result of the victim's B and the defendant. In Germany, the verdict in such cases is that if the victim is aware of the danger of the act and has consciously accepted the danger, the defendant cannot be punished even if the defendant's act facilitates the occurrence of the dangerous result.

In the fourth case, although it was the taxi driver who drove the passengers to death in the weather of thunder and lighting, the result of this accident was insisted by the victims, who agreed with the danger. In this case, it needs to be pointed out that while the victims agreed on the possible dangers of the act, they did not agree to change the dangers into reality. In Germany, the verdict in such cases is that the taxi driver has clearly told passengers of the danger and that they have a clear understanding of it, but they are still going ahead. In such cases, the taxi driver has no responsibility or obligation to protect the passengers, so the taxi driver does not have to bear any criminal responsibility for the death of the passengers.

We can know from the above cases that risk acceptance can be divided into three categories. The first category is self-hazard, which refers to the victims still carry out such behaviors when predicting those are dangerous and may bring harm to their own rights and interests, so as to form a direct causal relationship between their behaviors and the infringement. For example, if the victim knows clearly that drunk driving is very dangerous, but he/she still carries out drunk driving, resulting in traffic accidents and his/her own injuries. Another sample is that the victim, realizing that usefulness in deep rivers can lead to danger, still went swimming, resulting in dangerous results. This kind of situations does not have the research value in the criminal law theory research, therefore this article would not narrate about that. The second type is self-dangerous participation, which refers to the victims' participation in certain harmful behaviors and awareness of the danger of such behaviors. There are direct psychological or physical connections between the results of the violation and their own behaviors. For example, in a foreign case, the victim died from injecting heroin, and the syringe was borrowed from the defendant. Therefore, it is impossible to directly judge the defendant as negligent wounding. The third category is the danger of others based on the agreement, which means that although the victims' current infringements are caused by others, the victims carry out the infringements on the basis of the consent of themselves. If the victims refuse to listen to the defendants' dissuasions and allow them to carry out certain acts, which result in infringements on themselves, then the defendants' acts are carried out on the basis of their consents, so that the victims themselves bear some responsibilities.

In the classification of risky behaviors, there is no necessity of research for the first category. However, there are several points in common between self - risk participation and other risk based on agreement. At first, the results of the actual harm are mainly caused by the ignorance of both the victims and the defendants. Secondly, both the victims and the accused do not want the results of actual harm to occur. Finally, it is the victims' "negligence" behaviors, resulting in actual harm, the victims should bear criminal responsibilities. In the study of risk acceptance theory, the latter two categories are mainly studied to provide theoretical basis for judicial practice.

5. Own risky participation

5.1 Both punishable and non-punishable for participation

The main criterion of self-danger is that the victims infringements have certain causal relationships with their own behaviors, which lead to the occurrence of infringements, and the defendant only plays a part in the incident. In their own risk, if the conditions of risk acceptance are established, the consequences of the infringement should not be borne by the defendant. There are three main reasons. First of all, in the late 20th century, the Germans put forward the denial that the defendant shall bear the legal results for the victims' self-hazard in their criminal law. They think if the defendants intend to participate in the victims' infringement themselves, they should not be punished by the law, and if the infringements are involved in the victims' faults, they should not bear the consequences too, therefore, if the defendants consciously and purposefully to make the victims self-hazard, constitutive requirements will not be established. There is still some

controversy about the opinions of the criminal law in China that the defendants participate in the danger of the victims, but in the actual cases, it is necessary to be punished by intentionally participating in and abetting others to carry out the self-harm behaviors [1]. Therefore, in Chinese criminal law, it is impossible to directly determine the innocence of the accused involved in their own danger. However, if the law does not punish the actions of self-danger of others, the defendants' participation cannot be convicted.

5.2 Comparisons between the negligent crimes and abettors

There is one more point, from the perspective of the crime of negligence, provided that the criminal law does not punish the abettors in the crime of negligence, only the conviction of the criminal negligence principal offender is established. Therefore, if the main composition of the violation of the victim's rights and interests in the case lies in the negligence of the principal offender, the abettor who participates in the violation will not bear the legal responsibility. Victims' rights suffered from the infringement of the main composition is making mistakes, so involved in negligence abettors will not assume legal responsibility, therefore, in their dangerous actions, the victims of the infringement is mainly composed of its own behavior, so the fault instigated the conviction, the abettors will not set up, this argument is based on the premise that the difference between the crime and negligent crime punishment. If the penalty is the same for both, then the negligence instigation needs to bear a certain penalty, then the above argument is not valid. In the behavioral theory, the relevant point of view holds that it is difficult to establish a unified standard for intentional and negligent crimes, and there is no concept of principal and accomplice in non-voluntary negligent crimes, so those that conform to the constitutive elements will be regarded as principal offenses. Thus to distinguish between the principal offense and the accomplice, the difference is mainly in the process of judging it. The basis of the judgment is to see whether it conforms to the corresponding constitutive elements, rather than through the causal relationship to determine. In the German criminal law, there is no big difference between the concept of negligent crime and crime. Thus in the criminal negligence is not to help make this concept, as long as it meets the requirements of a person, it will be regarded as negligent crime, under this view about their risk of penalties for the defendant is established, in the case of faults in self abuse others also is regarded as one hand, it will receive the corresponding punishment. It can be seen that it is difficult to prove that the self-danger participants do not constitute a crime from the point of view of abettor in negligence.

5.3 The subordinate principle of complicity

In the self-danger, the participants are not the actual common offenders, but the victims' infringement is caused by its participants and itself, so it conforms to the concept of joint crime from the perspective of common constitution. Joint crimes conform to the concept of violation of law. Therefore, in the process of proving the establishment of the crime, it is necessary to clarify the ownership of the violation [2]. In actual cases, to determine whether the relevant ACTS constitute a joint crime, the participants should be held objectively accountable. The violation results are implemented jointly by victims and participants, with the joint crime to have some similarities, those are the reasons why there are crimes and accomplices. It can be for their implementation of the victims as a case of crime, and participants for the case of accomplices. In the judgment of crime, it is necessary to judge the behaviors of the principal offenders, to see if they constitute a crime, if they are the victims' own implementation of the infringement behaviors, and the behaviors are illegal or not. If in the case of negligence, the defendant causes injury to others due to negligence, the "other" here does not include the victim himself. If the victims' serious injuries are caused by himself, they cannot be regarded as negligent injuries, which do not meet the constitutive requirements. Therefore, from the perspective of attribute, the conviction of abetting behaviors will not hold.

6. The otherness of the risk based on consensus

6.1 Standardize the opinions beyond protection

From the existing part of view, in the otherness of the risk based on consensus, the victims will convert the risk that may be caused to oneself to others, and the former is more passive than the behaviors that the danger transformation from one's own behaviors to ones own aggression. From another point of view, if the victims' victimization is transformed by the defendants' danger and the defendants do not carry out other dangerous behaviors, then the respondents and the defendants have the same responsiveness. At the same time, if both predicting the danger equally, they will have the same degree of responsiveness, then the objective imputation will not be established. However, there are some doubts about this point of view. In self-danger, the result of infringement is caused by the victims, while in the consensual danger, the result of infringement is caused by the defendants, so it is wrong to treat the two equally. Also the participants are not the primary results, and their behaviors can be regarded as subsidiary, which are generally not within the scope of the criminal law. Whereas in consensual danger, a conviction of the conduct of the accused is established, while the conduct of the victims becomes an adjunct to the judgment of punishment. If the victims in the case of the infringement results are caused by the defendants' acts, rather than caused by the victims' behaviors, then the congruency from the two to foresee the danger to deny the defendants' criminal behaviors is not established, so it is hard to deny the imputation. From the perspective of the conclusion of the current, there is a contradiction in these two points.

6.2 Victims dogma

The participants in the victims' response are the victims and the defendants, and the victims need to consider the relationships between the two. Considering the relationships between the victims and the nations, the basic principle of victims dogma is that if the victims can avoid damage through their own strength, while protecting their legal interests, the national criminal need not be used. The national jurisdiction should be considered as a last act [3]. In previous theories of crime, it's mainly that determining guilt by the defendant's act, and the basis is one-sided. It did not take into account the victims' participation behaviors, and the implementation of the punishment to the defendants and the implementation of the protection of the victims, both are relative. If the victims can protect themselves but have not been implemented, in which cases the victims are not protected, the criminal penalty also cannot be established, so that they will not accept the punishment. From this point of view, in the criminal law, the victims who have the self-protection ability, became a kind of auxiliary means, so during the conviction to the defendants, it should be based on the formation of specific results of damage.

7. The legal basis of risk acceptance

The victims' legal basis of risk acceptance is self-determination. Everyone is a free individual, so the self-determination right reflects the meaning of self-determination and free will. In the relevant theories of criminal law, these two concepts have different connotations. The most prominent difference is the main body of the two points. In the theory of risk acceptance of the victims, the subject of self-determination is the victims, while the subject of self-determination is the criminals' will. Therefore, from the perspective of criminal law, self-determination is mainly aimed at the victims.

The discussion of the right to self-determination can be carried out on the basis of "right", focusing on the rights of victims to freely deal with their rights and interests. The criminal law limit of self-determination is discussed, that is, what extent the victims disposes his rights and interests.

8. Viewpoints of this paper

Combination of points of view, it is a failure that denying the convictions based on risk

behaviors of acceptable, and trying to bring them out of crime. But it's still a sensible idea from the constitutive requirements, duty and does the specific point of view of illegality judgement. From the perspective of constitutive elements, if the defendants' acts result in actual harm, then they are consistent with the constitutive elements of negligence and injures. Then it cannot negate the dangerous results from objective imputation, which are still within the scope of constitutive elements [4].From the perspective of illegality, it does not have the priority to protect interests, so the reasons for the obstruction of law are not established. Therefore, it cannot be ruled out as illegal.

9. Conclusion

The theory of risk acceptance is that relevant legal personnel must master. In the application, it is the key to maintain the authority of national law to make a fair judgment based on the actual situation of the case and guarantee the use of reasonable.

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