

Философия права

Размышления о возможности познания противоправности The introspection and Reflection on the Possibility of Illegal Cognition

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Abstract. *The cognition of illegality is the foundation of responsivism. However the lack of standardization and clearness in the judgment of illegality cognition leads to judicial tension, which can be alleviated by the necessity of prevention. Under the hierarchical criminal system in the Civil Law System, the status of cognition possibility of illegality plays a positive role in the construction of justification, security measures and normative responsibility. In Chinese Four Elements, the possibility of illegal cognition is the element of intent. The cognition of illegality is the expression of condemnable will, which embodies the opposition or contempt to the whole legal order. The distinction between normative elements and factual elements is relative, and judgment shall be made from such dimensions as formal basis, substantive basis and policy basis. The standard of judgment for the two shall also be improved and refined.*

Keywords: *Cognition of illegality, Responsivism, Necessity of prevention, Normative element.*

I. Raising questions

The proposition of a risky society has played an active role in promoting the development of the regulatory function of the Criminal Law. In order to prevent the occurrence of social risks in various fields, the function of the management of the order of administrative laws and regulations has been strengthened. The normative value of administrative crime has been continuously demonstrated. Based on the need of social governance, the provisions of administrative crime have been increasing rapidly in number and types, and soon become a rival to natural crime.¹ In terms of the change in the number of criminal types, from the traditional absolute predominance of natural crime to the absolute proportion of statutory crime.¹

However the specialty and complexity of administrative laws and regulations are far beyond the cognitive ability of social subjects, who often becomes the objects of criminal law for lack of legal knowledge. According to the principle of responsivism, culpability is the Basis of Criminal Responsibility and only an awareness of illegality is required before an actor can be investigated for criminal liability. In view of the current judicial practice of our country, judicial subjects still have the traditional thinking of presuming that they know the law and do not pay full attention to the problem of legal misconceptions².

But that would be a departure from the principle of responsivism. In recent years, judicial cases related to the recognition of illegality have emerged continuously in our country, for example Tianjin Zhao Chun-

¹ Li Yunping, Chu Huaizhi. Face the Coming of the Era of Legal Offence // Procuratorial Daily. June 1, 2007.

² The possibility of illegal cognition and the avoidance of the mistake of illegal cognition discuss the problem of illegal cognition from different sides. If the actor does not have the possibility of illegal cognition, the mistake of illegal cognition is inevitable; if the actor has the possibility of illegal cognition, the mistake of illegal cognition can be avoided. In order to facilitate the development, the concept of Illegal Cognition Possibility is explained and demonstrated in the article.

hua illegal possession of a gun case³, Inner Mongolia Wang Lijun illegal corn sales case⁴ and Henan Qin illegal cutting of key state protection of plant crime⁵...

To this regard, we should give a positive response from the theory of criminal law. In other words, how to construct a mechanism for distinguishing and analyzing errors in legal cognition that is in line with the need of practice is a problem that should be paid close attention to in the theory of criminal law.

II. Analysis on the theoretical development of the Illegal Cognition Possibility

Rationalism and indeterminism in psychology lay a theoretical foundation for the development of responsibility principle in classical criminal jurisprudence, do not know the law for crime then becomes a new form of culpability. This is not only a profound reflection on the ignorance of the law, but also a positive response to the ideas of freedom and democracy in the Enlightenment period of capitalism. "Only someone who can recognize that his behavior is prohibited by law is the subject of responsibility."⁶

The theory of psychological responsibility in classical criminal jurisprudence mainly points to psychological facts, i.e. an actor has intent or negligence in implementation of a dangerous act which shows inherent mentality against the legal order and therefore is reprehensible. Professor Ono Ono Ichiroku pointed out that the essential characteristic of intentional purpose is not the understanding of the criminal facts, but the denial of the inhibitory feelings generated through the cognition of the criminal facts. That is, the act is committed with illegal consciousness.⁷

Accordingly, the theory of psychological responsibility refers to the actor's denial of or violation of legal consciousness or the subjective aspect of the actor aiming at the consequences caused by their behavior. To be sure, the theory of psychological responsibility has metaphysical method logic and rational thinking which is the basic elements of classical criminology.

However with the development of the society and the diversification of social risks, the scope of the criminal law has been expanded to meet the needs of social governance which makes the content and types of administrative prisoners constantly increase. More importantly, the philosophical basis and guid-

ing methods of criminal law development is also developing, such as social science, positivism and neo-Kantianism, which continues to influence the development of criminal law theory and form new guiding concepts for the classical crime theory system. Therefore, the traditional concept of criminal law in the natural and physical sense began to change. "On the methodology of criminal law dogmatism, Welzer opposes natural-physicalism and normativist holds that the value connotation of criminal law should not be reduced to a pure causal process or constructed on the basis of pure norm, but should be combined with reality. Therefore, people need to pay attention to the construction of existence prior to law and the resulting material-based logic"⁸

Based on the new theoretical basis and social needs, the principle of responsibility develops and enriches itself to adapt to the social reality and the risk situation.

First of all, the internal motivation for the development of the theory of responsibility. The theory of psychological responsibility is the basic framework for determining culpability, and it has laid an effective foundation for criminal governance in early capitalist society. The theory of psychological responsibility limits the elements of two psychological facts: intent and negligence, which embodies the value of naturalism. However, if the lack of normative judgment and value measurement, it can not effectively deal with the new problems in judicial practice.

First, the psychological responsibility of theory can not reasonably explain the justification. According to the psychological responsibility of theory, the perpetrator shall bear the corresponding criminal responsibility according to the responsibility of the harm caused by the intentional or negligent behavior. For justification, if the actor has subjective intention or mistakes in cognition, which has led to harmful consequences, the actor shall bear criminal liability according to the responsibility. However, the justification is often based on protecting the more important legal interests at the expense of the less important legal interests, which conforms to the constitution of individual crime in form, but does not infringe upon the legal interests in essence. Therefore, the psychological responsibility of theory is obviously not reasonable enough when dealing with the justification.

³ Judgment of the second instance on the crime of illegal possession of firearms by Zhao Chunhua // (2017) Jin 01 end of criminal proceedings No. 41.

⁴ Judgment of the Retrial of the Crime of Wang Lijun's Illegal Business Operation // (2017) Nei 08 Criminal retrial. No. 1.

⁵ *Qin Yunhuan*. Illegally felled plants under key state protection Judgment of the first instance // (2016) Yu 1224 First criminal trial. No. 208.

⁶ [Germany] *Hans Heinrich Schiesseck and Thomas Weigert*, German Textbook of Criminal Law, trans. Xu Jiusheng, China Legal System Publishing House. S. 538.

⁷ Quoted from Feng Jun, *Consciousness of Illegality*, Zhao Bingzhi, New Explorations in Criminal Law, People's Publishing House, 1993. P. 251.

⁸ *Hans Joachim Hirsch*, Zum 100. Geburtstag von Hans Welzel, ZSt W 116 (2004). S. 2.

Second, the psychological responsibility of theory can not make the effective response to the unconscious negligence⁹. Can the actor be condemned for a negligent act that occurs without awareness? According to the theory of psychological responsibility, subjective negligence is a component of culpability and the actor shall bear criminal liability, for the dangerous act. However, unconscious negligence indicates that the actor does not have a clear understanding of the social harm caused by the act, cannot form the will or motivation to oppose the legal order, and does not have the psychological basis for condemnation. "The reason why intentional behavior is severely punished is because the perpetrator still carries out the behavior even after he has overcome the opposing motive of the behavior."¹⁰

What the writer explain is the nature of responsibility doctrine of criminal intent, in fact this problem still exists at the level of criminal negligence. For example, cognitive errors could also reflect the indifference of the actor's consciousness of rules, but unconscious errors could hardly be related to the will of law. Third, the theory of psychological responsibility can not provide the existence of the elements of norms. With the increase of administrative laws and regulations, the challenge to the possibility of legal cognition is increasingly severe. Then the value of free will in the implementation of dangerous act gradually decreased and the value of other psychological factors began to show, determinism began to become the important basis of responsibility theory. In other words responsibility is not a mere psychological fact of the actor to be recognized, but a normative evaluation that lays the foundation for condemnation.¹¹

Therefore psychological fact is no longer the only factor determining behavior, and social factor becomes the important condition governing behavior. In the aspect of responsibility, the intention or negligence of psychological fact is no longer unique and the objective factor outside psychological fact becomes the normative condition for judging responsibility. From then on, the theory of normative responsibility began to replace the theory of psychological responsibility and began to include the consciousness of illegality in the level of responsibility elements.

Secondly, the external influence of the development of the responsibility's theory. Besides the internal motivation, the development of responsibility principle is also promoted by public policy which is the redistribution of legal epistemic obligation between

citizen and state. "The authoritative fiction based on the absolute obligation of all citizens to know the law has been profoundly questioned and the so-called allocative criterion or demarcation of the line has been reduced to the following question: under what circumstances is it permissible for the state to place the risk of ignorance on the part of the individual?"¹²

Ignorance of law does not exempt from responsibility since ancient Rome deviates from the principle of responsibility doctrine. Psychological responsibility theory brings legal knowledge into responsibility doctrine and presumes that the doer has the obligation of legal knowledge. From not knowing the law not being exempt from responsibility to not knowing the law not committing a crime symbolizes the establishment of the principle of responsibility, which is of great significance to the construction of modern society ruled by law. In the period of capitalist enlightenment, it was epochal to give the obligation of legal knowledge to the doer, which was related to the simple law, the single type of crime and the understanding of harmfulness as the understanding of illegality. With the complexity of the social structure, the diversification of the types of crimes and the promotion of the regulatory function of the criminal law, the difficulty of law cognition is increasing sharply. "There are cases in which no expertise contributes to a thorough understanding of the criminal law. Even professors and practicing lawyers who spend most of their professional lives trying to sort out the intricacies of criminal law are familiar with only a small part of the law that confuses us."¹³

The opinions of the writer is reasonable and point out the difficulty of legal cognition clearly. In view of the influence of legal cognition on the sharing of criminal responsibility, under the new social background, the distribution of legal cognition obligation should reasonably consider the reasonable disposition between the citizen and the society. In this sense, psychological responsibility theory based on presumption of knowing law gradually lags behind the development of society, and it is necessary to improve its structure to adapt to the need of risk allocation in the changing society. It is under such a social background that the possibility of illegal cognition arises, which is not only the requirement for citizens' obligation of legal cognition, but also the response to the elements of public policy.

It is timely to rethink the problem of cognition of illegality in theory. Professor Minoru Otani once

⁹ Unconscious negligence is a concept in German criminal law theory, which is similar to negligence in our country.

¹⁰ [Japan] *Ono Ono Ichiroku*, The Theory of Criminal Constitutive Elements, trans. Wang Tai, Chinese People's Public Security University Press, 2004. P. 154.

¹¹ [Japan] *Yamaguchi Hou*, General Introduction to Criminal Law (3rd ed.), trans. Fu Liqing, China Renmin University Press, 2018. P. 195.

¹² *Lao Dongyan*, Responsibility Doctrine and Cognition of Illegality, China Legal Science, No. 3, 2008.

¹³ [Germany] *Welzel*, Introduction to the Theory of Purposive Action: A New Prospect of Criminal Law Theory (Supplement 4th ed.), China Renmin University Press, 2015. P. 75.

pointed out that according to the Illegal Cognition Possibility, the cognition of illegality is not necessary for the formation of intention, but if the actor is not in the possibility (or inevitable) situation, cognition of illegality error is the cause of liability.¹⁴

Therefore, from the recognition of illegality to the Illegal Cognition Possibility is the development and progress of the theory of responsibility in the present age. Not only in theory, but also in the judicial practice of the civil law countries pay more and more attention to the possibility of illegal cognition. "In cases, especially those of lower courts, when there is no possibility of consciousness of illegality, the limits intentional theory based on blocking intent as per Article 38.1 is mostly advocated, and it can be expected that the Supreme Court will also change its decisions in this direction."¹⁵

The reason lies in the change of social background, and the object of condemnation has changed from psychological facts to normative elements such as illegal consciousness. As a result, the principle of responsibility completed a transformation in its internal structure. "It is certainly reprehensible that the actor knows that his act is illegal but still commits similar act. If the actor can realize illegality with a little attention, but the actor is not aware of it and despises the existence of law, this is the possibility of illegality cognition, which is also worthy of condemnation. In other words, the possibility of illegality and illegality cognition are both providing judgment materials and basis for liability condemnation."¹⁶

From the cognition of illegality to the possibility of illegality, it shows the change of the object of condemnation. It is the redistribution of citizen's legal cognition obligation and the development from psychological responsibility theory to normative responsibility theory, which accords with the inner demand of responsibility principle under the spirit of modern rule of law. Especially in the field of legal crime, how to examine the distribution of the obligation of legal cognition, it is more worthy of theoretical attention. Just as some scholars pointed out: "This means that in the contemporary legal context, it is necessary to re-examine who bears the adverse consequences of ignorance of law or how to allocate the risks of ignorance of law. If a state can relieve itself of the burden of proof with respect to notification by means of presumption in the areas of core criminal law, individuals shall not bear the corresponding adverse

consequences in the areas of ancillary criminal law where presumption is not available."¹⁷

According to the opinions of some writer, the obligations of legal cognition shall be reasonably distributed based on the actual needs of the society in view of different legal cognition in different social stages.

III. An Analysis of the Position of the Cognition Possibility System of Illegality

The possibility of illegal cognition is not limited in the criminal theory system of Germany and Japan. With the in-depth research of the principle of responsibility in the criminal law, it has been proved that the possibility of illegal cognition is intention or responsibility elements.¹⁸

However some scholars hold a different view: The study of the possibility of illegal understanding should not continue to struggle with the intentional and responsibility elements, but should shift the theoretical focus to the construction or improvement of the institutional technology or discretion mechanism. "The crux of the problem of illegality cognition is not whether the lack of illegality cognition obstructs the responsibility or the intention, but under what circumstances the criminal responsibility of the actor should not be investigated. That's reasonable."¹⁹

It is reasonable to extend the study of the possibility of illegal cognition to the technical level, but the systematic status of the possibility of illegal cognition should not be neglected. In other words, if we can't have a reasonable understanding of the status of the possibility of illegal cognition, it is difficult to construct and perfect the theory from the technical level.

Firstly, the position of illegality cognition in the criminal theory system of Germany and Japan. In the theory of criminal law in Germany and Japan, there is a dispute between the theory of intention and the theory of responsibility on the possibility of illegal cognition. The theory that the lack of illegality consciousness will affect the existence or absence of intent and discuss this kind of influence is called intent theory. The theory of responsibility deals with the lack of consciousness of illegality as a problem different from the intentional blocking of responsibility.²⁰

¹⁴ [Japan] *Minoru Otani*, General Lecture Notes on Criminal Law, Trans. Li Hong, China Renmin University Press, 2008. P. 312.

¹⁵ [Japan] *Nishida Noriyuki*, Introduction to Japanese Criminal Law, trans. Wang Zhaowu and Liu Mingxiang, Law Press-China, 2013. P. 215.

¹⁶ *Zhou Guangquan*. Illegality Awareness Is Not an Element of Intention // China Legal Science. 2006. No. 1.

¹⁷ *Lao Dongyan*. Responsibility Doctrine and Cognition of Illegality // China Legal Science 2008. No. 3.

¹⁸ *Chen Xingliang*. Study on Awareness of Illegality // China Legal Science. 2005. Is. 4.; *Zhou Guangquan*. Op. cit.

¹⁹ *Lao Dongyan*. Op. cit.

²⁰ [Japan] *Masahide Maeda*, Lectures on Criminal Law (6th ed.), trans. Zeng Wenke. Peking University Press, 2017. P. 146.

If the illegal understanding belongs to the intentional constitutive elements, then it is the wrong constitutive elements, obstructing the criminal intent. If the harmful act is not a kind of negligence crime, it does not constitute a crime, so the harmful act cannot be subject to criminal punishment. However, this conclusion is unreasonable. "In order to avoid this unacceptable conclusion, the proponents of intent theory argue that the application of intent theory to any crime would entail intolerable loopholes and in that time negligent crime should be punished."²¹ But this point of view is not reasonable, it will expand the scope of the regulation in criminal law.

The debate on the possibility of illegal cognition has lasted for many years in the theory of criminal law in continental law system. Even though Welzel classified the possibility of illegal cognition as a third kind of liability independent of intention and negligence in the system of criminology, the dispute continued. It was not until the Criminal Law Reform Act of 1975 in Germany stipulated the error of constitutive elements and the error of illegal cognition in Article 16 and Article 17 that criminal intent and illegal cognition were two different conditions of constitutive elements of a crime were confirmed.²²

Until the Federal Supreme Court of Germany explicitly took the possibility of cognition of illegality as an element of liability in the judgment of a case, the theoretical debate on the status of the possibility of cognition of illegality came to an end. "A principled decision of the Grand Criminal Chamber of the Federal Supreme Court (In accordance with the doctrine of liability) recognized a sense of wrongdoing as an element of liability for independence. In the scope of errors of understanding, the constitutive elements of the errors of understanding and prohibited errors of understanding drew a full stop in the development (Federal Supreme Court Reports of Criminal Judgments 2, 194)."²³

The debate about the status of the possibility of illegal cognition in the system is not only the consideration of the different stages of illegal cognition. That is to say, the possibility of illegal cognition is not only a system problem and its influence on judicial practice is obviously different in different stages.

First, it will affect the application of security measures. "Security measures are special preventive disposal adopted by the law for persons without or with limited capacity and persons responsible for special risks by means of rectification, reformation, medical treatment and other methods."²⁴

The security measure is the specific measure besides the penalty to the person who has no responsi-

bility, the person who has limited responsibility and the person who has the certain social danger in the law. Such specific measures include medical treatment, protective observation, etc. Thus if illegality is an element of intention, a wrong understanding of it will prevent criminal intention. Although the endangering act does not constitute a crime, the actor may be subject to security measures. This is because the element of responsibility possessed by the actor can represent one's personal danger. On the contrary if mistake of illegal perception is the essence of responsibility, it will lead to the non-existence of the crime and the inapplicability of security measures to the actor.

Secondly, it will affect the implementation of the urgent justification cause. Article 32, paragraph 2 of the German Penal Code defines the emergency defense as "the necessary defensive action to protect oneself or others from an ongoing illegal attack." So if the mistake of illegal cognition is placed in the category of intentional constitutive elements, the problem of illegality of dangerous act can be eliminated in the phase of conformity. When the victim faces the infringement caused by the wrongful recognition of the illegal act by the perpetrator, the victim cannot exclude the illegal infringement through an urgent justification cause. This is because the dangerous act is not illegally aggressive. But if the wrong understanding of the law belongs to the responsibility nature, the dangerous act has the illegal attribute. For such illegal infringement the victim may, in accordance with the law, urgently defend the perpetrator to protect their legitimate rights and interests.

Third, it will influence the development of the principle of responsivism. From the theory of psychological responsibility to the theory of normative responsibility, the evaluation of culpability is a process of transformation from psychological facts to normative facts. In other words the reprehensible object is transformed from the uncertain psychological content to the normative and definite content, which is the development and perfection of the principle of responsibility in the criminal theory system. So the possibility of illegal cognition is a normative element of reprehensible conduct. If it is placed in the intentional constitutive elements of the category, it still belongs to the psychological responsibility theory. In this way, the critical elements of normative responsibility theory can not be fully reflected in the stage of responsibility and the scientific nature of the principle of responsibility can not be effectively reflected.

²¹ Jescheck, in GA 1955, S.100; Arthru Kaufmann, JZ 56 S.393.

²² Wang Gang. Review of German Criminal Legislation in the Past Fifty Years // Political Science and Law. 2020. 3.

²³ [Germany] Johannes Wiese's General Introduction to German Criminal Law, trans. Li Changke. Law Press-China, 2008. P. 459.

²⁴ Han Zhongmo. Principles of Criminal Law. China University of Political Science and Law Press, 2002. P. 494.

Secondly, the status of illegal cognition in China's criminal law system. The possibility of illegal cognition is the content of responsiveness and belongs to the ontology of criminal law. Therefore, the discussion of this question does not deviate from the criminal theory system of our country. It is of great significance to the judicial practice of our country how to deal with the systematic problem of wrong cognition of illegality. The possibility of illegal cognition comes from the Three Tiers, so it is necessary and reasonable to discuss its status in the background of German and Japanese criminal law. But the Four Elements is different from the stratum criminal theory. So discussing the Illegal Cognition Possibility's system status under the criminal theory system of our country is obviously different from that of Germany and Japan. If we discuss the cognition of illegality in our country's criminal law under the Three Tiers, the conclusion will be unreasonable because of the dislocation of the theoretical system. If we discuss the possibility of illegal cognition under the hierarchical criminal system, it is not worth discussing further. Because this question in Germany and Japan criminal law theory already had the final verdict.

Therefore, it is reasonable and scientific to discuss the cognition of illegality on the basis of the constitution of Four Elements. According to the criminal constitution system of our country, the cognitive elements belong to the subjective culpability. Therefore, the illegal cognition mistake should belong to the category of subjective cognition and it is the norm appraisal's question. Furthermore, the illegality mistake belongs to the content of criminal intent. If the actor has the Possibility of Illegal Cognition, it has the criminal intent. In other words, the possibility of illegal cognition should be placed in the intention of crime. If it is lacking the possibility of illegal cognition of criminal intent, harmful behavior can not constitute a crime. "Since the formation of intent requires that the actor knows that his behavior will harm the society, an awareness of the social harmfulness of the act, it is enough to show that our criminal law deals with the Possibility of Illegal

Cognition in the structure of intent. This is because it is not consistent with the mainstream view in Germany and Japan that the recognition of illegality is an element of responsibility. If repeatedly entangled in its positional question, it unavoidably gives the human a feeling that avoids the important matter and focuses on the trivial matter."²⁵ The view of the argument is doubtless reasonable. Because it accurately points out that illegality cognition is a problem of criminal theory system and gives a clear answer to the system and status of illegality cognition.

IV. Criteria for Judging the Possibility of Cognition of Illegality and Rational Reflection

The Possibility of Illegal Cognition is a normative responsibility element, so it conforms to the internal logic of crime structure. From the presumption of legal cognition in classical crime to the confirmation of the Possibility of Illegal Cognition under the system of purposeful crime's theory, the risk of erroneous legal cognition shifts from the perpetrator in part to the state. To some extent, it reflects the balance between the principle of responsiveness and public policy. This is important for civil rights protection.

Responsiveness weakens the function of criminal law while affirming the right of civil freedom. With the increase of specialization and complexity of legal norms, the main body of society requires a clear understanding of legal norms at the responsibility. This makes the criminal law can not fully play its positive governance function and deviates from the value orientation of criminal policy to promote the positive prevention function. So the allocation proportion of the risks of wrong cognition of law begins to change and the risks of wrong cognition of legal borne by the State begin to be partially transferred to the subjects of the acts. This effectively alleviates the tension between responsiveness and policy of value.

But theorists respond reasonably to the need of public policy at the structure of illegality cognition which leads to a difficult technical problem. That is, the subject of justice how to know and judge the possibility of illegal knowledge? The analysis of many judicial cases shows that the judicial subjects often avoid the possibility of illegal cognition in the judgment. This was tantamount to giving up on the normative theory of responsibility. For example, Ye bought a match gun from Taobao as a toy for his child and kept it in the trunk of his car. It was later found out by the public security organs. It was identified that the match gun was powered by gunpowder and its muzzle specific kinetic energy was greater than 1.8J / cm². According to the judicial interpretations of the Supreme People's Court and the provisions of the Ministry of Public Security, the Tianyuan District Procuratorate concluded that: "If they are identified as guns and more than one gunpowder-driven guns are illegally possessed, the crime of illegally possessing guns shall be constituted."²⁶ It is precisely because of the difficulty in proving the cognitive possibility of violation that the judicial subjects take an evasive attitude towards the determination of the cognitive possibility of violation.

First, a critical analysis of the theory of The Possibility of Illegal Cognition. Professor Che Hao

²⁵ Lao Dongyan. Op. cit.

²⁶ Liu Xie: "Zhuzhou Man Buys" Toy Gun "Only After Police Identify It as Real" // URL: http://hunan.ifeng.com/20161223_0.shtml.

think that the current focus is not on discussing the system and status of the possibility of illegal cognition, but on constructing a feasible set of applicable standards from the technical level. This can alleviate the dilemma of inconvenient application of justice. He put forward the following standard: "An avoidable mistake of understanding illegality must meet the following two conditions: objectively there is an opportunity to find out the law to avoid the mistake and the actor does not try to find out the law to avoid the mistake."²⁷

There is no doubt that the standard of the cognition of the possibility of illegal cognition is based on the rational thinking of the theory of criminal law and the practice of judicature. So it may promote qualitative of The Possibility of Illegal Cognition and the sentencing function to play an active role. But it is a pity that the standard of discriminating the Possibility of Illegal Cognition has not got a positive response in practice, and has not deepened the cognition of the standard design in theory. The specific reason is that the technical standards advocated by the writer is basically based on the theory of criminal law in the continental law system. It also has not designed in line with our country's judicial practice needs of the target system.

Firstly, the feasibility of the standards for judging the Possibility of Illegal Cognition is insufficient. According to Wiesels, "the certainty of the inevitability of the error of understanding requires a very strict judicial decision. Whether the actor was originally capable of recognizing the wrongful nature of his act on the basis of his social status, personal capacity and the cognitive faculties and legal-moral values to which he could be asked to mobilize. This is decisive."²⁸ However, Wiesels' discussion on the avoidability of illegal cognitive error is relatively broad, which is of limited value to the guidance of judicial practice.

Professor Roxin refined Wiesels's theory and states that the avoidability of illegal cognitive errors depends on three conditions. (1) The actor must have the opportunity to think or inquire about the illegality that his behavior may have. (2) When this opportunity exists, the actor must completely not trying to find out the truth or such effort must be very inadequate. This results in the exclusion of liability being improper and unreasonable from a preventive point of view. (3) The actor makes an effort to learn the law only within an excessively narrow scope in spite of the opportunity which he had. The actor makes an effort to

learn the law only within an excessively narrow scope in spite of the opportunity which he had.²⁹

The argument about the three dimensions mentioned above has been going on for several decades in German criminal theory, but it can't reach a satisfactory conclusion and provide a reasonable and effective judgment for judicial application. Based on the technical criteria of the German theory of epistemic possibility of illegality, Che Hao focuses on whether the actor is trying to understand legal norms. Concretely, avoidable illegal mistake of cognition mainly depends on two aspects: the actor's ability to know the law and the degree of effort. However, from the judicial practice, it is uncertain to judge the ability to know the law and the degree of effort. Therefore, this lacks feasibility in judicial application.

For example, Qin found similar "weeds" growing on the hillside near his farmland. So he picked three plants after doing the farm work home and was seized by the forest police. After identification, Qin cut the Hui orchid is a national key protection plant. Immediately Qin was detained for 7 days and was placed on file for investigation and prosecution. The People's Court of Lushi County sentenced Qin to fixed-term imprisonment of 3 years with a probation of 3 years and a fine of CNY3,000 for the crime of illegal logging of plants under key state protection.³⁰ In this case, whether Qin had the ability to know the law and whether he tried to find out the truth were not explained and proved in the judgment. This also shows that the judgment standard of the Possibility of Illegal Cognition has not been recognized in judicial practice.

Secondly, the standards for determining the possibility of illegal cognition are excessively abstract. Analyzing the standards of judging the error of legal cognition, each standard is abstract and uncertain. Article 17 of the German Penal Code states: "A person who commits an act without being aware of its illegality shall not be held criminally responsible if the mistake is unavoidable." As for how to determine the inevitability of epistemic error, the German scholar Wiesels pointed out that the judgment should be based on the epistemic ability and values of the actor. But cognitive ability and values are both macroscopic and abstract contents, and their practical value is limited. But cognitive ability and values are both macroscopic and abstract contents, and their practical value is limited. In the judicial practice, the judicial subjects in Germany have not given a clear answer to the problem of wrong cognition of the law. Therefore, it has to take the Gewis-sensspannung as the judgment

²⁷ Che Hao. Legal Crime Era of Illegality Understanding Errors // Tsinghua Law. 2015. No. 4.

²⁸ [Germany] Johannes Wiesels. General Introduction to German Criminal Law, trans. Li Changke, Law Press-China, 2008. P. 252.

²⁹ [Germany] Claus Roxin General Introduction to German Criminal Law (Vol. 1), translated by Wang Shizhou / Law Press-China. 2005. P. 625.

³⁰ Ma Jiangang, etc.: "picked 3" weeds "man sentenced to 3 years," Henan Legal Daily, April 19, 2017.

basis of the Possibility of Illegal Cognition. For example, the judicial decisions of the German Supreme Court have pointed out that when the actor does not realize the wrongfulness of the act, it is necessary to use the judgment of "Gewis-senspannung".

That is, "the actor has an obligation to use all his cognitive ability and the whole ethical world view, if this can form a judgment of the legality or illegality of a particular behavior."³¹

If we want to use the criminal legal theory of Germany for reference to construct the judgment index of illegal cognition possibility, we need to resort to non-normative values. Its theoretical value and practical significance are relatively limited. Because the technical standards of the possibility of illegal cognition are abstract. So In the judicial practice, there are some difficulties in the application of the standard, which leads to the improper application of the criminal law and the infringement of the spirit of responsibility. For example, teenagers tend to like imitation guns. As a result, some young people have been prosecuted for online purchase of imitation guns and even sentenced to life imprisonment. In practice, there is usually a lack of clear and reasonable standards for illegally cognition the inevitability of buying simulation guns. This is also the main reason why similar judgments frequently cause theoretical doubts. It is worth noting that from the criminal legislation and judicial practice³² of some countries and regions have not stopped their efforts because of the Possibility of Illegal Cognition of judicial difficulties. On the contrary, they actively think and perfect from the system level of criminology, and try to jump out of the Possibility of Illegal Cognition itself. This effort becomes more urgent and important as the concept of risk society is proposed.

Secondly, the era development of the Possibility of Illegal Cognition. Since the 1960s, Baker proposed that the risk society theory has had an important impact on the German Three Tiers. The purpose of the criminal law began to become the basis of building the criminal law system. The function of positive general prevention replaces vindictive punishment and changes the structure of criminal law, which makes the social regulation function of criminal law more and more obvious. To this, Professor Robinson argued that it is not realistic to completely abandon the consideration of prevention in the distribution of criminal responsibility. At the same time, the requirements of retribution and prevention should be considered simultaneously.³³

According to the theory of positive general prevention, punishment for crime is no longer the fundamental goal pursued by criminal law. Cultivating the normative consciousness of social subjects has become the core value of the functionalist criminal law and the task of the times. The unreasonable discriminating standard and the positive general precaution are all changing the erroneous views on the cognition of illegality in the traditional theory of criminal law. As far as the former is concerned, it is necessary to refine the standard of distinguishing the Possibility of Illegal Cognition in order to reasonably distinguish the problem of illegal cognition. As for the latter, it was to cultivate the awareness of laws and regulations in society. To be sure, the discriminating standard of the Possibility of Illegal Cognition and the function of positive prevention are discussed from the aspect of legal cognition. The difference is that they are from different aspects to the performance of the understanding of criminal law attention. It is at this point that the positive general prevention and the Possibility of Illegal Cognition have an internal link. "On the issue of whether and how to impute responsibility to the wrong understanding of the law, it is necessary to 'establish and maintain the effect of general prevention through imputation'."³⁴

The positive general prevention reconstructs the theory of crime from the aspect of criminal policy, the concrete manifestation is the reconstruction of responsibility, and claims that it is composed of two parts: the crime responsibility and the necessity of prevention. It also proposed the superior concept of self-responsibility.

The reason why the necessity of prevention is implanted in the category of responsibility is that we should solve the problem of cognition of criminal law from the angle of functionalism. This includes the following two aspects specifically. First of all, we should actively advocate the social main body's standard consciousness. The application of criminal law is not for the purpose of punishing the actor, but for the purpose of restoring the normative consciousness damaged by the criminal behavior. Secondly, the standard of discriminating the Possibility of Illegal Cognition should be supplemented. If the specific situation of the agent's legal cognition cannot be reasonably defined according to the standard of distinguishing possibility of legal cognition, a judgment shall be made again according to the precautionary necessity.

³¹ [Germany] *Claus Roxin*, Jurisprudence of the Supreme Court of Germany, Introduction to Criminal Law, trans. He Qingren, Cai Guisheng, China Renmin University Press, 2012. P. 96.

³² For example, "inability to avoid" in French Penal Code, "Best Effort" in Italian Constitutional Court, "Just Cause" in Taiwanese Criminal Law and "Reasonable Reliance" in American Model Penal Code are all efforts and explorations in this field.

³³ See *Paul H. Robinson*. Hybrid Principals for the Distribution of Criminal Sanctions // 82 Northwestern University Law Review (1987).

³⁴ *Neumann/Schroth*, Neuere Theorien von Kriminalität und Strafe, 1980, S. 34.

In this way, it can be accurately judged whether the actor conforms to the expectation of responsibility.

According to the supplement and limitation of the necessity of preventing to the Possibility of Illegal Cognition, it is difficult and inconvenient for the judicial subjects to judge a case with the Possibility of Illegal Cognition in practice. And it is also difficult to find out whether the actor has tried to know the law. Then we can exclude the criminal liability of the perpetrator on the basis of the necessity of prevention. These cases include the crime on illegal possession of firearms by Zhao in Tianjin, the crime of illegal logging of plants under key state protection by Qin in Shanxi and the crime of illegal business operation by Wang Lijun of Inner Mongolia. Professor Zhang Mingkai has clearly pointed out: Even if this kind of perpetrators have the Possibility of Illegal Cognition, but there is almost no danger of committing crime again. Therefore, it lacks the legitimate basis for applying the punishment. If the actor is not prosecuted, it will also be lessons. However, labelling first-time offenders as criminals and imposing penalties, in particular freedom punishment, would be counterproductive to crime prevention.³⁵

According to the writer, even if an actor has awareness of illegality, his criminal liability may be excluded based on precautionary necessity. Only in this way can it conform to the spirit of the criminal law and the judicial nature.

V. Reasonable differentiate and analyze between Factual Errors and Normative Errors

In order to reasonably deal with the Possibility of Illegal Cognition. We need to reflect not only on the status of the system and the standard of judgment, but also on the distinction between factual error and normative error. In this regard, some scholars advocate dichotomy. That is to say, the definition of the constituent elements should be based on the judgment of norms or the legal analysis of the constituent elements. Some scholars advocate that the distinction between factual and normative errors is taken from five aspects such as social significance, legal significance and moral significance.

The existence of different opinions in theory shows the difficulty in distinguishing between factual errors and normative errors. Some scholars have pointed out that the distinction between factual errors and legal errors has always been a muddled account.³⁶

Writer find it difficult to distinguish the factual errors from the normative errors, and their conclusions are not reasonable. In fact, the factual element and the normative element are relative existence but not absolutely different. Therefore, the two cannot be clearly distinguished according to the objective criteria. The factual elements has the legal constitution, therefore needs the judge through the legal norm to carry on the expression to it. And the normative elements also need to be restored to the factual elements and explained it. So the two are not either-or, but mutually inclusive. In short, in view of the judicial subject's different standpoints, experiences and viewpoints, there will be different judgments on the elements of norms. "The necessary meaning shall be determined by the interpretations of the corresponding constitutive elements of the crime, and the judgments may differ. There is also a reason for that."³⁷

Therefore, the subject of justice in the judicial practice of the same elements will make different judgments and it may be derived from the needs of policy to make different considerations. On the whole, a reasonable distinction between factual errors and normative errors provides a feasible standard for recognizing the Possibility of Illegal Cognition. This requires us to proceed from the formal level, the substantive level and the policy level three dimensions, carries on the progressive type omni-directional inspection.

1. Formal Basis: Factual Error is Conformance Judgment, Normative Error is Illegality Judgment

Generally speaking, compliance is the content of constitutive elements and it's a wrong understanding of the state of an objective behavior belonging to constitutive elements. It is connected to errors of fact. The cognition of illegality is a wrong cognition of illegality under the condition of a complete cognition of constitutive elements, which is related to the error of norms.

Professor Welzel thinks it is necessary to understand the error of constitutive elements and the error of prohibition, and to distinguish the two types of errors from the level of illegality and constitutive elements. If a man takes an article of property from another in the mistaken belief that it is his own, he is in error of constitutive element (he didn't know that he was taking someone else's property). But if someone mistakenly believes that he has the self-help right (e.g., he has a right of self-help as a creditor vis-à-vis a solvent debtor) to take other people's property, then he has a wrong understanding of the illegality of the

³⁵ Zhang Mingkai Avoidance of Recognizing Administrative Offences as Criminal Offences: Concepts, Methods and Routes // China Legal Science. 2017. No. 4.

³⁶ Lao Dongyan. Op. cit.

³⁷ [Japan] Yamaguchi Hou. General Introduction to Criminal Law (3rd ed.), trans. Fu Liqing. China Renmin University Press, 2018. P. 204.

behavior. A person who does not know that he has a pledge on his hidden property is mistaken about the state of affairs. If he knows this but mistakenly believes that he has the right to lift the fetters, then he is in the error of prohibition.³⁸

According to the point of this paper, from the perspective of conformity or illegality, can provide a reference for the distinction of factual and normative error. However, it should be pointed out that the errors of constitutive elements are not all errors of fact. In addition to the elements of fact, there are also elements of norm such as obscenity, insult, indecency and so on. If only from the perspective of conformity and illegality, we can not reasonably distinguish the mistake of fact from the mistake of norm. "Misunderstanding the constitutive elements of norms is a mistake of law, but it is a mistake of constitutive elements. The mistaken recognition of the subjective elements of self-defense is a mistake of fact, but a mistake of prohibition."³⁹

Therefore, conformity or illegality is only a formal requirement to distinguish factual error from normative error. It has certain reference value. But it also needs to be supplemented and perfected from other dimensions. In other words, the judgment of conformity and illegality can provide the formal basis for determining the error of fact or the error of norm. But only this is not enough, we also need to examine from the level of substance to determine whether it is a factual error or a normative error.

2. Substantive Basis: Factual Error is the Factual Judgment of Yes and No, Normative Error is the Value Judgment of Right and Wrong

Some scholars think, "If the actor's cognitive error is through the careful observation and judgment of the facts may be overcome, then this cognitive error is a factual error. If the actor's cognitive error can be overcome by further understanding the norms of criminal law, then this error is the cognitive error of illegality."⁴⁰

For example, the perpetrator mistakenly considers the fishing ban as an illegal fishing ban. In fact, the actor misjudged the fishing period stipulated by the law. This is therefore an factual error of understanding. If the actor thinks that the fishing ban period can also be fishing, that is, the actor thinks that fishing

is not illegal by the law. It is a normative mistake of understanding. So errors of fact may be avoided by careful observation, errors of law need to be avoided by familiarity with the law. Professor Kinderhoiszel once pointed out: "To recognize the characteristics of the normative constituent element, we must also understand the legal or social function of this element. Thus, in the elements of the normative elements of the actor must be aware of the object involved in the undertaking of the relevant actual use. Only in this way can intent be established."⁴¹

According to this paper, whether it can be recognized that the function of the society that constitutes the elements is a substantial judgment. In the obscenity smuggling case against ALY of Mali, the defsel argued that, because of cultural differences, it was not a crime for the defendant to sell or purchase pornographic discs in his own country. So ALY doesn't know that this is a crime in China. The court accepted the argument and pointed out in its judgment that ALY, a Malian citizen, had committed a minor act due to his wrong understanding of Chinese law and his subjective malignancy is also smaller.⁴²

In this case, the understanding of obscene articles is a factual error or a normative error, we need to consider whether the actor has realized the value of CD's social function and practical use. If the actor does not realize its social function, it should belong to the factual error and obstruct the criminal intention. Making a judgment based on the dimensions of facts and value is to provide a basis for distinguishing between a factual error and a normative error from a substantive level.

It must be pointed out that errors of fact and errors of norm cannot be exactly distinguished from errors of norm because of the relativity of fact and value and the influence of extralegal factors. Sometimes we need to judge by the elements of policy. Just as some scholars said: "In some cases, whether it is an illegal error or a factual error will produce a dispute. This is mainly because of the ambiguity and ambiguity of fact and law. That is, facts include not only the elements of description but also the elements of norms. This makes the distinction between fact and law ambiguous."⁴³ In some cases, therefore, it is necessary to distinguish between errors of fact and errors of norm in the light of criminal policy.

³⁸ [Germany] *Welzel*. An Introduction to the Theory of Teleology: A New Prospect for the Theory of Criminal Law (Supplement 4th ed.). China Renmin University Press, 2015. P. 87.

³⁹ Vgl. *Welzel*, Das Deutsche Stafrecht, 11. Auf l., Walter de Gruyter, Berlin, 1969, S. 167.

⁴⁰ *Zhang Mingkai*. Criminal Law (5th ed.). Law Press-China, 2016. P. 325.

⁴¹ [Germany] *Kinder Heusel*. Textbook of General Theory of Criminal Law (6th ed.), trans. Cai Guisheng. Peking University Press, 2015. P. 273.

⁴² Criminal Judgment of the Guangzhou Intermediate People's Court of Guangdong Province (Sui Zhong Fa Xing Er Chu Zi. 2009. No. 193).

⁴³ *Chen Jialin*. The Ideological Trend and Change of Foreign Criminal Law Theory, Chinese People's Public Security University Press, 2017. P. 402.

3. Basis of Policy: Distinguish Factual Errors from Normative Errors in the Context of Criminal Policy

From the perspective of practice in addition to the theoretical criteria to identify the elements of fact or norm, sometimes it is necessary to make a judgment based on the necessity of prevention. In some cases it is indeed difficult to distinguish between elements of fact and elements of norm. This requires the use of values such as policy, interests and public recognition. In other words, the factual elements and normative elements shall be reasonably distinguished according to comprehensive standards. From the criminal law precedents at home and abroad, we can also see that the criminal policy plays an important role in distinguishing between the facts and the norms. Professor Yamaguchi Hou once pointed out: "Because the legal precedents do not affirm the possibility of exemption in the absence of illegal awareness, we can only deny the intentional cases. There has pragmatic and easy reason."⁴⁴

We also demonstrated the cases of violating hunting and discarding seals, for example, the distinction between a flying squirrel and a mus and the determination of tearing seals. According to the writer, it is practical and reasonable in judicial practice to distin-

guish errors of fact from errors of illegality according to practical needs. In a word, the problem of factual error and illegality error can be dealt with flexibly in judicial practice according to the need of policy. Scholars of our country, after reviewing the judicial distinction of the common law's countries, point out clearly that the judge usually does not decide whether to obstruct intent after distinguishing between mistake of fact and mistake of law (That is, whether the punishment is necessary). On the contrary they will consider the necessity of punishment first, and then regard the denial of intentional liability as a mistake of fact and the affirmation of intentional liability as a mistake of law.⁴⁵

So the writer more intuitively point out that in the distinction between legal error and factual error, the value of the judgment, the interests of the balance and the elements of policy also play a role in the division.

As for the definition of the elements of norms, it is lack of objectivity and certainty. Apart from the common understanding of some elements of norms, there is no clear conclusion as to whether the rest elements are elements of facts or elements of norms. This requires us to investigate from multi-levels and multi-dimensions in order to reasonably distinguish between factual errors and normative errors.

⁴⁴ [Japan] Yamaguchi Hou, General Introduction to Criminal Law (3rd ed.), trans. Fu Liqing. China Renmin University Press, 2018. P. 204.

⁴⁵ Lao Dongyan. Op. cit.