

Strafbares Unrecht: a theory have different status in different countries

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Abstract. This article will briefly explore this connection. When we talk about legal systems, we tend to think of them as having universal applicability, but the fact is that different countries often different ways of determining the same legal fact, even for the same legal theory, different countries have different development trends. The fundamental reason for this phenomenon is that many objective factors, such as the social development status of different countries, the level of people's education and the external environment they live in, comprehensively influence the emergence and development of the legal system.

Keywords: Strafbares Unrecht; the principle of punishable illegality; Quantity of crime; dualism of illegality.

1. Introduction

There are many civil law countries in the world today, the best examples of them are Germany and Japan. After Second World War,

Japanese as a learner of German law, in the process of learning, It made many creative and imaginative modifications to German laws according to the actual situation of Japan. On this basis, China also innovated the Japanese law as well. During these series of learning and creation of the process, the criminal law theory has been a great development. But behind the principle of punishable illegality in Japanese criminal law and compare it with the system of quantity of crime in Chinese criminal law, what the root cause of their different fate? And what causes the reform and development of Japanese criminal law and Chinese criminal law in this process? I want to analyse this from a few different angles.

2. The origin of Punishable illegality:

Strafbares Unrecht

The concept of Strafbares Unrecht comes from the German word strafbaresunrecht, which was first proposed by Hegel in his book--Grundliniender Philosophiedes Rechts . It refers to whether a person should be punished by criminal law when his behavior is illegal. So it could be called as punishable illegality. Hegel advocated the distinction between illegal acts in criminal law and other fields of law, especially illegal acts in civil law, so as to advocate the particularity and independence of illegal acts in criminal law. But as soon as this theory was put forward, it was immediately opposed by many jurists. From the perspective of the dualism of illegality, they criticized Hegel's claim that the illegality in criminal law has its particularity. In the 1920s, the punishable illegality was completely denied in the theoretical field of German criminal law.

3. Development in Japan

But when the theory spread to Japan, it was a different story. During the Meiji Restoration period, Japan extensively studied the laws of European countries, among which the German law was the main object of study. The reason why the Japanese government mainly studied German was that the main goals of the Japanese government at that time were finance and military. The Japanese government believed that to achieve this goal, a powerful bureaucratic state with the imperial system at the center must be established. From this point of view, it is more suitable for the social situation of Japan to adopt the German law with the imperial system as the core than to adopt the French law with the

presidential system as the core. After decades of study, the Japanese government adopted a criminal code based on the German Criminal law in 1907. In this process, Japanese jurists also had many voices of innovation.

During that time, punishable illegality radiate the vitality in Japan. This situation stems from a case handed down by the Japanese government in 1909. The case involved a tobacco farmer who failed to pay one thousandth of a yen worth of tobacco leaves and was prosecuted. The farmer was convicted in both the first and second trials, but the court of Final appeal said the verdict was wrong and the defendant should be innocent. The reason it gave was that a minor offence should not be punishable by criminal law if the offender did not pose a serious physical danger. [1] Japanese scholar of criminal law, みやもとひでな admired this and firstly put forward the punishable illegality and the idea of modestly restraining character of criminal law as the theoretical basis of punishable illegality. After that, Japanese legal scholars said that punishable illegality can be divided into absolute minor punishable illegality, relatively minor punishable illegality and relative illegality. In 1982, professor まえだまさひで put forward the idea of dividing punishable illegality into relative minor punishable illegality and absolute minor punishable illegality. Since then, two views have emerged in the field of Japanese jurisprudence. Professor さえきちひろ and まえだまさひで believe that the absolute minor punishable illegality belongs to the problem of constitutive requirement since the relative minor punishable illegality belongs to the problem of ground for elimination of illegality. [2][3] However, professor ふしきひでお thinks that the relative minor punishable illegality also belongs to the problem of ground for elimination of illegality. [2] Anyway, one thing for sure is that this theory is well developed in Japan.

4. The Sinicization of the Theory of Punishable illegality: Quantity of crime in China

Next I want to analyse the difference and connection between punishable illegality and quantity of crime in China. But before we do that, we need to talk about China's legal system and social composition to figure out why the theory of punishable illegality has developed in China. It is worth mentioning that Chinese criminal law is mainly influenced by the Soviet criminal law, which is different from Japan in this point [4]

First of all, Chinese criminal law adopts a unified legislative model. That is to say, the legislation of Chinese criminal law is both qualitative and quantitative. To some extent, this model has eased the debate in China about the different evaluation criteria for illegal behavior in the theory of punishable illegality. Because the unitary legislative mode has some disadvantages, for example, judicial organs may abuse the power of interpretation, local judicial discretion atrophy and so on, so that most of the countries with civil law system adopt the dual legislative mode. So why does China adopt a unified legislative model? This is determined by China's special national conditions and legal culture.

Firstly, the unified legislative model coincides with dialectical materialism. Dialectical materialism holds that everything in the world is a unity of a certain quality and a certain quantity. This makes the theory of punishable illegality of minor injury should not be punished by criminal law has a philosophical basis. Second, from the theoretical perspective of Chinese criminal law, the amount of crime, as an element of the degree of violation, provides a basis for whether the violation reaches the degree of punishment. It is obvious that the element of crime is not independent of the composition of the crime, but can be embedded in each constituent elements, so as to evaluate whether the infringement caused by illegal acts has reached the degree of criminal punishment. Third, anti-social behaviors exist in any country at any time, and criminal law is the ultimate barrier to deal with these anti-social behaviors. However, the more special the criminal law, the more careful its application should be. Under the guidance of this view, the Chinese government is especially cautious about the application of criminal law, which also gives the opportunity for the development of punishable illegality in China. The result of this development was the birth of the quantity of crime. Last but not least, China's crime theory, which takes social harmfulness as the core evaluation criterion, is

consistent with the theory of punishable illegality. Because the Chinese system of crime theory consists of four elements to determine whether an act is a crime, and there is no single element of illegality, which makes the judgment of illegality appear scattered.[5] In this case, the evaluation standard of whether a violation constitutes a crime must include the flexibility of the degree of criminal behavior, which makes the theory of punishable illegality, that is, the sinicized system of the amount of crime, have a reasonable space for existence.

5. Different fate: Comparisons and three root reasons behind

So here is the question. Why the same theory has totally different fate in three countries. To figure out this question, I believe we should firstly discuss the particularity of German criminal law and Japanese criminal law.

German criminal law has a highly elaborate and circumferential theoretical system, and its theory is fully practice-oriented. For example, professor Claus Roxin's book--<STRAFERCHT ALLGEMEINER TEIL BAND> is one of the most important criminal law textbooks in the German-speaking world. This book is also known as the most abundant and thorough analysis of the general issue of criminal law textbook. [6]. Thus we can get a glimpse of the rigor and profundity of German criminal law theory. As I mentioned above, scholars of German criminal law thought the perspective of the dualism of illegality would mess with the standards by which violations are evaluated. So because of the high degree of rigor of the theory, there is no chance of trial and error in this theory in Germany. But Japan is different. Under the influence of the Meiji Restoration, which mainly aimed at economic and military development, the development of Japanese jurisprudence showed strong characteristics of serving the economy. The 1910 tobacco farmers case is a case in point. As the amount involved is only one-thousandth of a yen, it is far less than the cost of the trial process in various levels of courts. So cases of minor damage after that are usually not treated as crimes. From the Meiji Restoration to the second World War and up to now, the Japanese government has always taken economic construction as the main policy of establishing the country. This makes Japanese criminal law form a theoretical model that pays more attention to economic benefits. I think this is one of the important reasons why the theory of punishable illegality has taken root in Japan.

Now, with that said, we can get to another question, which is what is the difference between the punishable illegality theory and the system of quantity of crime and what are the reasons for these differences?

The above mentioned reasons why the theory of punishable illegality fits in with China's social system and legal system. Perhaps, then, we can try to analyze the shortcomings of the theory of punishable illegality, so as to explore why the Chinese government has chosen the system of quantity of crime instead punishable illegality.

The General provisions of Chinese Criminal Law clearly put forward the requirement of the amount of crime through the Proviso, and this requirement has played a restrictive role in the whole criminal law provisions. Correspondingly, the requirement of the amount of crime proposed in the specific provisions of criminal law is regarded as the concretization of the requirement of the amount of crime in the general provisions of criminal law.[7] It can be seen that there is a huge difference between the punishable illegality theory and the crime measurement system, that is, the punishable illegality theory only exists as an isolated judicial theory in Germany and Japan. However, in China, the system of quantity of crime is used by judicial departments in a three-dimensional way.

There is another problem that the requirement of the amount of crime put forward by Chinese criminal law shows the characteristics of abstraction and fuzziness in the general theory and the sub-theory of criminal law. For example, Article 129 of China's Criminal Law stipulates that the condition for the crime of concealing lost guns and not reporting them is that "a person equipped with guns for official use fails to report the loss of guns in time, causing serious consequences". However, the judicial interpretation system in China's judicial system has perfected this deficiency. In the case of "serious consequences" in the above example, the Supreme People's Procuratorate has prescribed

three situations. First, the lost gun is used by another person, causing an accident of minor injury or more; Second, the lost gun is used by another person to carry out illegal activities; Third, circumstances that cause other serious consequences. At the same time, there are some crimes that have very clear limits. For example, the crime of producing and selling fake and inferior products stipulated in Article 140 of the Criminal Law of China stipulates that the minimum standard for sentencing this crime is "the amount of sales reached more than 50,000 yuan". That is to say, although there are still some crimes that have not been clearly specified the specific quantity of crime requirements, the theory of punishable illegality may lead to the arbitrariness of judicial interpretation of the drawback is still eliminated to the greatest extent.

Last but not least, there are also have different purposes between the punishable illegality and the quantity of crime. The purpose of the the quantity of crime system in China is to narrow the scope of criminal judgment, so as to help reduce the social opposition formed by the fight against crime, and also help the judicial organs to concentrate on dealing with cases that seriously endanger the society. However, for the Japanese government, the value of the theory of punishable illegality is more to exclude from the scope of criminal judgment some acts whose illegality is too slight to be economically punishable. The final acquittal of the tobacco farmer case involving only one thousandth of a yen is the most typical example of the economic benefit pursued by the theory of the illegality of punishment.

It has to be mentioned that the system of the the quantity of crime with the main purpose of narrowing the scope of criminal judgment also has inevitable drawbacks. This move leaves a gap in China's crackdown on behaviors that harm society, and makes China's criminal law network sparse, which is not conducive to the comprehensive legal control of behaviors that harm society.[8] It is manifested in four aspects.

First, a large number of uncompleted forms of crime go unaddressed. The provisions of Articles 23, 24 and 25 of the General provisions of the Criminal Law of China indicate that the Chinese government has cracked down on unfinished forms of intentional crime. However, the crime quantity system also requires that "serious consequences" can constitute a crime. However, the incomplete form of many crimes can not be said to have "serious consequences", so these incomplete forms of crimes are difficult to establish in fact.[9]

Second, a large number of crimes go unpunished. China's crime quantity system requires that the amount of a single crime must reach a certain degree or the accumulative amount of multiple crimes must reach a certain degree. However, in real life, a large number of criminals refuse to admit their previous crimes after being caught, and the amount of a single illegal act is not enough to be considered as a crime, so a large number of crimes are covered up.[10]

Fourth, a large number of illegal and criminal acts are not punished, which will stimulate more people to commit illegal and criminal acts. Studies have shown that people actually commit crimes, usually because they care about the existence of a fluke before committing a crime, believing that the crime will not be detected after the crime, can escape punishment.[11] Therefore, if a large number of illegal and criminal acts are not punished, a bad avalanche effect will be formed in the whole society, which will stimulate a large number of people to carry out illegal and criminal activities. In this respect, the application of the theory of punishable illegality requires that minor punishable illegality cases must be specifically measured and applied by the court after the public prosecution to the court. This procedure guarantees that the perpetrator does not have any chance of being immune from prosecution.

6. One possible speculations

It can be said that both the circulation of the punishable illegality theory in Japan and the specific application of the quantity of crime system in China have their social roots and inevitable shortcomings. Therefore, the existence and application of the same or similar legal system in different situations are determined by many factors such as legislative system, social situation, history and

culture. It also means that the rise or fall or change of a theory does not necessarily mean that the theory itself has a different meaning. In most cases these changes are due to the conditions of the users themselves. For this paper, both the punishable illegality theory applied in Japan and the quantity of crime system applied in China are reasonable and also need to be improved. Therefore, in my opinion, if some systems are no longer applicable or the disadvantages become more and more serious due to the evolution of society, observing the application of similar systems in other countries and finding the social differences behind them may be one of the ways to solve such problems.

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