刑法学博士文库

On Ausführung

犯罪实行行为论

本书是在我的同名博士论文的基础上修改而成。虽然当时论文是应急之作，但本书并非应景之作。

范德繁/著

中国检察出版社

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犯罪实行行为论

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序

吴振兴*

我的博士研究生范德繁同志将其同名博士论文《犯罪实行行为论》修改扩充成书，付梓出版，作为他的导师，我很高兴。现因其之邀，欣然命笔作序，以表祝贺！

犯罪实行行为作为犯罪论中的基础理论，是近现代刑法及刑法理论关注的焦点之一，也是当代主客观相统一的犯罪构成理论中最重要的方面，以往刑法学界对此缺乏深入的研究，可以说国内对此问题的专门论述尚属空白，但是其理论的基础性地位又十分重要，在可供借鉴的资料十分有限的情况下，能将其作为专题进行探讨并成就一本著作，其难度可想而知，作者能够迎难而上，小题大做，并潜心写成专著，足见其可贵的探索精神。正如，评审专家评阅认为，该文对实行行为进行了深入全面的研究，填补了这个问题上的理论空白。

本书立足于罪刑法定主义的立场，以行为刑法为考察背景，以规范分析为基点，对构筑刑法中犯罪构成要件的行为要素予以系统梳理。综观全文，本书观点独到，论述充分。书中很多观点颇有见地。如认为，犯罪实行行为在犯罪构成的视野之下，是规范的框架

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类型。在法益保护的犯罪本质的观念理解之下，实行行为的质的规定性在根本上是对法益侵害的现实危险性，作者在对实行行为的质的规定性予以界定的基础上，又分别对实行行为的特殊形态进行了实行性和行为性的分析，澄清了那些刑法中实行行为性不甚明显的行为类型，本著作分别分析了原因上的自由行为、间接实行行为和不真正不作为等行为的实行行为性的症结所在，并进行了理论上的充分论证，在整体上勾勒出实行行为的完整画面。实现了实行行为理论上的自足和丰满。作者对这些问题的论述都不是泛泛而谈，而是旁征博引、条分缕析，言之有理、持之有故。比如对实行行为的范畴内容一章进行论述时，洋洋洒洒近万言，阐述之深入、匠心之独具可见一斑。

在上述问题的基础上，作者还对实行行为的起止过程和结构模式进行了论证，对实行行为的着手和终结的判断提出了独到见解，为司法实践提供了一定的理论指导，在实行行为的起止过程一章，作者最后从犯罪行为未遂存在的可能、共犯责任的分担、追诉时效的起算以及行为时空的确立等方面来论证了实行行为的过程意义。难能可贵的是作者创造性地将实行行为的结构模式归纳为行为多寡模式和要素粘合模式，并分别进行了深入研究。通过上述问题的分析论证，展示了作者严密的逻辑思维能力，显示了其比较深厚的学术功底。正如答辩评语所言：范德繁同志的《犯罪实行行为论》一文对实行行为进行了深入全面的论述，在一定程度上填补了理论研究的空白。该文立足于客观主义的刑法理论，在对实行行为质的规定性予以合理界定的基础上，对实行行为的概念、特征、判断方法逐一进行论证，不仅对正犯的实行行为、预备犯罪的实行行为等实行行为的一般问题进行了概括，而且对实行行为的异常形态、实行行为与犯罪发展阶段的关系、实行行为结构模式等问题的探究，具有一定的开拓性。该文视角独特，立意深刻，体系严谨，资料翔实，观点富有启迪性，文字畅达，是一篇优秀的博士学位论文。如

此评价应该说是十分恰如其分的。

范德繁同志1993年考入吉林大学法学院，1997年本科毕业、2000年硕士研究生毕业均以年级第一名的好成绩考入我的门下。经过十年的法学学生生涯的熏陶和六年的刑法学研究生的专攻，他积累了深厚的学术功底和较强的科研能力，经过其自身的努力和奋斗，在法学学术方面初露头角，后因种种原因，投身于司法实践工作，相信他也会取得令人满意的成绩。在作此序前，欣闻作者已申请入中国人民大学法学院博士后流动站进行程序法的研究，作为其导师，为其能有这样的学习探索精神而感到高兴，并祝愿他能取得优异的成绩！

吴振兴

2005年8月

内容摘要

犯罪实行行为是犯罪论中的重要范畴，对其进行深入探讨意义重大。在“无行为就无犯罪”的格言意义上，实行行为是构成一切犯罪的基底，刑法评价功能都是围绕着实行行为而展开，换言之，犯罪论的建构是以实行行为为主线的。作为刑法重要范畴的实行行为具有双重属性，在规范的层面上，它是刑法分则各本条规范内容的核心，在犯罪构成意义上它又是具体个罪的罪体核心。文章以规范为视角，力图分析在一般意义上实行行为所具有的规定性。在探讨了构成实行行为的全部实质规定性之后，逐一分析了刑法中异常行为形态在实行行为规定性上的符合性。文章所进行的实行行为实质探讨目的在于对刑法中的这一重要范畴予以一体化的微观澄清，从而促进刑法理论研究对实行行为的重视。

突出实行行为的理论地位并将其视为刑法中的重要范畴，首先必须要解决的是其立论前提的澄清，因为进入犯罪构成视野中的行为是被立法类型化的实行行为，是将事实上无数变化的行为抹去具体的面孔进而抽象的结果，因此，需要明确的是，在最根本的意义上，要解决立法所评价的对象是行为人的主观恶性，还是行为人实施的客观上的行为，即因刑法评价客体的对立而产生的行为刑法和行为人刑法的立场对立。只有先确立了刑法评价客体而后才有客体评价。在规范视野下的实行行为承担着客体评价的功能，所以只有刑法评价客体是行为人的行为，实行行为的犯罪论地位才能确立。行为人刑法以实施行为的人的恶性人格为评价对象，因为人的恶性

和人格的危险是难以把握的，所以在罪刑法定的现代法治文明下，行为人刑法的理论主张与行为刑法所主张的以抽象行为作为评价客体在与罪刑法定的精神契合上便黯然失色了。基于对两种立场的系统梳理，作为实行行为的立论前提，只能是在行为刑法的立场之上。刑法学理论发展中所形成的行为理论是在一般意义上对进入刑法评价中的行为予以筛选而形成的理论体系，在逻辑层次上，实行行为并不能与之相提并论，但在前提意义上，行为理论的确立直接决定着实行行为的立论。在对行为理论进行总体评价的基础上，文章认为行为刑法中的行为应该是基于意思支配或意思可能之下的对外界发生具有刑法重要性后果的人类行止。在回到犯罪论地位的思考中，实行行为在犯罪构成体系中，它是罪体的核心要素，在刑罚规范的地位中，它又是刑罚法规各本条的罪刑规范模式中的重心。

作为重要的刑法概念，实行行为有其特有的范畴内容。在概念的界定上，通说观点站在构成要件的立场上，采取形式的客观说，认为所谓的实行行为就是指刑法中具体犯罪客观方面的行为。显然，通论观点混合了行为事实和抽象的行为框架，混淆了实行行为的事实层面和规范层面。更为重要的是它并没有指明实行行为的实质内容，基于此，文章站在实质的法益侵害的立场上，认为实行行为是蕴含于具体犯罪构成中的具有法益侵害现实危险性的行为。以这一概念为基础，实行行为便具有了抽象性、类型性、应然与实然的统一性以及相对性等特征。这些特征构成实行行为形式的侧面，而在本质特征上，实行行为性即对法益侵害的现实危险性是其内涵的全部内容。实行行为性的规定性构成实行行为的实质之维，这一维度有无的判断集中在行为对法益的现实危险，而危险的判断又成为十分棘手的问题，文章在对几种危险判断的方案进行利弊分析的基础上，主张客观的危险的判断，具体以社会一般人为基准，以科学的因果法则为补充。为了澄清该概念内涵，文章又对实行行为与刑法中的构成行为、正犯以及预备行为进行了区分。在概念的

机能上，归纳为罪刑识别机能、罪态承载机能和刑法安定机能。实行行为本身是一幅多姿多彩的画面，根据不同的标准，可以对其进行不同的类型划分，文章分别从主体角度、行为实施进程的角度以及实行行为构成数目的角度对实行行为进行了类型划分，在多维的视角下揭示实行行为的特征全貌。

实行行为被作为刑法中独立的范畴提出，丰富且多维的规定性构成了实行行为的实体内涵，因此，可以说，实行行为理论本身是自足的。内涵于其自身的规定性在一定意义上又成为评价各种行为事实是否成为实行行为的标准。在明确了实行行为的内在标准之后，不得不论证的是在事实形态上发生的各种行为样态的实行性，即在实践中所发生的非标准的，异常的行为事实是否能被类型化的标准的实行行为评价，也就是异常的行为事实是否具有规范符合的问题。为了实现理论的自足，对于在事实上的间接实行、不真正不作为、原因上的自由行为等非典型形态行为的实行行为符合性，文章都予以了深入的探讨。认为间接实行本身只是标准实行行为的实施方式的变异而已，在刑法规范的价值意义上间接实行与直接实行是等同的，同样具有法益侵害或现实危险的实质内容，间接实行的利用行为本身实行行为性不可否认。类似的不真正不作为同样具有行为样态上的非典型性，区别于被规范所预设的真正不作为，因刑法规范的设置，真正不作为的实行行为性不再成为问题，不真正不作为如何在规范上与真正不作为等置，便需要理论的论证。在逻辑的层次上，真正不作为是行为的规范形态，事实上不存在作为的实施可能。事实层面上表现的不作为行为只是真正不作为的行为形态的一种，当那些在不作为行为以前自己设定了向侵害法益方向发展的因果关系的情形在构成要件上就实现了等置，就可以以规范中的实行行为来予以评价。此外，在原因上的自由行为的场合，由于行为实行与责任上的分离，违背了行为与责任同在原则，其实行行为性受到怀疑，文章以实行行为的实质规定性为理论基础，阐述了原

因上的自由行为的行为性和实行性。认为，原因行为对法益侵害的现实危险性是其实行行为性的根本所在。原因行为与致害行为的一体性共同构建了原因上的自由行为是实行行为的全部内涵。

解决实行行为的逻辑内涵和异常行为形态的实行行为性之后，进一步需要阐述的是实行行为的过程判断及其意义。首先明确了犯罪阶段与实行行为过程间的关系，实行行为的过程是实行行为从开始到结束的全程延续，它始于实行行为的开始，终于实行行为的结束。在时空延续上，实行行为的过程要比犯罪阶段短，犯罪阶段始于犯罪的预备行为，实行行为的过程始于犯罪实行行为的着手，犯罪阶段止于犯罪的完成，而实行行为的过程止于实行行为的结束。由此，实行行为的全过程是犯罪阶段的一部分，而且是有决定意义的部分。关于实行行为着手的判断，历来是刑法学界争议的焦点，文章在分析各种观点的基础上，认为实行的着手是在犯罪行为发展过程中，在一定的犯罪意图支配下，行为对法益侵害的危险性明显陡增于现实紧迫的程度，行为进入符合具体犯罪构成行为领域的转折点。在实行行为的终结的判断上，文章认为，没有统一的行为认定标准，只能具体行为具体判断，实行行为的终结与犯罪的完成也并不是完全对应，犯罪的完成可能在实行行为的各阶段，可以存在于实行行为过程中，也可以发生于实行行为的终结之时，更有可能延续在实行行为终结之后的实行后阶段。确立了实行行为的起止过程，其过程意义便在各个领域得到发挥：实行的开始是未遂犯罪存在的可能；在实行行为延续的阶段，便存在共同犯罪责任划分的问题；行为延续的整个过程又是犯罪行为追诉时效起算的时点，此外，行为过程的确立又是行为时空确立的前提，在刑法的时空效力判断上意义重大。

在实行行为的微观探讨方面，文章通过对我国刑法中实行行为的结构模式归纳来探寻实行行为的结构表现，实行行为的结构模式直接决定着罪行的犯罪形态以及司法认定。通过分析，文章将我国

刑法中的实行行为归纳为行为多寡模式和要素粘和模式。所谓行为多寡模式是指构成具体罪行的自然行为数量来划分的结果，根据行为数量，在行为复数的情况下称为复合型实行行为，复合型实行行为构成的犯罪在犯罪形态意义上是复行为犯。除此以外，与之相对是单一型实行行为。要素粘合型实行行为是根据行为实施的要素与行为本身的情况，将那些与主体紧密结合的实行行为概括为主体粘合型实行行为，将那些行为对象与行为本身粘合的情形概括为对象粘合型实行行为。当然，除了这些结构模式之外，从别的角度，我们还可以将实行行为概括为其他的结构模式，只是限于篇幅，文章仅就以上典型的结构模式予以归纳并略作了研讨。

关键词： 行为　　实行行为　　事实　　规范　　结构模式

Abstract

Ausf hrung is an important category within Verbrechenslehre, and it is of great significance to exploring related questions deeply. In the proverbial sense of " no behavior then no crime" , Ausf hrung is a foundation in constitute the whole criminal bases and criminal law evaluation function is all around Ausf hrung to launch. In other words, Ausf hrung is the mainline of the construction of Verbrechenslehre. As an important category in criminal law, Ausf hrung has dual natures: on the level in norm, it is the core of each provision contents in specific part in criminal law; in the criminal composing meaning, it is the core of concrete offense. This paper regards norm as the angle of view, analyzes the forms of Ausf hrung in the general meaning. After inquiry into all substantial forms of Ausf hrung, the paper analyzes successively the accordance with regulations in abnormal forms of action in criminal law. The aim of the discussions in the thesis on Ausf hrung is to clarify this important category systematicly, which promotes the criminal law theories research to value the Ausf hrung.

The theory situation of Ausf hrung should be stressed and seen as an important category in criminal law. First, we should clarify the theory premises of it, because the behavior that enter the criminal constitute in the visual field is the legal typical Ausf hrung, which is the abstract result of innumerable changing behaviors after neglecting their concrete

faces. Therefore, what we need to clarify is, on the most basic meaning, to solve whether the legislation object for evaluating is a behavior of subjective malignant, or objective behavior of the person, namely the opposite evaluation object causes the opposition of Tatstrafrecht and T terstrafrecht. Only the criminal law evaluation object is established firstly, we can evaluate the object then. Under the norm visual field of the Ausf hrung, it undertakes a function of object evaluation, so only criminal law evaluation object is act of the person, the position of Ausf hrung in Verbrechenslehre is established.

T terstrafrecht makes the malicious personality of the person as the evaluation object. Because personal malice and dangerous personality is difficult to grasp, under the modern civilization of rule of law reflected by the principle of, the theory of T terstrafrecht and abstract act as evaluation object is not confidence with the spirit of the principle.

Based on the two analyzing positions, the theory preemies of Ausf hrung can only built on the position of the Tatstrafrecht.

The handlung theory that has developed in the theory of criminal law comes into being in the way of systematically choosing handlung to value in general meaning. On the logic level, Ausf hrung can't be mentioned in the same breath with it. But on the premise meaning, handlung theory's establishment directly decided this argumentation of Ausf hrung. On the basic of total evaluation on the handlung theory, this thesis argues that the act in the Tatstrafrecht should be a kind of human conduct that has penal result to outside on the foundation of mind controlling or mind possibility. In rethinking its status in Verbrechenslehre, Ausf hrung is the core factor of criminal external form. On the status of punishment norm, it also is the key to crimes and punishment regulation mode.

As an important concept in criminal law, Ausf hrung has its special category and content. In its definition, general issue on the Tatbestand point adopts formal objective doctrine and claims that so – called Ausf hrung refers to objective act in concrete crimes. Obviously general issue mixes act fact and abstract act frame, and confuses different level between fact and norm of Ausf hrung. More important, it hasn't point out substantial content of Ausf hrung. In view of this point, this thesis stands on substantial violation on legal interest, and argues that Ausf hrung exists in concrete criminal constitution and has practical dangers of violation on legal interest. On the basic of this concept Ausf hrung has following features: abstract, typical, uniform of lex lata and lex feranda, and relative. these features constitute formal aspect of Ausf hrung. But in its natural feature, practical dangers of violation on legal interest is all the contents of Ausf hrung. The regulation of Ausf hrung is substantial dimension. Judgment on whether this dimension exists focuses on practical dangers of violation on legal interest. But the judgment on dangers is difficult issue. This thesis analyzes advantages and disadvantages of several kinds of dangers judgment and claims that objective dangers judgment should regard social ordinary people as standard, and science causation principle supplement. In order to clarify content of concept, this thesis differentiates Ausf hrung, constitutional actand prepared act. The mechanism of concept can be divided into reorganization mechanism of crime and punishment, undertaking mechanism of criminal forms, and stable mechanism of criminal law. Ausf hrung itself is colorful picture. According different standard it can be divided into different types. This thesis categorizes Ausf hrung from the aspect of subject, conduct process, and constitutional numbers. Therefore these aspects uncovers the whole character of Ausf hrung.

Ausf hrung is raised as an independent category in criminal law. Rich and multi – dimension regulation constituted substantial content of Ausf hrung. So we can conclude that Ausf hrung is self – satisfied. The content of regulation also becomes the standards to value whether the conduct fact should be Ausf hrung in general meaning. After clarifying inner standard of Ausf hrung, we have to prove conduct types happened in the fact forms. Namely, whether nonstandard, abnormal conduct facts happened in practice can be valued by typical Ausf hrung. That is to say, if abnormal conduct facts has regulation issue. To realize self – satisfaction of theory, this thesis discusses deeply untypical conduct types, such as factual indirect conduct, nonstandard omission, and voluntary act in cause. The author argues that indirect conduct itself is only changeable standard Ausf hrung. Indirect conduct equals to direct in the value meaning of penal norms, and also has substantial content on violation legal interest or practical dangers. We can not deny that the utility act of indirect conduct possesses Ausf hrung features. Similarly nonstandard omission has untypical conduct features, and is different from standard omission formulated in the regulations. Because of the criminal law regulations, the conduct feature of standard omission is not a problem. But how nonstandard omission equals to standard omission should be proved. On logic level, standard omission is the regulation types of conduct and hasn't execution possibility of act factually. Omission reflected in fact level belongs to one of kinds of standard omission. When those omission set up one causation of violation legal interest, it realizes equality and can be valued by Ausf hrung in regulatio. In addition, because of separation of conduct and liability, voluntary act in cause violates this principle of act and liability in coincidence. Its conduct is doubted. On the theory basic of substantial regulation, the thesis inte-

rprets conduct and execution of voluntary act in cause. Practical dangers of violation on legal interest by voluntary act in cause are essential cause of Ausf hrung. Cause conduct and harm conduct co – build all content that voluntary act in cause is Ausf hrung.

When we resolves logic content of Ausf hrung and act nature of abnormal conduct, course judgment of Ausf hrung and its meaning should be explained further. At first, the relationship between criminal stages and course of Ausf hrung is defined. As space and time develop, the course of Ausf hrung is shorter than criminal stages. Criminal stages begins from prepared act, while course of Ausf hrung begins from execution of Ausf hrung. Criminal stages stops at completed crimes ; the course of Ausf hrung ends in Ausf hrung. Therefore the whole course of Ausf hrung is part of criminal stages and is a vital part. The judgment of Ausf hrung execution is the focus in criminal law field. After analyzing all points, author argues that Ausf hrung execution is danger that is a violation on legal interest, and obviously increases its extent under some criminal minds during the couse of criminal conduct. At this turning point, conduct become constitutional conduct complies concrete crimes. On the jugde of end at Ausf hrung the thesis argued that if there is not united standard, we can only specially judge. The ends of Ausf hrung can not match to criminal complete one by one. Criminal complete may exist in each stage in Ausf hrung: in the middle of course, in the end of it, and even after it. Establishing its beginning and end of Ausf hrung, the course meaning is developed in each field. The start of Ausf hrung is the possibility of attempt crime; liability distribution of complice exists in the extending stage of Ausf hrung; the whole course of extending conduct also is beginning of accusation prescription. In addition, the estabilshmen of conduct course is premise of establishment of space and time

of conduct.

In the aspect of careful discuss on Ausf hrung, the thesis concludes Ausf hrung construction mode in Chinese criminal law and explores its construction feature. Construction mode of Ausf hrung determines types of criminal forms and judicial verdict. Ausf hrung in Chinese criminal law can be divided into conduct quantity modes, factor sticky modes. The so – called conduct quantity mode is clarified by special natural conduct quantity. According to the conduct quantity, plural conduct is called compound Ausf hrung. The crime constitutes compound Ausf hrung is compound crimes. Except for this, single Ausf hrung is its counterpart. According to factor of conduct execution and conduct conditions, factor sticky Ausf hrung summarizes subjective connection Ausf hrung into subjective sticky Ausf hrung. nd it summarizes object and conduct sticky situation into object sticky Ausf hrung. Of course, except for this construction mode, we can summarize other construction mode from other angle. Considering limit length of thesis, the author only summarize typical construction mentioned above.

Keyword : Conduct; Ausfuhrung; Fact; Norm; Construction mode