

New Views on Characteristics of Harmful Behavior

NOUVELLE THEORIE DES CARACTERISTIQUE DU COMPORTEMENT DE LA NUISIBILITE

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Abstract

There have been different opinions on the characteristics of harmful behavior among which the common view thinks that harmful behavior has three characteristics: Corporeality; Intentionality; Harmfulness. When judging these views, we need to treat harmful behavior as basic, core, boundary, combination element in the system of constitutive elements of crime. As the basic element, harmful behavior should explain various kinds of crimes. The reasoning and argument should be comprehensive. However, intentionality has excluded *actio libera in causa* and *vergelichkeitsdelikt* outside of harmful behavior so it cannot be recognized as characteristic of harmful behavior. As the core element, harmful behavior must reflect the nature and legal characteristics of crime which indicates that harmfulness and illegality must be the characteristics of harmful behavior. As the boundary element, harmful behavior exclude pure mental activities via corporeality out of crime, therefore, corporeality should of course be the characteristic of harmful behavior.

Key words: Harmful Behavior; Corporeality; Intentionality; Harmfulness; Illegality

Résumé

Concernant les caractéristiques des comportements d'endommagement qu'ils apparaissent des différents points de vue, le point de vue de la nuisibilité dans le généralement parlant dispose trois grands caractéristiques, ils disposent en physique, en signification, et nuisible. Lors de l'appréciation des ces points de vue, il faut considéré que le comportement de la nuisibilité comme le

maintient d'un élément centrale, d'un élément de frontière et un élément globalisé sous le base de la structure de la crimialité. La nuisibilité s'agit comme l'élément principal, elle s'explique largement les différents type de la crimialité, son établissement de théorie doit être strict et par précaution, il faut exclure les comportement d'exprès et non exprès en dehors du cadre de la crimialité. Donc, ce dernier ne doit pas être considéré comme un des caractéristique du comportement de la nuisibilité. La nuisibilité agit comme l'élément central, elle doit s'apparaître comme un caractéristique de la crimialité et un caractéristique juridique. Dont qui sont considérés des comportement dangereux et illégaux. Les comportements à risque comme un facteur de division, à travers le corps de l'activité purement idéologique à des crimes, il devrait aussi être le caractéristique physique du comportement de la nuisibilité.

Mots clés: Comportement de la nuisibilité; Physique; Significatif; Nuisible; Contraint à la loi

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1. VIEWS ON HARMFUL BEHAVIOR AND REASONS FOR CHOOSING CHARACTERISTICS

1.1 Main Views on Harmful Behavior in China

As the objective aspect of the constitutive elements of crime, harmful behavior does not include harmful result. There are several views on the definition of harmful behavior in Chinese criminal law circles. The first view thinks that harmful behavior is a body action made under

actor's intention or will (GAO, 1998, p.110). The second view thinks that harmful behavior is a body action which violates criminal rules or mandatory requirement under the control of the actor's intention (XIONG, 1992, pp.4-9). The third view thinks that harmful behavior is a body action that has social harmfulness (LI, 1997, pp.62-67). The fourth view thinks that harmful behavior is a body action objectively against criminal rules or mandatory requirement (NI, 1999, p.67). The fifth view thinks that harmful behavior is a socially harmful body action which objectively against criminal rules (HUANG & ZHANG, 2007, p.58).

We can conclude several probable characteristics from above views: a. corporality, b. intentionality, c. harmfulness, d. illegality. Corporality means harmful behavior is body action; Intentionality means harmful behavior is a conduct controlled by intention; harmfulness indicates that harmful behavior is a conduct that infringes legal interest; Illegality means harmful behavior is not allowed by the law. The five views are results of the combination of those four characteristics. The corporality characteristic has been concluded in all five views. Scholars hold different views on the other four characteristics when they judge characteristics of harmful behaviors.

1.2 Behavior Theories in Civil Law Countries

There are four main theories about behavior in civil law countries. The theory of causal behavior believes that behavior is objective body movement caused by intention and causal process of the result created by objective body movement (HONG, 1997, p.40, 161). The second theory is "finale Handlungslehre". This theory recognizes that behavior is intentional behavior of human being, that is to say, based on his or her knowledge on causality, the actor foresees the result of his or her behavior and sets goal according to it and then, do the behavior to achieve this goal. The third theory is social behaviorism which thinks that behavior is a body action that has social significance (ZHANG, 2007, p.63-64). The fourth is the "personliche Handlungslehre" which thinks that behavior is the actualization of the actor's personality (BAO, 1995, p.77).

From the four theories on behavior, we can generally get the probable five characteristics of behavior: a. corporality, b. intentionality, c. purpose, d. sociality, e. personality. The understanding of the corporality characteristic is almost the same as the thoughts of Chinese scholars on it. However, there is big difference in the understanding of the intentionality characteristics. Intentionality characteristic in the definition of behavior is neutral and colorless which means that the definition of behavior cannot show the content of intention because it is the content of responsibility. This has separated intention with its content and the intentionality in the definition of behavior is a blank and empty concept (ZHANG, 2007, p.62). Purpose means that behavior is not only intentional

but also planned. The sociality refers that behavior is a social act and has social significance. Behaviors do not have sociality cannot be recognized as behavior in criminal law. Personality is to say that behavior is made to show the personal attitude of the actor and is the reflection of the actor's personality. The four theories all recognize corporality as the common characteristic of behavior and have different views on the other characteristics.

1.3 Reasons for Selecting Characteristics of Behavior

According to different theories on behavior or definitions of harmful behavior, we can conclude several characteristics in a definition-to-characteristics thinking logic. However, we can think from the opposite side that we chose characteristics of the behavior according to what we think it should be and generalize the definition of behavior or harmful behavior. This is a characteristics-definition thinking logic. The behavior in criminal law or harmful behavior we need should meet the following requirements:

Firstly, behavior should have the boundary function. Crime is a behavior. There is no crime without behavior. Purely brain activities or indication of criminal intention are subjective affair but not crime. Only when they get expressed by behavior, it can be crime. Therefore, both Chinese and foreign scholars have recognized corporality as one of the characteristics of behavior or harmful behavior. It is the key for behavior to show the boundary function and also the need for protecting human rights by criminal law.

Secondly, behavior should have the function of being the basic element. Behavior is the core and most important elements among the constitutive elements of crime. The definition of behavior should apply to all crime in criminal law without exception no matter act or omission, intentional or negligent, *actio libera in causa* or *vergelichkeitsdelikt*. The theory of causal behavior emphasize that behavior is the reflection of intention and should have obvious external action. While omission does not have the obvious external action, so there is certain difficulties in explain omission under the theory of causal behavior. The "finale Handlungslehre" theory strengthening the purpose of behavior but negligent crime does not have purpose which means this theory cannot explain negligent crime.

Thirdly, behavior should have the function as a connecting element. In the theory of the civil law system, behavior is a connecting element which connects illegality, responsibility and punishment. However, this connection is based on the judgment of behavior onwards and illegality, responsibility and punishment afterwards. Hence, among the constitutive elements of behavior, the most important is factual ones but not the value elements. Although social behaviorism and personliche Handlungslehre are relatively complete in their scope, the

value judgment on the social significance when judging behavior under the social behaviorism is not proper. The social significance of behavior should be referred to when judging illegality of the behavior, however, the social behaviorism has investigated it in behavior which has made the value judgment of social significance doubled and also brought it forward and consequently makes the definition of behavior lose the function as connecting factor. The personality of personliche Handlungslehre is a concept relating to responsibility. Judging personality in the behavior may be thought as preposing personality which is supposed to be judged in responsibility or making repeated evaluation, at the same time, it has destroyed the function of behavior as a connecting factor. Due to the constitutive elements of crime in China is a united system of both fact and value judgments, especially there is no independent judgment on illegality, therefore, there should be different understanding on the connecting function of harmful behavior in the constitutive elements of crime system in criminal law in China which does not mean we can exclude the illegality element out of harmful behavior. On the contrary, to treat illegality as one of the characteristics of harmful behavior can help explain just cause and the urgent avoidance of danger well. And this is also the reflection of the connecting function of harmful behavior.

Last, definition of behavior should be simple and proper. To do research on the definition of behavior aims at preinstall an objective, simple, clear and proper judgment subject for recognizing crime. If it is too complicated or abstract, people will feel difficulty in grasping it. The definition of “sociality” of the theory of social behaviorism is too wide and unclear and the personality of the “personliche Handlungslehre” is also difficult to understand. Both of the theories have defects in this aspect. Harmful behavior does not equal to crime only when other constitutive elements completed it can be called crime. Hence, the scope of harmful behavior should be wider than the scope of crime otherwise it is very possible to add other conditions into the scope of behavior. It is not only impossible to exclude behaviors as psychopath’s out of harmful behavior but also inappropriately replaces the judgment of other constitutive elements of crime.

2. VALUE ANALYSIS ON INTENTIONALITY

As one of the elements of harmful behavior, intentionality is commonly recognized in both theory and practice. It is thought that intentionality has the ability to exclude unconscious behavior out of behaviors in criminal law and in the same time save judicial resources. The author thinks that intentionality not only has the function in filtering harmful behavior but also limit the application scope of the concept of harmful behavior.

2.1 Intentionality does not have the Function to Sift Harmful Behavior.

Supporters of intentionality thinks that intentionality has the function in sifting harmful behaviors and exclude behaviors irrelevant to the criminal rules, behaviors made under absolute enforcement and behaviors made by psychopaths which cannot be controlled or governed by the actor so that to avoid judgment on those behaviors to waste judicial resource (WU, 2005, p.81). The statement that intentionality has the function to sift harmful behavior eventually is a theoretical hypothesis made by supporters for in judicial practice the function does not exist at all. When a case that looks like a murder has been found, we cannot judge from the crime scene that whether there is intentionality in the killing conduct. If it is conducted by psychopath after the investigation, the actor does not need to take responsibilities for it. Therefore, behavior made by psychopath is unconscious but it does not be recognized via intentionality of the behavior, instead, it is concluded from the fact that psychopath does not take criminal responsibility. Behaviors made by sleepwalkers in sleeping, behaviors in the force majeure circumstance and behaviors made under absolute enforcement are all behaviors that do not need to take criminal responsibilities which is concluded from the situation that they lack of intentional misconduct or negligence. According to the above circumstances, we cannot say that the actor does not make harmful behaviors. We can only suggest that due to the lack of criminal responsibilities or guilty their behaviors do not constitute crime. It is unable for us to judge intentionality outside of the object or objective aspect. However, after the judgment of the object and objective aspect made, there is no need to discuss intentionality of the behavior.

2.2 Intentionality is Only a “Label”.

From the definition of intentionality, it can be found that the content of intentionality has overlapped the guilty in the subjective aspect of crime. Supporters of intentionality think that the intent and fault in the subjective aspect of a crime is different from that of the content of intentionality in harmful behavior. The intent and fault in the subjective aspect of the crime refers to the attitude of the actor’s behavior’s result. However, as the content of intentionality in harmful behavior, the intent and fault is an attitude about the actor’s behavior. From the stipulations of article 14 and 15 of the Criminal Law of the People’s Republic of China, it can be found out that the subjective aspect of crime is a subjective attitude of the actor on the harmful social result that is made or may be made by his or her behavior. It is not the attitude about the harmful behavior. Thus, considering the subjective aspect of harmful behavior and subjective evaluation of the constitutive elements of crime do not contradict with each other and there is no possibility for making repeated judgment (JIANG, 2001, pp.28-29). For consequential offense that

has both harmful behavior and harmful result, the above view can make sense. However, for behavioral offense that only has harmful behavior, the guilt can only be the attitude about the harmful behavior and intentionality and the guilt will definitely overlapping. In fact, guilt is the attitude about the harmful behavior and its nature which is conducted by the behavior. In this sense, the content of intentionality and guilt are overlapping. Just as some scholars pointed out "if we keep the mental element in intend or negligence in the concept of behavior, it is inevitable to give repeated evaluation. If we insist in distinguishing them, the mental element in harmful behavior can only be a fictitious thing without real content and the best we can say about it is a "Label" (HUANG & ZHANG, 2007, p.57). However, the "label" and the intentionality supported by the theory of causal behavior which refers to value neutrality or neutral, colorless, blank and empty intention are almost the same.

2.3 Intentionality is not Suitable for all Harmful Behaviors.

As crime the *actio libera in causa* and *vergelichkeitsdelikt* are widely accepted. Although there are different theories on the liability of it in civil law states, the compliance of it as constitutive element of crime does not show anything special. The difficult point in explaining the criminality of it by Chinese criminal constitutive elements theory is also the guilt but if intentionality is one element of harmful behavior there will definitely be another unsolvable difficulty. If the difficult of guilt or liability of the *actio libera in causa* and *vergelichkeitsdelikt* is how to apply the principle that liability goes with the behavior, then the difficulty of intentionality of harmful behavior is to explain non intentionality into intentionality which is certainly impossible. If intentionality is the characteristic of harmful behavior, it will definitely require the actor have the intention when he or she acts harmful behavior and it means that intentionality must exist in the same time of doing the harmful behavior but before or after. Nevertheless, harmful behavior of the *actio libera in causa* is made without consciousness and *vergelichkeitsdelikt* is forgetting to do necessary behaviors. Intentionality does not exist in both behaviors no matter act or omission.

In the process of cause setting of the *actio libera in causa*, the actor does have intention. *Vergelichkeitsdelikt* should not forget the behavior he or she is currently doing but these contents are just what needed to be thought about when determine guilt or responsibility which has no relation with the intentionality. Some scholars argue that intentionality is included in the nature of harmful behavior, however, intentionality and corporality of harmful behavior cannot only exist at the same time but also in sequence. For example, one kills some people after drunk and the reason he get into the situation of pathological drunkenness is to behave murder (JIANG, 2001, pp.28-29). This argument says intentionality is

the nature of behavior on one hand, and on the other hand, it says intentionality and corporality can exist separately which is obvious paradox and cannot make any sense. Contrarily, the so called intentionality under this circumstance is totally the content of guilt. To explain guilt or responsibility by stating that the two do not exist at the same time is allowed but it cannot tell the intentionality of harmful behavior.

In conclusion, although intentionality can exclude unconscious behaviors out of harmful behavior, unconscious behaviors usually are ruled out of criminality for the lack of guilt or criminal capacity in practice. Apart from the judgment on guilt or criminal capacity, it is impossible to directly verify intentionality of harmful behavior and not to say indentify it. Therefore, intentionality belongs to guilt and does not have independent value of existing. To leave aside of intentionality, the *actio libera in causa* and *vergelichkeitsdelikt* do not have anything special as harmful behaviors and the only difference is about the guilt or responsibility.

3. VALUE ANALYSIS ON THE HARMFULNESS

The harmfulness in a harmful conduct indicates that harmful conduct has the nature that can infringe on legal interest and the characteristics of the harmful conduct are obvious. However, some scholars think that the concept of a conduct in Chinese criminal law is the conduct in most common sense. The harmfulness is not a particular characteristic of criminal conduct. Both the illegal civil and administrative conducts have social harmfulness. It is obviously not logical to define conduct through this attribute rather than a characteristic. Therefore, as we defined that conduct in criminal law does not include social harmfulness. It is an objective status under the circumstance that the doer should control or has controlled acted on certain person or object (WANG, 2010, p.14). Trying to deny the harmfulness characteristic of criminal conduct by explaining that harmfulness does not belong to the harmful conduct does not make any sense. It is not only a misunderstanding about the harmfulness but also does not understand the value of harmfulness. Harmfulness in harmful conduct in criminal law is different from the harmfulness of other illegal conduct in nature. The severity of the harmfulness in criminal law is the largest. Only for short and conventionalized usage we use harmfulness instead of serious harmfulness. It is just like we call the substantive characteristics of crime social harmfulness instead of serious social harmfulness. Harmfulness has the function to exclude conducts without harm. If there is no harmfulness characteristic in criminal law, it is possible to recognize non-harmful conducts as criminal ones. For example, A intended to kill B. When A

get the information that B is going to other city on business, he tries to encourage B to take plane for he wishes B get killed by aircraft accident by chance. B listens to A and then takes plane to the other city. However, unfortunately, the aircraft crashes on the way and B gets killed by the accident. In this case, A has the intention to kill B, persuades B to take plane, and finally gets the result that B gets killed by accident. There is no doubt that A's behavior meets the substantive requirement of the constitutive elements of murder. However, in the objective aspect whether A does the conduct of killing B and whether the death result of B has causality with the conduct are the key point of recognizing A's behavior's nature. A acted a persuading conduct to make B take plane in this case while this persuading conduct cannot do any harm to B under normal conditions. Therefore, A's conduct does not have harmfulness and of course is not harmful behavior which leads to the result that A cannot be committed as crime. If we do not consider the harmfulness characteristic of A's conduct, A's conduct obviously must be thought as harmful behavior and the death result of B of course have causality with it according to conditionality theory. Under this circumstance, A should be committed murder. Even if there is no causality between A's behavior and B's death according to the equivalent causality theory, A's behavior has to be recognized as attempt murder. It is clear that harmfulness has function in protecting offender's human right and should be thought as characteristic of harmful behavior.

If we say that the corporality is fact judgment of harmful behavior and harmfulness is the value judgment of harmful behavior, it is because that the constitutive elements of crime in China which is a united system of both fact judgment and value judgment is different from the civil law states'. As the core element of the constitutive elements of crime, harmful behavior includes both fact and value judgments and is a combination of harmfulness and behavior. Otherwise, it should be called behavior instead of harmful behavior as in the civil law system. As the modifier of the word behavior, harmful reflects the value judgment of behavior. Harmfulness, a value judgment, is purely an objective judgment and it has nothing to do with the subjective psychological attitude of the actor. It provides objective basis for giving criminal sanctions to the actor of harmful behavior and is also the nature of crime which is the basic embodiment of social harmfulness.

Since the judgment on harmfulness of harmful behavior is an objective judgment, we should take objective standard when deciding whether a behavior is harmful and can be recognized as harmful behavior. Consequential offence can be understood according to the adequacy theory of causal relationship. When legal interests damaged by certain behavior have social correspondence, the harmfulness of the behavior is

positive. Otherwise, the harmfulness is negative. Whether the harmful behavior has caused factual harmful result does not have connection with harmfulness. Because harmful behavior is a patterned behavior which is stipulated by criminal law, we can judge behavioral offence by using canalization of harmful behavior and the above standards which means when certain behavior is patterned behavior and has the social adequacy, the harmfulness is confirmed and this behavior is patterned harmful behavior. Otherwise, when the behavior cannot be recognized as patterned harmful behavior, the harmfulness is negative and the behavior is not a patterned harmful behavior. Social adequacy means it usually happens so. It's a normal situation but not special or occasional ones. In the example we talked earlier, the reason why the behavior that A persuades B to take plane does not have harmfulness is at common sense asking another person to take plane cannot lead to death of the person which means there is no social adequacy in the behavior. Therefore, the behavior that A persuades B to take plane is not murder.

4. VALUE ANALYSIS OF ILLEGALITY

Crime is a conduct. Harmful behavior is the core of a crime. Recognizing illegality as a characteristic of harmful behavior is the requirement of the principle that conviction and penalty according to law and also the inevitable result of that constitutive elements of crime act as the objective aspect of stereotyping of crime. The author of this paper agrees with the following reasons held by some scholars in adding illegality element to the definition of crime conduct. Adding the illegality element into the definition of crime conduct fits the overall characteristic of China's criminal law theory. The comprehensive evaluation of specific conduct made by the constitutive elements of crime in China is an evaluation that includes appropriateness, illegality and accountability of the constitutive elements of crime. That is to say, the constitutive elements of crime are not only the behavior Patten but also criterion of legal evaluation. Under such system, illegality and accountability are not recognized as independent elements of crime, instead, they reside in objects of crime, objective elements of crime, subject of crime and evaluation of subjective elements of crime. Illegality as core element of constitutive elements of crime should of course contains criminal illegality in order to express legal characteristics of harmful behavior in criminal law (HUANG & ZHANG, 2007, p.57). No doubt, as harmful behavior illegality only refers to external illegality. It does not contain internal illegality. The internal illegality is included in the harmful behavior.

To recognize illegality as characteristic of harmful behavior is not only the requirement of identifying crime according to law, but also the necessity for harmful behavior to play its role as a connecting element. As

non-crime issues, how to add just cause and the urgent avoidance of danger into the system of constitutive elements of crime has been a problem which scholars usually wish to but fail in resolving. In the constitutive elements of crime system of the civil law, just cause and the urgent avoidance of danger are thought as issues that coincidence with the constitutive elements of crime but lack of illegality. In China, judging constitutive elements of crime is not only a factual process but also a value analysis. Therefore, just cause and the urgent avoidance of danger cannot be thought as at the same time meet the requirement of the constitutive elements of crime but are not crimes. If illegality is thought as characteristic of harmful behavior, just cause and the urgent avoidance of danger can be excluded of harmful behaviors for they do not contain illegality objectively. Of course, just cause and the urgent avoidance of danger also need subjective conditions which are the aims of them. Nonetheless, it is appropriate to explain that just cause and the urgent avoidance of danger are not crime by stating harmful behavior is the connecting element of the constitutive elements of crime and just cause and the urgent avoidance of danger do not have illegality characteristic of harmful behavior.

In a word, harmful behavior in China's criminal law as the core element in constitutive elements of crime should show essential characteristics and legal characteristics of crime which means illegality and harmfulness must play as characteristics of harmful behavior. However, harmful behavior as the objective constitutive element, corporality should be thought as characteristic of harmful behavior. Accordingly, harmful behavior can be defined like: Harmful behavior is body action which is harmful

to society and stipulated by criminal rules. Hereinto, corporality is the formal characteristic of harmful behavior, harmfulness is the substantive characteristic of harmful behavior and illegality is the legal characteristic of harmful behavior.

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