Theories on Negligent Co-perpetrators: An Overview I

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Abstract

Among the theoretical doctrines of negligent co-perpetrators, there are positive theories and negative theories on the existence of negligence co-perpetrators. The development of theories on negligent co-perpetrators has generally gone through four phases, during which the positive theory and the negative theory oppose each other all the time and prevail over each other alternately. This article intends to explore the evolution and present situation of research into the negligent co-perpetrators in criminal law theories by discussing the negative theory on co-perpetrators, with an aim to provide inspiration for the research on negligent co-perpetrators.

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Introduction

Among the theoretical doctrines of negligent co-perpetrators(1), there are positive theories and negative theories on the existence of negligence co-perpetrators. The development of theories on negligent co-perpetrators has generally gone through four phases(2), during which the positive theory and the negative theory oppose each other all the time and prevail over each other alternately. In the phase from the pre-war to early post-war, the debate was focused on whether the concept of co-perpetrators of negligence could be established, and a mode involving complete opposition had been formed, i.e. the Doctrine of jointness in crime=the negative theory, the Doctrine of jointness in conduct=the positive theory. After 1970, a

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（1） Law distinguishes three categories of offenders (1) **a perpetrator** is someone who pursues a criminal endeavor with at least one other confederate, sharing joint control over the operation; (2) **an accomplice** is someone who does not satisfy all the requirements for liability as described in the definition of the prescription but she/he nevertheless unlawfully and intentionally furthers the commission of the offence by somebody else; (3) **an accessory after the fact** is someone who unlawfully and intentionally, after the commission of the offence, assists a perpetrator or accomplice to escape liability. Grant, J. (2020). Chapter 19: Participation in crime | African Legal Information Institute. Retrieved 20 November 2020, from https://africanlii.org/book/chapter-19-participation-crime.

Sometimes in academic theses, a perpetrator is described as principal offenders, also known as direct actual/main/direct perpetrator. However a distinction can be drawn between a direct and an indirect perpetrator. In this article, both direct and indirect perpetrators are included; therefore a co-perpetrator is used instead of a principal offender or others.

（2） 大塚裕史「過失犯の共同正犯」刑事法ジャーナル 28 号（2011 年）11 頁。On the division of phases for the evolution of theories on negligent co-perpetrators, also see 北川陽祐「過失犯の共同正犯について」法学研究 13 号（2011 年）71-86 頁、北川佳世子「我が国における過失共同正犯の議論と今後の課題」刑法 38 巻 1 号（1998 年）47 頁以下。

succession of practical cases recognized the negligent co-perpetrators; in the meanwhile, the new negligence theory came into being, which characterized the offence of negligence as the breach of duty of care, so the "the jointness of crime" may be construed as "jointly committing a conduct lacking duty of care", which alleviated the opposition between the doctrine of jointness in crime and the doctrine of jointness in conduct and made the doctrine of partial jointness in crime shift its position from the negative theory to the positive theory on co-perpetrators of negligence, thus the positive theory gradually becoming a dominant theory. Furthermore, among scholars of the positive theory, some advocating the doctrine of dissolution into spontaneous offences held that although negligent co-perpetrators could exist in terms of concept, there was no utility, so a case involving negligent co-perpetrators could be handled by recognizing spontaneous offences of negligence. In addition, the view of denying the possibility in the establishment of negligent co-perpetrators based on the doctrine of jointness in crime has always existed. This chapter intends to explore the evolution and present situation of research into the negligent co-perpetrators in criminal law theories by discussing the negative theory on co-perpetrators, with an aim to provide inspiration for the research on negligent co-perpetrators.

I. the Negative Theory based on the Doctrine of Jointness in Crime

(1) Negative Theory based on the Doctrine of Jointness in Crime

The theory on negligent co-perpetrators in criminal law theories of Japan was originally developed in terms of the opposition between the doctrine of jointness in crime and the doctrine of jointness in conduct. Such mode of opposition, i.e. the doctrine of jointness in crime=the negative theory on negligent co-perpetrators, the doctrine of jointness in conduct=the positive theory, existed before the war and the

early post-war period. Regarding what "jointness" refers to, the doctrine of jointness in crime held that co-offending means several persons jointly commit a specific crime, i.e. several persons convicted of one crime. According to the doctrine of jointness in crime, the actor must have knowledge of the consequence required in the actus reus, in other words, the jointness is reflected in the "intentional conduct", which means that each actor communicates intent on achieving a specific criminal result with each other; however, there is no such intentional conduct in the offence of negligence, so there are no negligent co-perpetrators. By contrast, the doctrine of jointness in conduct held that co-offending means several persons jointly perform conduct which has not been determined in terms of actus reus yet, and the communication of intent is satisfied when each actor has the common intent to perform such conduct, without the requirement of the common intention of a crime, so there could be co-perpetrators in an offence of negligence.

The theoretical foundation that used to deny the existence of negligent co-perpetrators is the doctrine of jointness in crime.(3) Takikawa Yukitoki, a representative scholar of such doctrine, considers that co-perpetratorship enjoy no unique nature in terms of physical element but a combination of conducts by co-perpetrators, which comprehensively supplement each other to satisfy the actus reus of a specific crime.(4) However, in terms of the mental element, the co-perpetratorship shows intrinsic characteristics, that is, each of co-perpetrators recognizes that his conduct is a supplement to other's conduct and supplemented by other's conduct. In other words, the resolution to achieve a consequence through conducts supplemented by each other is the characteristic of co-perpetrator, and such kind of mental state of

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（3） 瀧川幸辰『犯罪論序説［改訂版］』（有斐閣、1947）228-229 頁。下村康正『刑法総論学説判例』（学陽書房、1979）139 頁。小野清一郎「過失犯の共同正犯といふことがあるか」『刑事判例評釈集　第 15 巻』（1960 年）４頁。

（4） 瀧川幸辰『犯罪論序説［改訂版］』（有斐閣、1947 年）228-229 頁。

mutual understanding only exists in intentional conduct, so co-perpetratorship is established on the premise of intention.(5) Although offenders of negligence may produce common negligent actions, they lack the resolution of intending to jointly cause a consequence by perpetrating partial conduct, so several persons who negligently satisfy the requirement of actus reus and cause the required consequence are regarded as separate offenders of negligence.(6) Shimomura Yasumasa also denies negligent co-perpetrators based on the doctrine of jointness in crime and holds that the essence of co-offending lies in the communication of intent to commit a crime, but the common intents of negligent perpetrators don't include the intent to jointly achieve the consequence, and they are just something common beyond the intent of the crime.(7) Although perpetrators negligently lack duty of care, they are independent mental phenomena of each perpetrator, so the jointness in conscious negligence could not be formed. According to the principle of culpability, the intent to perform a real act together is not sufficient to constitute a crime if the actor lacks the knowledge of such offence or the possibility to get such knowledge. Therefore, there exist no co-perpetrators in the offence of negligence.(8)

If the doctrine of jointness in crime regards the joint crime as the common intentional crime, there are at least two problems as follows: (1) if we first limit the joint crime to the intentional crime and then deny the existence of the negligent joint crime because it is not an intentional crime, it is an expounding method with a preconceived conclusion to discuss the negligent joint crime by taking the intentional joint crime as the blueprint or the model. The negligent crime is a concept juxtaposed with rather than subordinate to the intentional crime, so the standard for co-offending

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（5） 瀧川幸辰『犯罪論序説［改訂版］』（有斐閣、1947 年）228-229 頁。
（6） 瀧川幸辰『犯罪論序説［改訂版］』（有斐閣、1947 年）228-229 頁。
（7） 下村康正『刑法総論　学説判例』（学陽書房、1979 年）139 頁。
（8） 下村康正『刑法総論　学説判例』（学陽書房、1979 年）139 頁。

developed from the intentional crime is not applicable to the negligent joint crime. (2) Formally, in terms of its concept only, the joint crime includes both intentional crime and negligent crime because the offence of negligence itself is a kind of crime, therefore, the situation where the perpetrators jointly commit negligent conducts should be regarded as the context of co-offending.

II. the Negative Theory based on the Doctrine of the Subject with Common Intent

(1) the Doctrine of the Subject with Common Intent and the Theory on Negligent Co-perpetrators

From the perspective of the doctrine of the subject with common intent, there forms no the subject with the common intent to perpetrate conduct under a common purpose in the offence of negligence; thus the co-perpetrators are denied. The doctrine of the subject with common intent enjoys a similar theoretical foundation with the doctrine of jointness in crime. The representative scholars of the negative theory based on the doctrine of the subject with common intent include Kusano Hyoichiro, Saito Kinsaku and Nishihara Haruo, etc. Kusano Hyoichiro, the founder of the doctrine of the subject with common intent, believes that generally speaking, social phenomena may be created by an individual's conduct or joint conducts of several persons.[9] Such a phenomenon of jointness is reflected as a division of labour or contractual relationship in economics and the incorporative or cooperative system in civil and commercial law.[10] The observation of such a phenomenon from the perspective of criminal law produces the concept of co-offending.[11] It is a unique psycho-social phenomenon produced by more than two persons integrating into one

（9） 下村康正『刑法総論　学説判例』（学陽書房、1979 年）139 頁。
（10） 下村康正『刑法総論　学説判例』（学陽書房、1979 年）139 頁。
（11） 下村康正『刑法総論　学説判例』（学陽書房、1979 年）139 頁。

for achieving a common purpose.....it can be assumed that the legislation on co-offending is made in view of such special psycho-social phenomenon.(12) The feature of the doctrine of the subject with common intent is that more than two individuals with different mentality and physicality are integrated into one for achieving a common criminal purpose. However, such the subject with common intent is not a natural phenomenon but created by more than two persons through an agreement in order to commit a specific crime. Such an agreement is also called conspiracy or complicity. (13) Saito Kinsaku also holds that the feature of the doctrine of the subject with common intent is that more than two persons jointly commit a crime, therefore, firstly, there must exist a common purpose of intending to carry out a specific crime; secondly, under such purpose, more than two persons become one with the same mentality and physicality (the establishment of the subject with common intent), and then one of them is required to perpetrate the crime.(14) Therefore, such special psycho-social phenomenon of establishing the subject with common intent can only exist in an intentional crime.

(2) Discussion on the doctrine of the subject with common intent

Although the doctrine of the subject with common intent answers the question of what is the foundation for criminal liabilities of co-perpetrators with conspiracy, there is a limitation in its theoretical basis; therefore negligent co-perpetrators may not be denied through the doctrine of the subject with common intent. Instead, the doctrine of the subject with common intent provides a theoretical foundation for co-perpetrators with conspiracy.(15) According to this doctrine, more than two persons, under the common purpose, jointly conspire to commit a specific crime and thus

（12）　草野豹一郎『刑法総則講義［第一分冊］』（南郊社、1935 年）193-194 頁。
（13）　草野豹一郎『刑法改正上の重要問題』（巌松堂書店、1950 年）315 頁。
（14）　斉藤金作『共犯判例と共犯立法』（有斐閣、1959 年）104 頁。

integrate into the subject with common intent, so the conduct by any one of them is regarded as the conduct by the subject with common intent and all conspirers are convicted of co-offending. From the fact that the doctrine of the subject with common intent provides a theoretical basis, it could be said that such a doctrine is functional.

The doctrine of the subject with common intent has also been criticized. Firstly, the doctrine of the subject with common intent is based on the position of collective accountability and thus violates the principle of individual accountability established by modern criminal law.(16) Secondly, the doctrine of the subject with common intent regards a supra-individual subject (a subject beyond group members) as the legal subject, so the person who assumes responsibility for the consequence should be the supra-individual subject with common intent, however, according to this doctrine, the person who finally assumes criminal liability is individuals who produce the subject with common intent. There is a theoretical inconsistency here, and additionally, this will result in the transference of liability which violates the principle of accountability in the criminal law.(17) The doctrine of the subject with common intent provides a strong rebuttal to such criticism and holds that "full liability due to partial conduct" contained in the co-perpetratorship enjoys the same principle with the doctrine of the subject with common intent and the only difference

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（15） The co-perpetratorship with conspiracy refers to such situation as that more than two persons conspire to commit a crime and one or several of them perform the criminally prescribed conduct based on the previous conspiracy, but others who only take part in the conspiracy without performing the criminal conduct required in the actus reus are also regarded as co-perpetrators. Article 60 of the Criminal Law of Japan sets forth that more than two persons who jointly commit a crime are perpetrators, so there are huge controversies over whether to recognize the existence of co-perpetrators with conspiracy and how to demonstrate the legitimacy of the existence of co-perpetrators with conspiracy.

（16） 佐伯仁志『刑法総論の考え方・楽しみ方』（有斐閣、2013）401 頁。

（17） 瀧川幸辰『犯罪論序説』（有斐閣、1947 年）235 頁。

is that the group members of the supra-individual subject are not conspirers but perpetrators in the dominant doctrine.(18) "full liability due to partial conduct" requires each participant assume their own liabilities for the whole criminal conduct of the actus reus committed by a kind of supra-individual being.(19) Although the dominant doctrine emphasizes the principle of individual accountability, it indeed recognizes the supra-individual subject. The principles constituting the dominant doctrine and the doctrine of the subject with common intent are the same.(20)

The author holds that although there is a phenomenon of collective accountability in the co-perpetratorship with conspiracy, this can only be regarded as a limited revision to the principle of individual accountability, so it cannot be generally applied to all situations of complicity. The "principle of full liability due to partial conduct" in the co-perpetratorship holds co-perpetrators liable for their conducts by regarding them as a whole. Although co-perpetratorship does not require everyone like an independent perpetrator to finish the whole crime through his own conduct, it in principle requires each participant commit partial conduct at least, otherwise the difference among perpetration, incitement and aiding can only be told according to the standard of playing a "significant role" which is not clear. Therefore, it is inappropriate for the doctrine of the subject with common intent to take the principle of collective accountability as the theoretical basis and implement it in the whole theory on the joint crime. To sum up, this argument from the standpoint of the doctrine of the subject with common intent is unnecessarily tenable that negligent

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(18)　西原春夫「共同正犯における犯罪の実行」植松正等編『現代の共犯理論：斉藤金作博士還暦祝賀』（有斐閣、1964 年）130 頁。

(19)　西原春夫「共同正犯における犯罪の実行」植松正等編『現代の共犯理論：斉藤金作博士還暦祝賀』（有斐閣、1964 年）130 頁。

(20)　西原春夫「共同正犯における犯罪の実行」植松正等編『現代の共犯理論：斉藤金作博士還暦祝賀』（有斐閣、1964 年）130 頁。

offenders cannot conspire to commit a specific crime and hardly establish the subject with common intent and thus negligent co-perpetrators are denied, because the existence of co-perpetratorship does not require the premise of establishing the subject with common intent, and this applies to both intentional co-perpetratorship and negligent co-perpetratorship.

III. the Negative Theory on the basis of the Concept of Expanded Perpetrator

(1) Basic Views of the Concept of Expanded Perpetrator

In German criminal law theories, the negeligent co-perpetratorship is denied generally and the concept of expaned perpetrator is accepted. According to the expanded perpetrator concept, an idea is employed that any anctor who is instrumental in the realization of a crime is a perpetrator. The traditional theory on the joint crime distinguishes a perpetrator from an accomplice and takes the perpetrator as the basis, the participant who incites or aids the perpetrator is regarded as an accomplice. The perpetrator is the sentencing benchmark for an accomplice, so the latter is imposed upon the same punishment as the former or mitigated punishment. By contrast, the expaned perpetrator concept regards all persons who contribute to the offence as perpetrators and does not pay attention to the difference in the form of conduct that whether a participant directly commits a crime or commit incitement or aiding, instead, each participant's conduct is separately and independently taken into account to see whether it constitutes a crime.

The proposition that the expanded perpetrator concept is applicable to negligent offenders is originated from the “binary concept of a perpetrator” of Hans Welzel. Welzel considers that the offence of negligence is an incurred offence, to which the "incurred offence elements" applies.[21] The elements of an intentional offence by acts are different from the incurred elements of an offence of negligence;

thus, it is incorrect to adopt the same co-perpetrator concept onto them.(22) The view that a perpetrator should be distinguished from an accomplice in the intentional offence is not necessarily suitable in the offence of negligence, that is to say, for the offence of intention, the restrictive perpetrator concept is adopted that distinguishes a perpetrator from an accomplice, by contrast, for an offence of negligence, the expanded concept of perpetrator is proper that the actor casually contributes to the consequence is the perpetrator in principle. Thus, we should distinguish different situations of intentional and negligent offences and adopt the binary perpetrator concept.(23) Welzel's such proposition is determined by the concept of purposeful act. Welzel holds that the purposeful (intentional) perpetrator is the dominator of the intent determination and commission of a crime; thus the distinguishment between a perpetrator and an accomplice should be made according to the existence or absence of the dominance over purposeful act.(24) The perpetrator is the person who dominates a crime by forming a purposeful intent. The accomplice, including an inciter and aider, just participates in the activity of other's dominance over a crime. However, all perpetrators in an offence of negligence are those who incur the consequence of satisfying the non-intentional offence elements through conducts violating the duty of care necessary for social life.(25) The offence of negligence is an incurred offence which incurs the consequence through conducts violating the duty of care necessary for social life and regards it as the basis for the perpetratorship. Therefore, the incurring of causation between the conduct and the consequence enjoys the

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（21）　H. Welzel, Studien zum System des Strafrechts, ZSTW 58 (1939), S.491, quoted in 松宮孝明『過失犯論の現代的課題』（成分堂、2004）47 頁。

（22）　松宮孝明『過失犯論の現代的課題』（成分堂、2004）47 頁。

（23）　松宮孝明『過失犯論の現代的課題』（成分堂、2004）48-50 頁。

（24）　H. Welzel, Studien zum System des Strafrechts, ZStW. Bd. 58 (1939) S. 539-540, quoted in 安達光治「客観的帰属論の展開とその課題［２］」立命館法学 269 号（2000 年）262 頁。

（25）　安達光治「客観的帰属論の展開とその課題［２］」立命館法学 269 号（2000 年）265 頁。

perpetratorship regardless of the degree and modes such as directness and obliqueness of the reason incurring the consequence. As a result, there is no distinguishment between a perpetrator and an accomplice for a negligent offender.

(2) Problems Caused by the Concept of Expanded Perpetrator

There are some problems caused by adopting the concept of expanded perpetrator in an offence of negligence. The concept is based on the equivalence of conditions and thus results in unlimited expansion of the scope of the offence of negligence. Although Welzel points out that an actor is not guilty of his social-adequate conduct (conduct in compliance with the duty of care necessary in social life) resulting in the consequence despite incurring infringement upon legal interests.[(26)] The theory on the social adequacy seems able to limit the scope of the offence of negligence; however, according to such theory, if a reason goes beyond the degree of social adequacy, it is the reason resulting in the consequence no matter how small its causative potency, thus this theory cannot impose an effective limitation on the scope of the offence of negligence. In addition, in a situation where the causation between each person and the consequence is unclear, the unified perpetrator concept does not work, for example, in the Rolling Stone Case.[(27)] That is to say when it is clear that the conduct of a part of plural actors results in the consequence; however, it cannot be established which one's conduct results, in consequence, a separate examination of causation between each actor and the consequence on the basis of the expanded perpetrator concept will lead to a conclusion that all of them are not guilty according to the principle of in dubio pro reo. Therefore, it is difficult to delimit the scope of the offence of negligence by adopting the expanded perpetrator concept.

（26） H. Welzel, Studien zum System des Strafrechts, ZStW. Bd. 58 (1939) S. 558, quoted in 安達光治「客観的帰属論の展開とその課題［２］」立命館法学 269 号（2000 年）263 頁。

Ⅳ. the Negative Theory on the basis of the Doctrine of Dissolution into Spontaneous Offence

Since the1990s, the doctrine of dissolution into spontaneous offence for the negligent offence has become gradually popular, which considers that the psychological causation as the theoretical basis for "full liability due to partial conduct" is too weak to support the establishment of co-perpetrators. Just as stated below, when the negligent co-perpetratorship is demonstrated by such objective jointness in conduct as "common violation of common duty", it fails to provide a reasonable explanation to the jointness in a mental state of co-perpetrators. There arises a doubt in the boundary between negligent co-perpetrators and spontaneous offences of negligence under the situation of paying little attention to the jointness in subjective elements. The doctrine of dissolution through spontaneous offences of

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(27) The **facts of this case**: In the evening of 21 April 1983, two men (A and B) were on their way home from their cabin in the Toss river valley near Zurich. They spotted two big stones (individually weighing 52 kg and 100 kg) at the top of the slope so steep that the bottom was not visible. They decided to roll these stones down the slope. A pushed the 52 kg stone down the hill, whilst B pushed the heavier, 100 kg stone. One of these stones struck and killed a fisherman at the foot of the slope. However, it could not be established which of the two stones had killed him.

The judgment of **Rolling Stone Case is**: When the case came before the Supreme Court, the judges held that A and B were criminally liable as co-offenders for negligent homicide. Up until that ruling, the notion of co-offending was strictly limited to intentional crimes. This seemed logical because the conventional view of co-offending generally requires the existence of a conspiracy: at least two persons who embark on a common criminal pursuit. However, in the “rolling stones” case there was no joint decision (conspiracy) to kill a fisherman. By deciding to roll the stones down the slope, A and B jointly engaged in grossly negligent behavior that caused the death of the fisherman. The Supreme Court ruling was an attempt to overcome problems of evidence by employing the tools of the substantive criminal law. The judgement and the facts of the case please see:Thommen, M. (2018). Introduction to Swiss Law (p. 390). Berlin; Bern: Carl Grossmann Verlag.

negligence is roughly divided into two categories. The one denies the possibility of establishing negligent co-perpetrators, that is to say, it denies the concept of negligent co-perpetrators through the interpretation of communication of intent; the other only denies the utility of negligent co-perpetrators and holds that the spontaneous offences of negligence may be established in the situation of common violation of common duty, so it is superfluous to create the concept of co-perpetrators.

(1) On Denying the Possibility of Establishing the Concept of Negligent Co-perpetrators

The view of denying the possibility of establishing negligent co-perpetrators criticizes the doctrine of "common violation of common duty" for only paying attention to the objective jointness in the perpetration of criminally prescribed conduct and ignoring the subjective element.[28] If the physical causation -- the coincidence (simultaneous commission) of perpetration of criminally prescribed conducts -- is regarded as the only basis for co-perpetrators, the difference between co-perpetratorship and spontaneous offences will disappear. Therefore, the co-perpetratorship is established on the premise of subjective elements reflecting psychological causation such as communication of intent and common plan, and there is no exception to negligent co-perpetrators. However, a negligent offender is

(28) The Doctrine of common violation of common duty was proposed by Claus Roxin and became a strong point of view as the theoretical basis for the positive theory on negligent co-perpetrators in Japan. Such doctrine means that in the situation of jointly carrying out the conduct containing a high risk of producing a specific consequence, each one of co-conductors is imposed on the common duty of care to prevent the consequence, and when each one makes the criminal consequence occur due to joint conduct violating the common duty of care, the negligence as an element of negligent co-perpetrators may be established because thea consequence as an element of the offence of negligence is incurred by jointly committing such offence of negligence.

unaware of the consequence; thus, such mental causation at the subjective level doesn't exist; thus, the negligent co-perpetratorship is denied. For example, Takahashi Norio considers that the sanction norms derive the attribution of the consequence while rules of conduct derive reciprocal attribution of conducts.(29) Because rules of conduct are related to the conduct expectation of the general people, judgment should be made in advance.(30) Based on the common plan, the actor has a certain expectation of the consequence caused by his own conduct and is able to control his status and role in the criminal enterprise.(31) In this regard, the basis for the reciprocal attribution of conducts is established.(32) The foundation for punishing co-perpetrators is that despite only committing partial conduct, each one should assume full liability through reciprocal attribution of conducts based on the significance of the status and role of each one's conduct in the realization of a conspired crime.(33) Therefore, each perpetrator cannot control his status and role in the enterprise without advance knowledge of the consequence. In other words, if actors have no knowledge of the negligent consequence of committing illegally dangerous conduct, the reciprocal attribution of conducts (violation of rules of conduct) cannot be made. The basis for the liability of co-perpetrators is the existence of such conspiracy formed by the knowledge of a joint crime; however, there is no such conspiracy for the establishment of negligent co-perpetrators, so the possibility of existing negligent

(29)　高橋則夫「共同正犯帰属原理」西原春夫先生古稀祝賀論文集編集委員『西原春夫先生古希祝賀論文集［第二巻］』（成文堂、1998）346-347 頁。

(30)　高橋則夫「共同正犯帰属原理」西原春夫先生古稀祝賀論文集編集委員『西原春夫先生古希祝賀論文集［第二巻］』（成文堂、1998）347 頁。

(31)　高橋則夫「共同正犯帰属原理」西原春夫先生古稀祝賀論文集編集委員『西原春夫先生古希祝賀論文集［第二巻］』（成文堂、1998）347 頁。

(32)　高橋則夫「共同正犯帰属原理」西原春夫先生古稀祝賀論文集編集委員『西原春夫先生古希祝賀論文集［第二巻］』（成文堂、1998）347 頁。

(33)　高橋則夫『刑法総論［第 4 版］』（成分堂、2018 年）483 頁。

co-perpetrators is denied. He also advocates the adoption of the unified perpetrator concept in the offence of negligence, that is to say, there should be no distinction between a perpetrator and an accomplice in the offence of negligence and each actor should be regarded as a perpetrator by separately determining the perpetratorship of all actors.(34) The understanding on the content of the common duty such as the duty to "take care of other companion's conduct because it is not enough for each actor simply take care of his own conduct", one's duty to "take care of the other's conduct" may be dissolved in the "spontaneous perpetrators with negligence in mutual supervision" in most cases.(35)

Ida Makoto also holds this point of view that in a case of an offence of negligence, since there is no agreement of the realization of the consequence, there is no assertion of joint liability for the consequence on the ground of such agreement.(36) Whether there exists negligence has always been determined individually for each actor and the principle of "full liability due to partial conduct" cannot be applied for specific conduct commonly committed only. As for an offence of negligence, as long as the adequate causation between the conduct and the consequence is determined, the actor can be held criminally liable as an independent negligent offender for the consequence even though the consequence occurs through the medium of other's negligent conduct. In this regard, there is an essential difference between a negligent offence and an intentional offence. In the case of an intentional offence, when other's intentional conduct serves as an intermediary for causing the consequence, the attribution of consequence to each actor as a perpetrator should be determined according to the revised offence elements.(37)

（34） 高橋則夫『刑法総論［第 4 版］』（成分堂、2018 年）484 頁。

（35） 高橋則夫「共同正犯帰属原理」西原春夫先生古稀祝賀論文集編集委員『西原春夫先生古希祝賀論文集［第二巻］』（成文堂、1998 年）352 頁。

（36） 井田良『刑法総論の理論構造』（成分堂、2005 年）372 頁。

The above-mentioned negative views deduce the inexistence of the concept of negligent co-perpetrators from the interpretation of communication of intent, that is to say, unlike an intentional offender, a negligent offender does not have the intent to realize the criminal purpose, so negligent offenders cannot communicate intent among them or produce common intent, then a joint crime cannot be constituted. In fact, the issue of whether negligent offenders have communication of intent or not has always been one of the heated disputes in theory on negligent co-perpetrators. Furthermore, the answer to the issue of whether there is mental causation in the form of communication of intent in an offence of negligence determines the subsequent development direction of the theory.

(2) Negating the Necessity for the Existence of Co-perpetrators

In previous doctrines, the doctrine of jointness in crime is opposed to the doctrine of jointness in conduct, and the former considers the joint intention necessary and thus denies the co-perpetrators in an offence of negligence, while the latter recognizes the co-perpetrators in an offence of negligence. However, nowadays, the doctrine of jointness in partial crime（部分的犯罪共同説）holds that as long as actors jointly commit the prescribed conduct of a negligent offence, they may constitute negligent co-perpetrators.(38) The view of affirming negligent co-perpetrators has become dominant, and the focus of discussion has shifted to the question that in what situations negligent co-perpetrators could be determined. The

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（37）　井田良『刑法総論の理論構造』（成分堂、2005 年）373 頁。

（38）　佐伯仁志『刑法総論の考え方・楽しみ方』（有斐閣、2013）427-430 頁。山口厚「過失犯の共同正犯について覚書」西原春夫先生古稀祝賀論文集編集委員会編『西原春夫先生古稀祝賀論文集［第２巻］』（成分堂、1998 年）387 頁。嶋矢貴之「過失犯の共同正犯論（1）（2・完）－共同正犯論序説－」法学協会雑誌 121 巻 1 号（2004 年）77 頁。金子博「過失犯の共同正犯について―『共同性』の規定を中心に―」立命館法学 326 号（2009 年）26 頁。内海朋子「過失共同正犯論について」刑法雑誌 50 巻２号（2011 年）135 頁。

current dominant view in Japan is that when several actors utilize and supplement each other in undertaking the common duty of care, and commit the joint conduct of failure to perform their duty of care, the establishment of negligent co-perpetrators can be determined.(39)

The doctrine denying the above-mentioned dominant one is another strong point of view. Its foundation is not the old negative theory (denying the possibility of establishing negligent co-perpetrators). Instead, on the one hand, it recognizes the possibility of establishing negligent co-perpetrators in theory, on the other hand, it advocates that based on the dominant view of "common violation of common duty", the case of several negligent offenders may be settled as a case of spontaneous offences of negligence (dissolved in the spontaneous offences), so there is no need to recognize negligent co-perpetrators and the recognizance of co-perpetrators in an offence of negligence possibly lead to excessive punishment.(40) Nishida Noriyuki holds that after all it just establishes a kind of supervisory negligence based on the

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（39） 川端博『刑法総論講義［第２版］』（成分堂、2006 年）539 頁。大谷実『刑法講義総論［新版第４版］』（成分堂、2012 年）414 頁以下。伊東研祐『刑法講義総論』（日本評論社、2010 年）376 頁以下。橋本正博「過失犯の共同正犯について」研修 743 号（2010 年）10 頁。金子博「過失犯の共同正犯について―『共同性』の規定を中心に―」立命館法学 326 号（2009 年）168-169 頁。内海朋子「過失共同正犯論について」刑法雑誌 50 巻２号（2011 年）135 頁。

（40） 井田良『講義刑法学・総論』（有斐閣、2008 年）476 頁以下。Takahashi Noria proposes that the mutually supplemental relationship between actors is significant only in the case of an intentional offence. Because in the case of an intentional offence, each actor's criminal intent is enhanced to amplify the risk of the occurrence of the consequence due to the existence of such mutual supplemental relationship, but negligent offenders are unconscious of the consequence. Furthermore, the practice of applying the restrictive perpetrator concept to an offence of negligence on the one hand and expanding punishment by means of recognizing negligent co-perpetrators under certain circumstances, on the other hand is contradictory. 高橋則夫「過失犯の共同正犯が肯定された事例―世田谷通信ケーブール火災事件第１審判決」『平成４年度重要判例解説』（1993 年）172 頁。

duty of mutual supervision at the horizontal level and it is sufficient to establish spontaneous offences of negligence if that is all.....[41] . In addition, Maeda Masahiide believes that to recognize co-perpetrators in practice may provide an argumentative advantage, for example, avoiding the judgment of specific causation, however instead there will arise new issues such as the determination of "joint negligence" which are as difficult as the demonstration of specific causation.[42]

(3) Discussion on the Doctrine of Dissolution into Spontaneous Offence

The first thing to be discussed is the practical significance of recognizing negligent co-perpetrators. The author holds that negligent co-perpetrators cannot be treated as spontaneous offenders of a negligent crime even though the former is limited to the situation of "common violation of common duty". The doctrine of dissolution into spontaneous offence for the negligent offence understands "common violation of common duty" as that each actor has not only the duty to prevent his own conduct from causing the consequence but also the duty to supervise others committing the joint conduct and prevent them from causing the consequence. Both the duty of taking care of one's own conduct and the duty to supervise others' conducts are in essence one's own objective duty of care, so a violation of such duty should be treated as an independent perpetrator. For example, the Tokyo District Court made a judgment for the Setagaya Cable Incident[43] on 23 January 1992 that each negligent actor in "common violation of common duty" is "dissolved into spontaneous offenders with negligence in mutual supervision". The problem of such point of view is not limited to this case. When actors in a case are horizontally cooperative, that is to say, actors are equal in status to finish the divided work, it is

（41）　西田典之『刑法総論（橋爪隆補訂）［第三版］』（弘文堂、2019 年）411 頁以下。

（42）　前田雅英『刑法の基礎［総論］』（有斐閣、1993 年）373 頁。前田雅英『刑法総論講義』（東京大学出版会、2011 年）506 頁。

hard to determine that actors are in supervisory positions, so the duty to take care of other's conduct cannot be established. The supervisory and regulatory negligence in the criminal theory refers to that the supervisor or regulator is responsible for supervision and regulation but fails to perform such duty and thus cause the consequence of infringing upon legal interests. The supervisory or regulatory negligence exists on the premise that the supervisor and the supervised are in a hierarchical relationship. If actors are not in a hierarchical relationship, it is unable to determine the supervisory relationship and regard it as supervisory negligence; thus it is unable to hold actors criminally liable as perpetrators for violating their duty of preventing others from committing criminal conducts.(44) In addition, it is of practical significance to recognize co-perpetrators of an offence of negligence because in a

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（43） 判時 1419 号 133 頁（世田谷ケーブル事件）。The court issued a judgment that two defendants jointly engaged in the work of melting the lead tube and expose the inside cable by the flame of the welding torches to connect telephone cables; the duties of care of two defendants are to mutually confirm the extinguishment of the flame of two welding torches and to jointly prevent fire from happening. However, two defendants failed to perform their duties of care and left the working site together. Due to their negligence, one of two welding torches was in the state of lighting up in a small flame which caused a fire burning the telephone cables and producing public danger. To sum up, it was determined that they were convicted of the crime of negligently causing a fire in the course of service as co-perpetrators. The judgment held that ……when it is predicted like this case that dangerous and serious consequence will happen in social life, co-operators assume the common duty of care due to mutual utilization and supplementation, and when co-operators commit the joint conduct of failing to perform the duty of care, all of the co-operators are determined as co-perpetrators of an offence of negligence and all actors as the co-perpetrators assume criminal liability for all consequences.

（44） Furthermore, such situation is only regarded as a kind of aid to the omission in an intentional offence, but according to the Doctrine of dissolution into spontaneous offence, a negligent offender will be upgraded as a perpetrator, which is not proper. It is generally believed that the negligent incitement and aiding are not culpable, but according to the Doctrine of dissolution into spontaneous offence, it constitutes an independent negligent perpertratorship, which will undoubtedly expand the scope of punishment.

case that several persons jointly make a decision resulting in the harmful consequence, if a co-perpetrating relationship is not recognized, it is hard to recognize the causation between the conduct of decision and the consequence or the possibility of avoiding the consequence. For example, in the case that all directors unanimously decide to sell defective goods, it is hard to determine the "but-for" relation between each approver and the consequence. However, if they are regarded as co-perpetrators, such determination can be made.(45)

V. Summary-- Communication of Intent and Co-perpetratorship

The Doctrine of **Jointness in Crime** regards the joint crime as the common intentional crime, raising the problem of the preconceived conclusion to discuss the negligent joint crime by taking the intentional joint crime as the blueprint or the model, neglecting negligent crime as a concept juxtaposed with rather than subordinate to the intentional crime, so the standard for co-offending developed from the intentional crime is not applicable to the negligent joint crime. Although **the Doctrine of the Subject with Common Intent** answers the question of what the foundation for criminal liabilities of co-perpetrators with conspiracy is, the phenomenon of collective accountability in the co-perpetratorship with conspiracy can only be regarded as a limited revision to the principle of individual accountability, so it cannot be generally applied to all situations of complicity. **The Unified Perpetrator Concept** which is based on the equivalence of conditions, in spite of the further introduction of the theory of social adequacy, it results in unlimited expansion of the scope of the offence of negligence. In addition, in a

(45)　松宮孝明『刑法総論講義［第 4 版］』（成分堂、2009）270 頁。佐伯仁志『刑法総論の考え方・楽しみ方』（有斐閣、2013）361 頁。

situation where the causation between each actor and the consequence is unclear, the unified perpetrator concept does not work. **The doctrine of dissolution into spontaneous offence** overlooks the premise for the actor assuming the responsibility of supervision and regulation. If actors are not in a hierarchical relationship, it is unable to determine the supervisory relationship and regard it as supervisory negligence; thus it is unable to hold actors criminally liable as perpetrators for violating their duty of preventing others from committing criminal conducts.

Throughout negative theories, the discussion about negligent co-perpetratorship is modelled on the theory of intentional co-perpetratorship. That is, "common intent to perform common conduct" is used as a critical element to determine co-perpetratorship is established. "Common intent of common conduct" means that each actor communicates intent on achieving a specific criminal result with each other; thus malicious (intentional) is a necessity, and there exist no co-perpetrators in the offence of negligence. Despite that the postwar "jointness in crime" doctrine shift the attention to "jointness in conduct", downplaying the requirement of communication of mutual criminal intent for co-perpetratorship establishment it still developed the doctrine of dissolution into spontaneous offence for the negligent offence based on questioning the looseness of communication of intent. In short, the theory on negligent co-perpetrators in criminal law theories of Japan was originally developed in terms of the opposition between the doctrine of jointness in crime and the doctrine of jointness in conduct and then continued to advance theories of negligent co-perpetrators based on different attitudes towards the communication of intent.