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On the Joint Omission Principal

SUR LE PRINCIPE DE NÉGLIGENCE COLLECTIVE

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Abstract: There are three doctrines regarding the issue of the joint omission principal in academia of overall negative, said a comprehensive, and limited say. And all of these three doctrines have their own advantages and deficiencies as well, and all of them, in general, are unable to explain criminal phenomenon. It can scientifically demonstrate the issue of joint omission principal only from the perspectives of dominated committed and obligation committed. Joint omission principal can only be tenable in the omission field of dominated committed; and joint principal won't be tenable in the filed of obligation committed or the field combined with both dominated committed and obligation committed.
Keywords: joint principal; dominated committed; Pflichtdelikt; omission; and the obligation to make

Résumé: Il y a trois doctrines sur la question de principe de négligence collective dans les universités. Et chacune de ces trois doctrines a leurs propres avantages et déficiences, et en général, elles sont tous incapables d'expliquer ce phénomène criminel. On peut démontrer scientifiquement la question de principe de négligence collective seulement du point de vue des dominés et de l'obligation. Le principe de négligence collective ne peut être tenable que dans le domaine de la négligence de dominés, et il ne sera pas tenable dans le domaine de l'obligation ou dans le domaine qui associe à la fois les dominés et l'obligation.
Mots-clés: principe collectif; dominée; Pflichtdelikt; négligence, l'obligation de faire

At present, criminal law scholars primarily discuss two issues regarding the subject of joint omission principal: the first one is that if joint principal is tenable among omission and the second one is that if joint principal is tenable between omission and act. There are three doctrines in academia of overall negative, said a comprehensive, and limited say. This paper, based on the introduction and commons on the above three doctrines, proposes its own unique viewpoints.

1. THE THEORY OF OVERALL NEGATIVE

Regarding the issue that if joint omission principal is tenable, there is overall negative theory among the criminal law theorists in Germany mainly represented by Armin Kaufmann, Welzel, and Grunewald. Based on his purposive act theory, for instance, Welzel believes that it is impossible that there is the intention of jointly execution in omission occasion, and accordingly it is impossible that there is the fact of jointly

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execution, either; and it therefore denies the joint principal of omission（Ma Kechang.2002）. G Grunewald believes that in terms of existence, non-typical negative crime is considered as the third criminal form which is even lower than accomplice, and there is no room for the concept of principal (Kamiyama Toshio. 1994).

Overall negative doctrine received criticism from plenty of scholar after it was proposed. Busse, for instance, believes that the intension in criminal law sense doesn't indicate that in purposive act theory. Regardless of the different features of act and omission in terms of composition, these two should be parallel criminal pattern in terms of standardized values, though.(Klaus—Henning Busse. 1974) Japanese scholar Toshio Kamiyama, for another example, once criticized: "Grunewald positions all criminal patterns of non-typical negative crime as omission participation, the third criminal pattern, and believes it is a criminal pattern lighter than crime of act and accomplice, which is unacceptable. Since it ignored legal interest protection mechanism of criminal law, disregarded the existing situation that protector is equivalent to crime of act, and lacks essential equality between violation and obligation." (Kamiyama. 1994) Author truly agrees above criticism.

2. THE THEORY OF SAID A COMPREHENSIVE

This theory believe that joint principal all likely to exist in the situation when the dangerous states, caused by the interaction among more than two omission and the act on others from non-actor, are possibly in the protector status of protection obligation. This theory is truly agreed by many scholars in Germany. For example, Woerner believes that interactions among more than two omission or between act and omission all possibly constitute joint principal. For the former, two persons or more with obligations share the same determination of not executing their obligations; for the latter, failing to prevent the violations results generated from proactive act indicates the behavior of non-actor is the spiritual help for the act, but the behavior of omission from the protector later can not be rule out the establishment of joint principal (Kamiyama.1994).

There is a considerable part of scholars in Japan approve the this theory. For instance, Ootsuka Masashi believes the situation that more than two persons with common obligation of act mutually contact crime intention and conduct the omission against their obligation can be concluded as co-execution and joint principal can be established (Ootsuka. 1993). Could joint principal be established between act and omission? Ootsuka Masashi believes that joint principal could be established between the act to execute a crime and the omission from a person in the protector status that could prevent criminal consequence from happening in the situation that both act and omission proceed under the intention liaisons between each principal of action (Ootsuka. 1993). In addition, Japanese scholars including Tatsuo Kagawa, Shinya Otani, and Utida Humiaki as well support this theory (CHEN. 2004).

The criticisms on this theory from current criminal law scholars are primarily reflected in two aspects: the first one believes that in multiple omission criminals, it should be considered as joint crime if any person's act could prevent the consequence from happening in all omission persons; in multiple omission criminals, it should be considered as joint principal if it needs all act from all omission persons to prevent the consequence from happening in all omission persons. For the former, Kamiyama Toshio illustrates via an example: if the father and mother don't feed a child based on the intention to kill the child, so that the child was starved to death, and then both the father and mother will be for responsible for all their act, they can be reverted to individual principal and there is no need to apply the jurisprudence for joint principal (Kamiyama. 1994). Some one refutes Kamiyama Toshio's opinion regarding this issue and believes that it will ignore the fact of intention liaison among the parents if this situation is executed as coincident principals, and the fact could generate mutually psychological promotion and is more dangerous than the coincident principals with no intention liaison, typical coincident principals then can not reflect this (Saitou. 2001). Secondly, comparing omission with act, omission plays a minor role in the joint principals constituted by omission and act, and it is more appropriate to identify non-actor as accessory. For instance, Jescheck believes by the time one party of participants complete the work division in proactive act while the other one is against legal obligation by not preventing the act of this actor, it is acceptable to determine the establishment of joint principals; however it is more in accordance with behavior dominance theory to identify non-act as accessory in this situation (Hans-Heinrich Jescheck and Thomas Weigend. 2001).

3. THE THEORY OF LIMITED SAY

Scholars in general discuss the issue of how to restrict omission joint principal from two aspects: if omission and omission constitute joint principal and if omission and act constitute joint principal.

1) The issue that if omission and omission constitute joint principal. The issue that if omission and omission constitute joint principal has also been discussed in two situations: the first one is joint principal in form, or in multiple un-actors if one person fulfills obligation, then the consequence will be prevented from happening; the second one is joint principal in essence, or in multiple un-actors it needs to all un-actors to fulfills obligations, the consequence can then be prevented from happening. Scholars support The Theory of Limited Say in general believe that the former should not be established as joint principal yet the latter could be established as joint principal.

2) The issue that if omission and act constitute joint principal. There is severe controversy regarding the issue that if act and omission constitute joint principal in the scholars in criminal law. Yamanaka Keiiti divides act obligations into two types: the first one, the act obligations based on protecting legal interests, which can be called as "legal interest protection type" obligation; the second, the act obligations generated for managing and monitoring hazard source, which can be called as "hazard source management and monitoring type" obligation. If the obligation actor owns belongs to legal interest monitoring obligation, it will establish omission principal as long as the actor violates this legal interest monitoring obligation and falls to prevent consequence from happening when the actor could do so, no matter what causes legal interest in danger is natural forces, animals, no criminal liability persons, or liable act. If what causes legal interest infringement is the criminal offence from others and as well the actor forms joint criminal intention with others, it then establishes the joint principal combined with act and omission. If act obligation is not the one based on legal interest monitoring, and it is based on hazard source management and monitoring obligation instead, then the non-actor should become the omission accessory. For instance, a dangerous animal feeder sees the third party drives the animal to harm a victim and the feeder could easily prevent this harm however failed to do so. And the feeder doesn't constitute principal but the accessory of omission mayhem instead (Yamanaka. 1999).

The Theory of Limited Say wins some support among the scholars in China's mainland, Dr. Li Haidong, for example, believes that it is more appropriate to process omission as accessory instead of principal under the situation that omission and act jointly commit crime (LI. 1998).

Through the interpretation on both the Theory of Said a Comprehensive and the Theory of Limited Say, it can tell that both of them, no matter the Theory of Said a Comprehensive or the Theory of Limited Say, have their reasonable part. From author's viewpoint, however, they are all unilateral and arbitrary as well. Their deficiencies are reflected as: first, unilaterally and arbitrarily consider all act obligations own the commonness point to multiple persons at the same time totally ignoring the nature of act obligations, which is wrong; second, attempt to determine omission joint principal quality based on both the work division of act and intention liaison quality of actors, whose research output is doomed to failure.

4. AUTHOR'S VIEWPOINTS

Form author's point of view, the key reason that the scholars in criminal law are unable to solve the puzzle of omission joint principal is that we have been ignoring for a long time two types of crime: dominated committed and obligation committed. Differences in nature, principle of imputation, and the criterions to identify principal and accomplice for these two types of crime determine the methods and criterions taken to process these crimes in criminal law.

Based on Jakobs' opinion, the reason for charging dominated committed is that dominated committed organizes all persons under dominance within the organization field to commit a crime. The basic organizing act within an organization field is crime dominance (XU. 2005), among which the dominance determining principal quality is connected with the organizing act of the owner of the organization field; it should be based on the fact that if the act dominates the criminal event to evaluate the organizing act as principal act or participating act (Vgl. 1993). As for dominated committed, the person must consider the danger for others generated from its own free scope the corresponding relation between act freedom and

consequence is its attribution theory (organization jurisdiction), and the act is the medium for actor to bear responsibility. Therefore, negative obligation violation is always reflected as legal interest infringement in criminal law terms; or concerning dominated committed, its criminal essence is legal interest infringement. Both the extent of legal interest infringement committed by the actor the one of causal flow control conducted by the actor are closely related to the act of the actor; act division and intention liaison of the actors are the essential basis to determine their joint crime. Act plays a decisive role for dominated committed, therefore, the measure to determine it as principal can only be determined from the fact that if the act dominates causal flow of the legal interest infringement; the dominator will be the principal yet non-dominator will be the accomplice.

Criminal law scholars call the crime against "the obligation to build up a common world with others" obligation committed. In Jakobs' opinion, there is a system functioning as the foundation to strengthen the unity and the obligation of the unity is reflected as the positive obligation of obligation committed in criminal law term. For obligation committed, the jurisdiction identifying it as the principal is established via violating an obligation confirmed by the system (i.e. positive obligation-author); and it has always been established. It believes that the principal responsibility of obligation committed is generated from the active responsibility additionally placed by the system, i.e. request norm acceptors to "build up a common world" with others to make others become better, in stead of just making up the loss caused by its own (ギュンター・ ャコブス. 1999-6). The violation of its own obligation for the obligation committed supported by a certain system determines, in principle, its principal quality(Vgl. 1996). The positive obligation refers to the one to step into the fields of others and build up an active relation with others. It in general takes a systematical special status (role-author) as premise, the reason to let the individual take the responsibility is not due to the first act the individual conducted but due to its positive obligation infringement instead. The individual with positive obligation is responsible for protecting particular legal interest be due to entering into a certain system, he must also be responsible for what happens even if the consequence is not from his act. Therefore the infringement of special obligation is his attribution theory (system jurisdiction) and the act is not the medium for the actor to bear responsibility. As for the violation of positive obligation, it is always reflected in the function infringement against the system, instead of legal interest infringement. In terms of obligation committed thereby, the crime essence is just the violation against the positive obligation approved by criminal law, the measure to determine the principal can only be the violation against the positive obligation.

Does omission committed include two criminal forms of dominated committed and obligation committed? The author believes that the key is if it can proof that whether or not the act obligation can include negative obligation, i.e. the obligation of not harming others, and positive obligation, i.e. the obligation of building up a common world with others; if yes, it then means the crime of omission includes these two types of crime. Professor Jakobs believes that isolated obligations, just like the obligations performed by the debtor in property law, are not generated from an active system and do not request obligors to build up a common world with others and proactively seek benefits for others; instead they are just the obligations in the organization fields of each personality body. The infringement against isolated obligations constitutes neither omission committed nor obligation committed (Jakobs. 1993). For instance, a father takes a neighbor's child to swim. When the child is drowning, the father is obligated to save the child and this obligation is the one in the organization field of personality body, and belongs to negative obligation. If the child dies because the father failed to save the child, the father then constitutes omission intentional homicide of dominated committed. If the father takes his own child to swim, and the father is obligated to save the child when the child is drowning and this obligation is the one in the system (i.e. parental rights obligation) of the personality body, and belongs to positive obligation. If the child dies because the father failed to save the child, the father then constitutes omission intentional homicide of obligation committed. Act obligation can thereby include negative and positive one, crime of omission should also include dominated committed and obligation committed accordingly. Based on this, the author advocates that it also should start from the omission joint principal of dominated committed and the omission joint principal of obligation committed to study the issue of omission joint principal.

4.1 Omission of Joint Principal of Dominated Committed

As mentioned earlier, it is of great significance for division of act and intention liaison among actors for dominated committed. It is worth noting that the negative obligation of dominated committed can be

entrusted to a number of persons, i.e. the negative obligation of dominated committed owns the homogeneity pointing to multiple persons. For example A entrusts his/her own child to B and C to look after, and the B and C have common obligation to look after the child. Based on this point, in terms of omission committed of dominated committed, it needs to analyze specifically:

4.1.1 Typical Negative Committed

In a typical negative committed situation, if multiple persons all are obligated to the act obligation of organization jurisdiction "do not harm others"; then they certainly can confess joint principal as long as there is subjective intention liaison and objective co-omission among them.

4.1.2 Non-typical Negative Committed

4.1.2.1 Situations among Omission

For dominated committed, it can divide the situations between omission and omission into two types: one is that the obligation of multiple actors can totally be performed by one person among the obligators, as long as one of them performs the obligation, the consequence can then be prevented; the other is that the obligation of multiple actors must be performed by the thorough cooperation of all obligators, the consequence can then be prevented. For the former, some people in the criminal law sector believes that there is no need to determine this situation as joint crime, and it will be just appropriate as coincident crime. The author doesn't agree this opinion because it ignores the reciprocity of equal obligation among various non-actors. Under intention liaison, now that every act obligator is able to individually prevent the consequence from happening, then every omission actor still needs to depend on the un-prevention act from the other side, i.e. the omission from the other side if each omission actor accomplishes offense, it can only accomplish crime with the co-omission from all actors."(ZHAO, XU. 2008-9) Therefore, as long as there is the fact of co-omission and with co-intention liaison, this situation can also constitute joint principal. For the latter, it then can definitely constitute joint principal.

4.1.2.2 Situations between Act and Omission

In terms of non-typical negative committed of dominated committed, the situations between act and omission could constitute joint principal; it needs to specifically analyze, though.

First, if there are agreements before or in the middle of an incident among obligators with obligated act, and one of the obligators proactively performs act and other obligators yet don't stop, which causes consequence, then it constitutes joint committed. For example, a husband and wife take a neighbor's child to swim, while swimming the husband and wife agreed to throw the child into deep water to drown; and the husband then throws the child into a deep pool, the wife is standing by but doesn't save the child, the child is then drowned.

Second, it still constitutes joint principal for the obligator with obligated act and the obligator without obligated act if they agree before the incident or while performing positive act that the obligator without obligated act proactively performs act and the obligator with obligated act does not perform prevention and rescue act, causing the consequence. For example, A takes neighbor's child to swim and C coincidently is swimming there. C recognizes the child is from his/her enemy's family and then persuades A to allow him/her to throw the child into the deep pool; or when C is holding the child to throw into the deep pool A sees what C is doing and then stops it, C persuades A to allow him/her to throw the child into the deep pool, and C then throws the child into the deep pool after A agrees C to do so, and the child is then drowned.

Third, it does not constitute joint principal if after the obligator without obligated act proactively performs act and the obligator with obligated act is about to rescue, and the former persuades the latter and the latter agrees not to rescue, which causes the consequence. For last example, C throws the child into the deep pool while A was not paying attention, and A is about to rescue, and C persuades A not to save the child and A agrees C's request, and the child is then drowned.

4.2 Omission of Joint Principal of Obligation Committed

As mention earlier, for obligation committed the intention liaison between act and actor does not have fundamental significance. The measure for the principal of obligation committed is still the infringement

against positive obligation; and it does not make any sense for the portion of the contribution from the act to the consequence in determining the measure for the principal of obligation committed. In addition, it should be noted that the obligation in obligation committed has nothing to do with first organized act and it just is the request externally imposed on the actor directly by force, during which there are no prerequisites such as persons, incidents, and things needed, i.e. the positive obligation is a medium-free obligation. The medium-free nature of the positive obligation leads to its another extremely important attribute, or due to medium-free, the positive obligation can only be directly entrusted to the specific person (role) from outside; the obligator still individually performs his/her own obligation instead of co-performing his/her own obligation even if the obligator is among multiple persons seem in the same obligation status. For example, when a wife sees her husband did not feed their child, her obligation is not performed by forcing her husband to feed their child, instead she must feed the child on her own; in addition, what the husband has fed does not indicate that the wife has performed her own obligation as well. If the wife intends to starve the child to death by taking advantage of the time when the husband is away from the home, yet she does not succeed because her husband returns home ahead of time and feeds the child, the wife will be determined as attempted due to infringing obligation, which is the unique specificity of positive obligation (ギュンター・ヤコブス. 1993-3). Based on these natures of obligation committed, we then specifically discuss if there is joint principal between the typical negative committed and non-typical negative committed of obligation committed.

4.2.1 Typical Negative Committed

Among typical negative committed, the obligation among multiple persons is the positive obligation of "building up a common world with others", which has no commonness. Due to its unique specificity, positive obligation can only point to each specific role, it requests that each being requested must unite with other, rather than a couple of persons, as an entirety, unite with others. Every single role performs its own obligation itself and has nothing to do with others. Yet it must be based on the existence of co-obligation to co-infringe co-obligation among multiple persons. If there is no co-obligation at all, then it does not make any sense to discuss so-called co-infringement (Vgl. 1999). Therefore, in the situation of typical negative committed of obligation committed, if multiple persons all have act obligation, then there is subjectively intention liaison and as well objectively co-act; however because there does not exist co-obligation among them, there off course does not exist joint principal, they can only be determined as coincident principal. The crime of abandonment specified in Chinese criminal law, for example, is the classic situation of typical negative committed. If based on intension of co-abandoning, both of the parents abandon the child to hospital entrance, they can not be determined as the joint principal of crime of abandonment because there does not exist co-obligation among two of them. Therefore there does not exist joint principal in the situation of typical negative committed of obligated committed.

4.2.2 Non-typical Negative Committed

4.2.2.1 The Situations between Omissions

In terms of obligation committed, the situations between act and omission can still be divided into two types: one is the act obligations of multiple actors can entirely be performed by one of the obligators, and as long as one of them performs the obligation the consequence then can be prevented from happening; the other is obligations of multiple actors must depend on the joint force of obligators to be performed so as to prevent the consequence from happening. For the former, since there is no commonness of the act obligations among multiple actors, even if there are subjectively common determination and objectively common act among the actors, still they can not constitute joint crime. For instance, based on the common determination to starve the infant to death, both the husband and wife don′t feed the infant, causing the death of the infant for starvation, this situation then does not constitute the joint principal of intentional homicide from omission. For the latter, it still can not establish joint principal with the same reason as the former.

4.2.2.2 The Situations between Act and Omission

Currently, it is broadly accepted in academic world that in this situation, as long as there is common intention to commit a crime between actors and non-actors and one of them of multiple persons of them perform positive act, then all of them should be determined as joint crime. Just as Professor Roxin

illustrated via an example, based the agreement between two warders, one gives the cell door key to the prisoners, and another, against his obligation, doesn't lock the outside door and prisoners then escaped. Both of them, based on the specifications in Item 2 of Article 120 in the Criminal Law of Germany, constitute the joint principal of the crime of releasing of prisoners (Kunio Midorikawa. 1994). The author believes this opinion is wrong. In terms of obligation committed, both the extent of work division and intention liaison among actors do not have decisive meaning, due to the unique specificity in positive obligation of obligation committed, it is determined that there impossibly exists joint principal in this situation.

In addition, it is worth discussing that in terms of the situations between dominated committed with act obligation and obligation committed with act obligation, dominated committed without act obligation and obligation committed with act obligation, is it possible, no matter the act or omission of dominated committed or the act or omission of obligation committed, to constitute joint principal? The author believes that there is absolutely no possibility to constitute joint principal in these situations. The reasons are: the establishment of joint principal must take common attribution theory and as well the penalization basis as its premise, the principle of the attribution theory for dominated committed is the responsibility for infringing negative obligation (organization jurisdiction), its crime nature is legal interest infringement, and its establishing measure is whether or not it dominates the causal flow of the legal interest infringement; While the principle of the attribution theory for obligation committed is the responsibility for infringing positive obligation (system jurisdiction), its crime nature is the infringement of the positive obligation approved by criminal law, and its establishing measure is whether or not it violates positive obligation. The difference in attribution theory and penalization basis of these two types of crime determines that it is impossible for these two types of crime to establish joint crime; yet they can only be established as coincident principal. For example, A takes B's child to swim and B happens to pass here when the child is drowning; and both A and B agree not to save the child, and the child then is drowned.

Conclusively, the author believe that joint principal of omission can only be established in the situation among the omission fields of dominated committed; and joint principal can not be established in both obligation committed fields and as well the dominated committed and obligation committed combined fields.

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