

Research on Criminal Regulations of Misappropriating Unit Obligatory Right

—Based on the Case of Misappropriating Company Obligatory Right by Chu

Luoyi Jiang^{1,2}, Yang Tian³

¹College for Criminal Law Science of Beijing Normal University, Beijing, China

²Beijing Fourth Intermediate People's Court, Beijing, China

³Law School of Beihang University, Beijing, China

Email: na.jiang@bnu.edu.cn

How to cite this paper: Jiang, L. Y., & Tian, Y. (2021). Research on Criminal Regulations of Misappropriating Unit Obligatory Right. *Chinese Studies*, 10, 42-52.
<https://doi.org/10.4236/chnstd.2021.101004>

Received: December 16, 2020

Accepted: February 2, 2021

Published: February 5, 2021

Copyright © 2021 by author(s) and Scientific Research Publishing Inc. This work is licensed under the Creative Commons Attribution International License (CC BY 4.0).

<http://creativecommons.org/licenses/by/4.0/>



Open Access

Abstract

In order to clarify whether misappropriating unit obligatory right constitutes the crime of misappropriating funds, the research starts from the object of the crime of misappropriating funds and makes it clear that its object is the right of possession and utilizing in the ownership of funds. Through research, it is found that the original intention of the legislation for the crime of misappropriating funds is to protect the assets of units that can be used immediately to perform the exchange function, and the difference between obligatory right and ownership of funds is whether it can be withdrawn, paid or used at any time. So the conclusion of the study is, for the behavior of misappropriating unit obligatory right, if the obligatory right is not due, it does not constitute the crime of misappropriating funds, and if it is due, it shall constitute the crime of misappropriation of funds.

Keywords

Misappropriating Unit Obligatory Right, Crime of Misappropriating Funds, Exchange Function, Ownership of Funds

1. Introduction: Disputes on the Determination of Misappropriating Unit Obligatory Right

With the continuous enrichment of business models, the forms of unit property rights are also increasing, not only including tangible rights such as ownership of funds and fixed assets, but also intangible rights such as obligatory right, equity, and intellectual property rights. Among them, obligatory right is the most common kind of intangible rights and there have been some cases of misappropriat-

ing unit obligatory right in the judicial process. There are disputes in the criminal law determination of misappropriating unit obligatory right.

With the reform of the system, the obligatory right is not only a right of claim, but also can be transferred, pledged, repaid, etc. Article 272 of the Criminal Law of the People's Republic of China stipulates the crime of misappropriating funds, and states clearly that the target of the crime is limited to "funds". The explanation of the word "funds" in the dictionary is: "funds" is the currency expression of property and materials. For the behavior of misappropriating unit obligatory right, some scholars believe that the "funds" in the law should be explained more extensively, while some scholars believe that the law provide for funds, which obviously should not include obligatory rights.

2. The Case of Misappropriating Company Obligatory Right by Chu

In response to the above disputes, the author tries to analyze whether misappropriating unit obligatory right constitutes the crime of misappropriating funds under the framework of the existing criminal law, combined with the case of misappropriating company obligatory right by Chu (No. 207 First Criminal Judgment of 2013 by People's Court of Yinzhou District, Ningbo City, Zhejiang Province).

The defendant, Chu, as the legal representative of an estate development company, on behalf of the company, transferred 11% of the shares of a certain project to Xu and other 4 people for a total price of 5.5 million Yuan on July 19, 2008. Xu and others paid 3.9 million Yuan in three successive payments, and still owed the estate company 2.06 million Yuan including principal and interest (as of June 30, 2010, the interest was calculated as 460,000 Yuan). On December 21, 2009, Xu and others transferred all their shares in the project to Wu and Chu for a total price of 46.5 million Yuan. On December 28 of the same year, Wu, Chu, and a company in Hefei agreed that Wu and Chu would contribute 9 million Yuan each, accounting for 20% of the shares each, and the company would invest 27 million Yuan, accounting for 60% of the shares. Wu and Chu should pay Xu and others 9.75 million including principal and interest each. On July 12, 2010, due to the expiration of the transfer payment period, Chu arbitrarily used the 2.06 million Yuan which Xu and others should repay to the estate company because of the equity transfer, to offset his debt of equity transfer (8.502 million Yuan) to Xu and others, for personal profitable activities.

The court of first instance did not affirm the accusation of 2.06 million Yuan. Hu, the original shareholder of the estate company, refused to accept it and appealed. There are two opinions on this problem: the first opinion is that this behavior constitutes the crime of misappropriating funds. The reason is that in addition to unit funds, the object of the crime of misappropriating funds also includes obligatory rights. There is no essential difference between misappropriating funds and obligatory rights of the company to offset personal debts. The second opinion holds that this behavior does not constitute the crime of misap-

propriating funds. The reason is that the object of the crime of misappropriating funds is unit funds. Unit funds refer to property controlled by the unit in the form of currency, and the obligatory rights are unit funds only when they are realized.

In order to solve the problem of the conviction of the behavior of misappropriating unit obligatory right in the case of Chu, the research idea is to start with the object protected by the crime of misappropriating funds, study the connection and difference between funds and obligatory rights at this stage, and see whether the act of misappropriating obligatory rights violate the object protected by the crime of misappropriating funds.

3. The Object Protected by the Crime of Misappropriating Funds

When it comes to the object of the crime of misappropriating funds, there is controversy on this issue in theoretical research. The first view is that the object of the crime of misappropriating funds is a complex object and misappropriating funds mainly infringes on the property ownership and the financial management system of companies, enterprises or other units (Li, 2012). The second view is that the object is the property right of companies, enterprises or other units and the specific infringement is the unit's right to possess, use and profit from property (Gao & Ma, 2011). The third view is that the object is the property ownership of companies, enterprises or other units and specifically refers to the right to possess, control and use (Su, 2012). The disputes between the above six viewpoints are mainly on three issues:

1) The specific object of the crime of misappropriating funds is what kind of right in the ownership of funds?

The author believes that the object of the crime of misappropriating funds is the possession and use of funds by companies, enterprises or other units. Ownership includes four rights including possession, use, profit and disposal. First, the right of dispose: although the nature of currency is that possession means ownership, and use means disposal, the unit's ownership of funds can be abstracted here. The crime of misappropriating funds requires that the perpetrator does not have the purpose of possession and just temporarily misappropriates the funds of the unit, so it does not infringe the right of dispose of funds. Second, the right of use: the purpose of misappropriating unit funds is to use unit funds for other purposes, so it would inevitably violate units' right of use funds. There is almost no dispute over these two points, and the dispute mainly lies in profit and possession. Third, the right of income: misappropriating funds does not necessarily infringe the right of income from funds. For example, unit funds in the form of cash do not bring benefits to the unit, and the misappropriating cash does not infringe the right of income, so even if the right of income is not violated, it can also constitute this crime. Fourth, the right of possession: some scholars believe that it should not be included in the object of the crime of misappropriating funds, because the value of funds is reflected in the exchange, and

simply possessing funds cannot bring value, which is the difference between funds and other things. But the author believes that possession of funds is not worthless. Although the value of funds is reflected in exchange, but possession is a prerequisite for exchange. The right of possession can ensure that property owners can obtain funds at any time when they need them. Just imagine that if a unit's funds are misappropriated, once the unit needs a large amount of funds, the remaining portion will be insufficient, which will damage the company's operation and management. Although the possession of funds cannot bring direct benefits, it is the basis to realize other powers. Therefore, the object of the crime of misappropriating funds should be the possession and use of funds by companies, enterprises or other units.

2) Is the financial management system the object of the crime of misappropriating funds?

From an objective point of view, misappropriation will inevitably violate the financial management system of the unit. Does this indicate that the financial management system is also the object of the crime of misappropriating funds? The author disagrees with this view because: first, the crime of misappropriating funds is stipulated in the crime of property infringement in Chapter 5 of the Criminal Law. It can be seen that misappropriating funds constitutes a crime mainly because it violates the property rights of companies, enterprises or other units. Second, temporary misappropriation has a small degree of infringement on the financial management order of the unit, and is not enough to constitute a crime. Third, misappropriating objects will also infringe the financial management system, and the degree of infringement is equivalent to misappropriating funds, but the misappropriating objects of company, enterprise or other units does not constitute a crime. It can be seen there is not necessary relation between infringement of misappropriation on the financial management system and the criminalization. Therefore, the author believes that the financial management system of the unit is not the object of the crime of misappropriating funds.

3) Why the misappropriation of objects does not constitute a crime?

Both the crime of misappropriating public funds and the crime of misappropriating funds limit the object of the crime to funds, while the objects of the crime of corruption and the crime of duty encroachment include not only funds but also objects. What is the purpose of such legislation? This involves the interests that legislators want to protect through the crime of misappropriating funds. The difference between misappropriation and encroachment lies in whether it is for the purpose of possession, encroachment of funds or objects will cause the loss of company property, both of which are considered as crimes and easier to understand. The behavior of misappropriation is different, the perpetrator has the purpose of returning, and the behavior does not infringe the unit rights to dispose of property. Although objects can be converted into funds through mortgage or sale, this conversion takes a certain amount of time and requires agreement with others. Therefore, the reason why the legislator did not regard the mi-

sappropriating objects as a crime is that the unit cannot immediately perform the exchange function of the objects when needed, which is different from funds.

In summary, the object of the crime of misappropriating funds is the possession and use of funds by companies, enterprises or other units. The legislative intent of the crime of misappropriating funds is actually to protect the assets of units that can immediately perform the exchange function.

4. The Meaning of “Funds” in the Sense of Currency and Judicial Interpretation

The explanation of the word “funds” in the dictionary is: “funds” is the currency expression of property and materials. The current judicial interpretation has expanded the meaning of “funds”, including financial certificates, securities, specific money and goods, and treasury bills. So we should figure out the connection between the meaning of “funds” in the sense of currency and judicial interpretation.

1) “Funds” in the sense of currency

Currency includes paper currency, metal currency, deposit currency and electronic currency. Paper currency and metal currency are the currencies that most people use daily, and deposit currency refers to bank deposits that can perform currency transaction media and asset functions, including current deposits that can be directly transferred and paid, corporate fixed deposits, and household savings deposits, etc. Electronic currency refers to the electronic data based on the financial electronic network, through the computer network system, by the transmission of electronic information to realize the payment function, usually using electronic payment tools such as card-based payment, online payment and mobile payment.

In general, paper currency and metal currency are the most basic forms of currency that realize their currency functions through exchange; current deposit can be withdrawn at any time; fixed deposits can be withdrawn at any time through withdrawal in advance; and some of the electronic currency can be converted with cash at any time, such as debit card, WeChat payment, etc., while others cannot be converted with cash, but can realize their currency functions through payment at any time, such as stored-value cards. It can be seen that “funds” can either be cashed out at any time, or can be paid at any time, and they can perform their exchange functions at any time.

2) “Funds” in the sense of judicial interpretation

In 2010, the “Opinions on Several Issues Concerning the Specific Application of Law in Handling Cases of Duty Crimes in State-Funded Enterprises” stipulated that financial certificates and securities are the targets of the crime of misappropriating funds. In 2003, Article 14 of the “Interpretation on Several Issues Concerning the Specific Application of Law in Handling Criminal Cases Impairing the Prevention and Control of Emergent Infectious Diseases and Other Disasters” stipulated that the criminal targets of the crime of misappropriating funds are extended to specific money and property. In 1997, “Reply of the Su-

preme People's Procuratorate on the Qualitative Issues of Misappropriating Treasury Bills" stipulates that the behavior of misappropriating publicly owned or own unit's treasury bills constitutes the crime of misappropriating public funds, and the targets of the crime of misappropriating public funds and the crime of misappropriating funds are theoretically identical. So the targets of the crime of misappropriating public funds include financial certificates, securities, specific money and goods, and treasury bills based on judicial interpretation.

Article 194 of the Criminal Law stipulates the crime of financial certificate fraud. The financial certificate in this crime refers to bank settlement certificate such as entrusted collection certificate, remittance certificate, and bank deposit certificate (Li, 2012). The financial certificate in the crime of misappropriating funds should specifically refer to bank deposit certificates, promissory notes, money orders, checks, etc. that can represent certain rights. Securities refer to certificates that have a certain par value and represent ownership of funds or obligatory rights. It can not only provide holders with regular income, but also as a commodity for sale and transfer, but it itself is just a kind of virtual capital with no value. Securities include commodity securities, currency securities and capital securities. Commodity securities such as bills of lading, currency securities such as bills of exchange and promissory notes, capital securities mainly refer to stocks and debt, which are also the main manifestations of marketable securities. Treasury bills refer to bonds issued by authorized departments of the government and are short-term treasury bonds. They are divided into certificate type and bookkeeping type. The bookkeeping type can be traded through the exchange, and the certificate type cannot be traded, but it can be withdrawn in advance just like the fixed deposit.

The government bonds of certificate type and fixed deposits can be withdrawn at any time through withdrawal in advance. Although stocks and other bonds except government bonds cannot be circulated in the market like cash, they can be bought and sold in the market at any time, and be freely exchanged for currency. It is a kind of currency expressed in a special form. The "funds" recognized by judicial interpretation can perform its exchange function at any time. The realization of this exchange function at any time lies in the strong credit guarantee of the government or bank, and all the "funds" have been marketed and have recognized market price, so they can be sold at any time. All in all, the characteristic of funds is "exchanging at any time".

5. The Relationship between Obligatory Rights and Funds

The right to turn funds into cash at any time, pay with funds or use them at any time is a kind of property right. Obligation is a kind of legal relationship that occurs between specific parties and can request specific behaviors. In this legal relationship, the right that one party requests the other party to perform specific behaviors is "obligatory right". Therefore, when discussing the relationship between obligatory rights and funds, we must first understand the distinction be-

tween obligatory rights and property rights.

1) The distinction and integration of property rights and obligatory rights

The traditional dichotomy of obligatory rights and property rights believes that the difference is mainly manifested in the following aspects: the first is that the property right is the right of domination and can be exercised without the assistance of other people; while the obligatory right is the right of claim, and its rights can only be realized with the help of the behaviors of others. The second is based on rights to specific people or all people, property rights are absolute rights, and the opposite party is one or several specific people; obligatory rights are relative rights, and the opposite party is all people. The third is that property rights are priority rights, and obligatory rights are equal rights. This simple dichotomy makes the application of obligatory rights and property rights either one or the other in property law (Chang, 2012).

However, with the development of economy and the diversification of social life, new types of rights and financial tools continue to emerge, and the so-called “rights explosion” has emerged, which has brought about the mutual penetration and integration of property rights and obligatory rights, and the boundaries have been blurred. In order to explain this phenomenon, someone has proposed that obligatory rights have the nature of property rights and property rights have the nature of obligatory rights. Obligatory rights with the nature of property rights mean that certain obligatory rights have the characteristics of certain property rights, which are specifically manifested as: the lease rights, the right of first purchase, the circulation of the right to contract management, the ownership retention system, and transfer guarantee, etc. Property rights with the nature of obligatory rights mean that certain property rights have lost some characteristics of the property rights, and have certain characteristics of obligatory rights, specifically including unregistered property rights under registration confrontationalism, and secured property rights with obligatory attributes.

In my opinion, obligatory rights with the nature of property rights and property rights with the nature of obligatory rights are only innovations at the system level, when certain obligatory rights and property rights have been given or reduced certain rights to adapt to the current stage of production and life. This does not affect the nature of typical obligatory rights and property rights. The logical defect of obligatory rights with the nature of property rights is mainly to equate the nature of the rights related to others with the nature of property rights. When certain specific obligatory rights have the effect of involving others, they are considered to have the nature of property rights. Property rights with the nature of obligatory rights mistakenly positioned property right as a right to all people. From this point of view, some scholars believe that the loss or reduction of the nature to all people will lead to property rights having the nature of obligatory rights. These views only focus on superficial phenomena and lack of deep insight into the essence.

2) Reasons for the integration of obligatory rights and property rights

The author believes that the main reasons that actually lead to the integration

of obligatory rights and property rights are as follows:

a) Independent economic value of obligatory rights

The connection between property rights and obligatory rights is usually manifested in that property rights are the prerequisite for the creation of obligatory rights, and obligatory rights are the basis for changes of property rights. Initially, the purpose of property rights especially ownership, was only to protect the right holder's control over the property, so that the right holder could freely possess, use, profit, and dispose of all his property, thereby satisfying his life needs, while obligatory rights are a kind of means of exchanging needed goods. But today, with the establishment of obligatory rights transfer, pledge of rights and other systems, as well as the securitization of obligatory rights, their circulation has become more and more free, making the obligatory rights show certain economic benefits. Obligatory rights are no longer a means to obtain property rights and itself is the purpose of relevant law. Economic value does not exist in property rights temporarily, but constantly moves from one obligatory right to another. However, the transfer of obligatory rights is similar to the transfer of objects. Although it can be converted into funds, it cannot be converted at any time, and it takes a certain amount of time.

b) Currency is also a kind of contract

Chen Caihong proposed the paper currency contract theory, which believes that currency is a kind of social commitment or guarantee in the equivalent form during the exchange of goods or services, and embodies a social credit economic relationship (Chen, 1997). This view is quite enlightening, but she only talked about paper currency and did not extend it to other currencies. Zhao Jian and others further proposed that convertible currencies can be regarded as obligation of banks to holders; non-convertible currencies can be regarded as options that the monetary authority gives currency holders legally enforceable effects (Zhao, Ma, & Feng, 2006). On this basis, Wang Xuelong proposed that currency is a contract designed to save transaction costs and contains the right to control social resources. The purpose of the contract is to protect currency as an efficient medium of exchange, thereby reducing transaction costs. It is credit that supports the realization of the contract, and the national credit is the guarantee for the performance of the contract (Wang, Yu, & Bai, 2012). That is to say, currency is different from other objects with use value, and its meaning lies in exchange, that is, currency is actually a kind of credit certificate that is generally accepted by society, has universal exchange value and is guaranteed by government credit.

c) The property rights of some funds exist in the form of obligatory rights

In the past, currency only included physical currency, paper currency, and metal currency, all of which could be paid directly. However, with the enrichment of currency types, although some currencies can be paid, they are realized through obligatory rights to third parties. For example, a bus card is a kind of stored-value card, which belongs to electronic currency. When passengers deposit money in the card, they actually obtain the obligatory rights that require the

bus company to provide services equivalent to the deposited money. The right of a value card is a kind of property right, but the stored value card itself is a certificate of obligatory rights. The same goes for stocks, bonds, deposits, etc. Our property rights to this part of the funds are actually obligatory rights. It is only because of the differences of the debtor's creditworthiness, transaction methods and others that this part of the obligatory rights can be withdrawn, paid or used at any time, and converted into property rights in the general sense.

In summary, obligatory rights and ownership of "funds" in the sense of currency are not two either-or rights with clear boundaries. The two are essentially the same and the difference lies in whether they can be withdrawn, paid or used at any time.

6. Methods of Misappropriating Obligatory Rights

The difference between obligatory rights and funds is whether they can be exchanged at any time, which determines that the way of misappropriating obligatory rights is also different from the way of misappropriating funds. There are two main ways to misappropriate obligatory rights:

1) Offset or transfer

Offset or transfer will lead to the elimination of the company's obligatory rights. From the perspective of rights, the legal representative of a company does not need to be authorized to perform civil juristic acts, and the restrictions on the right of legal representative by the company's articles of association cannot be against bona fide third parties. That is to say, if the company does not restrict the legal representative's right to transfer, the transfer is valid, and even if restricted, the transfer of the obligatory rights is valid if the other party is a bona fide third party, otherwise the validity of the contract for the transfer of obligatory rights is to be determined. From a practical point of view, misappropriating obligatory rights through offset or transfer must transfer the IOU. Once the IOU is transferred, even if the company still has the obligatory rights, there is no evidence to prove its obligatory rights. But even if the company's obligatory rights on the original debtor are eliminated, the misappropriator has created a new tort debt to the company. So it can also be regarded as a process of debt transfer.

2) Set up pledge of rights

The misappropriator uses the company's obligatory rights to set up a pledge of rights for himself or others, also needs to transfer the certificate of rights, and the obligatory rights are not eliminated. Same as offset and transfer, if the misappropriator is the legal representative, he has the right to establish a pledge, or although he does not have the right, but the other party is a bona fide third party, the establishment of the right pledge is valid. In other cases, the validity of the right pledge is to be determined.

In general, the same in above three methods is that the company's financial interests are not affected before the debt expires. Only when the obligatory rights expire, misappropriating unit obligatory right belongs to the protection scope of

the crime of misappropriating funds.

From the analysis of above six sections, we can see that the crime of misappropriating funds protects the right of the unit to possess and use funds. This is the difference between obligatory rights and ownership of funds. After the maturity date of the obligatory rights, if this behavior causes the funds to be recovered after a period of time, the time for misappropriating funds is from the maturity date of the obligatory rights to the day when the funds are recovered. Therefore, the case of misappropriating company obligatory right by Chu is a typical offsetting behavior of misappropriating obligatory rights. The company's obligatory rights to Xu have expired, so it should be determined as the crime of misappropriating funds.

7. Conclusion

Based on the above research, we can conclude the identification of misappropriating unit obligatory right, and summarize the research process.

1) Identification of misappropriating unit obligatory right in different situations

Obligatory rights are only a kind of expected economic benefit, without the right of possession and use. Therefore, according to the modest nature of the criminal law, simply misappropriating obligatory rights does not constitute the crime of misappropriating funds.

Obligatory rights have an agreed repayment time generally, and the debtor should repay the creditor's principal and interest at the time of repayment. That is to say, under normal circumstances, the debtor will repay the loan as agreed, and the creditor's rights will be converted into property rights of the funds; but if the debtor fails to repay the loan according to the agreement, the creditor can also restore his property rights through litigation and other methods. Of course, this part of the right is still the obligatory right before the repayment. For the misappropriation of unexpired obligatory rights, it should be assumed that the debtor will repay the arrears on time, that is, once the repayment period is reached, the obligatory rights will be transformed into the unit's property rights to the funds. If the debtor fails to repay the debt three months after its maturity, it can be deemed as "misappropriating the funds of the unit for personal use or loaning to others and not repaying it for more than three months" as stipulated in Article 227 of the Criminal Law, which may constitute the crime of misappropriating funds.

2) Research review and deficiencies

The study starts with the four rights to possess, utilize, profit from and dispose of property of ownership, analyzes one by one, and clarifies that the object of the crime of misappropriating funds is the right of possession and use of funds, and the object of protection of the crime is unit assets that can immediately perform the exchange function. The difference between obligatory right and ownership of funds is whether it can be withdrawn, paid or used at any time. On this basis, the conclusion of the study: the author believes that obligatory rights unexpired ob-

ligatory rights of companies, enterprises and other units does not constitute the crime of misappropriating funds. Once the repayment period is reached, the due obligatory rights can be regarded as funds, and the agreed repayment time is the time when misappropriating funds begins, which should be handled as ordinary crime of misappropriating funds.

There are also some deficiencies in the research. First, the research is limited to the existing legal framework. The harm of misappropriating obligatory rights is no less than ordinary misappropriation of funds. Under the current legal framework, it can also be dealt with by comparison with the misappropriation of funds, but it is suspected of expanding the interpretation. Therefore, a separate crime should be established in legislation for misappropriating obligatory rights. Second, in actual company management, the ways to misappropriate obligatory rights include offsetting or transfer, and the establishment of pledges of rights, etc. The different situations and ways of misappropriating obligatory rights require further analysis.

I believe that with the state's emphasis on the protection of unit property rights, the enterprise property rights protection system and the corresponding criminal law system will definitely continue to improve.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

References

- Chang, P. A. (2012). The Relevance of Creditor's Rights and Property Rights in the Normative System. *Law Research*, 6, 34.
- Chen, C. H. (1997). Paper Currency Contract Theory. *Financial Contract Research*, 8, 50.
- Gao, M. X., & Ma, K. C. (2011). *Science of Criminal Law*. Beijing: Peking University Press, Higher Education Press.
- Li, X. H. (2012). *Research on Specific Provisions of Criminal Law*. Beijing: Renmin University Press of China.
- Su, H. Y. (2012). *Science of Criminal Law*. Beijing: China University of Political Science and Law Press.
- Wang, X. L., Yu, X., & Bai, X. Q. (2012). Currency Contracts, Financial Functions and Economic Development. *Research on Financial Issues*, 1, 45.
- Zhao, J., Ma, Y. J., & Feng, G. F. (2006). Industry and Regional Cluster Analysis of China's Banking Industry Involving Listed Company Guarantees. *Research on Financial Issues*, 5, 17.