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Reflections on "Not Rescuing People in Danger" From the Perspective of Criminal Law Legislation

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Abstract

It basically falls into the category of criminal law legislation to discuss whether it is feasible to make it a crime not to rescue people in danger in the criminal law. In terms of the complexity of its concept and connotation, this issue should be differentiated in legislation. Since the definition of this crime is out of line with the social moral basis popular in China, it is difficult to find support for it from the standard for social damage in the theories on the criminal law and criminal omission, hence leading to imperfect penalty effects and a series of difficulties in judicial operation. As a result, in the current social conditions, the general subject's inaction cannot be criminalized at the moment.

Key words: Criminal law legislation; Not rescuing people in danger; Omission

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INTRODUCTION

It was in March 2001 that over 100 NPC members proposed that doing nothing to rescue people in danger should be included in the criminal law due to such inaction on people from ruin or in danger tends to cause vicious social influences, hence triggering wide attention from different fields. Along with the deepening of reform and opening, the advance of market economy and accelerated pace in linking up with the world, a lot of characteristics in China's social transition period are increasingly obvious, among which the omission for people in danger reported in newspapers frequently exists. A majority of people who learn about such news will be outraged and then deny such behavior morally. However, moral issues fall into the category of non-compulsory inner restriction, so sensitive or rational citizens will resort to the law. In their eyes, the coercive power brought about by the establishment of such a crime will offer expectations more or less.

Nevertheless, things do not go so smoothly. Such a proposal has aroused wide disputes on issuance. Some supporters, such as Sun Guohua, argue that such an omission's social damage is increasing, making it difficult to stop such phenomenon's expansion if it is only treated by moral condemnation. Obviously, such an opinion focuses on social damage. Objectors list many reasons for the infeasibility of adding such omission to the criminal law from many perspectives, including morality, politics, legislation and judicial practice. In reality, it seems that such objective opinion takes dominance in this debate. (Xie, 2009; Ruan, 2012; Li, 2010; Fan, 2014) Ever since Little Yueyue's Case in 2011, the disputes on whether to include not rescuing people in danger are getting increasingly fierce. This article intends to analyze this issue from the legislation of criminal law.

1. THE CRIMINAL LAW LEGISLATION

It has been long discussed whether to criminalize not rescuing people in danger. Since this issue fundamentally belongs to value choice and normal design in the legislation of criminal law, legislation should serve as the mainstream clue throughout the whole analysis process.

The legislation of criminal law, one part of the important contents of the legislative activity, has undergone a process from unconsciousness to consciousness all over the world. During the course, it is a manifestation of social civilization advance for legislation to be shifted from a tool for tyranny to a regulatory means for controlling the whole society in the conscious manner. Up to now, the legislation of criminal law refers to an activity conducted by the legislative bureau in creating criminal laws and regulations in accordance with the actual demands of political and economic development. According to "no act, no criminal law", legislation is by nature a social institution for the judgment, choice and screening of act value. Any existing or unknown crime is defined based on their characteristics according to the value judgment and choice of the state, society and the ruling class. This process, completed by the legislator, will unavoidably involve some subjective factors, therefore, the unification of objective reality and subjective evaluation is the basis for the survival and development of the criminal law legislation. Thus, legislation must conform to the principle of being practical and realistic as well as the subjective conforming to the objective. In its legislation of criminal law, every nation is expected to start from its reality. After all, law is only an external manifestation for production relations, therefore, any legislation away from reality is bound to fail. On the whole, the combination of theory and practice must be clung to when discussing the feasibility of criminalizing not rescuing people in danger.

2. THE CRIME OF "NOT RESCUING PEOPLE IN DANGER"

2.1 The Special Subject of the Crime of "Not Rescuing People in Danger"

The criminalization of not rescuing people in danger has triggered lots of disputes due to the complexity of its concept and connotation. Actually, such disagreement is caused by unclear idea of such action. Based on whether the subject has any specific obligation or responsibility, the subject of such omission can be divided into the general subject and the special subject. The former refers to the subject without specific responsibility or obligation while the latter goes to the other end. Here, the specific obligation or responsibility can be called duty of action. Once endowed with this duty, any inaction forms a prerequisite for pure criminal omission due to its damage to the interests of law (Li, 2014). According to the social contract theory, the rights and obligations among naturally-formed social subjects as well as between individuals and the nation exist objectively. Since there are no accidents, anything reasonable should be protected by law. It is the law that endows some people with specific obligations to maintain the balance and harmony of rights and obligations in the whole society, so the criminal law and other laws seem necessary to be in existence. If the subject expected to conduct its duty fails to fulfill that, such balance between rights and obligations is ruined, hence spreading from individuals, local fields to the whole society and damaging the interests protected by the law. As a result, the criminal law, the last protective barrier, lists it as a crime and penalizes the subject accordingly, thus maintaining the survival and development of the whole society. The inner connection between criminal omission and the criminal law legislation and regulation serves as the key for the recognition and analysis of the criminalization of not rescuing people in danger.

Generally, if rescuing people in danger is included in obligations, it is possible to criminalize not doing that. The duty of act related to criminal omission (Zhang, 2014) generally involves four aspects all of which seem to include the obligation of rescuing people in danger (Gao, 2014; Zhang, 2011): (a) the duty of act laid down in law; (b) the duty of act required by duty or business; (c) the duty of act triggered by legal acts which refer to the acts able to cause rights or obligations in law and mainly refer to contract acts at present; (d) the duty caused by antecedent actions. Due to the previous act conducted by the doer, certain legal rights are in danger, therefore the doer has to burden the duty to take active actions in order to prevent harmful results.

In judicial practice, there are lots of inaction cases when endowed with the duty of act in which much contradiction is caused due to the complexity between inaction and the result. For instance, if a babysitter finds the baby cut his wrist which leads to unstoppable bleeding but ignores the possibility of life risk and finally leads to the baby's death due to excessive bleeding, there is no doubt that this action is a crime. Then how to secure the conviction? Criminal homicide? Dereliction of duty? Neglect of duty? In my opinion, none of them make sense. Therefore, some scholars, starting from the point of scientific conviction, propose that not rescuing the special subject in danger should be convicted as the crime of not rescuing people in danger (Ye, 2013). Although this conception sounds reasonable, another issue draws attention that in what way the scale of specific duties and obligations can be defined. In my personal opinion, the scale needs to be defined according to law, duty, business, legal actions and antecedent actions. It is not an absolute issue whether the special subject should assume the obligation of rescuing people in danger. Instead, the identity and duty of the subject should be taken into consideration for analysis, otherwise the scope of attack might be enlarged. For example, the legal duty for a policeman is to drive out the rascals and protect the people and to protect people's legal interests from being damaged. When he comes across a drowning kid, he has no obligation of rescuing due to the limited duty.

If he comes to the rescue, his brave act for a just cause should be spoken highly of; if he doesn't do that, what he receives can only be moral or disciplinary negation instead of legal or even criminal penalty. Obviously, the crime of not rescuing people in danger aimed at the special subject is reasonable in terms of scientific conviction while the specific duties and obligations it involves is of relativity in terms of the rescuing act.

2.2 Considerations on the Feasibility of the Criminal Law Legislation and the General Subject's Crime of Not Rescuing People in Danger

As is mentioned above, some scholars support criminalizing not rescuing people in danger based on scientific conviction and conduct the legislative design (Chen, 2012). Despite their point of departure, their inclusion of all general subjects into criminal penalty remains to be discussed. Expanding such a crime to the general subject, no matter whether the doer has the ability to rescue the person in danger or whether there is actual danger or not, seems unrealistic or even overcorrect. Considering there is no sufficient supporting evidence for the criminalization of not conducting brave acts to rescue people, we only cover whether to criminalize not rescuing people in danger conducted by the general subject except for that. For this issue, I give a negative answer.

2.2.1 Consideration of the Social Moral Basis

Law and morality are inseparable. Law is the minimal form of morality, in which "minimal" means that it is widely accepted by the society. Generally, the criminal law achieves its function through prohibitive regulations, such as prohibiting murdering and drug dealing by listing them as crimes. This legislation is based on the negative judgment of the majority of the public towards murdering and drug dealing, therefore corresponding criminal legislation can achieve public recognition (Zhou, 2013). Only such legislation can hold water, can have basis for moral reality, consistency and applicability and therefore can be followed in practice. In contrast, once not rescuing people in danger by the general subject is confirmed guilty, such subject is required by the criminal law to fulfill the duty of rescuing. Although people usually speak highly of people's bravery in rescuing others in danger and show their disapproval of those who don't, these are only direct, external and sensitive responses. Actually, whether some moral requirements can be internalized depends not on this but on the inner recognition and acceptance of the subject. In reality, from the angle of others, people seem to be able to understand their inaction when faced with someone in danger and this will not necessarily give them huge impacts on their moral value system since they cannot be sure they will be brave to rescue the person in danger if that happens to them. This is the reason why sometimes when faced with someone in danger there is a crowd who stands by but do not offer a hand. As a result, such a legislation criminalizing this act will not be widely accepted by the public. To be objective, the current moral state of Chinese citizens is still far from being brave to rescue people in danger as an instinctive moral response of a civilized citizen.

Many foreign countries such as Germany, France, Italy, England and US have all criminalized such inaction (Feng, 2000; Wang, 2013). So someone makes such exclamation that European and American countries which attach greater importance to the division between morality and law as well as guaranteeing individual rights and freedom even go further than Confucianism-influenced China in listing moral requirements into law (Fan, 1997). In fact, this is easy to follow. In terms of moral tradition, there are differences in characteristics covered by false appearance between China and West: China, pursuing social orientation, actually emphasizes personal virtues while West, pursuing individual orientation, emphasizes public morality. China's thousands of years of culture and history are largely built on family system, of which self-sufficiency and isolation lead to their people's moral characteristics of being narrow-minded. According to the idea of self-cultivation and personal virtue cultivation in Confucianism, public morality seems to be lacking in the history of Chinese morality development. For instance, Chinese people can risk themselves for family members, relatives and friends but show indifference to strangers in danger. In contrast, in foreign countries, personal freedom and rights are emphasized a lot along with advocacy of humanism, universal fraternity and equality, sometimes encouraged by commodity economy, citizen society and religions. Somehow, their universal emphasis on public morality is beyond doubt, leading to a huge disparity in this issue between East and West. Since rescuing people in danger is a kind of mutual assistance among social members, it should fall into the issue of public morality. Due to their solid moral basis and encouragement of social morality, it is not strange that the crime of not rescuing people in danger is included in the western countries' criminal law. However in China, due to the lack of substantial, universal and strong moral support, this act cannot be laid down in the criminal law.

2.2.2 Reflections on the Standard of Social Damage

The reason for NPC members and a small number of supporters for the criminalization of "not rescuing people in danger" lies in its social damage. In their opinion, the social damage caused by not rescuing people from ruin or in danger is serious enough to be convicted by the criminal law, which conforms to the consistent position and standard for China's legislation of criminal law. No matter it is a crime already defined or not yet, its social damage exists objectively, forming the unification of objective facts and subjective evaluation. As a result, such inaction can be evaluated from the perspective of social damage no matter whether it is criminalized. But

the problem lies in that social damage is not a reasonable standard for the judgment that whether an action should be listed in the criminal law. Currently, the theory of social damage is increasingly challenged in both theory and practice due to it is unavoidable defects: (a) ambiguity. It is hard to define a clear and quantitative standard when judging an act's social damage since it is a vague and general concept. This ambiguity stems from the uncertainty of wickedness in quality and quantity defined by the carrier on which evaluation relies such as the mainstream value system of the whole society and morality. Even from the perspective of tolerance by the society, whether such social damage has destroyed the basic requirements for the survival of social relations or the corresponding adjustment ability of general social regulations, its randomness and uncertainty is hard for us to follow. (b) It violates the principle of legality, serving as a theoretical tool for enlarging the scope of criminal attacks, exceeding current laws and regulations and carrying out short-term criminal policies. As is mentioned above, since we cannot set definite and clear standards for the judgment of social damage and social damage is generally set on the position of invisible regulations which mean that once an act is thought by the force of state to have risk or damage and needs to be attacked, such a supreme norm of social damage can be employed even if the current law has no clear item about it as a crime. Such a measure goes beyond current law to achieve its purpose of conducting short-term criminal purposes by neglecting the principle of legality. Some abnormal phenomena during the crackdown are a vivid portrayal of its negative impact. (c) It tends to cause penalty beyond penal law and unjust judicial practice. Due to the lack of definite standards for social damage, the judge has huge discretionary power, which acts as the source for penalty beyond penal law and unjust judicial practice. To sum up, some issues, such as whether there is inaction on people in danger, how serious the social damage is, whether it is serious enough to be criminalized in the criminal law, seem subtle due to the unreasonableness of the standard for social damage.

2.2.3 Considerations on the Composition of Criminal Omission

There are three elements of criminal omission: duty of act, failing to fulfill the duty despite ability to do that, cause-and-effect relations between the failure to fulfill the duty and the harmful result. Considering the latter two are not the key of the argument, we only focus on the first element here.

It is easy to induce from the classification of the duty of act that these duties have been listed previously in some laws, regulations, institutions or matters prior to the adjustment of the criminal law. For example, Article 261 in China's current criminal law mentions maintenance obligation which was previously laid down in the Marriage and Family Law and the duty of act mentioned in Article 168, 135, 376 and 411 have been in existence in Corporate Law, Labor Safety Laws and Regulations, Military Law and Customs Law; the duty of act triggered by contracted or antecedent acts are also related to existing legal relations. The antecedence of the duty of act not only manifests the nature of the criminal law as the law for final protection but eliminates the criminalization of not rescuing people in danger conducted by the general subject, that is, the possibility and feasibility of forming and forcefully promoting the duty through the criminal law. Otherwise, such duty, criminal law and penalty can be measures beyond penal law.

2.2.4 Analysis on the Basis Theory of Criminal Penalty

Criminal penalty is a severe punishment. It depends on the definition of the scope of criminal punishment whether to define an act or relevant social phenomenon as a crime and whether to regulate it with criminal punishment. If the general subject's failure to rescue people in danger is to be included in this scope, it has to be based on the criminal penalty theory but actually it isn't. The power of punishment is based on the organic combination of social self-discipline and external discipline. Criminal punishment is restricted by social justice and utilitarianism in which social justice represents certain standard for social evaluation only with which the power of punishment can be a solid basis and in conformity to the psychological state of the society. Only when people accept a regulation as fair and are ready to be restricted can it exert the real effects. If it can only be maintained by habit or suppression, any tranquility and harmony are a false illusion; with disorder and dissatisfaction growing in a subtle way, the seemingly controlled desire can explode at any moment (Durkheim, 1996).

The criminalization of not rescuing people in danger by the general subject is not only unfair but departs from its original aim. Utilitarianism, acting as another prerequisite for criminal penalty, requires that the application of criminal punishment must serve the purpose of preventing crimes. However, once such inaction is criminalized, the number of criminals will be large enough to manifest it as a punishment on individuals by the state or the society due to its non-automation and non-orientation. This measure serves the demand for social survival and development so the conduct of the power of punishment is of self-disciplinary nature. Meanwhile, penalty depends on crimes and crimes are restricted by many objective factors instead of being an outcome of subjective imagination, so the power of punishment is of external discipline as well. The organic combination of the two is the real basis for such power. Great pains caused by increasing penalty, together with dissatisfaction of the public, will be likely to cause ineffective punishment arrangement and hence lead to less effective. Besides, unscientific legislation may cause concrete undue infringement on citizens' free

rights, hence leading to negative value of punishment. Currently in China, with lots of virtues being lost, such a crime can at most dispel those bystanders. As a result, a vicious cycle may be produced with no preventive function of penalty and ruined dignity of law. With just criminal penalty being a necessity, it lacks reasonable and sufficient evidence to exert criminal punishment on the general subject's not rescuing people in danger.

2.2.5 Reality

Another significant reason for the infeasibility of such a crime for the general subject lies in some practical problems: (a) how to offer proof. For the case of not rescuing people in danger, witness statement is the most persuasive evidence. In a dangerous situation, if someone stands out to offer a hand, the rescuer is endowed with the right to testify against those bystanders or escaping drivers; but if no one comes to the rescue, it is extremely difficult to offer proof. (b) how to confirm criminal responsibility. Usually due to the lack of action and distinguishable external acts in criminal omission it is difficult to confirm the body of responsibility. For example, in the case of a pregnant woman's death due to nobody's rescue, it is easy with only one or a few persons on the spot while it is hard to confirm the body of responsibility when there is a big crowd standing by (this situation is not unusual and happens from time to time.) Should all bystanders or only some of them to be investigated in terms of criminal responsibility? If we agree on the latter choice, what is the applicable standard to distinguish these people? Is there practical likelihood for it to be against the principle of legality and everyone's equal treatment by the criminal law? These questions are unavoidable and hard to answer and deal with. (c) The criminalization of not rescuing people in danger by the general subject will not only blur the boundary between law and morality but reverse the order of rights and obligations required by legal ideology and spoil the inherent balance and harmony of the criminal law system. As a result, maybe more people will fear to frighten, hence leading to the disappearance of their remained consciousness and sense of justice. For the likelihood of the shift of such a negative situation through the criminalization of not rescuing people in danger, we might as well be cautious.

CONCLUSION

Law has limited power, so does the criminal law. Since legality is not almighty, any real legal state keeps it in mind to enhance its moral enlightenment on the public. Despite the close relations between law and morality, we should still be cautious on such a major issue, which is required by the most restraint nature of criminal law. Required by scientific conviction, it is reasonable to add the crime of not rescuing people in danger for the special subject. However, it is not a reasonable treatment for the general subject, at least at present and for a long time in future. Strict law will not necessarily arouse people's moral conscience but might lead to intentional or unintentional legal evasion. With rescuing people in danger regarded as an excellent virtue, it is a tragedy to have to turn to the criminal law for the adjustment. No rescuing people in danger, as a social problem, can be treated by social means.

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