

刑事暴力
分级研究

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刑事暴力分级研究

Research on the Grade for Criminal Violence

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内容摘要

暴力作为最为常见的犯罪客观要件的表现形式之一，在刑法中不同条文中的外延并不一致，导致理论和实践工作者概念上的模糊，这既损害了法律的规范作用，也容易破坏司法的统一性，因此，有必要以暴力分级的方式加以解决。笔者通过比较后确定了以法益作为暴力的分级标准，将暴力分为侵犯生命利益的暴力、侵犯身体健康利益的暴力、侵犯人身自由利益的暴力和侵犯财产利益的暴力等四个级别，并具体分析暴力各级别的具体表现形式后论述暴力分级在实践中的应用和操作。

作者将文章分为四章，从各方面对暴力及暴力分级进行了较为深入的探讨。

第一章分为三节。第一节通过国内外对暴力的不同定义和立法例比较归纳出暴力的特征和定义；第二节为进一步界定暴力的外延，论述了刑法学上的暴力与暴力犯罪、无形暴力（精神暴力）、家庭暴力等概念的区别和联系；第三节依据不同的标准对暴力进行了分类。

第二章分为三节。第一节论述了暴力分级的必要性、功能和困难性；第二节经过对学界不同暴力分级的标准进行比较后确定本文暴力分级的标准为暴力侵犯的法益；第三节阐述了暴力分级理论具体内容。

第三章分为四节。第一节论述了“行凶”和“暴力杀人”这两种一级暴力的表现形式；第二节论述了“暴力伤害”和“暴力抢劫”这两种二级暴力的表现形式；第三节论述了“暴力拘禁”和“暴力侵入”这两种三级暴力的表现形式；第四节论述了“抢夺”和“砸”这两种四级暴力的表现形式。

第四章分为三节，论述了暴力分级在实践中的操作和应用。第一节论述暴力级别冲突的定义、表征与解决方法；第二节论述了暴力过限的定义、特征、处理，并特别阐述两种暴力过限情形的处理方式；第三节论述了暴力分级对违法性阻却事由的影响。

关键词：暴力；暴力分级；实践操作

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ABSTRACT

Although Violence is one of the most common behavior of the objective element for a crime, it is not clearly defined in the Criminal Law. The obscurity of the definition results in problems both for the theoretical study and practical field, making uncertainty in jurisdiction. The author believes that it is necessary to solve such problems through the classification to violence. It is suggested that the legal benefit be the standard for that classification and violence shall be classified into four kinds: violence that assault upon the legal benefit of a victim's life; violence that impaired the legal benefit of a victim's health and body; violence that infringe the legal benefit of a victim's freedom; violence that infringe the legal benefit of a victim's property. This paper will further discuss on how to apply such a classification into the practical field. All the content is divided into four chapters.

The first chapter has three sections. The first section gives the definition of violence. The second section further interprets the extension of the definition and shows the differences and connections among the violence in the criminal law, criminal violence, psychological violence, family violence. The third section makes the classification for the violence.

The second chapter has three sections. The first one explains the necessity, function and shortage of the classification. The second section compare different classifications in the current theoretical field and the author believe that the standard for the classification of violence shall be preference. The third section interprets the details of the classification.

The third chapter has four sections. The first one explains the representations of "do violence" in the Chinese criminal law and "violence assault upon a victim's life", which belongs to the first-classification of violence. The second section defines the representations of "injure by violence" and "highjack by violence", which belongs to the second-classification of violence. The third section defines the representations of "custody by violence" and "intrude by violence", which belongs to the third-classification of violence. The fourth section defines the representations of "snatch" and "smash". which belongs to the fourth-classification of violence.

The fourth chapter divided into three chapters. The first section discusses the conflictions result from the classification of the violence and its representations and solutions suggested. The second one explains the definition and characteristic of “excess violence” and its solution, especially the solutions to the two kinds of excess violence. The third one interprets the influence caused by the violence classification to those conditions under which the “illegal behaviors” will be allowed by the criminal law.

Keyword: Violence; Classification for violence; Practical Operation

厦门大学博硕士论文摘要库

目 录

前 言	
第一章 暴力概述	
第一节 暴力的定义和特征	
一、国内学者对暴力的界定	
二、各国、地区暴力立法例比较	
三、结论	
第二节 刑法学上的暴力与相关概念的区别和联系	
一、与暴力犯罪的联系	
二、与无形暴力（精神暴力）的区别	
三、与家庭暴力的区别与联系	
第三节 暴力的分类	
一、重暴力和轻暴力	
二、直接暴力和间接暴力	
三、对人暴力和对物暴力	
四、作为基本构成的暴力和作为修正要件的暴力	
第二章 暴力分级理论	
第一节 暴力分级的必要性、功能和困难性	
一、暴力分级的必要性	
二、暴力分级的功能	
三、暴力分级的困难性	
第二节 暴力分级理论的标准	
一、标准之一：强度说	
二、标准之二：危害程度说	
三、标准之三：实际后果说	
四、标准之四：综合考察说	

五、对上述标准的评判	
六、本文的标准：法益说	
第三节 暴力分级理论	
一、对法益的划分	
二、暴力分级理论的内容	
第三章 暴力各级别的表现形式	
第一节 一级暴力的常见表现形式	
一、行凶	
二、暴力杀人	
第二节 二级暴力的常见表现形式	
一、暴力伤害	
二、暴力抢劫	
第三节 三级暴力的常见表现形式	
一、暴力拘禁	
二、暴力侵入	
第四节 四级暴力的常见表现形式	
一、抢夺	
二、砸	
第四章 暴力分级理论的操作	
第一节 暴力级别冲突	
一、暴力级别冲突的定义与表征	
二、解决暴力级别冲突的方法	
第二节 暴力过限	
一、暴力过限的定义、特征	
二、暴力过限的处理	
三、两种暴力过限情形	
第三节 暴力分级对违法性阻却事由的影响	
一、问题的提出	
二、问题的分析	

目 录

三、问题的解决.....

参考文献.....

厦门大学博硕士学位论文摘要库

厦门大学博硕士学位论文摘要库

CONTENTS

Preface

Chapter 1 introduction to violence.....

Subchapter 1 the conception and the characteristic of violence

 Section 1 the definition by internal scholars

 Section 2 the comparison among the different legislation modes adopted
 by different countries or areas

 Section 3 the conclusion

**Subchapter 2 the differences and connections between the violence
 and other conceptions**.....

 Section 1 the connections between the violence and the violent crime

 Section 2 the differences between the violence and mental violence

 Section 3 the connections and differences between the violence
 and family violence

Subchapter 3 the classification for violence.....

 Section 1 the grave violence and the light violence

 Section 2 the direct violence and the indirect violence

 Section 3 the violence towards people and the violence towards object

 Section 4 the violence as the basic criminal constitute and the violence as
 the amended criminal constitute

Chapter 2 the theory of grade for violence.....

**Subchapter 1 the necessity, function and difficulties of the grade
 for violence**

 Section 1 the necessity of grade for violence

 Section 2 the function of grade for violence

 Section 3 the difficulties of grade for violence

Subchapter 2 the standard to grade the violence.....

 Section 1 the standard of the intensity

 Section 2 the standard of the degree of harmfulness

 Section 3 the standard of the result

Section 4	the standard of the synthetical study
Section 5	the appraise of the different standards.....
Section 6	the arthor’s oppinion- the standard of the legal benefit
Subchapter 3	the theory of grade for violence
Section 1	the grade for legal benefit
Section 2	the theory of grade for violence’s content.....
Chapter 3	the representations of the different grade of violence ..
Subchapter 1	the representations of the first-grade of violence
Section 1	do violence
Section 2	violence assault upon a victim’s life
Subchapter 2	the representations of the second-grade of violence
Section 1	injure by violence
Section 2	highjack by violence
Subchapter 3	the representations of the third-grade of violence
Section 1	custody by violence
Section 2	intrude by violence
Subchapter 4	the representations of the fourth-grade of violence
Section 1	snatch.....
Section 2	smash.....
Chapter 4	the practical operation of the theory of grade
	for violence
Subchapter 1	the confliction from the grade for violence
Section 1	the conception and the characteristic of the confliction from the grade for violence
Section 2	the way to solve the confliction problem from the grade for violence.....
Subchapter 2	excess violence
Section 1	the conception and the characteristic of excess violence.....
Section 2	the operation of excess violence
Section 3	the two states of excess violence.....
Subchapter 3	the influence caused by the violence grade to those
	conditions under which the “illegal behaviors”

CONTENTS

will be allowed by the criminal law

Section 1 the raise of the problem

Section 2 the analysis of the problem

Section 3 the solution of the problem

Bibliography

厦门大学博硕士论文摘要库

厦门大学博硕士学位论文摘要库

前 言

吴思先生在《血酬定律》一书中写到：“据说，生活在北极的爱斯基摩人对白色有详细的区分，我们眼中一派白茫茫的世界，在他们眼里却有丰富的层次和色彩。他们可以用丰富的词汇描述我们视若无睹的差异，譬如阳光下的白和阴影下的白。”之所以如此，吴思先生认为是因为他们有相应的语言和命名。吴思先生由此感叹到：“规范概念可以帮助我们看清楚许多东西，但也遮蔽了许多东西。”^①推此及彼，刑法条文中也存在这样的“规范概念”，看上去内涵统一，但具体到各个条文里却有外延和程度上的不同。例如“暴力”一词，作为犯罪客观行为要件最基本的手段和内容之一，广泛规定于《刑法》除分则第八章（贪污贿赂罪）、第九章（渎职罪）之外的诸章节中，但在总则和各分则之中的涵义却不相同。试比较《刑法》第 20 条：“对正在进行行凶、杀人、抢劫、强奸、绑架及其他严重危及人身安全的暴力犯罪，采取防卫行为，造成不法侵害人伤亡的，不属于防卫过当，不负刑事责任。”中的“暴力”和《刑法》第 246 条：“以暴力或者其他方法公然侮辱他人或者捏造事实诽谤他人，情节严重……”中的“暴力”，前者是偏正结构词组“暴力犯罪”一词的修饰词，意为“以武力作为方法、手段的”，其同位语是“智力”，其外延包括了行凶、杀害、严重殴打、绑架……，针对的客体是人身安全，且必须达到“严重”的程度，因此必须排除轻微的殴打、针对物品的打砸等手段；后者单独使用用于罪状描述，意为“具有某种强制作用力的行为”，其同位语是“胁迫、诈骗、秘密窃取……”等等，其外延包括了殴打、捆绑、强制、禁闭……，但不包括杀害、绑架等行为。可见，同样是“暴力”，蕴涵的意义却截然不同。我国台湾地区也有相同的情形。在台湾，“一般所谓暴力，在刑法上称为强暴，在秩序维护法上则称为暴行，用语虽有不同，其意则一。”^②台湾学者林山田就认为：“虽然众多条款在构成要件的规定上都为强暴，但是却有程度上的差别。某一行为造成被害人被强制的程度，充当强制罪的强暴已是足足有余，但是充当强奸罪或强盗罪的

^① 吴思.血酬定律——中国历史中的生存游戏[M].北京：中国工人出版社，2003.4.

^② 甘添贵.刑法之重要理念[C].台北：瑞兴图书股份有限公司，1996.356.

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