

Exploration of the Legal Benefits of the Offence of Throwing Objects from the Perspective of Spiritualisation of Legal Benefits

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Keywords: The offence of throwing objects from a height; spiritualisation of legal interests; risk society; public administration order

Abstract: The provision of the Criminal Law Amendment (XI) which makes throwing objects from a height an independent offence has value theory justification and has been praised as a "vivid lesson on the rule of law", but the direction of the legal benefit of this offence is vague and there are many disputes in the doctrine. Based on this, this paper examines the changes in the theory of legal interests in the risk society, and acknowledges that in order to effectively deal with the post-industrial risk criminal law system from punishment to prevention, it is necessary to recognise the spiritualisation of legal interests and to seek the corresponding limitations. By integrating the current development of spiritualised legal interests in China and the pros and cons of various doctrines, it is determined that the protection of legal interests of the crime of throwing objects from a height is the order of public administration rather than public safety or people's sense of security, and that a clue-based explanation of "significant circumstances" should be provided and the binary punishment mechanism should be perfected, so as to put forward counter-measures and suggestions in terms of legal countermeasures.

1. Disputes over the attribution of legal interests in the offence of throwing objects from a height

The prioritisation of criminal law penalties and misdemeanour legislation has been a notable legislative phenomenon since the Criminal Law Amendment (VIII) Act, and the provision in the Criminal Law Amendment (XI) Act that throwing objects from a height is independently criminalized^[1] is yet another example of the State's active participation in the management of society and the protection of people's "safety above their heads". The first instance draft of the Criminal Law Amendment (XI) stipulates in the offence the endangering of public security, which is later revised to endangering public security, and the final legislation defines the offence as serious, and transfers the position of the offence system from endangering public security to under the offence of obstructing the order of social administration, indicating that the legislature's understanding of the protection of legal interests for this offence is constantly abstracted and spiritualised. With regard to the protection of the legal interests of the offence of throwing objects from a height, there are mainly different controversies in theories, such as the theory of people's sense of security, the theory of public security, and the theory of public administrative order.

Jiang Tao and other scholars hold the public security view of the legal interest of the crime of throwing objects from a height, and by analysing the relationship between the legal interest and the constituent elements, they believe that the protection of the legal interest of the individual crime has a corrective function for the constituent elements of the individual crime, and should not be determined by the constituent elements of the individual crime, and that the legal interest and the constituent elements belong to the inner system and the outer system of the criminal law. Random acts of throwing objects from a height can endanger the personal safety and property safety of the public, so that the protection of the legal interests of this offence is not the social management order but public safety ^[2]. Jiang Tao believes that it is a legislative error to stipulate the offence of throwing objects from height in the offence of obstructing social management, which needs to be corrected from the point of view of criminal law doctrine, and the main path is to explain the public security through the two parts of the substantive legal interests and formal legal interests. This viewpoint also criticises the public administration order jurisprudence. First of all, from the perspective of the linkage between execution and punishment, there is no administrative criminal law in the context of China's dual sanction system, as a typical administrative offence, the offence of obstructing the management order needs to be preceded by the corresponding administrative punishment, but there is no administrative regulation of the act of throwing objects from a height in China. At the same time, the obstruction of social administration requires the involvement of a large number of people and the gathering of people in order to undermine the public administration order, while the lack of the involvement of people in the act of throwing objects from a height makes it difficult to determine that it is an obstruction of the social administration order.

The law is progressing because of academic controversy, and by synthesising the different doctrines on the legal interests of the offence of throwing objects from a height above, it can be concluded that the exploration of the legal interests of this offence is inseparable from the trend of spiritualisation of legal interests and the theory of risk society. As far as the protection of the legal interests of the offence of throwing objects from a height is concerned, the theoretical controversy about its protection of legal interests can be summarised in two main lines. The formal main line can be attributed to the changes in the legislation of the chapter in which the crime is located and the change of the crime, and the controversy in the academic circle is mostly focused on this; the substantive main line is the recognition of the spiritualisation of the legal interests and the understanding of the development stage of the spiritualisation of the legal interests in our country. Looking into the "public security theory", "social management order theory" and "people's sense of security", it is not difficult to find that these views of legal interests are constantly being abstracted and spiritualised. For the investigation of the protection of the interests of the offence, should be from a positivist point of view, less "I think", more "I found ^[3]." A purely doctrinal study of law, immersing itself in the modification of the offence and the change of its chapters as the object of study, while ignoring the huge connotation of criminal law as the will of the state, and disregarding the influence of the economic, social, and political environment that dominates behind the independence of the offence of throwing objects from a height, will result in the existing theoretical system failing to give an effective response to the prevalent realities.

Classical criminal law creates offences as a result of the perpetrator's infringement of a substantive legal interest; criminal law norms arise after the legal interest has been infringed, and this legal interest is readily discoverable. The spiritualised legal interest protected by the offence of throwing objects from a height is the result of the antecedentisation of criminal law protection; the legal interest is created. From the perspective of the cause of the problem, the phenomenon of spiritualisation of legal interests in a risk society should be explored. And the protective legal interests of the offence of throwing objects from a height should be interpreted, focusing on clarifying the protective legal interests of the offence and falsifying the doctrine of the legal interests of not belonging to the offence

of throwing objects from a height. So as to avoid the impact of inappropriate penalties on the criminal law theoretical system centred on the protection of legal interests.

2. The Flux and Dilemma of Legalism in a Risk Society

(1) Background to the spiritualisation of legal interests - the risk society theory

Criminal law is not a closed system, but adapts itself to the social context. According to Baker's description, this is a society marked by new types of risk and uncertainty, for which the criminal law is facing structural changes and needs to be transformed from a punitive to a preventive orientation. According to Laodongyan, "the theory of risk criminal law is the result of the intrusion of public policy into the field of traditional criminal law under the risk society and the transformation of the institutional technicality of traditional criminal law, including the forward shift of the criminalisation standard and the expansion of the mimicry and presumption. The trend of spiritualisation of legal interests is part of the risk society ^[3]." Richard Chang points out that "the scope of criminal law penalties should be expanded with the advent of the risk society, such as the addition of negligent and dangerous offences, and that the worthlessness of results is not a new basis for violation of the law, but rather the worthlessness of behaviour, and that strict liability should be adopted rather than adherence to the doctrine of liability ^[4]." Under the background of risk society, the trend of foregrounding the protection of legal interest, the expansion of dangerous crime and the establishment of spiritualised legal interest are the prominent phenomena of the world's criminal law amendment, and the connotation and extension of legal interest are becoming more and more blurred. Risk society in the fact that the attribution of behavioural attribution for China's criminal legislation for the expansion of the trend of spiritual interests in the expansion of the legitimacy of the basis, in particular, the Criminal Law Amendment (XI) in the new offence of spiritual interests in the expansion of the original adjustment of the crime has also expanded the scope of application of the spiritual interests of the law. There are two diametrically opposed considerations in the criminal law academic community regarding this phenomenon, with deniers arguing that criminal law should be appropriately decriminalised and rejecting further expansion of legislation^[5], and supporters arguing that the abstraction and spiritualisation of legal interests is the development trend of criminal law, and that the trend of expanding crimes is an objective need to meet the challenges of a risky society, and that there is no contradiction with the principle of criminal law's humility^[6], and that the traditional theory of legal interests has been subjected to serious impacts and challenges. Regardless of the outcome of the debate, it may lead to unfavourable impacts, the victory of the deniers may be the inability of the criminal law to cope with the new types of risks in the risky society, which is not conducive to the functioning of the protection of legal interests, while the victory of the supporters may lead to the emergence of radical and irrational criminal policies. The personalised, materialistic and static category of legal interests in the traditional criminal law system cannot cover new types of rights and interests, and criminal law needs to return to the core criminal law area^[7], and constantly adjusting itself according to the social reality is an inevitable and reasonable choice for the development of criminal law in a risky society, which can be seen from the evolution of the theory of legal interests.

(2) New changes in the doctrine of jus cogens

Over the past decades, the criminal law protection of social interests has invariably been judged on the basis of the principle of the protection of legal interests. As a fundamental concept of criminal law, the concept of legal interest can be traced back to the German jurist Birnbaum, and the concept of legal interest was reborn by the scholar Binding in his interpretation of the German Penal Code of 1871. Binding's theory of legal interest is summarised as the "state theory", in which norms take precedence and legal interest exists as a subsidiary concept of normative theory, i.e., legal interest

exists as an object of norms, and Binding's view of legal interest can be summed up as the essence of crime is the violation of norms. Unlike Binding, the scholar Lester holds the "interest theory" of the concept of legal interest, that legal interest is not the creation of the legislator, but the social life in the generation of the interests of the people before the law, legal interest is not the interests of the law itself, but by the law to protect the interests of people recognised, but it is not opposed to the norms of the importance of the norms themselves, in his rendition, the legal interest is divided into "the norms", "the norms", "the norms", "the norms", "the norms" and "the norms". In his interpretation, the legal interest is divided into "law" and "benefit", the latter is a kind of existence prior to the actual law, while the former is given its meaning in criminal law. Later scholars have debated the theory of legal interest in different ways, but most of them have not gone beyond the framework of "state theory" and "benefit theory", and many scholars believe that the key to the difference between these two doctrines lies in whether or not to recognise the spiritualisation of legal interest ^[8].

3. Necessary limitations on the spiritualisation of legal interests

With regard to the trend towards spiritualised legal interests, it is not necessary to include all spiritualised legal interests in the scope of criminal law guarantees, otherwise it would be a departure from the dawning principle of a State governed by the rule of law. If criminal law does not recognise spiritualised legal interests, it will result in norms that are incapable of responding to the risks of modern society, neglecting the function of protecting legal interests; if it recognises them without restraint, it will reduce criminal law to a tool for preventing risks, neglecting the function of safeguarding human rights. On the one hand, the spiritualisation of juridical interests may lead to criminal law becoming the safeguard law of the State. Spiritualisation of legal interests associates criminal law with common values, leading to the consideration of legal interests based on political and ethical perspectives. For example, German criminal law during the Nazi era stipulated that "there is fundamentally only one property that legal interests should protect: the life of the nation, and only that which is the phenomenon of the life of the nation deserves the protection of criminal law.^[8]" When criminal law becomes the safeguard law of public power, people's rights are bound to be violated from public power. On the other hand, the spiritualisation of legal interests may undermine the modesty of criminal law. Generally speaking, the starting point of criminal law punishment is to start, but in the risk society, the criminal law needs to protect the legal interests in advance, which may lead to the overly wide scope of the criminal law. At the same time, out of the criminal law limitations and "necessary evil" of the rule of law rights protection requirements, according to the principle of criminal law modesty, the criminal law should be set up in the principle of individual legal interests infringement, and the new criminal legislation in the setting of the offence of throwing objects from a height in a single step, across the individual legal interests infringement of the level of the attribute of the pre-crime. As far as the form of crime against spiritualised legal interests is concerned, since the danger of the mechanism of spiritualised legal interests is a kind of abstract judgment that cannot be examined concretely, the abstract crime of spiritualised legal interests does not have the possibility of the form of concrete dangerous crime, but can only take the form of abstract dangerous crime^[9], which will conflict with the principle that the criminal law is based on the principle of punishing the actual harmful criminals. The increasing spiritualisation of the legal interest, in the enhancement of the encompassing capacity of the legal interest itself at the same time also make the high hopes of the legal interest of the critical function of the gradual disappearance, so some scholars advocate the denial of the theory of the legal interest, and replace it with the principle of proportionality and so on in the Constitution. Hirsch explains that "the theory of legal interests alone cannot undertake the theoretical task of proper criminalisation, but should be supplemented by legal paternalism, the principle of offence, etc. ^[10]." However, the purpose of criminal law is to protect the

legal interest and the essence of crime is to violate the legal interest, as shown by the mandate of the Criminal Code in Article 2 of our Criminal Code and the definition of crime in Article 13 of the Criminal Code. Criminal law is to protect legal interests by sacrificing them (applying penalties)^[11]. The emergence of phenomena such as the spiritualisation of legal interests does not mean that the protection of legal interests loses its role, but on the contrary, it is necessary for the concept of legal interests to perform the critical function of legislation. According to Professor Roxin "The concept of legal interests is a concept of legal interests with critical legislation, through which the purpose that the concept of legal interests aims at is to inform the legislator of the reasonable boundaries of punishment^[12]". The decriminalisation of suicidal behaviour in Europe in the 1960s and of homosexual behaviour in South Korea in 2016 is based on the critical function of the legal interest. The theory of legal interest is still acknowledged by most scholars, and the rapid social changes in the risk society make it more necessary to play the legislative and regulatory function of legal interest in the criminal legislation, and to judge what kind of spiritualised legal interest should be protected by the criminal law, which should avoid the simple conversion and mechanical legislation, and to unfold the review and judgement of the protection of the spiritualised legal interest from the following perspectives.

4. Exploration of the legal benefits of the offence of throwing objects from a height

(1) Critique of the legal theory of the public's sense of security

In terms of the legislative background of the crime of throwing objects from a height, safety above the head is indeed a consideration of the legislature, but the legalisation of the sense of security will lead to excessive spiritualisation of legal interests, and should be wary of the hazards brought about by excessive abstraction and spirituality of legal interests, and determine that the sense of security does not belong to the scope of legal interest protection. The sense of security above the head is often only the degree of emotion corresponding to the people's behaviour towards urban overhead throwing, and it is opposed to the use of the people's sense of security as the value orientation of the crime of overhead throwing and the irrational criminal law response that may arise.

(2) Critique of the public security interest doctrine

It is difficult to distinguish between offences against public security and offences against social order under the Criminal Law, both of which are committed against the public, and the debate on the protection of the legal interest of the offence of throwing objects from a height is more focused on this. It should be considered that the offence of throwing objects from a height is a misdemeanour and should not be considered among the most serious crimes against public security, while public security, which is a material legal interest, does not provide complete protection of human rights.

Risky, involving a wide range of endangering public safety type of throwing objects from a height is the most social concern and criticism, covert and strong endangerment of public administration order of throwing objects from a height at the same time worthy of regulation, should not be "mistakenly familiar as true knowledge". As the people live, study public process formed in a stable state of life, public management order is as public security more spiritual, abstract level of reflection. The public management order is considered to be the protection of the legal benefits of the offence of throwing objects from a height will not "deviate from the preset bull's-eye", leading to the failure of the normative purpose of the criminalisation of the offence of throwing objects from a height. As Professor Chen Xingliang highly evaluates, "the adjustment of the chapter position of the offence of throwing objects from endangering public security to disturbing public order is actually a more scientific criminal law response to the act of throwing objects from a height ^[13]."

(3) Affirmation of the legal interests of the public administration order

If the offence of throwing objects from a height is recognised as public safety, it will not be

conducive to the effective protection of spiritualised legal interests and will not be able to effectively regulate the act of throwing objects from a height; if the offence of throwing objects from a height is considered to be the protection of legal interests in terms of the public's sense of security, it will not be conducive to the safeguarding of human rights, and will result in the undue expansion of the State's penal power. It should be considered that the protection of the legal interest of the offence of throwing objects from a height is the public management order that provides prior protection for public security.

5. Improvement of the legal benefits of the offence of throwing objects from a height

The new offence of throwing objects from a height added by the Criminal Law Amendment (XI) cannot be considered as emotional or symbolic legislation for the protection of the spiritual legal interest of "order in the management of public places". Its background is the risk prevention brought about by the risk society, in other words, it is to achieve the purpose of general prevention in order to protect the safety overhead against the background of the accumulation of the risk of victimisation by throwing objects from height due to the accumulation of the urban housing pattern, and the spillover of the traditional risk of victimisation due to the act of throwing objects from height. Benefit of law from the materialisation of abstraction, spiritual is a main line of development of the theory of benefit of law, people's sense of security that the physical sense of law and order as the criminal law benefit of law, for the principle of criminal law modesty for damage, is not conducive to the protection of human rights; Public security that the scope of coverage is too narrow, is not conducive to the fight against crime. It is determined that the legal interest of high-altitude protection lies in "public management order", which not only pays attention to the compatibility between criminal law offence systems, but also conforms to the reality of the development of the theory of legal interest in China. However, in terms of legal countermeasures, attention should be paid to the following two aspects.

(1) Improvement of the articulation of the binary penalty mechanism

Throwing objects from a height is a reasonable offence. Many scholars take a negative attitude towards the criminalisation of throwing objects from a height from the standpoint of criminal law moderationism. Extreme criminal law moderationism takes human nature's evil as a starting point, believing that everyone may commit crimes, and that legislating for the offence of throwing objects from a height may result in the lack of freedom for the majority of people. However, according to the normal human nature hypothesis, criminals are in the minority, and the independent criminalisation of throwing objects from a height implies the protection of the interests of the majority of citizens. Spiritualised protection of legal interests and sophisticated means of criminal law protection can lead to an increase in people's well-being, and blocking legislation on the basis of moderationism is bound to compromise the protection of legal interests^[14]. In any country, a code of law does not work alone, but is coordinated together, which is what Professor Chen Xingliang calls the holistic effect of the legal system^[15]. On the necessity of its criminal punishment, the legislator believes that the crime of throwing objects from a height coordinates and connects with the tort of throwing objects from a height in the Civil Code, but the tort liability is limited in punishment for some serious acts of throwing objects from a height, and thus the criminal law for the crime of throwing objects from a height is necessary^[16]. "Rather than being fundamentally a special law, criminal law is the sanctioning force for all other laws^[17]". The biggest difficulty in the civil tort of throwing objects from a height lies in identifying the aggressor, and the requirement of fair compensation for occupants by fair liability is contrary to the principle of self-responsibility, and makes many innocent occupants pay for the aggressor. The Civil Code requires public security organs to investigate throwing objects from a height, which lacks the basis for public security organs to intervene, and the public security organs are passive auxiliary investigators^[18]. The establishment of an independent offence strengthens the investigation of throwing objects from a height. The establishment of the offence of throwing objects

from a height makes the investigation of the truth a legal obligation of the public security organs, which is of great significance in enhancing the effectiveness of the regulation of throwing objects from a height. From the perspective of comparative law, the criminalisation of throwing objects from a height is not the first of its kind in China, as Hong Kong has set up an investigation team for cases of throwing objects from a height to investigate and impose criminal law sanctions ^[19]. In Singapore, there is no restriction on the height of objects to be thrown, as long as the throwing of rubbish in public places poses a potential threat to the lives and property safety of citizens, it will constitute an offence ^[20]. At the same time, the criminal law is not only a norm of adjudication, but also a norm of guidance. The eighth amendment to the Penal Code, which criminalises drunk driving, has significantly reduced the proportion of drunk drivers in society, and the verdict on the criminalisation of throwing objects from a height will also make the public, who are aware of the judicial decision, perceive the power of the norm's existence.

(2) Strictly defined "aggravating circumstances"

Article 6, paragraph 5 of the 2019 Supreme People's Court's Opinions on the Application of the Trial of Cases of Throwing and Falling Objects from a Height According to Law (hereinafter referred to as the "Opinions") has a provision on the circumstances under which a heavier penalty shall not be applied to a suspended sentence, which states that "other circumstances of seriousness of the circumstances." The provisions of the Opinions on throwing objects from a height should not be applied to the newly created offence of throwing objects from a height. Although the Opinions have not been repealed, but then the crime of throwing objects from a height is to stand in the dangerous method of endangering public security point of view of legislation, due to the modification of the crime of throwing objects from a height, the seriousness of the circumstances has been modified by the sentencing from the heavy punishment of the circumstances of the conviction of this offence. If at the same time that the seriousness of the crime is both the aggravating circumstances of the punishment, but also the conviction of the offence will be caught in the circular interpretation of the method of argument. The establishment of the offence of throwing objects from a height is itself the result of the prior protection of spiritual legal interests in a risk society, and the judicial interpretation should avoid the "other hazardous acts" similar to the bottom of the provisions, resulting in further ambiguity of the punishment when listing the acts. It is clearly inappropriate to use other aggravating circumstances in judicial interpretations to explain the aggravating circumstances in criminal law provisions.

References

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