

# The Crime Nature of the Obligation Criminal

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## Abstract

The concept of the obligation criminal (Pflichtdelikte) was first proposed by Professor Roxin, but the crime nature of the obligation criminal is still being largely disputed in the criminal law theory circle, and someone thought it was the legal interest violation, and others thought it was the violation of positive obligation which has been recognized by the criminal law. As viewed from the obligation, the criminal law regulates two obligations, i.e. the positive obligation and the negative obligation, and the former is embodied in the obligation of “not to harm others”, and the latter is embodied in the obligation of “establish the common worlds with others”. The positive obligation not only contains “not to harm others”, but requires people to unify others, so the positive obligation can not equal to the negative obligation. As viewed from the criminal law, it is advisable to identify the behavior of violating negative obligation with the legal interest violation. But it is not correct to identify the behavior of violating positive obligation with the legal interest violation, because the crime nature of the obligation criminal is the violation of positive obligation which has been recognized by the criminal law.

**Keywords:** Legal interest, Obligation Criminal (Pflichtdelikte), Positive obligation, Negative obligation

What is the nature of thing? As viewed from philosophy, the nature means the essential character of thing, and it is the internal association of various necessary factors composing the thing. The nature of thing is composed by the special antinomies containing in the thing (Xiao, 1981, P.289). Whether the nature of crime is legal interest violation or the obligation violation? This question has been puzzling the scholars of criminal law. Today, in the theory circle of German criminal law, the crime nature of the dominance criminal (Herrschaftsdelikte) has been cognized as the legal interest violation, but the crime nature of the obligation criminal is still being largely disputed in the criminal law theory circle, and someone thought it was the legal interest violation, and others thought it was the violation of positive obligation which has been recognized by the criminal law. First, the crime concept of the obligation criminal will be discussed as follows, and then the crime nature of the obligation criminal will be analyzed.

## 1. The concept of the obligation criminal

The concept of the obligation criminal (Pflichtdelikte) was first proposed by Professor Roxin, and he pointed out the difference of the obligation criminal and the dominance criminal from the behavior meaning of crime, and he thought that the key component of the obligation criminal was to protect the functionary ability of the life domain to avoid damage, so doer's legal or social role was decisive, not the exterior representation of the crime behavior. On the contrary, the dominance criminal was to crash into a life domain which he had not contacted and he should not contact according to the law, so representation of his crime behavior was decisive (Vgl. Roxin, 1973, 2.Aufl. S.17 f). He thought that for legislators, when the content of the crime which deserved to be punished was significantly influenced by the obligation status, they would not think about the concrete behaviors, and regarded the doer's obligation as the core of the event, and significantly limited the outsider's punishment (Strafbarkeit). If legislators adopted other position, they would first think about the dominance structure, and put the barycenter on the dominance of exterior behavior (Vgl. Roxin, 2006, 8.Aufl. S.385 f). That is to say, in Professor Roxin's opinion, for the dominance criminal, his exterior behavior is decisive, but for the obligation criminal, his exterior behavior is not decisive, and the decisive factor is that the doer violates the special obligation. Though Professor Roxin regarded the obligation criminal as one kind of executant when he discussed the executant system, and proposed the concept of the obligation criminal many times, but he didn't define the obligation criminal definitely (Doctor He Qingren used some articles such as “Roxin, Täterschaft und Tatherrschaft, 8.Aufl., 2006, S.382 ff”, “Sánchez-Vera, Pflichtdelikt und Beteiligung, 1999, s.24 f”, and “Chen, Zhihui, Criminal of Obligation, Taiwan Jurist, No. 23, 2004, P.36” as references, and summarized Professor Roxin's concept of obligation as that “the obligation criminal means such key components, and in them, the executant could only be those persons who violate those special obligations before the key components and out the criminal law”, that can be seen in Chen Xingliang's book of “Review of Criminal Law (P.244, Vol. 24, 2010 Edition, Beijing: Press of China University of Political Science & Law)”).

Professor Jakobs first explained that his crime theory system was “a functional, value-judged, and intention-oriented system (Witteck, 2004, S.144)” in the crime system, and thought that “people could organize

the world, but live in the world which has been organized with various systems (Vgl. Jakobs, 1993, Teil.2. Aufl., 1/7)". There is one kind of system which is the base to strengthen the unity, and the unity could be because of private causes such as love and mercy, but it is not decided by random individual feelings, and it must be based on systems. For example, for parents, reliers with special trust relationships, and servants in the state obligation, because of the existence of systems, no matter what they would like to, they must unify children, reliers, and counterparts, and no matter what they organized before, each even in the common world would be attributed to them, because they are required compulsorily by the law to unify others. The requirement that these people unify others is a kind of united obligation, and it is represented as "building a common world with others (Die Bildung einer gemeinsamen Welt)". This united obligation is represented as the obligation criminal's positive obligation in the criminal law. For the obligation criminal, the domination to decide the executant is confirmed by violating an obligation ensured by the system (i.e. the positive obligation, noted by the author), but it will always be confirmed. The executant's responsibility of the obligation criminal is generated from the positive obligation added by the system extra, i.e. requiring the criterion embracer to "build a common world" with others, and make others become better, not to compensate the loss induce by himself. In other words, the obligation of executant is not confirmed by his organization domain, but by the role's obligation in the system (Vgl. Jakobs, 1996, S.32ff). When the obligation criminal supported by certain system violates his obligation, he is decided as the executant. Based on that, Professor Jakobs thought that the obligation criminal meant the crime violating the domination of system (institutionelle Zuständigkeit) (Vgl. Jakobs, 1996, S.21ff).

## 2. The disputation about the crime nature of the obligation criminal

Whether the crime nature of the obligation criminal is the legal interest violation or the positive obligation violation? That is drastically being disputed in the theory circle of German criminal law, and there are following opinions concretely.

The first opinion thinks that the violation of the obligation criminal's obligation is only decisive to decide his status of executant, and is meaningless to decide the punishment, and the base to decide the punishment of the obligation criminal still is the legal interest violation, i.e. this opinion thinks that the obligation criminal's obligation violation is only the standard to confirm the executant, and its crime nature still is the legal interest violation. Scholars holding this opinion include Roxin and Witteck. Professor Roxin thought that the crime dominance (Tatherherrschaft) was not a universal principle, because there were some key components which could eliminate its application. For example, a civilian forces one police to extort a confession (Article 343 of German Criminal Law), so he has the so-called crime dominance because of his will dominance. Even now, according to the regulation of the article 343 of the German Criminal Law, he would not be the executant of the crime of extorting a confession by torture, because this criminal is the positional criminal, and only the person with the special identify of civil servant could be the executant of the crime of extorting a confession by torture. If people further study the foundation to decide the executant, they will find that both the identity of the civil servant and the abstract qualification can not make someone be the executant, but the consciousness violation of the special obligation behind the identity establishes the character of executant. In all these cases, that special standard which is decisive for the character of executant exists in one obligation violation (Vgl. Roxin, 2006, 8.Aufl. S.352 ff). Though Professor Roxin thought the standard to decide the executant of the obligation criminal was the obligation violation, but he also thought that the punishment of the obligation criminal was because that the obligation criminal violated the legal interest. Professor Roxin mentioned that whether one key component was decided as the dominance criminal or the obligation criminal was a legislator's value selection time after time. He did things by this way or by that way, that was decided by the obligation status in the range of legal interest violation (Vgl. Roxin, 2006, 8.Aufl. S.385 ff). Professor Jakobs's student, Sánchez-Vera, also thought that the violation of the unity obligation only decided the executant in Professor Roxin's eye, and the legal interest violation was still the decisive factor to decide the punishment of the crime (Vgl. Sánchez-Vera, 1999, S.34).

Professor Witteck also thought that the standard of the executant of the obligation criminal was the obligation violation, and it was independent of the legal interest violation, but he also thought that the legal interest violation was the punishment base of all crimes, including the obligation criminal. In his opinion, "the functions of the society and these stanchions supporting these functions are not decisive causes materially, because people must form the factors of the society behind these systems. The unity which is protected by the criminal law according to the systems would not be allowed to break away from the required guardian's benefits. It doesn't com down to the essential exceeding human behavior ability finally, because the system could operate only by the persons who create it. According to the systems of the society, the unity ensured by the criminal law could and should be required, because the deficiency of this unity means the direct harm for those people and their

legal interests behind these systems. The behaviors according with roles in the system are required by the criminal law, because the roles in the systems undertake larger danger than certain person who is protected by the systems or whose legal interest is ensured out of the systems (Witteck, 2004t, S,153)". For example, for the breach of trust, "property damage concerns whether the relative person is punishable; on the contrary, the violation of the property damage management obligation concerns that the relative person's any participation is punishable (Witteck, 2004t, S,128)". "The task of the article 266 in the Criminal Law is to protect the victim's property to be free of damage, not to protect the victim's trust to be free of abuse. In the same way, the base of punishment is the legal interest violation represented by the property damage, not the obligation violation (Witteck, 2004t, S,129)". Professor Witteck's final conclusion was that "the obligation criminal's punishment base is that there is a system guarantee of legal interest, and the persons acting in the system are required to look after the legal interest corporately. And the nature still is the legal interest violation (Witteck, 2004t, S,153)".

The second opinion thinks that for the obligation criminal's crime nature, the obligation violation only is the necessary premise or the additive condition, but finally, the obligation criminal exists because these crimes violate the legal interest. Many scholars such as Jescheck, Gössel and Hoyer held this opinion. Both Professor Jescheck and Professor Gössel thought that the violation of special obligation was only the necessary condition to become the executant from the obligation criminal, not the sufficient condition, and the obligation criminal's punishable base mainly was the legal interest violation, but the obligation violation should not be ignored at the same time. For example, Professor Jescheck thought that "the only correct opinion is that the executant in all personnel criminals only is the obligation undertaker. But that doesn't mean each obligation undertaker is the executant, that is to say, he have to have the crime dominance, or have to participate in the crime dominance, or operate with others under a tool without identity to be the indirect executant. His punishment is mainly based on the legal interest violation under the crime dominance (Jescheck/Weigend, 1996, 5.Aufl. ,S.652)". Professor Gössel also thought that "the crime dominance always is necessary, but it is not always the sufficient factor of executant. Even for the obligation criminal, the crime dominance is the factor of executant which can not be abandoned, but it can not be only used to decide general person's character of executant, and it can only aim at the behavior object which is definitely described by the law (Gössel, 1999, S.138)".

Professor Hoyer didn't deny the existence of the obligation criminal, but he thought that the only particularity of the obligation criminal was the obligation violation except for the executant premise of general dominance criminal. His reason was that the key component of the obligation criminal could not be satisfied only by the single obligation violation, and it must combine with the legal interest violation or the danger. Whether for the offense of consequence or for the potential damage offence, to violate the special obligation is only one illegal part to compose the key component, and if the violation or danger of the legal interest is deficient, the key component could not be composed sufficiently, and the theory of executant could not exist, even the crime could not exist. Taking the article 266 of the German Criminal Law as the example, he explained that the executant of the breach of trust should not only breach the obligation of property management, but damage the property owner's property (SK-Hoyer, 2000, 25/21ff). "The core person of the obligation violation could only be the undertaker of the obligation, but the core person inducing the damage may be another person, and his behavior is attributed to the undertaker of obligation according to the rule of the dominance criminal (SK-Hoyer, 2000, 25/22ff)".

The third opinion thinks that the nature of the obligation criminal is the violation of the positive obligation, not the legal interest violation. Professor Jakobs held this opinion, and he thought that the crime behavior was the meaning expression of the conflict between the criminal's explanation mode and the explanation mode of the criminal law, and by the punishment, the criminal's meaning expression would be marginalized as the world explanation mode which didn't deserve to be stimulated, and the standard force of the criminal law criterion would be maintained, and human anticipation would be strengthened at the same time. On that meaning, the harm of crime is not the legal interest violation, but the violation of the criterion force, and the task of the criminal law is not to protect the legal interest, but maintain the force of the criminal law criterion (Wayne Jacobs, 2004, P.96). In his crime system, he divided the executant into two types. The first type is the obligation criminal, and the domination of the executant character could be confirmed by violating the obligation ensured by the system, and it always would be confirmed. The second type is the dominance criminal, and the domination of the executant character is linked with the organization range owner's organization behavior, and whether the organization behavior is evaluated as the executant behavior or the participation behavior is decided by whether the behavior domain the crime event (Vgl. Jakobs, 1993, Teil,2.Aufl. 21/1 ff). For the obligation criminal, both the executant character and the punishment character are decided by the violation of the special obligation. "When doer doesn't play "each person's" role with the negative content that could not be allowed to

harm others, but pay the role with the positive content, i.e. this positive role should have thus content: he should establish a common world with another person at least, and he should look after this person, and could not deteriorate but should improve his status, that is to say, he always play the roles such as government official, father, mother, guardian, and property manager, and he has the task to implement one system, and here, it is not proper to call the result of obligation violation as the legal interest violation. However, a police who holds the baton to beat others damages the victim's health, and people would call this behavior as the legal interest violation, which is positive. But, the damage that he plays the special role of police has not been proposed, that is not proper, because the fact comes down to the damage of a special obligation (i.e. the positive obligation, noted by the author), and also influences the implementation of one honest police (Wayne Jacobs, 2004, P.98-99)." For the obligation criminal, "in Professor Jakobs' opinion, the violation of unity obligation decides not only the executant character but also the punishment of the crime behaviors (Vgl. Sánchez-Vera, 1999, S.34)". So the nature of these crimes is the violation of the positive obligation.

### 3. The author's opinion

For above opinions, the author agrees with Professor Jakobs' opinion, and before the reasons are explained, the illogicalities of the first opinion and the second opinion are discussed as follows.

For the first opinion, Professor Roxin and Professor Witteck thought that the obligation criminal's obligation violation only decided the executant character, but the punishable base still was the legal interest violation, which might not justify themselves. On the one hand, the dominance criminal's punishable base is the legal interest violation, and the rule of executant is the crime dominance rule dominating the causal flow of legal interest violation. On the other hand, the obligation criminal's punishable base still is the legal interest violation, but his rule of executant is the violation of the positive obligation being independent of the causal flow of legal interest violation. In theory, the rule of executant is certainly decided by the punishable base, i.e. the nature of crime, and the punishable base establishes the core factor of crime, and the person who controls the core factor may be the executant, on the contrary, the person who has not controlled this core factor would not be the executant in any case. For example, the crime nature of the dominance criminal is the legal interest violation, and its rule of executant is only the person who controls the causal flow of the legal interest violation. Professor Roxin and Professor Witteck thought that the obligation criminal's punishable base was the legal interest violation, and his rule of executant was the obligation violation, which obviously breached the principal that the punishable base of crime accorded with the executant rule.

For the second opinion, Jescheck, Gössel and Hoyer thought that the obligation criminal's obligation violation was only the necessary premise or the additive condition to form the executant, but the obligation criminal's punishable base mainly was the legal interest violation, so the obligation criminal's rule of executant became the "obligation violation + crime dominance". That was still criticized by others, for example, Professor Roxin said that the obligation violation decided the executant, and it didn't fulfill the key component. And the abetter and the aid also implement the violation of the protected legal interest, but the executant is only the person who violates the special obligation of the key component. If the executant is required as not only "the core person violating the obligation" but also "the core person damaging the property", so when these two core persons are assumed by two different persons, all participators should be innocent, because there is no one who can satisfy the premise of executant of "obligation violation + crime dominance" (Vgl. Roxin. (2006). *Täterschaft und Tatherrschaft*, 8. Aufl. S.745 f). Professor Joecks also put forward similar opinion, and he thought that "the undertake of loyal obligation is the executant of the breach of trust, and when he doesn't prevent others' behaviors of property damage, i.e. by nonfeasance, he could be the executant with the crime dominance and the loyal obligation violation, and by the mode of feausance, even the degree of crime dominance is not achieved, he will the executant of the breach of trust" (MK-Joecks, 2003, 25/43). The author thinks that Professor Roxin and Professor Joecks' criticisms are correct.

The author thinks that the obligation criminal's obligation violation could not only decide the rule of executant, but be the punishable base, and following reasons are explained.

First, the concept of the obligation criminal is a functionary, value-judged, and standard concept. As viewed from the author's opinion, the legal philosophy foundations in the obligation criminal and the dominance criminal are different. The legal philosophy foundation in the obligation criminal is that "the survival of certain community must depend on an association frame which is established randomly being divorced from individuals, i.e. the criterion; the society should be understood as the standard world in this frame, and only when the criterion which creates the personen, no the naturally meaningful individual, instructs the communication, i.e. when this criterion offers the explanation mode of the rule for the behavior, the society is practical (Wayne Jacobs, 2001, P.21)". In

the legislation, the legal philosophy foundation of the obligation criminal is represented to confirm the un-violation of the special obligation of certain system domination, and the person who violates the special obligation in system will be punishable and be the executant, and the legislator only consider doer's violation of special obligation, not the degree of the behavior, and the violation degree of the behavior to the legal interest. The obligation criminal's legal philosophy foundation is different with the dominance criminal's legal philosophy foundation, and the dominance criminal's legal philosophy foundation is the material-oriented logic which is represented by that according to the actual status (the nature of things) which can be grasped in the experiences of natural science, the legislator's decision composing the law base can be concretized, and the "existence theory structure" according to the legislation value judgment can be sought. In other words, for the dominance criminal, the nature of things on the meaning of the existence theory is the base of the criterion which can not be abandoned, and the legal concept should be continually standardized by dint of the type theory thinking in the legal philosophy to continually approach the "nature of things". For the dominance criminal, legislator has to consider the violation degree of the behavior to the legal interest, and the legal interest violation is the dominance criminal's punishable base, and the control degree of the behavior to the causal flow of legal interest violation becomes the "force" of behavior to compose the executant rule, and it is very important for the dominance criminal. Professor Roxin first put forward the concept of the obligation criminal, but he didn't grasp the difference of the legal philosophy foundation between the obligation criminal and the dominance criminal from deeper layer, and falsely thought that obligation criminal's legal philosophy foundation is the material-oriented logic, and the result was that after "his student Schünemann pointed out that Professor Jakobs' obligation criminal had essentially different theoretical base with Professor Roxin's obligation criminal, i.e. Professor Jakobs was pure normativismus, but Professor Roxin didn't deny the existence theory structure of the actual situation before the criminal law (Schünemann, 2003, P.408)", Professor Roxin definitely pointed out that his criminal law theory with the personnel mechanism theory was consistent with Professor Jakobs's criminal law with the system function theory. And if he supported Professor Jakobs's theory only in order to get rid of the difficulty from some arraignments for the obligation criminal, he would make the academic mansion which he had paid large efforts be collapsed. After realizing the ponderance of the problem, Professor Roxin begun to make a clear distinction with Professor Jakobs, and he not only deleted the recognition words to Professor Jakobs in his new book of "The Executant and the Crime Dominance", but also showed his difference with Professor Jakobs' theory in the public occasions (Roxin, 2007, P.160).

Second, as viewed from the obligation, the obligation criminal's special obligation violated can not completely equal to the dominance criminal's. The dominance criminal's violation is the negative obligation, but the obligation criminal's violation is the positive obligation. The ideal source of the negative obligation and the positive obligation could be traced to Cicero's "De Officiis". Cicero thought that "all nobilities of the life are contained in the emphasis to the obligation, and the shame of the life is in the negligence of the obligation (Cicero, 1999, P.9)". "The systematic discussion of any problem should start from the definition of the obligation, to confirm what problems should be discussed (Cicero, 1999, P.11)". According to that, he thought that "the first task of justice is not to harm others (Cicero, 1999, P.31)". After that, the negative obligation of "not to harm others" became a traditional system in the Roman law to come down, and consequently, many thinkers begun to extensively and deeply study the negative obligation. Just as what Schopenhauer thought, "the requirements of justice are only negative, which could be achieved by the compulsion; because all people could carry out the formula of "not to harm others" (Schopenhauer, 1996, P.244)". Pufendorf utilized the negative obligation of "not to harm others" to explain the crime, i.e. "under thus concept, all crimes such as homicide, harm, strike, rob, theft, bilk and other violent forms are understood as a kind of forbidden harm exerting others directly or indirectly by self or others (Pufendorf, 1991, P.57)". In the criminal law theory, that is represented by "anticipating each person should look after his organizational activity, not to harm others, and this anticipation only has the negative contents, i.e. each person's organizational activity range should be separated, and his anticipation should be the dominance criminal or the crime dominated by the organization (Vgl. Jakobs, 1993, Teil,2.Aufl., 1/7)". Therefore, for the dominance criminal, the violation of the negative obligation can be represented as the violation of others' person, property or other benefits, i.e. equaling to the legal interest violation, in other words, the dominance criminal's crime nature is the legal interest violation.

The thinking foundation of the positive obligation can trace to Cicero's "De Officiis", and Cicero wrote that "human being come into the world for the human being and the mutual help among them, so we should follow the nature which is the guider, serve the public benefits, work for no reward each other, give or get, and make people more minutely associated by the technique, or by the labor, or by trying his best (Cicero, 1999, P.23)". This obligation of "serve the public benefits, work for no reward each other" is a kind of positive obligation of "building a common world with others". For the positive obligation, Pufendorf referred to "it is not enough not

to harm others or not to deprive others' dignity, and these obligations are only the causes to perish the hates. At least, if human brains have been associated by tighter bonds, people have to do better things for others. Some people only doesn't drive me away by his hostility or inglorious behavior, but he carry out the social obligation, rather than he should be the person who mercifully treats me, so that I will live on this land happily to share my nature. The close relation established by the nature among people must be exerted by the mutual obligation (Pufendorf, 1991, '64)". Fries also mentioned the positive obligation, and he said, "Parents have the positive obligation to bring their children up, only they still arrange for their children's life", "Just for the relation between parents and children, this relation must be regarded as that parents randomly brings their children to this world, so they directly have the obligation to make their children's status be more satisfactory under their tendance (Fries, 1818, S. 171 f, 216 f.)". The positive obligation is a kind of unity obligation, i.e. the obligation requiring "building a common world" with others, and it still contains the negative obligation, but it is completely different with the negative obligation, and it requires not only not harming others, but making others better and better. The positive obligation "is not the product that citizens govern their own ideas, but it is imposed to citizens from the exterior; it is not to confirm citizens' freedom, but only endow citizens obligation; it doesn't help citizens to resist the exterior intervention, but requires citizens to give up their own rights for the social or others' benefits (Vgl. Seelmann, 1994, S.295,299)". In the free society, the first task of the law is to guarantee citizens' freedom, and the obligation of "not to harm others" is the major idea of the legislation. But it can not say that the positive obligation could be abandoned, because in any one country and society, "if the positive obligation is not the base, the country and the society could not set up its own base and boundary. For example, the law of the state must take some judiciaries as the premise to exert its function; if the organizational institution of the government operates normally, civil servants must do things according to regulations, and both can not leave a series of positive obligations building the judiciaries and administrative structure". In the criminal law theory, it is represented as "the anticipation of the function of the basic systems, and this anticipation have positive contents, and the system could adjust various personens' range of organization activity, and the disappointment of it will induce the obligation criminal or the crime dominated by the system (Vgl. Jakobs, 1993, Teil.2.Aufl., 1/7)". The violation of the negative obligation of "not to harm others" always takes "harming others" as the sign by certain medium (i.e. the organizational behavior), i.e. the danger of the legal interest violation is generated by the organizational behavior. But the obligation criminal's positive obligation is represented by "undertaking responsibility not because of his organizational behavior, but generally ensure the result would not happen in a common world". For example, parents have the obligation to look after their sick children, though the illness happens not because of their culpable tendance; keeper must eliminate the danger of the property kept by him, even if the danger is not his faults; the civil servant with certain right has to denote necessary things in order to avoid destroying the environment, though the cause of destroying is foreign to him. Therefore, the civil servant's positive obligation is independent of the organization behavior, and it is the requirements which are imposed to the doer from the exterior, without the precondition of any person and thing. That is to say, the positive obligation is the obligation without medium (unvermittelt). This character of the positive obligation makes that the obligation criminal's crime nature is only the violation of the positive obligation, though sometimes the violation of the positive obligation would come down to the legal interest violation more or less, but for the obligation criminal, that is only the surface, and the violation of the positive obligation is behind the surface. The "force" of the behavior and the violation degree of the behavior to the legal interest are not decisive for the obligation criminal, because the nature of the obligation criminal is the violation of positive obligation, and the development of the behavior and the control degree of the causal flow of the legal interest violation are only the surface phenomena. If the obligation criminal's crime nature equals to the legal interest violation (i.e. the dominance criminal's crime nature), the violation of the positive obligation will equal to the violation of the negative obligation, which is largely wrong.

Third, the obligation criminal's crime nature is the violation of the positive obligation, but sometimes the violation of the positive obligation would come down to the legal interest violation more or less, that doesn't mean the obligation criminal's crime nature is the legal interest violation, because the violation of the positive obligation sometimes will not come down to the legal interest violation, so the example of the obligation criminal who doesn't come down to he legal interest violation will be a powerful strike to the opinion that the crime nature is the legal interest violation. A, the person preferred boys to girls. After he had married with B for one year, B had a baby girl. When the baby girl was half a year old, A forced B to divorced with him many times, but B didn't agree, and she left the girl at home, and went to work in Qingdao alone. A had to look after the daughter alone. One day, the daughter caught a cold, and A took the baby to the hospital. In the hospital, A escaped when the nurse was looking after his daughter. After six months, B returned from Qingdao, and she found there was no her daughter at home, so she asked A, and A cheated her that he sold the daughter. B was

very angry, and called the police, and the police caught A. Through the survey of the police, the daughter was found in the hospital and raised by the hospital (When the author discussed this case with the professor Feng Jun, he gave a similar case. A is the husband, and B is the wife. They had two daughters, but they hoped to have a body to carry on the family line. When their third baby was born in the hospital, they found it was a girl again, so they escaped when the nurse was looking after the baby. One year later, the hospital found them and asked them to take their baby back, but they didn't admit this girl who was their daughter in deed after appraisal. Professor Feng Jun was inclined to affirm that this case should be the crime of abandonment. And because the time of abandonment was too long, which belonged to the vicious circumstance, so they should be convicted). After the trial of first instance, the court convicted A for the crime of abandonment, and condemned him on probation. A obeyed the crime. The crime of abandonment is the representative obligation criminal, and for this case, A's abandonment had not make his daughter's healthy right damaged, but A disobeyed the positive obligation of raising his daughter, and the abandonment time achieved 6 months, belonging to the vicious circumstance, so he should be convicted.

Fourth, the positive systems (such as the police system, the civil servant system and the parents' system of duty of support) in obligation criminal should not equal to legal interests. When Professor Roxin discussed judiciary orders and judgment that misused the law, he thought that the "justice" was the legal interest of the orders and judgments that misusing the law, and if the judge intentionally made a false adjudge, he damaged the justice by the most serious mode (Claus Roxin, 2006, P.164). But could the judiciary equal to the legal interest? To be sure, "we can divide the legal interest into the individual legal interest and the super-individual legal interest (Zhang, 2000, P.167)", but this super-individual legal interest must be based on the individual legal interest, and be the "sublimation" of the individual legal interest. Both the individual legal interest and the super-individual legal interest must all be embodied in the people-oriented interest finally. The concept of the super-individual legal interest saves grace, but it has potential danger, i.e. it may cognize some phenomena which have no necessary association with people as the legal interests. The positive systems such as the judiciary, the police system, the civil servant system and the system of parent's right have no necessary association with human interest, but to protect these systems by the criminal law is to maintain the functions of these systems, not to protect the interests in these systems. If the positive system of the obligation system is regarded as a kind of super-individual legal interest and people assume these systems could revert individual legal interest as a matter of course, that is largely wrong. As Professor Roxin said, "justice" is the legal interest of orders and judgments that misused the law, but if this "justice" is regarded as the super-individual legal interest, and the super-individual legal interest is reverted to the individual legal interest, it would only be the victim's legal interest in the orders and judgments that misused the law. But for the orders and judgments that misused the law, the criminal law only protects the function of the judiciary, not both parties' interests. If one sentence could make two parties satisfied, but disobey the regulations of the law, judge's judgment still belongs to the orders and judgments that misused the law, and he should be convicted by the criminal law. Therefore, the author thought that the positive system of obligation criminal should not be confirmed as the super-individual legal interest, because it has no necessary association with human interest.

Finally, for the positive obligation violated by the obligation criminal, following opinions should be emphasized. First, the positive obligation violated by the obligation criminal is different to general legal obligation. Someone claimed that all crimes violated legal obligation, and they thought that the nature of obligation criminal was the obligation violation, so it's not necessary to take the obligation criminal as the independent crime type to study. For example, Professor Otto thought that the illegitimacy was implemented by the behavior, and was embodied in the invalidity which had been denied by the law. The key component of illegitimacy could be only fulfilled when a legal obligation was violated except for the legal key components, i.e. the violation of the protected legal interest. In other words, after adding protected legal interest explanation, the type of violation, and the violation avoidance obligation, the key components of the law could be converted to illegal key components (Vgl. Otto, 2004, 7. Aufl. 5/10 ff.). The violation of the special obligation in the obligation criminal is just the general obligation violation, and though it exclusively limits the key components of the illegitimacy, but is not proper to distinguish the executant and participation criminals. In the existing theory, the division of the personnel criminal and the general criminal is right, and there is no place for the obligation criminal (Vgl. Otto, 2004, 7. Aufl. 21/37 ff). Professor Gössel and Professor Zipf also put forward similar opinion with Professor Otto, i.e. each crime behavior would be represented as an obligation violation finally. There was an obligation that the criterion acceptor must obey behind the behavior criterion regulated by the criminal law, i.e. the legal interest protected by the criterion should be emphasized. Whether in Roxin's dominance criminal and obligation criminal, or in Jakobs' crimes based on the organizational dominance and based on the system dominance, the violation of this obligation exists unlimitedly, because as viewed from the crime, all crimes are same (Vgl. Maurach/Gössel/Zipf,

1989, Band 2, 7. Aufl., 47/91). Abstractly, crimes are the behaviors violating the essential obligation, and who harms others, who should be responsible for his behavior, and this behavior should be attributed to him. In fact, the general obligation proposed by these three professors is only the negative obligation, i.e. “the obligation not to harm others”. But could this negative obligation equal to the special obligation in the obligation criminal? Obviously it could not. Just as Professor Witteck said, the obligation of “not to harm others” must be strictly distinguished with the special obligation of the obligation criminal. The special obligation comes down to special domain of responsibility, and only the person with the obligation could be the core person in this domain, so the special obligation is a factor to decide the executant, but the obligation of “not to harm others” is independent of the executant rule, and it could only decide the punishable base of the behavior (Witteck, 2004, S.110). The obligation of “not to harm others” must avoid the happening of harm, because doer’s activity in this domain would disturb others’ rights and interests. But the obligation violated by the obligation criminal is to actively avoid the danger even if which is not related with his domain.

Second, the positive obligation violated by the obligation criminal is the obligation out of the criminal law, i.e. the special obligation before the key component and out of the criminal law. Professor Roxin thought that the obligation criminal’s special obligation should be logically put before the criminal law, and generally root in other legal domains, such as the civil servant’s obligation in the public law, the silence order in the industrial laws, and the support or raise obligation in the civil law (Vgl. Roxin., 2006, 8. Aufl., S. 352 ff). For this opinion, someone thought it was ambivalent, and on the one hand, Professor Roxin thought that the executant was the problem which should be solved in the key component, but on the other hand, the so-called executant rule in the obligation criminal should be confirmed from the existing standard before the key component (Vgl. Maurach/Gössel/Zipl, 1989, Band 2, 7. Aufl., 47/91). In fact, the judgment that the obligation criminal violates the special obligation out of the criminal law “is not confirmed by the reference in the criminal law criterion, but internally confirmed by the explanations of this criterion (Witteck, 2004, S.111 f)”. Legislator only constitutes the articles of the criterion according to his life experience principles, and when the obligation factor in the key component needs to be explained, people have to explore the source and premise of the obligation (which can not be seen only from the articles), if the violation of the obligation in the article is not the core of the key component after exploring, so the person who violates this obligation could only be the executant. So the judgment of the executant in the obligation criminal is not confirmed out of the key component, but is confirmed by the criterion that who is the core person in the behavior event in the key component.

Third, the obligation criminal’s positive obligation is the obligation out of the criminal law, and this obligation may come from the obligations coming from other branch laws. Will it induce the revival of the formal law obligation theory to take some obligations regulated in other branch laws as the obligation criminal’s positive obligation? The formal legal obligation theory was the early opinion aiming at the negative crime, and it thought that the legal duty to act in the negative crime came from laws or contracts, and the essential content of the legal duty to act was abandoned. Because only the formal-oriented laws and contracts could not answer which obligations in laws and contracts have the meaning of criminal law, the punishment of the negative crime is too expanded. On the other hand, many protective obligations and security obligations out of laws and contracts have the punishment character, but the range of the negative crime is also reduced improperly according to the formal legal obligation theory. Therefore, for the pure form, the formal legal obligation theory could almost not be supported today (Grünewald, 2001, S.19). There is a dispute, i.e. does the obligation criminal’s positive obligation truly come from other department laws? Obviously it doesn’t, because the obligation criminal’s special obligation comes from the social domain which has been built well and could operate according to various systems, and people undertake their own roles and carry out their own obligations, so the function of this domain could be sustained effectively, and it is not enough for “not to harm others”, the undertakers of roles have to unify others actively according to systems, and help others like help themselves. Because of its importance, the system to confirm the content of role is absorbed by the whole law order of the state, and embodied in various department laws. Taking the system of civil servant as an example, this system is an important part in the whole law order of the state, and it not only would be the core content of the civil servant law, but also be one theoretical reference of the obligation criminal in the criminal law. It is not so much that he special obligation in the criminal law here comes from the core content of the civil servant law, as that both come form the abstract system surrounding the civil servant relation in the whole law order. But only when the obligation embodied in the whole law order could only be recognized by the criminal law, this obligation could be the obligation criminal’s special obligation, so the positive obligation violated by the obligation criminal must be the obligation recognized by the criminal law. Therefore, the obligation criminal’s crime nature should be the violation of the positive obligation recognized by the criminal law.

In sum, the violation of the positive obligation is not only the executant rule to decide the obligation criminal, but also the punishable base, but this positive obligation must be recognized by the criminal law. Therefore, the obligation criminal's crime nature should be the violation of the positive obligation which has been recognized by the criminal law.

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