

To Construct a „Procedure-Dependent” Theory of Criminal Illegality of Person

Bei-Shen Lin^{*}

Abstract

The purpose of this article is to construct a „procedure-dependent” theory of criminal illegality of person, which emphasizes the link between personal capacity and the concept of legality/illegality. Such theories can be traced back to Hans Welzel. However, after he put forward the relevant statement, due to the inability to properly integrate the subjective dimension (purpose) and the social dimension (social equivalence) that constitute the two pillars of the concept of illegality, it sparked debates in later generations. Therefore, the first half of this article will analyze and criticize Welzel's original discussion and several representative theories of illegality of person. Then, this paper will propose and construct a "procedure-dependent" theory of criminal illegality of person, in which the subjective and social dimensions of illegality are properly integrated. Inheriting the related statements of contemporary philosophy of language, this paper holds that: persons are neither individuals who can discover themselves without the presence of others, nor standardized roles that can only fully accept the action options set by society, but a "communicative rational subject" who can travel through it, accept roles under normal circumstances, but also provide reasons when necessary to create the possibility of change. Based on this, in order to claim the legitimacy of a judgment of illegality, the legal community must construct a fair procedure that allows actors to change the interpretation of the meaning of

^{*} Assistant Professor at School of Law, Fu-Jen University; Dr. iur., Frankfurt University, Germany.

E-mail: 153166@mail.fju.edu.tw

their actions by the existing interpretation framework in society. That is, the fair procedure provides an interface for the integration of the person and society. Finally, this paper puts forward the basic proposition of this theory of illegality: "An action that is deemed to have the meaning of denying rights through the framework of behavior interpretation in the world of life in a fair criminal procedure is an illegal action."

Keywords: criminal illegality, theory of criminal illegality of person, communicative rationality, communicative freedom, procedure-dependent