

# The subjective elements of the crime of environmental pollution

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## Abstract

The view that the subjective element of the crime of environmental pollution should be exclusively categorized as either intent or negligence would create punishment gaps for this offense and does not align with the actual circumstances of judicial practice. The crime of environmental pollution is one with a dual fault form, meaning both intentional and negligent acts of environmental pollution can constitute the crime. The reason for establishing the crime of environmental pollution with a dual fault form in criminal law is to address the difficulty of proving the subjective element of this offense. The dual fault form not only lowers the standard of proof but also reduces the statutory penalty, preventing minor offenses from being heavily punished. Therefore, it does not violate the principle of proportionality between crime, responsibility, and punishment.

## Keywords

From the Perspective of Evidence Law; Crime of Environmental Pollution; Subjective Fault Form; Dual Fault

## 1. Introduction: Review of Viewpoints on the Subjective Form of the Crime of Environmental Pollution

Regarding how to determine the subjective form (*mens rea*) of the crime of environmental pollution, academic circles primarily hold two views: One view can be called the "single culpability doctrine," which holds that the crime of environmental pollution can only be either negligence or intent. If it is considered a negligent crime, intentional acts cannot constitute it, and vice versa. The other view can be called the "dual culpability doctrine," which holds that acts polluting the environment, whether negligent or intentional, can constitute this crime. This view is further divided into the "compound culpability doctrine," the "blurred culpability doctrine," the "alternative culpability doctrine," and the "coexisting culpability doctrine."

### 1.1. Single Culpability Doctrine

The "single culpability doctrine" is a view derived from strict adherence to traditional criminal law theory.

According to traditional criminal law theory, negligence and intent reflect different levels of the offender's subjective culpability.

Therefore, even for the same act, based on the difference in its subjective culpability form, the nature of the crime and the social harm it reflects are also different.

Thus, a single crime can only have one form of culpability, either intent or negligence. Believing that acts of polluting the environment with either intent or negligence can constitute the crime of environmental pollution fundamentally contradicts legislative (legislative - legislative practice/convention) and the principles of criminal law.

While adhering to the premise that one crime can only have one form of culpability, the "negligence theory" holds that the subjective form of the crime of environmental pollution can only be negligence.

Its main reasons are: First, intent or negligence manifests as the attitude towards the result; even if the actor intentionally committed the act of polluting the environment, their attitude towards the serious consequences of polluting the environment that resulted is one of negligence.

Second, the Criminal Law already provides for the crime of spreading dangerous substances ( - e.g., crime of endangering public security by dangerous means like poisoning). If the crime of environmental pollution were considered an intentional crime, it would overlap with the punishment scope of the crime of spreading dangerous substances.

This does not conform to the principle of legislative (scientificity/rationality).

Third, judging from the statutory punishment for the crime of environmental pollution, its maximum penalty is 7 years of fixed-term imprisonment. This is inconsistent with the statutory punishments generally assigned to intentional crimes by the Criminal Law but aligns more closely with the characteristics of punishments for negligent crimes.

The "intent theory" holds that the crime of environmental pollution is constituted by intent. Its main reasons are: First, based on the legislative provisions for the crime of environmental pollution, interpreting it as a negligent crime does not conform to the general principles of interpreting criminal law provisions, i.e., the crime of environmental pollution itself does not involve (major legal interests - vital interests like life, health, major public safety), lacking the substantive basis for establishing a negligent crime.

Second, when an actor intentionally commits an act of polluting the environment, they can foresee the occurrence of the harmful result and typically hold a mentality of either direct intent or indirect intent (recklessness/dolus eventualis).

Third, recognizing the crime of environmental pollution as an intentional crime would not create a punishment gap, because acts of polluting the environment

committed based on negligence can be punished as negligent crimes endangering public safety.

## **2. Resolving the Conflict Between Crimes with Dual Culpability Forms and the Principle of Matching Responsibility, Crime, and Punishment**

The purpose of establishing crimes with dual culpability forms in criminal law, besides avoiding punishment gaps in substantive law, is also to address the difficulty of proving the subjective elements of these crimes from an evidence law perspective. Therefore, if research is confined solely to the realm of criminal law doctrine, it is impossible to fully examine the reasons for the existence of crimes with dual culpability forms and the purpose of their establishment, and it is also difficult to resolve their conflict with the principle of matching responsibility, crime, and punishment ( - often translated as principle of proportionality or suiting punishment to crime). Following this line of thinking, the author will analyze the conflict between crimes with dual culpability forms and the principle of matching responsibility, crime, and punishment by incorporating relevant content from evidence law.

### **2.1. Responses from Proponents of the "Dual Culpability Doctrine" to This Issue and Existing Problems**

The biggest challenge faced by the "dual culpability doctrine" is its potential violation of the principle of matching responsibility, crime, and punishment.

Because the judgment of the overall social harm of a criminal act depends not only on the serious result it causes but also on the culpability form governing the commission of the criminal act.

Therefore, if the same crime is considered to be both a negligent crime and an intentional crime, it will inevitably create a serious conflict with the principle of matching responsibility, crime, and punishment.

In response to this, proponents of the dual culpability doctrine respond as follows: The "compound culpability doctrine" has considered its conflict with the principle of matching responsibility, crime, and punishment since its inception.

According to this doctrine, the difference in subjective culpability between direct intent and negligent negligence ( - unwitting negligence) and overconfident negligence ( - advertent negligence), and between indirect intent and negligent negligence, is enormous; they cannot coexist within the same charge.

However, the situation between overconfident negligence and indirect intent is different; it was originally difficult to distinguish which of the two has greater or lesser subjective culpability, and the significance of distinguishing them is not very great.

But, judging from the current main theories regarding crimes with dual culpability forms and the actual situation in judicial practice, crimes with dual culpability forms are no longer limited to the coexistence of overconfident negligence and indirect in-

tent; they also include cases of indirect intent coexisting with negligent negligence, and direct intent coexisting with negligence. Therefore, this doctrine cannot reasonably explain all situations of crimes with dual culpability forms.

The "blurred culpability doctrine" holds that for certain statutory offenses ( - mala prohibita), including the crime of environmental pollution, even without strictly distinguishing between intent and negligence, it would not violate the principle of matching responsibility, crime, and punishment.

Because statutory offenses themselves are not crimes established based on social ethics; identical acts committed intentionally or negligently do not have essential differences in statutory offenses, and the differences in their sentencing are not significant.

Although this viewpoint has some merit, its existing problems are also evident: First, how to accurately distinguish between statutory offenses and natural crimes ( - mala in se) still lacks a clear standard, and with societal progress, statutory offenses have a tendency to transform into natural crimes.

When the boundary between statutory offenses and natural crimes itself is unclear, attempting to mitigate the conflict with the principle of matching responsibility, crime, and punishment by claiming that distinguishing intent and negligence is not very meaningful in statutory offenses and that they lack essential differences seems unwise.

Second, China's Criminal Law stipulates many statutory offenses, and the vast majority of statutory offenses prescribe different punishments for different culpability forms.

For example, tax evasion is a typical intentional statutory offense, but negligent tax evasion does not constitute a crime. This indicates that in statutory offenses, different culpability forms also determine different natures of crimes.

Therefore, broadly claiming that distinguishing intent and negligence is not very meaningful in statutory offenses and that they lack essential differences is an inadequate response to this issue.

Both the "alternative culpability doctrine" and the "coexisting culpability doctrine" hold that in specific cases, different punishments should be determined based on the difference in the actor's subjective culpability form to resolve the conflict with the principle of matching responsibility, crime, and punishment.

The only difference is that the "alternative culpability doctrine" also believes that merely emphasizing the distinction of the crime's subjective culpability form in judicial practice is insufficient to fundamentally solve the problem; criminal legislation should respond to this, i.e., establish different statutory punishments for different culpability forms.

If in crimes with dual culpability forms, intent and negligence must be strictly distinguished in all circumstances, and different punishments applied based on different culpability forms, then what is the point of criminal legislation establishing

crimes with dual culpability forms?

Why not follow the usual legislative practice and establish separate crimes for intentional and negligent situations?

The purpose of establishing crimes with dual culpability forms in criminal law is precisely to intentionally blur the boundaries between intent and negligence for certain crimes, not strictly distinguishing between them, in order to solve the difficulty of proving the subjective elements of certain crimes.

Therefore, although these two viewpoints appear to solve the conflict between crimes with dual culpability forms and the principle of matching responsibility, crime, and punishment, they essentially deny the *raison d'être* of such crimes.

In summary, although the above viewpoints have responded to the conflict between crimes with dual culpability forms and the principle of matching responsibility, crime, and punishment, none can provide a convincing answer.

This is closely related to the above proponents being overly confined to seeking answers solely from the perspective of criminal law doctrine. For example, the "compound culpability doctrine" is limited to finding justification from the social harm of the crime for why dual culpability crimes do not violate the principle, which thus strictly limits its scope of application, i.e., it can only explain the conflict issue regarding overconfident negligence and indirect intent, but is powerless against other situations of coexisting culpability forms appearing in reality.

Although the "blurred culpability doctrine" was initially proposed precisely to address the difficulty in judicial practice of distinguishing intent and negligence for certain crimes and the difficulty of proving subjective elements, statutory offenses in criminal law are not established for the purpose of not distinguishing the subjective culpability forms of certain crimes, and the vast majority of statutory offenses still strictly distinguish between intentional and negligent crimes.

Therefore, using statutory offenses in criminal law to explain the conflict between crimes with dual culpability forms and the principle of matching responsibility, crime, and punishment will also inevitably fail to yield reasonable conclusions.

Although the "alternative culpability doctrine" and the "coexisting culpability doctrine" argue for the rationality of crimes with dual culpability forms from the perspective of criminal law norms, they also consider the problem entirely from the pure perspective of criminal law doctrine, and are inevitably bound by the basic principle of criminal law that "different culpability forms reflect different social harm," making it difficult to find a solution to the conflict between crimes with dual culpability forms and the principle of matching responsibility, crime, and punishment.

It is evident that the above proponents, starting from a purely criminal law doctrine perspective, have not found a solution to the problem.

The author believes the reason for this phenomenon is that the establishment of crimes with dual culpability forms involves considerations not only from substan-

tive law but also from the perspective of evidence law.

Therefore, to understand this legislative phenomenon, it is necessary to change perspective and analyze it from the angle of criminal justice integration (- an integrated approach combining substantive criminal law, procedure, evidence, etc.).

### **3. Conclusive Determination on the Subjective Form of the Crime of Environmental Pollution**

Having clarified that recognizing the crime of environmental pollution as a crime with a dual culpability form does not violate the principle of matching responsibility, crime, and punishment, the next issues to resolve are how to determine its specific culpability form in cases and how to determine complicity.

Based on resolving these two issues, a conclusive determination can be made regarding the internal disputes within the dual culpability doctrine.

#### **3.1. Determination of the Specific Culpability Form for the Crime of Environmental Pollution and Identification of Complicity**

As mentioned above, different doctrines have different views on how to determine the subjective form of the crime of environmental pollution in specific cases.

The "compound culpability doctrine" holds that for certain crimes, as long as there is conclusive and sufficient evidence proving that the actor's subjective aspect when committing the harmful act was not direct intent, the compound culpability crime can be applied for punishment.

Implied meaning: in judicial proof activities, there is no need to deliberately prove whether the criminal's mentality was one of indirect intent (recklessness) or over-confident negligence.

The "blurred culpability doctrine" is basically consistent with the "compound culpability doctrine," only further proposing that in all cases, as long as it is proven that the actor had "at least negligence," the defendant can be found guilty of the relevant crime.

The "coexisting culpability doctrine" and the "alternative culpability doctrine" are completely opposite to the above views, holding that in the judicial determination of specific cases, it should be unequivocally ascertained what kind of criminal mentality the actor held, and different punishments should be determined based on different culpability forms to meet the requirements of the principle of matching responsibility, crime, and punishment.

The "alternative culpability doctrine" even further proposes that if intent or negligence cannot be confirmed, the actor cannot be found guilty.

Regarding the above debate, the author agrees with the viewpoint of the "blurred culpability doctrine."

This is because, in crimes with dual culpability forms, if the distinction of subjective culpability forms significantly impacts sentencing, it will inevitably cause both the

prosecution and defense to fiercely dispute the determination of the defendant's subjective culpability form, plunging the case into endless litigation. This fails to solve the difficulty of proving the subjective elements of these crimes and therefore does not conform to the original intention of establishing crimes with dual culpability forms in criminal law.

Moreover, as mentioned earlier, crimes with dual culpability forms, established to address the difficulty of proving subjective elements, lower the statutory punishment while overall lowering the standard of proof, thus not violating the principle of matching responsibility, crime, and punishment.

Both the "coexisting culpability doctrine" and the "alternative culpability doctrine" hold that the subjective culpability form of the offender should be ascertained and distinguished in all circumstances, which obviously contradicts the original intention behind establishing crimes with dual culpability forms.

The "blurred culpability doctrine," building on the "compound culpability doctrine," goes a step further by proposing that as long as "at least negligence" is proven, the relevant crime can be established. That is, when based on existing evidence it is impossible to determine whether the actor's subjective culpability form was intent or negligence, but it can be proven to be at least one of them, then their culpability form can be presumed to be "negligence." This undoubtedly solves the difficulty of proving the subjective elements of these crimes, is highly operable, and therefore better aligns with the legislative (original intention) of crimes with dual culpability forms.

It is important to note that even acknowledging that the subjective culpability form of certain crimes can simultaneously include both intent and negligence does not affect determining its unique culpability form in specific cases.

That is, when existing evidence can prove that the actor committed the relevant crime based on intent or negligence, their subjective culpability form should be determined as intent or negligence; when existing evidence can only prove that the actor committed the crime based on either indirect intent (recklessness) or overconfident negligence, but cannot distinguish between them, their culpability form should be presumed to be negligence, i.e., the "at least negligence" advocated by the "blurred culpability doctrine."

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