

## Feasibility of the Application of Common Law Double Tier Model in China from the Burden of Proof Perspective

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### Abstract

Since just cause and other behaviors that exclude social harmfulness are not included in constitution of a crime, the distribution of burden of proof is not clear. Behaviors that exclude social harmfulness is the content of the defense of just cause in British and American double tier model and the burden of proof is clear. We cannot introduce or borrow the British and American double tier model to clearly exclude the burden of proof of behaviors which have social harmfulness for it could lead to the increase of the accused's burden of proof and therefore causes inability of proofing, the burden of proof of both the prosecuting and defending parties mixed and conflict, and no way for bearing the burden of proof for the accused.

**Key words:** The constitution of a crime; Behaviors that exclude social harmfulness; Double tier model; Burden of proof

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The formation of a crime requires a series of conditions which are scattered in the rules of the criminal law. Gathering all these conditions, a unity containing completed internal structure is the theoretical system of a crime. The theoretical system of a crime is a theoretical model and is a thinking tool for defining crimes. Different countries' criminal law theories adopt various

theoretical system of a crime by combining with their historical and cultural traditions, realistic requirements, and other comprehensive elements. For example, in China it is the constitution of a crime, in Japan and Germany it is the class crime constitution theory, and in the USA and Britain it is the double tier model. In the trend of globalization, the concepts of criminal theory in different countries are becoming more and more alike. The comparison and mutual learning around different crime constitution systems has become the hottest topic in criminal law field. The introduction of the class crime constitution theory from Germany and Japan in Chinese criminal law academic world has become common practice and there is still no special discussion in whether we can introduce the double tier model of the Britain and the USA. There are already some scholars who think that we should learn from the British and American double tier model to reconstruct Chinese criminal constitution theory. However, there are also some who deny the introduction of the double tier model from a macro view for they think the British and American model grows on the basis of case law and the success of it mainly owes to the function of the judges. In China, the two essential elements are missing, China's criminal procedure model level falls far behind the British and the American adversary systems', and practicing departments' lack of awareness upon procedure (Li, 2006, pp.43-44). However, macroscopic layer discussion is too general to make people believe. Therefore, we still need to give detailed analysis from microscopic point of view. The feasibility of burden of proof is a necessary microscopic angle for analyzing whether we can adopt the British and American model.

### 1. THE DEFECT OF THE CONSTITUTION OF CRIME IN BURDEN OF PROOF

According to Chinese traditional criminal law theory, the constitution of a crime contains four aspects which

are object of crime, objective aspect of crime, subject of crime, and subjective aspect of crime. Object of crime is the socialism social relations which is protected by criminal law and harmed by crime; the objective aspect of crime is the external manifestation of the activity of crime; subject of crime is the nature person being over the age to bear legal criminal responsibility, has criminal capacity, and act harmful behaviors. Legal person can be some criminals' subject; the subjective aspect of crime means that the actor of the behavior is guilty (includes intention and fault) (Gao & Ma, 2011, pp.49-50). The four elements of the constitution of crime are all positive elements. Any behavior tally with the constitution of crime is criminal behavior which is the only reason for criminal responsibility (Ma, 1999, pp.70-75).

Behaviors that exclude social harmfulness include just cause, act of rescue, ordinance behaviors, act of lawful occupation, victim's commitment, deducing promise, self-rescue, self-harming act, and conflict of obligation, etc. are thought as behaviors that conform to the constitution of crime but do not have social harmfulness for which they are not criminal behaviors.

If the constitution of crime is all the elements required by the establishment of a crime, plus the requirement of judging whether a behavior excludes social harmfulness, then behaviors that exclude social harmfulness is completely included by the constitution of crime; in addition, since the four elements of the constitution of crime are all positive conditions for judging crime, the accusing party should bear the burden of proving that the behavior excludes social harmfulness while the defendant does not have any responsibility in proving it. Obviously, such result goes against the judicial practice that the defendant has certain degree responsibility in proving behaviors that exclude social harmfulness. This means that Chinese constitution of crime theory cannot provide substantial law foundation for the distribution of criminal liability in proving behaviors that exclude social harmfulness.

If behaviors excluding social harmfulness meet the requirements of the constitution of crime *prima facie*, then when and how to exclude it from crime has become a question. In fact, when judge whether a behavior is a crime or not, people do not include behaviors excluding social harmfulness into the constitution of crime. Consequently, the burden of proving behaviors excluding social harmfulness has become unclear and caused a lot of questions in whether it can correctly judge crime practically. Constitution of crime is the standard for committing a crime and every elements of it should be proved by the prosecution. The prosecution will not prove the non-existence of the behavior excluding social harmfulness because it is not included in the constitution of crime. Therefore, the defender should raise the behavior excluding social harmfulness. To what degree

does the defender need to prove the existence of the behavior excluding social harmfulness to challenge the charge of crime from the prosecution? It is not clear at all. Such issues are usually dealt by the judge with discretion in practice which leads to different judgments from case to case, makes laws and regulations of a state disunited, and violates the principle of equality. People cannot help wondering that since the Supreme People's Court and Supreme People's Procuratorate of China have made huge amount of judicial interpretations for criminal law issues, why they do not make one or two interpretations for behaviors excluding social harmfulness. In fact, because the burden of proof of behavior excluding social harmfulness should be resolved within the constitution system of crime, it is normal that there are no judicial interpretations for it. There are some courts giving provisions stipulating just cause. Paragraph 1, Article 66 of "Trial implementation of the rules stipulating various evidence related issues for dealing with all kinds of cases of Beijing superior people's court": "The defendant does not have the burden of proving himself or herself innocent. Whereas if the defendant defend with the reasons such as psychiatric disorders, just cause, act of rescue, legal authorization, legal reasons, or non-absence at the scene of the crime, he or she have to provide related evidences to prove." The rule requires defendant take the responsibility in proving behavior excluding social harmfulness, however, whether such rule is reasonable needs further discussion. Therefrom, the burden of proof of behaviors excluding social harmfulness has become one of the biggest issues of Chinese criminal constitution theory.

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## 2. CHARACTERISTICS OF THE BURDEN OF PROOF IN BRITISH AND AMERICAN DOUBLE TIER MODEL

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For most lawyers, judges, and law drafters, the distinction of fundamental criminal law framework is the differentiation of crime and defenses (Robinson, 2005, p.4). The constitution of crime in British and American criminal law is summed up by Chinese scholar Prof. Chu Huaizhi as double tier model includes "fundamental elements" and "sufficient liability elements" (Chu, 2005, p.36) so that to realize the butt joint of the communication between Chinese and the Common law criminal theories. Fundamental element of the constitution of crime is called "crime" in common law system criminal law. "Generally, crime is constituted by two elements: criminal behavior—objective condition or external condition of a crime; and criminal mind—subjective condition or internal condition of a crime" (Dressler, 2009, p.75).

Criminal behaviors and criminal mind are basic facts of a crime and active conditions for establishing criminal liability. In Anglo-American system's criminal procedure,

the prosecution should prove it beyond a reasonable doubt. For example, in American criminal justice system, the prosecution should prove the charged crime beyond a reasonable doubt, that is to say, the prosecution must prove that the defendant did certain criminal behavior and the details of the behavior and the damaged stipulated by laws were caused by the behavior (Reid, 2001, p.87). Nevertheless, prosecution's proof of some criminal behavior and criminal mind beyond a reasonable doubt can only reflect that the crime established *pro forma*. In order to get rid of the charge, defendant usually defends for themselves. If the defense of innocence exists, the behavior is innocent. Therefore, if a behavior is eventually recognized as a crime, the defense for innocence must not exist. This is the sufficient liability condition called by professor Chu Huaizhi. Just as some scholars said when discussing whether psychopath's behavior can be recognized as crime: "although the behavior of the defendant meets the requirements of a crime *prima facie*—behavior, mental condition, causal relationship, and consequences—if the behavior is not made with intention or it is not a consequence that could be controlled by the actor, then the defendant should be innocent without being punished" (Morse, 1985, p.777, 728). The American criminal law theory has divided defense reasons into "lack of evidence", just cause, immunity defense, special reason defense, and external defense reason. "Lack of evidence" means that "defendant provides evidence in court hearing to prove that the prosecution did not give evidence to prove one of the basic elements of crime." Just cause defense includes self-defense, protection for others, protection of property and to living conditions, law enforcement, and act of rescue, etc. Immunity defense includes intimidation, drunkenness, mental disorder, and diminished responsibility, etc. Just cause defense and immunity defense can be applied in all kinds of law break behaviors. However, special reason defense can only be applied in one or few kinds of unlawful acts (Dressler, 2009, Fn. 6, pp.184-187). The basic characteristic of special reason defense is that although the actor of the behavior has meet all elements required by being charged *prima facie*, in fact he or she does not make the social harmfulness stipulated by the rules of criminal law (Liu, 2010, p.132). External defense reasons have no connection with the social harmfulness and its punishment caused by the behavior, for example, the diplomatic immunity (2010, p.187). Defense reasons are negative elements of criminal liability. In the circumstance that criminal behavior and criminal mind is proved, defense reasons stop the establishment of crime and the criminal liability of the defendant. Defense reasons are usually proposed by defendant or lawyer after which the prosecution can bear the burden of proving the non-establishment of the defense reasons. Sometimes, the persuading responsibility may also be taken by defendant who depends on the

difference in defense reasons and judicial areas.

The characteristics of the British and American double tier model are: combines positive and negative elements together to construct the theoretical system of the constitution of crime; the legalization of the constitutional elements coexist with super regulation defense reasons. Therefore, the starting point of the British and American constitution of crime theory is judicial experience and the end is simple and practical. The biggest advantage of the British and American constitution of crime theory is the fully reflection of the process of conviction (Zhou, 2011, p.59-60). "It is a unique characteristic that to involve prerequisite in lawsuit into the constitution of crime in common law system's criminal law. Due to the existence of legal defense, the double tier constitution of crime system introduces the defendant's and the defender's positivity during identifying criminal activities and uses such civil judicial resource to make the identification of crime pays more attention on the realization of individual justice" (Chen, 2001, p.217).

The double tier model of common law system recognizes just cause, act of rescue, and other behaviors excluding social harmfulness as defense reasons which belong to the content of "iusta causa defense". Comparing with the constitution of crime, the unclear burden of proof of the behaviors excluding social harmfulness has been eliminated.

### 3. FEASIBILITY OF THE APPLICATION OF THE DOUBLE TIER MODEL OF THE COMMON LAW SYSTEM FROM THE PERSPECTIVE OF BURDEN OF PROOF.

Since there are huge differences between Chinese and Common law countries' legal culture and judicial systems, it is not possible for China to copy or borrow the double tier model from them from the burden of proof point of view.

First, it is difficult to define the burden of proof in defense. "Insufficient evidence to defend" means the crime that accused by the prosecution does not exist or the behavior does not meet the requirement of the substantial elements of a crime. However, whether it is because the lack of substantial elements to make the behavior not a crime or just for the "insufficient evidence to defend" to avoid criminal liability? There is a dilemma. If the charge of a crime does not establish because of the nonexistence of the accused criminal behavior or criminal mind, then the litigation should stop in the phase of proving substantial criminal elements. On the contrary, "Insufficient evidence to defend" has to go into the next defense reasoning stage. If the failure of the charge of crime is because the "insufficient evidence to defend", then meeting the requirement of criminal substantial elements is the premise

while which goes against the reason of “Insufficient evidence to defend”. Therefore, there is another giant contradict in burden of proof: for the prosecution, the establishment of criminal substantial elements should be proved by the prosecution and the proof standard should meet the degree of beyond a reasonable doubt; while the existence of the defense reasons for innocence should be borne by the defendant, for example, the defendant should be responsible in persuading in “Intimidation”. If the defense reason for “lack of evidence” is required to reach such a high degree, it definitely eliminates the prosecution’s burden of proof which could lead to confusion and contradiction between both sides.

However, it is not a problem for British and American criminal procedure since the USA and the Great Britain are both case law countries and the burden of proof can be decided by each single case without thinking about the generality. In the *United States v. Johnson* (1992) case, the defendant Johnson was accused threatening witnesses. However, Johnson thought the prosecution should prove beyond a reasonable doubt that he intentionally threatened or induced the witnesses based on “lead or induce witnesses to withdraw testimony, records, documents, or other evidences in formal procedure”. But positive defense requires Johnson to prove that he merely did some actions based on “encouraging, inducing, or leading other people testify truthfully”. In this case, the criminal minds and the defense facts are obviously overlapped. Johnson thought that the overlap has made his positive defense lose significance. The Second Circuit Court of the USA thought that the burden of proof of the prosecution is proving beyond a reasonable doubt that Johnson intentionally threatened or induced the witnesses basing on inducing the witnesses drawback testimony or other evidences; once the prosecution meets the requirement, Johnson can still use preponderance of the evidence to prove the intention part of his positive defense, that is to say, he only wish to let the witnesses withdraw unreal testimony (Lai, 2007, p.117).

On the contrary, as a defense, “consent of victim” is proved by the accuser. As the American scholar Husak said: “within the scope of a crime, lack of consent could be an element of the establishment of a crime or it can be said that the existence of consent plays the role of proving the appropriateness of behaviors” (Husak, 1987, p.198). Whether we should let the defendant prove that the behavior is approved by the victim to deny the establishment of a crime or we should make the prosecution prove that the victim disagree with the behavior acted by the defendant so that to certify the establishment of a crime? In common law countries’ criminal law theory, “lack of consent” usually exists as the establishment element of a crime. For example, statutory rape is an appropriate case. Sexual intercourse without consent is obviously an element. Unless the “disagree” element be met, or the behavior cannot be

recognized as a statutory rape. Just as some scholar said: “in a charge of the statutory rape, the responsibility of the prosecution is not only limited in proving the fact that the penis inserted the vagina but also proving the fact that the victim disagreed with the sexual intercourse and proving that the defendant knew clearly that the victim disagreed with the intercourse with him or did not know whether the victim would like to have intercourse with him due to carelessness as well.” (Andrews, 1992, p.62) Therefore, in statutory rape, the prosecution must prove that the victim does not agree with the sexual intercourse with the defendant when the sexual behavior happens instead of proving that the defendant wishes to have sexual intercourse with the victim (Lai, 2007, p.117).

From the above two cases we can see, there is no unified way to bear the burden of proof in common law double tier model. In China statute law is the tradition. People pay great attention on deductive reasoning and precise conceptualized constitution of crime with strong logics. In such system, people wish there are unified rules for all cases. Traditions like the common law system that burden of proof differs from case to case and no unified rules are provided which does not meet the common sense of people and also not easy for people to accept. Cases in real life are of different kinds and types; therefore, the distribution of the burden of proof of defense varies. There is no case law tradition in China, thus, we cannot get any enlightenment from previous cases. In addition, since there is no unified rule stipulating the burden of proof, judges are confused and the phenomenon that same case have different judgments widely exists which will definitely cause harmfulness to the unity and judicial authority of the state’s legal system.

Second, the existence of the British and American model supplement with strict adherence to due process, the great authority owned by the Constitution, and the tradition of protecting human rights. If we hope to borrow or copy the British and American model to reach the goal of respecting due process, improving Constitution authority, and protecting human rights, it can only go far away from the original evaluation standards of constitution of crime, adopts the value and mission that exceeds far beyond its own contents which are difficult to endure, and the result may be nothing at the end. Such unacclimatized constitution of crime system can only be discarded in practice.

The British and American model attaches relatively heavy burden of proof for the defendant which is compatible with the great defense ability of the defendant in British and American model. The Anglo-American law system adopts adversary system, strengthens both parties’ dominant role and litigation function during a lawsuit, and allows them argue and defend proactively and mutually. The adjudication organ does not have the responsibility to investigate the fact actively. Police, procurator, defendant, and the defender are equal and enjoy the equality of arms.

For example, the dual investigation mechanism which allows the procurator and the defendant investigate at the same time gives the opportunity for the defendant to acquire completed and comprehensive exculpatory evidence timely; the state carries out common law aid system which makes defense a solid system foundation and resource guarantee. Nevertheless, there are also several cases that superior courts repeal guilty verdicts and proclaim innocent for the defendants due to the reason of lack of defense. Obviously, the British and American liberalism tradition is a double-edged sword for personal litigation rights protection; it gives sufficient opportunities for individuals to protect their own litigation rights and also heavy obligations for protecting personal litigation rights. If the obligation is not performed, the damage of litigation rights shall be on one's own account.

While in China, inquisitorial system is used and the burden of proof on the defendant side is less. Inquisitorial system emphasizes national law enforcement organs' and judicial departments' function and power during litigation, pays attention to the function of the judge in actively investigating facts of the cases, does not strengthen the subjective position and dynamic role of the parties in litigation (Xu, 1999, p.34). Thus, the protection of individual rights depends on the state giving relative heavy obligations to judicial organs. For instance, the state requires that prosecutors must have the obligation of being objective and the judges have the responsibility to investigate the fact. Prosecutors' obligation of being objective means they should keep objective and fair during criminal procedure, strictly follow objective facts, pay attention on evidences, facts, and laws that go against the rights of criminal suspects as well as the ones that are beneficial to them. "According to the principle, prosecutors and policy should have the obligation to take action fairly and equally, especially gives comprehensive investigation on the truth and facts. Prosecutors and policy cannot prove the defendant guilty on a single side on purpose" (Herrmann, 1995, p.34). China executes misjudgments accountability system on public security organs and their working staffs and tries to practically protect criminal suspects and defendants' rights. Therefore, judicial departments are given much heavier burden by the state to protect criminal suspects and defendants' legal rights proactively and shall take responsibility when lack of performing such burden. The protection of criminal suspects and defendants' legal rights mainly depends on judicial organs' responsibility performance rather than actively exercise their rights of defense.

Some people argued that we should learn from the British and American model to reconstruct Chinese criminal constitution theory: the constitution of a crime should include two conditions which are fundamental elements of a crime and preclusion elements excluding criminal liability. Fundamental elements of a crime are made up by objective and subjective elements. Preclusion

elements excluding criminal liability contain law violation preclusion and liability preclusion (Yu & Wen, 2002, p.56). However, if introduce the common law model rashly to China or reform Chinese constitution of crime according to the common law model without related development of judicial system such as applying adversary system, there is no way for China to realize the effect of protecting human rights, what is worse, may worsen the position of defendant. The above reconstruction scheme for Chinese criminal constitution theory has difficulties from the perspective of burden of proof. Take the burden of proof in cases that defendants defend for under the criminal capacity as example. There is a kind of defense existing in the common law model: the "Minor defense" which means the prosecution does not have the responsibility in proving the defendant under age, instead, the defendant should bear the burden of proof and should bear the disadvantaged consequences when lack of proving. In China, subject of crime is one of the four elements of the constitution of crime. The prosecution should bear the burden of proof in proving the defendant has already reached the age of having the criminal capacity, if the prosecution failed in doing so, the defendant cannot be judged guilty. If we follow the reconstruction scheme to exclude minors when excluding preclusion elements in criminal liability, then the defendant should bear the burden of proof in proving the age which will definitely make things worse – without knowing the age, it can be impossible to designate defense. However, there is no legal aid system applied in criminal cases in China, of course there is no defense lawyer in certain amount of cases. Since the lack of ability in defending for themselves and the detention which has deprived the minors' ability in evidence collection, how can the minors prove for themselves?

Generally, in order to resolve the problem of burden of proof, the development direction of Chinese constitution of crime is to include behaviors excluding social harmfulness into the constitution of crime. However, based on the inquisitorial system in China, it is impossible for us to adopt the double tier model of the Anglo-American system. Thus, we still need to consider the problem of whether the borrowed elements can be suitable for China.

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