

Criminal Law Rules for Theft between Relatives and their Reference

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Abstract. In China, as a special form of theft, the theft between relatives has been specially concerned since the ancient times, with legislation inheriting evolved for thousands of years; in the West, the special criminal law rules for relatives between theft do not only have a long history, and there are also many theoretical disputes and difference of legislation cases. After founding of the People's Republic of China, the criminal law regulations on the issue of theft between relatives has completely eliminated the Chinese and western legal traditions, causing lack of humanization and scientific insufficiency. Having an objective analysis on the legislation for theft between relatives and its theoretical basis and spiritual base can provide some experience and reference for the scientific and developed criminal law of China.

I

The crime of theft what we call today is "the behavior of steal the properties with great amount occupied by others or the behavior of stealing for many times for the purpose of illegal occupation", [1] while theft between relatives refers to the behaviors stealing the properties with great amount occupied by each other or the behavior of stealing for many times for the purpose of illegal occupation between relatives legally. In China, theft is one of the oldest crimes. [2]As a special form of theft, theft between relatives has been concerned by the law since the ancient times, with the legislation tradition followed for thousands of years and ended after the founding of the People's Republic of China.

Since the modification of law at the end of the Qing Dynasty, the reform of legal system in China has been experienced for more than 100 years. During this period, our model set was to simulate the West (especially the European countries), with the logistic starting point that the Chinese law is lagged, while the western law advanced and value orientation of getting rid of the inherent legal moral components with the patriarchal idea as the core and the feudal survivals to promote "since", while this was considered to be "one of the biggest misunderstandings of the Chinese people since the beginning of modernization of Chinese law in this century (editor's note: 20th century) by Mr. Fan Zhongxin. [3] It is not appropriate to make conclusion hurriedly on which is correct or incorrect. The purpose of researching the issue of theft between relatives with the strong traditional characteristics of Chinese inherent law and sorting out the western law tradition for this issue ".....explaining the past and present theories and practices" is to both make clear its original appearance and explore the original due spirit behind the modern legal system of China", [4] and this might make clear which is correct or incorrect to some extent and provide some experience and references for the scientificness and development of the present Chinese law.

II

By contrast to the criminal legislation of countries of civil law system, countries of Anglo-American legal system regulate the theft between relatives relatively simply. In the Anglo-American legal system countries, the crime of theft was first established by the British court through precedents, with a wide concept, actually including theft, embezzlement and defraud, both the 1962 Model Penal Code of America and 1968 Theft Act of Britain adopt this mode, so theft between relatives in the Anglo-American legal system and that in the civil law system do not have the same extension completely. According to the convention of common law, no crime of theft is

established between spouse, because the theory of common law holds that first, theft of one person to himself/herself does not constitute theft of crimes; second, in the special occasion specially specified by the law, the husband and wife are deemed as the same person; finally, in terms of property disposal, the law deems the behavior executed by one party of the spouse as if executed by the other party; as a result, the theft between husband and wife does not constitute crime. [5]

So far, the common law conventions are somewhat limited in the Anglo-American legal system countries, the theft between husband and wife is not innocent absolutely, but the criminal regulations are different, roughly including three modes: first, take America for example, Section 223.1 of 1962 Model Penal Code of America specifies that “The theft by the perpetrator to his/her spouse may not be taken as the matter of defense. But the behavior of employing household articles, personal articles or other properties that can be touched by both the husband and wife can constitute only after separation of both parties”. [6] That is to say, during the cohabitation, the disposal of property by one party of the spouse does not constitute crime of theft, and only the stealing of property with property right expressly belonging to the other party can constitute crime of theft; second, take Britain for example, Article 30 of 1968 Theft Act defines the theft between husband and wife relatively complexly, in general, no matter the property is owned by an individual or co-owned by the husband and wife, the theft between husband and wife will constitute theft of crime, but only under the condition of separation of husband and wife can the victim of spouse of police can accuse the injuring spouse, and under the condition of cohabitation, the proceedings must be instituted by the procurator or it is required to subject to the consent of the procurator, because “the proceedings instituted by one party of the spouse accusing the other party or the third party accusing one party of the spouse of crime is too easy, which can only cause discrimination and is unhelpful to sustain a satisfactory family relation”. [7] Third, take Canada for example, Article 289 of the existing criminal code of Canada promulgated in 1971 specifies that the theft of property between husband and wife during cohabitation does not constitute crime of theft, that is to say, the crime constitution of theft between husband and wife is limited to the separation. During cohabitation, whether one party of the spouse disposes of the property or steals the private property of the other party, no crime of theft is constituted.

It can be seen from the simple statements above that there is something in common between the legislation tradition on theft between relatives in the Anglo-America legal system countries and the traditional Chinese society, and their natural cultural commonness is to maintain the family morality, harmony and relative relationship.

III

The civil law system countries undertake the tradition of Roman law, with special articles specifying the issue of theft between relatives in the criminal legislation. Taken France and Germany pioneering the civil law system, Article 380 of 1810 French Criminal Code specifies that the theft of spouse's articles or the remains of the dead spouse and the articles of parents or children or the mutual theft between affinities of the same generation only incurs the civil compensation obligation without criminal liability; Article 247 of 1871 German Criminal Code specifies that for the theft or embezzlement between relatives and guardians, the institutions are indictable only upon complaint and can be withdrawn; for the theft and embezzlement between direct descendent and spouse, there is no punishment. The criminal law regulations and modes on theft between relatives in the modern civil law system countries are quite different, because of different theoretical bases constructed, there are roughly three kinds of theories, namely theory of obstruction of people punishment, theory of obstruction of punishable illegality and theory of responsibility obstruction.

The theory of obstruction of people obstruction holds that the theft between relatives conform to the components of crime of theft, the behavior is illegal, but based on the basic legal principle that “law does not enter the family”, the national interference is based on the premise of free disposal between relatives, i.e. the prosecution demand is based on the premise of personal institutions of the aggrieved relatives, “this special specification is established based on the principle that the state does

not interfere with the domestic dispute, being a matter of criminal obstruction exclusive to individual without any relation with the criminal illegality and liability.” [8] Germany is a typical example of legislative precedents based on this theory. Article 247 of the 1998 German Criminal Code specifies that for the theft of property of family members, guardians and attendants, or if the aggrieved person lives with the perpetrator in the same room, it is indictable only upon complaint. “Law does not enter family” does not mean that the family is beyond of law, there is no necessary connection between the objective relative relationship and the subjective relative contact, the crime between relatives is anything but affection between family members, the judgment of law is roughly similar with the will of people. Whether the property crime between relatives will prevent the sustaining of affection between family members varies between people and is difficult to be defined, so it is sensible to adopt personal judgment and promise to give relief in law.

The theory of punishable illegality obstruction holds that relatives are a consumption unity in property, and the mutual infringement of property interest between members is not deemed to be illegal generally. Although the theft between relatives is illegal, it does not reach the degree of being punishable; while the theory of liability obstruction mater holds that in terms of law, it is difficult to expect that no theft is executed between relatives, due to lack of expectation possibility, the perpetrator has no liability. [9] Although the two theories have different explanation directions, the conclusion that the perpetrator in the theft between relatives is not guilty, and for the legislative precedents conforming to their theory, the typical example is France. Articles 311-12 of French new criminal code effective on March 1, 1994 specify that the theft of property of direct relatives and the theft of property of non-separated spouse may not cause criminal prosecution. It is not difficult to see that this specification is extremely similar to some old laws in some aspects before the end of the Qing Dynasty, and it seems to contain the meaning of “joint property during cohabitation” and “no separation of property between relatives”. Analyzed from the regulated aspects, the nature of the two theories above is the judgment on where there is affection between family members made for the aggrieved relatives by focusing on the relief of offender, and the hypothetical scene is difficult to be convinced, “because it must be excessive to say that the behaviors between relatives does not have the punishable illegality or is lack of possibility of expectation”. [10]

The theory of illegality reduction and the theory of liability reduction are the relatively moderate attitude of illegality obstruction and liability obstruction, with natural difference from the above two theories in explanation method, only the conclusion is more eclectic, thinking that the theft between relatives reduces the punishable illegality or responsibility, so theft between relatives still constitutes crime, but can be or should be punishable. Although the degrees are different, it is undeniable that the so-called “reduction” or “obstruction” liability can be deemed to be absolutely credible only by employing the personal judgment of the aggrieved relatives. From the position of theory of illegality reduction or the theory of liability reduction, for the legislative conclusion of theft between relatives, the “reduction” is more proper, and the typical example is Spain. Article 268 of the existing criminal code of Spain specifies that the theft between spouse of illegal separation, not separated actually or declared to be separated, divorced and of invalid marriage by law, linear ascendants, descendents, brothers and sisters of blood relation or adaptation relation and the relatives of the same generation constitutes theft between relatives, which is only applicable to the civil specifications, and the criminative liability can be exempted.

As stated above, the modern European countries undertaking the tradition of civil law system have special specifications for the theft between relatives in the criminal legislative, although there is slight difference in the legislative principle, the ideological basis is that the law does not enter family, and there the debates of theories and differences of legislative cases represent different understanding to the ideological basis.

IV

The establishment of any legal regulations must be based on the prudent analysis on the worldly life materials, because stability is the life of law. A legal regulation that cannot be respected by the

mass, the target that it expects to implement due to lack of life basis will be withered finally due to exhaustion of vitality, so for the establishment of any legal regulation, the legislator has to view its value. From this aspect, “purpose is the creator of all laws, and each legal regulation is from one purpose, i.e. an actual motivation”. [12] Setting the special cases of theft between relatives in the crime of theft is a supplementation made to the general specification of crime of theft based on the specialty of the family relationship.

Jhering thought that protecting the social life condition is the substantial purpose of law, while the family stability and affection extension are the essential life conditions of individuals. Analyzed from the aspect of positive law, the special case of theft between relatives is the modification made to the general specification of theft. And the direct motive power is from the basic humanity of human culture of harmonizing family and maintaining affection between family members, while the higher value appeal is to realize justice and guarantee the stability of law.

If we can understand this superficial principle, we have to reinterpret the legislative tradition of theft between relatives of the Chinese law system for thousands of years, reevaluate the legislative value of theft between relatives in the western society and review the lack of theft between relatives in legislation since the founding of the People’s Republic of China. Mr. Fan Zhongxin thought that the legal reform aimed at “legal westernization” in China for nearly 100 years makes the legal system of China resist the traditional Chinese culture too much and seriously deviates from the spiritual tradition of legal culture of the west, as a result, many systems established since the ancient times, especially some systems since the founding of the People’s Republic of China actually has severed our two links, one is the link of traditional Chinese culture, and the other is the link of civil law system. After the link is severed, there is no independent growth and development, making the Chinese people feel strange, isolated and alienated. This is the fact, and especially for the theft between relatives.

The author thinks that the criminal law is to regulate the theft between relatives in name, but actually there is leeway for the affection between family members, so it is not that law does not reconcile the relative relation, but does not interfere to the relative dispute easily. Between the fact of theft between relatives and the regulation of laws, the nature is not the objective relative relationship, but the subjective relative contact, law does not replace but appoint the party concerned to make a judgment, and implements relief to the offender and aggrieved person according to the judgment result, i.e. to carry forward the meaning “that criminal law is the great charter of the aggrieved person and the offender” while representing the real intention of modesty. “Law should be objective, which is the essence of a legal system”, [12] whether there exists the subjective affection between family members, only the party concerned, especially the aggrieved person of the theft between relatives can maintain its objectification through his own judgment, and all others except this are surmises. Law needs to maintain the extension of relative relationship and does not lose its dependent character, and the sensible action is to endow the aggrieved person of theft between relatives with the right of criminal punishment, and decide whether to reduce or exempt the criminal punishment to the offender with the mood consideration as the main basis. Therefore, in terms of theft between relatives, “the theory of obstruction matter of people punishment” and its legislative cases are worthy of reference.

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