

Discussion on the Problem of Misunderstanding in Indirect Criminal

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Received 22 December 2016; accepted 15 February 2017

Published online 26 March 2017

Abstract

The problem of misunderstanding in Indirect Criminal causes a big controversy in the identification of the indirect offenders. Plenty of researches have been done around this issue by scholars, and many different views have been brought up. Among them, the focus of controversy is mainly about two particular situations: the user having a wrong knowledge about the nature of the tool being used, and the person used becoming an insider halfway through the crime. Through the analysis of existing representative principles and perspectives, the authors believe the user should be considered as constituting Indirect Criminal if the user's practice is equivalent to an instigator, with the mean of an indirect offender, due to misunderstanding; similarly, the user should also be punished as an indirect offender if the user's practice is equivalent to an indirect offender, with the mean of an instigator, due to misunderstanding; on the other hand, punish the user as an indirect offender under the circumstance when the innocent person used becomes an insider seems reasonable. By discussing the problem of misunderstanding in Indirect Criminal, we hope we can benefit from it for further research on problems relevant to Indirect Criminal.

Key words: Indirect crimina; Misunderstanding; Crime

Xiao, Z. F. & Luo, Q. (2017). Discussion on the Problem of Misunderstanding in Indirect Criminal. *Cross-Cultural Communication*, 13(3), 38-41. Available from: <http://www.cscanada.net/index.php/ccc/article/view/9554>
DOI: <http://dx.doi.org/10.3968/9554>

Error in the criminal law refers to the improper understanding of a person's subjective opinion on the legal meaning or one's actions or the fact that it is harmful to society (Ma, 2003). As with other kinds of errors, Indirect Criminal errors also include subject, method and other kinds of errors. For these problems, they can be solved using the general theory of errors, and generally there is no dispute. The focus of controversy among scholars is mainly about two situations: the user having a wrong knowledge about the nature of the tool being used, and the innocent person used becoming an insider during the crime. The authors will discuss them below in this article.

1. THE USER HAS A WRONG KNOWLEDGE ABOUT THE NATURE OF THE TOOL BEING USED

The user's wrong knowledge of the nature of the tool being used means that, due to a misunderstanding, the user has committed an act equivalently to an instigator as an indirect offender or committed an act equivalently to an indirect offender as an instigator. Under such situation, there are different principals on how to deal with it: a. subjective principle, which believes whether the user is responsible as an instigator or indirect offender should be determined based on the mean of the perpetrator; b. objective principle, which argues that it should be based on objective facts. We should use the actual facts of the infringement as the basis to determine whether the behavior of the perpetrator is in line with the fact of the crime. Hence, in the error of the indirect offender, the kind of user's crime should be determined based on the objective meaning of the user's behavior. c. A compromise, which claims that both the subjective and objective aspects of the user's behavior should be taken into account. They believe the user, based on the mean of

an indirect offender and making the situation suitable for the instigator, should be considered as an instigator (Chen & Hong, 1982). Since the user's misunderstanding of the nature of the tool being used can be divided into two cases: acting as an instigator with the mean of an indirect offender and acting as an indirect offender as an instigator. Therefore, the authors will discuss them separately.

A. Due to the misunderstanding, the user acts as an instigator with the mean of an indirect offender. In this case, scholars have different opinions on whether the user constitutes Indirect Criminal or instigation. According to the subject principle, because the perpetrator has the mean of an indirect offender, and thus the user constitutes Indirect Criminal. According to the object principle, the error of an indirect offender should be determined based on the objective mean of the user's behavior; since the user acts as an instigator with the mean of an indirect offender, the user should be considered as an instigator. However in the view of the comprise, whether the user acts as an instigator with the mean of an indirect offender or the user acts as an indirect offender with the mean of an instigator, the perpetrator should be considered as an instigator because: first of all, between the Indirect Criminal and instigation, the Indirect Criminal is worse than instigation. According to Article 38 (2) of the Japanese Penal Code, Indirect Criminal cannot be treated as instigation; secondly, it can be said that Indirect Criminal includes the meaning of instigation (Ma, 1999). It is thus obvious that when the user acts as an instigator with the mean of an indirect offender, different conclusions on whether the user constitutes Indirect Criminal or instigation can be drawn according to different theories. And because of this, scholars have different views on this issue, as well. Several German scholars believe that in the case of full responsibility of the direct practitioner, the manipulator behind the scene mistakenly believes that the direct practitioner is lack of intention or responsibility, and he believes he manipulate the behavior, but in fact he only plays the role of instigation. In this case, the manipulator can only be considered as constituting a complete instigation because his conduct contains intention of instigating (Jescheck & Weigend, 2001). However, Professor Xingliang Chen, one of our criminal law scholars, believes that the perpetrator, who acts as an instigator with the mean of an indirect offender, should be considered as constituting Indirect Criminal. And it is desirable subjectively to punish the perpetrator as an indirect offender. Nevertheless, in specific arguments, the principle of unity of subjective and objective should be held consistently (Chen, 2002).

The author believe that, if the user acts as an instigator with the mean of an indirect offender because of an misunderstanding, the user should be considered as constituting Indirect Criminal because: first of all, when the user acts as an instigator with the mean of an indirect offender, the user has both a deliberate intention of the

crime and a deliberate use of another person; that is, the user understands the behavior of using someone else would harm the society and hopes and actively pursues the occurrence of this harm, which is also the result of Indirect Criminal offence. Although in fact, the user may acts as an instigator, the user does not know subjectively that the person used actually has committed the intention of a crime; so there is no common criminal intention between the user and the person used. Thus, the common criminal intention between these two does not exist, and the deliberate intention of the user is merely a deliberate intention of a separate offence, which is completely different from the common criminal intention an instigator would have subjectively. Secondly, when the user acts as an instigator with the mean of an indirect offender, the user has objectively applied the use of action. Although it actually has an effect of instigation, the nature of the act is unaffected. In fact, because of the separate criminal intention of the user and the user's acts of instigation, which causes the criminal behavior of the person used, the behavior of the person used should be regarded as behavior acted by the user using the course extension of the user's limb, which is consistent with the nature of Indirect Criminal. In conclusion, when the user acts as an instigator with the mean of an indirect offender due to an misunderstand, the user should be considered as constituting Indirect Criminal, and the person used shall bear the criminal responsibility independently of his or her criminal behavior according to the criminal law.

B. The user acts as an indirect offender with the mean of an instigator due to a misunderstanding. Under such circumstance, scholars hold different opinions on whether the user is an indirect offender or an instigator. According to the subject principle, because the perpetrator has the mean of an instigator, and thus the user constitutes instigation. According to the object principle, because the perpetrator acts as an indirect offender objectively, it should be considered as Indirect Criminal. According to the compromise, the perpetrator should be considered as constituting instigation. It is thus obvious that when the user acts as an indirect offender with the mean of an instigator, different conclusions on whether the user constitutes Indirect Criminal or instigation can be drawn according to different theories. And because of this, scholars have different views on this issue, as well. German scholars believe that the person behind the scene mistakenly believes that the perpetrator, who is directed to intentional act, is able to hold responsibility, but in fact it is not the case (For example, person A persuades person G, whose appearance does not show mental illness, to murder person X). It is necessary to consider it as instigation here because person A acts as the initiator of the act with only the intention of instigation and does not realize it will make him objectively become the owner of the behavior in this situation (Wessels, 2008). On the other hand, some scholars believe the instigator and the

indirect offender both use other people to accomplish their own criminal purposes; while the perpetrator mistakenly takes incapacitated person as a responsible person to abet, this instigation behavior objectively still has the property of using other people to commit a crime, and objectively the user has the criminal purpose of using others, as well, which can be identified as Indirect Criminal (Liu, 1999). Other scholars believe that the perpetrator abets other party thinking the other party has achieved the age of criminal responsibility, but in fact, the other party has not reached the age of criminal responsibility, in such situation, only when both subjective and objective are consistent with one another, can the perpetrator be identified as an instigator (Zhang, 2003).

The authors believe when the user acts as an indirect offender with the mean of an instigator due to a misunderstanding, the user should be punished as an indirect offender because: first of all, according to the Criminal Law in China, A joint crime refers to an intentional crime committed by two or more persons jointly. Constituting a joint crime requires the number of perpetrators must be two or more, while all perpetrators must reach the age of criminal responsibility and are responsible persons. If a person with criminal responsibility has implemented harmful behaviors together with a person without criminal responsibility, then it cannot be constituted as a joint crime. Therefore, in order to constitute instigation, the person instigated must be criminal responsible. Under the situation where the user has mistakenly taken incapacitated person as a capacitated person and abetted that person, since the person instigated in fact is incapacitated, if we see the user as an instigator, then it will exist the irrational phenomenon of instigation without perpetrator (although Article 29(2) of the Criminal Code in China provides that if the abetted person has not committed the corresponding crime, then the punishment on the instigator can be lenient or reduced; that is, it may constitute an independent instigation, which is questioned by the scholars. Moreover, the circumstance in which the abetted person has not committed the crime does not include the case where the abetted person is incapacitated and has not committed a crime). This is not consistent with the nature of a joint crime. Secondly, in order to constitute a joint crime, co-perpetrators must have a common crime intention, that is, through means of contacts, co-perpetrators recognize that the results of their common criminal behavior will harm the society, decide to participate in the joint crime, and hope and let it happen. In the case where the user mistaken the incapacitated person or person lacks of deliberation as a person with full responsibility and abet that person, because the person used is incapacitated or lacks of deliberation, the intention of a joint crime cannot be formed between the user and the person used. Hence, it is unreasonable to identify the user as an instigator from this perspective. Thirdly, when the user acts as an indirect offender with the mean of an

instigator, although the intention of the user subjectively is as an instigator, an instigator still achieves their own criminal purposes by using the other party; moreover, an indirect offender also uses the behaviors of the other party. In another word, Indirect Criminal and instigation both have a certain degree of using other parties, but Indirect Criminal has a broader scope than instigation. Instigators can only abet the person used for criminal behaviors, whereas the behaviors of the person used by indirect offenders can be criminal, legal or cannot be judged by the criminal law. In the case where the user mistaken the incapacitated person or person lacks of deliberation as a person with full responsibility and abet that person, because the person used is incapacitated or lacks of deliberation, and based on above analysis, the user cannot constitute instigation, and it will be more reasonable to consider it as an Indirect Criminal.

2. THE INNOCENT PERSON USED BECOMING AN INSIDER DURING THE CRIME

In the case where the user used innocent person to commit the crime, and the person used becomes an insider during the action but still continues the crime, there are different views on how to deal with this problem. One of the point of views thinks that the behavior of the user to use the person used to commit a crime is an real act of the user, and the fact that the person used becomes an insider is only a slight mistake of the causal relationship; thus, accomplished Indirect Criminal is still convicted (Chen, 2006). Another point of view believes that attempted Indirect Criminal should be constituted because when the person used becomes an insider midway and continues to commit the crime according to one's own will, which is usually unpredictable and lacks of causal relationship, it should be considered as attempted Indirect Criminal (Chiyo, 1997). Some other view argues since the essence of the mean of Indirect Criminal contains intention of instigation, through study on both subjective aspects and objective aspects of the conduct, the user should be considered as an instigator (Otasuka, 1977).

The authors believe that in case, it is more reasonable to punish the user as an Indirect Criminal because: first of all, the user has a subjective intention to use the innocent person used, and since the person used is innocent, the user's intention is an independent criminal deliberation; that is, there is no joint crime between the user and the person used. After the person used has become an insider and still choose to continue committing the crime until it is accomplished. It is apparent that the person used has a criminal intention by now, but the user is unaware of it. Therefore, there is still no joint crime formed between the two. Those who think the user has constituted instigation under such situation hold no scientific basis. Secondly,

the user carries out the behavior of using, although the person used has become an insider midway through the crime, which is still carried out by the person used, the behavior of the person used is still in accordance with the user's expected plan; this is consistent with the composition of Indirect Criminal. Of course, in this case, the person used should bear the independent criminal responsibility of one's criminal acts in accordance with the criminal law.

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