

On Commitments in Criminal Law

SUR LES ENGAGEMENTS EN DROIT PÉNAL

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Abstract: The commitments in criminal law mean that a victim commits others to infringing on his/her legal interests, which includes three elements of promisor, commitment behavior, and promisee, and every single aspect has certain conditional requirements. The theory of criminal law in continental law system divides commitment into two categories: the commitment of constitutive requirement elimination and the commitment of illegality elimination. Since there is no single illegality judgement in China's crime constitution system, the commitment of illegality elimination is excluded its criminality through the fact that the behavior doesn't conform to crime constitution. The above classification is thereby meaningless in China; it should be uniformly called the commitment of exclusion of criminal cause. In addition, some commitments can not exclude behavior criminality but can mitigate criminal responsibility, called the commitment of mitigated criminal responsibility; there are some other commitments can not be excluded criminality because of the clear deification in the law or called invalids commitments, including the invalid commitment of same crime constitution and the invalid commitment of different crime constitution.

Key words: Commitment; Illegality; Legal interest; Constitutive requirements; Elimination

Résumé: Les engagements en droit pénal signifie que la victime engage les autres à porter atteinte à ses intérêts juridiques, qui comprend trois éléments du promettant, le comportement engage et promesse, et chaque aspect a certaines exigences conditionnelle. La théorie du droit pénal dans le système de droit continental se divise en deux catégories d'engagement: l'engagement de l'exigence constitutive de l'élimination et l'engagement de l'élimination illégal. Comme il n'y a pas de seule illégalité de jugement du crime de la constitution en Chine, l'engagement de l'élimination de l'illégalité est exclu de son incrimination par le fait que le comportement n'est pas conforme à la constitution de la criminalité. Le classement ci-dessus est donc dénuée de sens en Chine, elle doit être uniformément appelé l'engagement de l'exclusion de la cause pénale. En outre, certains engagements ne peuvent pas être exclure le comportement de la criminalité, mais ils peuvent atténuer la responsabilité pénale,

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appelés l'engagement de la responsabilité pénale atténuée, il y a certains autres engagements ne peut être exclu de criminalité, car la clarté de la déification dans la loi ou les invalides engagements, y compris les engagement invalides de la constitution de la même crime et l'engagement invalide de constitution crime différent.

Mots clés: Engagement; L'illégalité; Les intérêts juridiques; Les exigences constitutive; Et l'élimination

1. THE CONCEPT AND NATURE OF COMMITMENT

When the perpetrator infringes on the legal interests of the owner of legal interests based on the commitment of the owner of legal interests; perpetrator's behavior normally does not constitute crime. When the commitment relates to if crime constitutive requirements are complete, the conclusion that the behavior does not constitute crime can be explained through the fact that the committed behavior does not complete crime constitutive requirements. When the commitment has nothing to do with crime constitutive requirements, since most of criminal laws do not have clear definition to allow eliminating the crime, the commitment can be treated as supra law crime elimination cause. But how does the commitment become supra law crime elimination cause, or what is the nature of commitment? There primarily are following opinions in continental law system theory (Zhang, 2007).

(1) Legal behavior theory believes that victim's commitment actually gives perpetrator certain right to impose infringing behavior, in this sense, it is a legal behavior. Commitment's valid constitutive requirements thereby should apply to the legal behavior principle in civil law as well.

(2) Interest waiver theory believes that order of law entrusts the legal interest maintenance to legal interest keeper, and commitment indicates the keeper gives up his/her own interest. However why commitment to killing is not allowed? Is committed injury just allowed in a certain range? Why a country can be exempted its duty to protect legal interest? It can conclude that this theory does not answer these questions.

(3) Protection waiver theory believes that commitment implies victim gives up his/her own interest and thereby gives up the protection from law. But why private waiver can violate the public protection obligation of a country? Why are there limitation requirements on personal commitments? This theory can not explain.

(4) Protection object partial drop theory believes that in addition to protecting various substantial legal interests, crime constitution requirements as well protect the disposition authority of legal interest keeper and commit to make the object protected drop. But this theory as well does not explain the limitation of commitment.

(5) Law policy theory or interest measure theory seeks the justification basis of commitment from interest measure principle, and believes the exercise of rights that do not impair personality freedom should be deemed to have social value. Thereby, within certain limitation in terms of order of law, personal subjective evaluation on legal interest has decisive significance.

There is evident defect in the first opinion above, and it completely uses civil law principle to judge the commitment in criminal law sense, ignoring the stipulations on the different purposes of commitment in criminal law and civil law. The three opinions in the middle are all theoretically less distribution, and can not explain the cases that although actions are based on commitment, they still constitute crime. Interest measure theory is consistent with the requirement to exercise legally protected personality freedom rights, and as well can explain some cases that although actions are based on commitment, they still constitute crime, the argumentation is more distributed. In fact, commitment as the free right for legal interest keeper to dispose his/her own interests should not normally be intervened by law. Only by the time the disposed legal interests are superior to free rights, law then stops them. The right to life is naturally superior to the right to freedom, criminality thereby can not be excluded from the commitment to others to infringe on the life of the promisor, and it should be punished as a crime.

2. THE KEY ELEMENTS OF COMMITMENT

Although commitment belongs to the one-side behavior of promisor, since it relates to the affirmation on the behavior of promisee, promisee's requirements have to be included in constitution requirements as the commitment of crime elimination. Commitment key elements therefore are supposed to include three aspects of promisor, commitment behavior, and promisee.

2.1 Promisor

The commitments from the promisor who has no disposition right or just has partial disposition right are all invalid commitments. Yet the commitments from the promisor who has no disposition ability are as well invalid commitments, and all of them can not eliminate constitution requirements and illegality.

2.1.1 Own disposition right on committed legal interests

The legal interests committed by victim can only be personal ones, and state or social legal interests are excluded from commitments. When state and social legal interests are concurrent with personal legal interests, even if there are gained commitments from personal legal interest main body, constitution requirements and illegality still can not be eliminated. In false accusation, for instance, even if there are commitments from falsely accused people, but this crime focuses on protecting the fairness of jurisdiction, therefore although there are commitments from falsely accused people, the commitments still can not impede false accusation constitution (Cai,1994). If property legal interests are co-owned by a couple of people, the commitment from all co-owners can eliminate crime, but the commitment from some of the co-owners can not, only gets a lighter punishment when sentencing.

Promisor only has disposition right on the legal interests belong to him/her, when promisor is in the position of guardian, it needs to specially analyze if the promisor has the disposition right on the legal interests belong to the person under guardianship. Guardian normally has disposition right on property legal interests, but as for the legal interests belong to personal rights, guardian normally has no disposition right. If on behalf of protecting more important interests of the person under guardianship, guardian has the right to make a commitment. For example, even if parents agree others to sell their own child, the others also should constitute the crime of child trafficking based on the behavior of making commitment to selling the child.

Not all personal legal interests can be disposed by obligee. Based on interest measure theory, the commitment from promisor to deprive right to life is invalid, there are some disputes on the issue that if the commitment from the promisor to severely damage his/her right to health can eliminate the criminality of severe damaging behavior, and its effectiveness should be considered with integrating various elements and as well based on the social tolerance in different countries.

2.1.2 Promisor owns committing ability

Committing ability relates to age and mental state. Usually a natural person owns the ability to identify various things when reaching certain age; yet an adult might lose the ability to identify various things due to suffering mental illness. Not all minors have not committing ability. When there is no clear definition in law, it needs to judge a minor's committing ability based on the fact that if the minor completely understands committed contents. Regarding sex-related commitments, criminal laws in various countries widely believe that the commitments made by the young girls or children under the age of 14 are invalid. Thereby although there are their consents, all actions of minor girl adultery or child molestation constitute crime of rape or crime of child molestation.

2.2 Commitment behavior

Commitment behavior refers to the true indication to commit others to infringing on promisor's legal interests, and it has characteristics of authenticity, legal interest dispositiveness, timeliness, and objectiveness.

2.2.1 Authenticity

Commitment must be the true indication of promisor and made in promisor's free will state. Joke-like commitments, the commitments based on force or coercion, and the commitments made under unconscious state are naturally invalid. The issue of if the commitment based on mistakes is valid is discussed in two cases: when there is misunderstanding on the legal interests to be disposed, commitment lacks authenticity, so it is an invalid commitment; when there is no misunderstanding on the legal interests to be disposed, but only on the purpose and intention of commitment, then the effect of commitment will not be affected.

2.2.2 Legal Interest Dispositiveness

Commitment is the indication to allow others to infringe on the legal interests of a promisor, and it therefore is a legal interest disposition behavior. In addition to understanding his/her own disposition legal interests, a promisor as well needs to understand that others will dispose his/her own legal interests based on the commitment the promisor made. If a person just understands he/she is disposing legal interests but does not recognize others dispose legal interests for him/her, then this only means self-damage yet does not mean commitment at all.

2.2.3 Timeliness

Commitment must be made before behavior or by the time of behavior; while the commitment made after behavior will be invalid. The commitment made before behavior can be revoked; the behavior carried out after commitment revoking can not be eliminated its criminality. Of course this revocation must arrive to perpetrator before behavior, if the revocation arrives after behavior implementation; the previous commitment is then valid.

2.2.4 Objectiveness

Commitment is supposed to have specific object, or promisee, in addition a promisor needs to indicate commitment to a promisee. When a promisor indicates commitment to a promisee, it does not require the promisor has specific understanding on the promisee, and it does not require making face to face commitment, either; as long as the commitment arrives to the promisee, it will be fine.

2.3 Promisee

The criminality of infringement from commitment can only be excluded, when promisee understands commitment and carries out corresponding behavior based on the commitment the promisee understands. If perpetrator does not know victim's commitment, and intentionally implements infringement for crime purpose, then the behavior of the perpetrator constitutes crime based on "Handlungsunwert" theory. The infringement carried out by an perpetrator beyond the commitment range the perpetrator understands is called excessive commitment implementation. The consequence caused by offender's behavior goes beyond the range of promisor's valid commitment, and thereby leads to unnecessary damage, the perpetrator should take criminal responsibility (Xiao, 2007).

The behavior of promisee to carry out commitment is not supposed to include other illegal purposes; otherwise criminality of the behavior can not be excluded. For instance, a promisee clearly knows a promisor wants to conduct insurance premium fraud, but still accepts the commitment to damage promisor's insured car, then the promisee should be punished with the promisor as the accomplice of offense of insurance fraud.

3. THE TYPE OF COMMITMENT

The commitment in criminal law in continental law system countries is generally classified into two categories, the commitment of constitution requirements elimination and the commitment of illegality elimination. While in China victim's commitment is regarded as exclusion of criminal cause (exclusion of social harm). Since the crime constitution theory in China is different from the one in continental law system countries, and China has no single illegality judge, the non-criminality of the behavior carried out based on the commitment of exclusion of criminal cause is ultimately interpreted through failing to conform to criminal constitution requirements. In continental law system countries, the commitment of

constitution requirements elimination is judged in constitution requirements conformity phase, and the commitment of illegality elimination is judged in illegality phase. The phase-difference in China does not exist, and the non-criminality of the behavior carried out will all be interpreted through the judgement on constitution requirements conformity, no matter what type of the commitment the behavior is based on. The above two types of commitment in China thereby have no value to distinguish, and it will be appropriate to uniformly regard them as the commitment of exclusion of criminal cause. In view of the complexity of commitment stipulations in criminal law as well as the different impacts from commitment in both conviction and sentencing, it needs to study commitment in three types as follows.

3.1 The commitment of exclusion of Criminal cause

The commitment of exclusion of criminal cause indicates the infringement carried out by perpetrator based on victim's commitment does not constitute crime. This type of crime stipulates litigant's will violation as the condition to constitute crime through an either explicit or implicit pattern. It will not violate litigant's will by the time offender obtains victim's commitment, and the criminality can thereby be excluded. No matter property crime such as larceny, property damaging, and robbery, etc, or personal rights crime such as intentional injury, rape, and illegal detention, etc, they are all the crimes of violating litigant's will. When victim promises perpetrator to take away his/her property, injure his/her body, take him/her into custody, or consent to have sex, perpetrator's behavior then does not constitute crime. Since China has no single illegality judgement, the non-criminality of the acts based on commitment is all excluded through failing to conform to crime constitution. The commitment of exclusion of criminal cause in China thereby can not be regarded as supra law crime elimination cause; for commitment, the non-criminality of the acts is excluded based on law-defined crime constitution.

In the criminal law of continental law system for the crimes of personal legal interest infringement, regardless of proper crime or personal rights crime, most of them take without obtaining victim's commitment as premise, it thereby does not need to particularly stipulate constitution requirements. Commitment-based acts implemented therefore are supposed to belong to the ones that do not conform to constitution requirements, and commitment should be the elimination cause of constitution requirements, too. For personal rights crimes, those carried out based on commitment are generally believed to have constitution requirements conformity, and what commitment eliminates is illegality. For this point some scholar questions why in criminal law the infringements, based on the commitment of victim, on freedom, reputation, credit, or secret legal interests can not be regarded as the elimination of constitution requirements but can only be regarded as the elimination of illegality? This is the legal interests such as freedom have fairly closed relation with the main body of legal interests, any infringement on them can not be considered having nothing to do with the main body of legal interests. This is different from the situation that the infringement on property legal interests has nothing to do with the main body of legal interests. Therefore, comparing with less important infringement commitments on body, reputation, credit, or secret legal interests, it can not totally deny the invasive of behavior on freedom legal interests. Since there is commitment made by the main body of legal interests before infringement to mitigate the illegality of infringement, the commitment can be regarded as the elimination of illegality but not the elimination of constitution requirements (Cai, 1994, 66) The above opinion judges whether the commitment eliminates constitution requirements from whether an behavior has invasive, which is distinguished from property legal interests or personal legal interests. Or commitment can not exclude the invasive of behavior on personal legal interests, therefore it can not eliminate constitution requirements conformity, only illegality; however commitment can eliminate the invasive of behavior on property legal interests, it thereby can eliminate constitution requirements.

Constructive commitment as the crime elimination cause refers the behavior carried out to infringe victim's another interest in order to protect victim's certain interest. Although the behavior didn't obtain victim's real commitment, the behavior can be regarded as constructive commitment that can eliminate the illegality of the behavior. Constructive commitment plays same role like real commitment. The reason constructive commitment lacks promisor's commitment indication is that there was no promisor there then, or promisor is unable to make commitment due to some reasons such as unclear mental state, etc. The behavior carried out based on constructive commitment must be beneficial to promisor, and the behavior carried out at this moment is normally for preserving the major interest of constructive commitment

promisor then to infringe promisor's minor interest, it thereby can be identified as necessity. The establishment of constructive commitment must be based on urgency, necessity, and effectiveness to avoid being abused. Urgency means that the reason can not obtain the commitment of victim in advance lies in the urgent situation then. Necessity means that there is existing necessity to take behavior immediately. Effectiveness indicates the behavior effectively protects victim's major interest. Both urgency and necessity must be judged by the specific circumstance then. When considering necessity, it can not only be in view of victim's personal aspect, and it as well must be in view of social ethics and justice, to make correct judgement. In view of effectiveness judgement, it can not only consider from consequence aspect. By the time to implement an behavior, as long as the behavior can be considered effective based on the knowledge and experience of ordinary people, the behavior then can be implemented. Even if the behavior is proved totally ineffective by facts after implementation; it can still be claimed as constructive commitment (Cai, 1994, 67-68).

3.2 The commitment of mitigating criminal responsibility cause

It is not true that the main body of right is allowed to make commitment on disposing all legal interests belong to it. Based on the above discussion regarding commitment key elements, it can tell that the commitment on depriving the right to life can not exclude the criminality of intentional homicide, and it is still punished as intentional homicide, only getting lighter punishment in sentencing. Although the victim's commitment in this case can not exclude the criminality of the behavior, it can still be taken into consideration when identifying perpetrator's criminal responsibility, and the commitment can be regarded as one of the causes to mitigate perpetrator's criminal responsibility, the commitment is therefore called the commitment of mitigating criminal responsibility cause.

There is no specific stipulations in law on what personal legal interest commitments can only mitigate criminal responsibility but not eliminate crime, it can only be comprehensively considered by judges based on social viewpoints from their legal practice combined with specific situations. Although there are some disputes regarding the issue that if the commitment on right to life, such as implementing euthanasia based on patient's commitment, can exclude criminality, it is generally believed that the commitment on right to life can only serve the cause of mitigating criminal responsibility but not the cause of eliminating crime. There are disputes on issue that if the commitment to severely hurt victim's health can exclude the criminality of the behavior. The author believes that this issue needs to be considered with the severity, method, motivation, and purpose of injury. If it believes commitment-based behavior can be tolerated by society, the commitment can then eliminate criminality; otherwise it can't.

The commitment of mitigating criminal responsibility cause can also appear at the commitment on complex legal interest. Some acts can at the same time infringe two legal interests or complex legal interests, one of which can be waived by victim's commitment, but the victim has no right to make commitment on waiving another. When two legal interests are concurrent, the implemented infringement based on victim's commitment infringes two objects at the same time, and the perpetrator can only obtain mitigated punishment. Since in complex legal interests, victim can effectively make partial commitment, then the corresponding behavior based on victim's commitment might obtain mitigated or waived criminal responsibility in this part according to associated circumstances. For example, the logging operation based on forest owner's commitment still constitutes crime if it is not approved by the forestry authority and didn't obtain logging permit from it. Although the commitment eliminates illegal logging crime, it can not eliminate the crime of deforestation. However it can tell from the legal sentencing of the two crimes that illegal logging crime is more severe than crime of deforestation, the reason is that the former infringes both state forest source protection regulation and owner's forest ownership at the same time; yet the latter just infringes state forest source protection regulation due to owner's commitment. At this point what forest reflects is complex legal interests. Forest's commitment is only valid on forest ownership but invalid on state forest source protection regulation. The perpetrator's logging behavior based on forest owner's commitment still constitutes crime of deforestation, but is less severe than the criminal responsibility of illegal logging crime without commitment.

In addition, although excessive commitment implementation needs to take criminal responsibility, if the part beyond commitment range can not be individually separated, then the implementation will be convicted with overall infringement. However with the consideration of the behavior within the

commitment range was carried out with the commitment when sentencing, it is thereby supposed to sentence less severe punishment. However, if excessive commitment implementation takes substantial change countering to victim's commitment, for example when victim makes minor injury commitment on himself/herself, perpetrator however kills the victim, then in this case the victim's commitment can not be regarded as cause of tolerant punishment (Ling, 2010, 140).

3.3 The invalid commitment clearly defined by law

Commitment needs to meet certain conditions, otherwise it might not product commitment effect, or invalid commitment. Commitment conditions however are not all fairly clear, and some conditions need to be judged specifically. For example, the commitment ability of promisor is then a condition needs to be specifically judged. Not every single audit owns commitment ability yet it is unnecessarily true that every single minor owns no commitment ability. Of course under clear legal stipulations, there is no need to conduct commitment ability judgement and commitments can then be uniformly identified valid or invalid.

The invalid commitments clearly defined in law indicate that perpetrator's behavior will constitute crime whether or not victim has made commitment. The crimes constituted with or without commitment can be classified into two categories; one is the same crime constituted with or without commitment and another is different crimes constituted with or without commitment.

3.3.1 Same crime constituted with invalid commitment

In this case, the reason victim's commitment is invalid rests with the special protection on minor girls. Since it believes minor girls are unable to correctly recognize the nature and consequence of their own behaviors, and law therefore presumes minor girls do not own the ability to decide their sexual behaviors and the "commitments" they made are thereby invalid.

Although invalid commitments do not affect conviction; it can affect sentencing. Although commitment-based carnal abuse and statutory rape by violence or threat are all convicted as rape, there is difference in sentencing. And the former will get lighter sentencing than latter. Invalid can thereby affect sentencing as a lighter sentencing circumstance.

3.3.2 Different crimes constituted with invalid commitment

Law clearly defines some behaviors conducted by perpetrator belong to criminal behaviors whether victim consents these behaviors or not; victim's consent however makes perpetrator's behaviors constitute other crime. Crime of whoring with a girl under the age of 14, for instance, if the victim does not consent prostitution, then perpetrator's whoring behavior does not constitute crime of whoring with a girl under the age of 14 anymore, and it constitutes rape instead. Since if there had no the regulation, based on the regulation of "*The Reply on the Question That If the Consensual Sexual with a Girl When the Perpetrator Didn't Know the Girl Is under the Age of 14 Constitutes the Crime of Rape*" by Supreme People's Court: The behavior that perpetrator had sex with a girl with the clear knowledge that the girl is under the age of 14, with or without girl's consent, will be convicted and punished as the crime of rape based on the regulation of Clause 2 of Article 236 in "*Criminal Law*." Since there is greater difference in statutory sentence for different crimes, and there will be different punishments for different crimes, invalid commitment will naturally affect sentence through affecting conviction.

During the war for instance, military man lets other to injure his body to avoid the war, if perpetrator knows or perpetrator is supposed to know promisor's purpose, the perpetrator-committed infringement should be punished as the accomplice of crime of self-injury in wartime. Of course, if perpetrator does not know the other side wants to avoid the war, perpetrator's behavior does not constitute crime. Therefore, promisor's purpose or motivation is not important for identifying commitment, as long as promisee does not have corresponding illegal purpose or motivation, it still does not affect the effectiveness of commitment.

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