

A Historical Review and a Critical Analysis of “Ausführungshandlung”

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Abstract

In recent years, due to the revision of Criminal Code and the improvement of criminal justice practice in Taiwan, the concept of “Ausführungshandlung”, which means one’s act is about to execute the criminal conduct, have become far more important than before. However, it is still unclear whether it has any functional meaning in criminal theory or not. In order to clarify this question, this paper analyzes the development and the orientation of “Ausführungshandlung” in Japanese criminal jurisprudence. We should first take a historical review and a critical Analysis toward Japanese criminal theories of “Ausführungshandlung”, and second, rethink several controversial issues, such as attempt theories, causation theories, and principal theories.

In conclusion, this paper considers the connotation of the concept of “Ausführungshandlung” from the standpoint of “Erfolgsunwert”, and doubts whether the one single concept of “Ausführungshandlung” can fully explain and answer questions about the causal relationship, attempt and preparation. The one single concept of “Ausführungshandlung” may be harmful to the implementation of the doctrine of legal interests, and it is also not conducive to the problem-solving commitment. Secondly, although some theorists reconstruct the meaning of the “Ausführungshandlung” from the point of view of “Verhaltensnorm” and assert that the “Ausführungshandlung” could provide people with obligation to comply with legal norms and clear guidelines of behavior, this paper argues that we should focus on the significance of criminal law as “Sanktionsnorm”. It means that the main target whom the criminal law

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wants to communicate with is the person who enforces the law, such as judges, and other law enforcers. For general people, the significance of criminal law lies in the principle of legality, which enables the people to clearly predict what kind of sanction and its effect their behavior may suffer, so as to form the basis of behavioral motivation. Thus, the functional importance of "Ausführungshandlung" shall not be overestimated. However, based on the principle of legality and the principle of clarity, the concept of "Ausführungshandlung" defined by the context scope of the constituent elements in crimes of specific criminal means (Verhaltensgebundenes Delikt) still contributes to specify which act we should take into consideration.

Keywords: Ausführungshandlung, the principle of legality, Verhaltensnorm, substantial step, crime of specific criminal means, obligation to comply with legal norms