

Бремя доказывания в отношении имущества, связанного с бандитизмом: прекращение преследования и регулирование

The Burden of Proof on Gang-related Property: Defunctionalization and Regulation

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Аннотация. Закон о борьбе с организованной преступностью устанавливает систему доказательств в части имущества, связанного с бандитизмом. Однако из-за недостатков системы доказывания и распределения бремени доказывания формируется неблагоприятная для обвиняемых тенденция в части конфискации. Дефункционализация бремени доказывания проявляется как дефункционализация содержания и функции бремени доказывания. Правила уголовной презумпции, инверсия бремени доказывания, перенос бремени доказывания и другие схемы распределения бремени доказывания не могут решить эту проблему. В соответствии со ст. 45 (3) Закона Китая о борьбе с организованной преступностью государственное обвинение должно нести бремя доказывания в отношении имущества, связанного с бандитизмом, умеренно снижать требования к доказательствам. При этом ответчик участвует в выявлении имущества, связанного с бандитизмом, в целях определения легитимности такого имущества.

Ключевые слова: Закон о борьбе с организованной преступностью, имущество, связанное с бандитизмом, дефункционализация бремени доказывания; обязательство ответчика.

Abstract. Anti-Organized Crime Law establishes the proof system of gang-related property. However, due to the abstraction of the proof system and the disagreement of the distribution of the burden of proof, the proof system has the risk of blurring the burden of gang-related property, and forms a tendency of confiscation that is unfavorable to the accused. The defunctionalization of the burden of proof is manifested as the defunctionalization of the main body, the content and the function of the burden of proof. In view of the problem, criminal presumption rules, inversion of burden of proof, transfer of burden of proof and other distribution schemes of burden of proof cannot solve the problem.

In accordance with Article 45 (3) of the Anti-organized Crime Law, the public prosecution should bear the burden of proof on gang-related property, moderately reduce the evidentiary requirements and proof standards of the prosecution's allegations to ease the prosecution's difficulty in proving, thus negate the vanity of the burden of proof. At the same time, the defendant bears the obligation to clarify the case of gang-related property, and participates in the identification of gang-related property, so as to realize the legitimacy identification of the nature of the gang-related property.

Keywords: Anti-organized crime law, Gang-related property, Defunctionalization of the burden of proof is blurred; Defendant's obligation.

In judicial practice, there is a widespread problem of void proof of gang-related property. In the proving of gang-related property, the burden of proof in criminal litigation fail to play an effective regulatory function and are actually in a state of formalization. The voiding of burden of proof is actually a representation of the wanton expansion of the state's confiscation power, which is extremely detrimental to the protection of the legal property rights and interests of the accused. In view of the fact that the burden of proof on gang-related property is actually failed in judicial practice, some scholars advocate that based on the difficulty of the public prosecution to prove, there is an urgent need to recover the stolen property and avoid losses, and the burden of proof is inverted¹ or the legal presumption rule² is set. Some scholars advocate that the burden of proof is balanced between the defense and the prosecution,³ and the burden of proof transfer mechanism is set with conditions. Some scholars insist that the public prosecution bears the burden of proof, but moderately reduces the standard of proof of the public prosecution from the perspective of power control and the protection of the defendant's property rights. These views intend to solve the problem of void proof of gang-related property, but there are differences in the extent to which the burden of proof of the public prosecution is reduced, whether the defendant bears the burden of proof and the extent of the burden of proof, which is not enough to effectively guide judicial practice. It is necessary to analyze the burden of proof with the specific provisions of Article 45 (3) of the Anti-organized Crime Law.

1. The main manifestation of the fuzziness of the burden of proof on gang-related property

The formalized burden of proof on gang-related property mainly refers to the substantive failure

of the traditional distribution rules of criminal burden of proof in the role of gang-related property proof, and the public prosecution does not bear the judgment risk that the fact of the elements is unclear. The specific performance is that the prosecution is insufficient in the charge of property related to the crime, the evidence conditions and standards of proof are defective. When there is doubt about the nature of the property, the defendant often bears the adverse consequences. The judge fails to strictly follow the rules of burden of proof, but makes vague and general determinations and makes non-substantive judgments.

1.1. The main body of the burden of proof on gang-related property is blurred

The public prosecution does not bear the burden of proof on gang-related property, which is specifically manifested as the lack of charges related to gang-related property. Compared with the charges of conviction and sentencing brought by the public prosecution, there are obvious deficiencies in the charges of gang-related property, which often fail to meet the legal evidence conditions and standards of proof, and there are many cases of insufficient charges of gang-related property and abuse of public prosecution power. The evaluation of the charge of gang-related property needs to be carried out from the two aspects of evidence conditions and proof standards.

In terms of the evidence conditions, there are often insufficient evidence, generalized accusations and excessive reliance on subjective evidence. The current situation of insufficient evidence for charges of gang-related property includes the huge amount of gang-related property itself, long time span and complex legal relationship, which makes it impractical and impossible to collect and verify evidence item by item, as well as the limitations of objective conditions such as limited judicial resources and excessive difficulty in proving gang-related property. It is also related to the pretrial procedure in which the case handling organs lay particular emphasis on the collection of

¹ See: Li Hai-ying, Fu Yi. Distinguish and Dispose the Property Involved in Underworld and Organized Crimes in China: A Reference from Unexplained Wealth Laws in Australia [J] // Social Science Journal of Jilin University. 2021 (6). P. 158.

² See: Xu Dai. Analysis on the Path of Improving the Property Disposal Procedure Related to the Gang Crimes. [J] // Journal of National Prosecutors College. 2021 (2). P. 106.

³ See: Yao Xian-sen. On the Proof System of Gang-related Illegal Property. [J] // Review of Politics and Law. 2022 (5). P. 143.

evidence for conviction and sentencing. In the limited judicial resources and short case handling period, the case handling organs can only lay particular emphasis on the collection of evidence that can prove the «organizational characteristics», «economic characteristics», «behavioral characteristics» and «harmful characteristics» of the crime. And pay less attention to the collection of evidence related to gang-related property,⁴ so as to make general charges on the confiscated, seized and frozen property involved.

In terms of the standard level of charges related to gang-related property, because of the lack of evidence, illegal charges related to gang-related property are difficult to meet the standard of clear facts. Only on the basis of a certain amount, type and corroborating relationship of evidences, and Gang-related property had been found out and met the prosecution conditions, the public prosecution organ can bring charges. The charging standard of the public prosecution organ is the result of the subjective evaluation of evidence, so the formation of the charging standard cannot be separated from the support of evidence. However, under the current situation of incomplete collection, insufficient quantity, and weak corroboration relationship between subjective evidence and evidence, the prosecution fails to form inner conviction of illegality of gang-related property in essence.

1.2. The content of the burden of proof on gang-related property is blurred

The essence of the burden of proof is that when the authenticity of an important factual claim cannot be determined, the party who bears the burden of proof for the factual claim will suffer an unfavorable judgment. In the disposal of gang-related property, there is a practice that doubts are not conducive to the defendant, and when the nature of gang-related property is in an uncertain state, the gang-related property will also be confiscated, which shows that the traditional rules of distribution of criminal burden of proof in the proof of gang-related property have a substantive failure, and the burden of losing the lawsuit has shifted.

In judicial practice, there is a widespread phenomenon that when the nature of the property is doubtful, the property is still ruled as illegal income and confiscated. The judge determines the illegality of the property or suspends the judgment

on the property according to the low standard of heart and evidence, both of which are unfavorable to the defendant. First, on the premise that the prosecution's allegations of gang-related property were insufficient, the defender raised reasonable questions and provided corresponding clues to the allegations of gang-related property, so that the proof of part gang-related property has not reached the level of beyond reasonable doubt. But in order to achieve the punishment purpose, the judge actually relaxed the standard of heart evidence and lowered the standard of proof of gang-related property.⁵

Second, the suspension of the judgment on gang-related property is manifested as follows: the judgment does not mention the disposal of the property involved, that is «no prosecution and no judgment»; The judgment listed the amount and valuation of the property charged by the public prosecution, but did not carry out the final judgment, that is «lawsuit but no judgment»;⁶ The judgment made a judgment on the disposal of part gang-related property, but did not mention the disposal of the remaining property, that is «partial judgment». The judgment methods of «no lawsuit, no judgment», «lawsuit but no judgment» and «partial judgment» make the disposal result of all or part of the gang-related property suspended, and the gang-related property is still in the state of being sealed, seized and frozen, which will not only damage the legitimate property rights of the defendants and interested parties, and the property is in an unstable state.

1.3. The function of the burden of proof on gang-related property is blurred

In the disposition of the property involved in the triad crime, the judgment of the property involved in the triad has some non-substantive judgment problems, such as the deficiency of proof and cross-examination, the lack of reasoning for the illegality determination, the simple summary of the property judgment, and even no mention of the disposition of the property involved in the judgment. This kind of non-substantive judgment reflects the function of the burden of proof is blurred.

In the court trial process, there is a widespread phenomenon of false evidence and cross-examination of the nature gang-related property,⁷ which leads to the dynamic level of the property judgment presented a non-substantive state; From the perspective of

⁴ See: *Xue Wen-chao*. Difficult problems of property disposal involved in triad organized crime [J] // Legal Forum. 2019 (1). P. 44.

⁵ See: *Cai Jun*. Research on the norms of property disposal involved in Organized crime [J] // Jiangxi Social Sciences. 2022 (2). P. 95.

⁶ See: *Li Hai-ying*. Distinguish and Dispose the Property Involved in Underworld and Organized Crimes in China: A Reference from Unexplained Wealth Laws in Australia [J] // Social Science Journal of Jili University. 2021 (6). P. 150.

⁷ See: *Li Ying*. An Empirical Research on Property Disposal Procedures in Mafia-involved Cases-Taking Part of Property Disposal Procedures in Mafia-involved Cases in ABC and D Province as Analysis Samples [J] // Journal of Shandong Police College. 2019 (5). P. 30.

litigation jurisprudence, only sufficient evidence and cross-examination by both sides of the prosecution and defense, the judge can form inner conviction and then make a substantive judgment. Otherwise, it will violate the requirements of procedural justice and leave the fair and reasonable procedure. Even if the court makes a correct judgment on the defendant's behavior, it will not be impartial.⁸

The illegality determination lacks reasoning, the simple summary of the property judgment, and even the disposition of the property involved is not mentioned in the judgment. This is the non-substantive judgment at the static level. In 2015, the Supreme People's Court issued several Provisions on the Execution of Property-Related Parts of Criminal Adjudication as an important document regulating the adjudication of property involved in criminal cases, and its article 6 has required: «As the basis for the execution of criminal punishment, the content of the judgment should be clear and specific, and meet the requirements of enforceability», but in judicial practice, the court's judgment on gang-related property is more vague, similar expressions are «the property and proceeds collected by the triad organization headed by xx and the criminals who organize, lead and participate in the triad organization. As well as the tools used to commit crimes, shall be recovered and confiscated according to law «and» the rest of the property shall be handled by the organs of seizure, seizure and freezing according to law ».

2. The reason why the burden of proof on gang-related property is blurred

Due to the complexity of the gang-related property itself, the limited case handling resources and the case handling thinking that attaches particular importance to conviction and sentencing, the criminal prosecution party will try its best to break free from the shackles of the distribution rules of criminal burden of proof in the disposal of gang-related property, aiming to exchange the small resources and energy input for the confiscation of gang-related property as large as possible, and the judge fails to play a substantive role in restricting the trial. This leads to the criminal burden of proof on gang-related property in a state of emptiness.

2.1. The Anti-Organized Crime Law does not specify the distribution of the burden of proof

Article 45 (3) of the Anti-organized Crime Law uses the normative terms of «evidence», «proof» and «explanation», which shows that lawmakers insist on the identification and judgment of the facts related

to gang-related property within the framework of evidence proof. Its rules are created from the aspects of evidence conditions, proof standards, property descriptions, etc., forming a gradual and spiraling simplified identification mechanism for gang-related property facts. However, due to the generality and fuzziness of legislative terms, the Settings of the burden of proof are not detailed, which undoubtedly has the risk of causing confusion in judicial application.

Article 45 (3) of the Anti-organized Crime Law adopts the normative term «the defendant cannot explain the legal source of the property», which is the direct cause of the dispute over the distribution of the burden of proof. It is not clear whether the public prosecution organ needs to bear the burden of proof, and what kind of obligation or responsibility the defendant needs to bear in the proof of the gang-related property. In criminal proceedings, the defendant enjoys the right to criminal defense, can plead innocence, sentencing circumstances and the law of the legality of the property involved, and can be defended in any criminal case, these are self-evident, but the Article 45 (3) of the Anti-organized Crime Law, highlights that «the defendant cannot explain the legal source of the property», Even as one of the preconditions for the confiscation of gang-related property, this is obviously different from the declaration of the defendant's right to defense, has been unable to explain the legal source of the property that is confiscated of the adverse consequences of the implication, but the legislation and clarify the substance of the term.

It is not clear that the defendant is required to state whether it is the defendant's right or obligation, and that the defendant cannot state whether it is accompanied by adverse consequences. If it is improperly applied, it will result in the alienation phenomenon of the defendant being confiscated if the defendant cannot explain. In the absence of evidence of illegality of the property, the judicial organ requires the defendant to explain the legality of the property, which makes the burden of proof of gang-related property to the extreme of only testing whether the defendant can explain the legal source. This is undoubtedly contrary to the original intention of legislation and the principle of equality between prosecution and defense.

2.2. Improper introduction of criminal presumption theory

In the disposal of gang-related property, it is necessary to achieve the criminal justice goal of «cutting off the blood» and «hitting the bottom of the money», but it must also follow the basic value requirements of equality of prosecution and defense and power restriction. In judicial practice, there is already neglect of the verification, proof and cross-

⁸ See: *Chen Rui-hua*. Principles of Criminal Trial. Beijing : Peking University Press, 2003. P. 32.

examination gang-related property, and the proof gang-related property is neglected in the litigation procedure, and the problem of irregular disposal of the gang-related property is extremely serious. If there is no restriction rule, the direct introduction of the presumption rule or the inversion of the burden of proof will not only lead to the disposal of the gang-related property to follow the administrative procedure, but also lead to the failure of the Anti-Organized Crime Law, which clearly stipulates that the trial process should conduct court investigation and debate on the property involved. Therefore, the disposal of gang-related property should still be included in the scope of judicial proof, moderately reduce the burden of proof of the public prosecution organ, and balance the relationship between the confiscation of illegal income and the protection of legitimate property rights.

On the one hand, in view of the advantages of the presumption rule in simplified proof, some scholars believe that the legal presumption rule can be restrictively in the confiscation of gang-related property. Compared with the logical inference from evidence to facts, presumption follows the thinking process from fact to fact. Presumption is not a logical connection based on correlation, and its essential feature is to create a legal relationship between the basic facts and the assumed facts,⁹ rather than a logical proof relationship.

When the basic facts are proved, the presumed facts are regarded as proven. Some scholars create a specific legal relationship between the irrational behavior of criminal suspects and defendants, the facts of life and consumption and the illegality gang-related property, and believe that the illegality gang-related property can be determined through the basic facts. For example, if the case handling organ has no direct evidence to prove the nature of the property, it can prove the basic facts such as the income and living status of the criminal suspect or defendant from indirect evidence, and prove that the relevant property is not the legal income of the criminal suspect or defendant from the perspective of «high probability», and finally form a judicial presumption of fact.¹⁰

The public prosecution organs can also from the perpetrator's lifestyle, expenditure and possession of

legally acquired property is inconsistent or concealed transfer of property and other aspects of evidence to prove that the perpetrator's property can not be legal income, and then it is presumed to belong to the illegal income.¹¹

On the other hand, some scholars advocate that through the legal inversion of the burden of proof, the objective burden of proof to prove the legality gang-related property is assigned to the defendant. The reversal of burden of proof means that the burden of proof in criminal cases is generally borne by the public prosecution or the party making a specific fact claim. However, in some cases the law may also stipulate that the burden of proof is borne by the defense or the opposite party making a specific fact claim.¹²

The burden of proof of the public prosecution can be reduced by shifting the burden of proof in legal forms. Australia's «Serious and Organized Crime (Unexplainable Wealth) Act 2009» stipulates the «unexplainable wealth system». The connotation of this system is that the property involved in the case is presumed to be illegal in advance, and the defendant proves the legality of his property. This approach has achieved remarkable results in combating organized crime and recovering stolen goods. Accordingly, scholars advocate the introduction of the inversion of burden of proof rule in the disposal of the gang-related property in China, defining the property whose nature is still difficult to be ascertained after the prosecution authorities take financial investigation means as «property of unknown nature». For this part of property, the inversion of burden of proof rule is applied, and the defendant bears the burden of proof for the property elements of unknown nature and unrelated to the elements of the crime.¹³

2.3. The transfer of the burden of proof with conditions has inherent limitations

Based on the consideration of moderately reducing the burden of proof of the prosecution party and not excessively expanding the burden of proof of the criminal defendant, some scholars put forward a conditional transfer scheme of the burden of proof, arguing that the prosecution party must fulfill and realize certain preconditions in order to transfer the burden of proof of the legality of part of the property to the defendant,¹⁴ and then limit the scope of the burden

⁹ Zhang Bao-sheng. Presumption is the interruption of proof process [J] // Chinese Journal of Law. 2009 (5). P. 175.

¹⁰ Mo Hong-xian, Li Zhan-zhou, Wang Su-zhi. Key points of interpretation and application of Anti-Organized Crime Law. Beijing : Law Press, 2022. P. 140.

¹¹ See: Xu Dai. Analysis on the Path of Improving the Property Disposal Procedure Related to the Gang Crimes [J] // Journal of National Prosecutors College. 2021 (2). P. 105.

¹² See: He Jia-hong. My View on the distribution of burden of Proof in Criminal Proceedings [J] // Political Science and Law. 2002 (3). P. 72.

¹³ See: Li Hai-ying, Fu Yi. Distinguish and Dispose the Property Involved in Underworld and Organized Crimes in China: A Reference from Unexplained Wealth Laws in Australia [J] // Social Science Journal of Jili University. 2021(6). P. 158.

¹⁴ See: Yao Xian-sen. On the Proof System of Gang-related Illegal Property [J] // Review of Politics and Law. 2022 (5). P. 143.

of proof of the defendant. Compared with the scheme that adapts to the vacuity of the burden of proof of the gang-related property, the conditional transfer of the burden of proof limits the vacuity of the burden of proof to a certain extent, but the ambiguity about what kind of burden of proof the defendant needs to bear is the inherent deficiency of this theory.

First of all, in order to transfer the burden of proof, the «conditional transfer» can limit the public prosecution's false burden of proof to a certain extent, but it is difficult to implement the condition. Transferring the burden of proof reduces the objectivity obligation of the public prosecution, and makes it easier to accuse the illegal property. But at the same time, it should not be ignored that in the current judicial practice, there are many deficiencies in the allegations of gang-related property itself, such as lack of evidence and proof standards.

If the burden of proof is transferred unconditionally, it will easily lead to generalization of the illegal charges of gang-related property by the public prosecution, that is, without actual verification, the sealed, seized and frozen gang-related property will be accused as illegal property. Excessive increase of the defendant's responsibility to prove the legality of gang-related property. Therefore, scholars put forward the «conditions» for transferring the burden of proof, that is the prosecution must meet the corresponding evidence and proof standards for the illegal charges of gang-related property, before the burden of proof of the legality of part of the gang-related property can be transferred to the defendant.

Secondly, after transferring the burden of proof of the legality of part of the gang-related property to the defendant, it will be easier for the prosecutor to charge the illegality of the gang-related property, which lowers the standard of the charge and allows the possibility of mistakes in some of the gang-related property charges. In criminal proceedings of a more «public interest nature», the principle of substantive truth requires state organs to pursue crimes within their functions and powers, and to clarify the truth of criminal facts, and strive to do nothing wrong.¹⁵

Furthermore, prosecutors must fulfill their objectivity obligation, which requires prosecutors to collect not only the evidence against the defendant, but also the evidence in favor of the defendant, and integrate the evidence on the record. If necessary, appeal or request an acquittal for the benefit of the defendant.¹⁶ Specifically, in the proof of gang-related property, prosecutors originally bear the objective obligation to distinguish between legal property and illegal property, and the illegality of their gang-related property charges should be excluded from the legal property, but through the transfer of the burden

of proof, the burden of proof of the legality of part of the gang-related property is transferred to the defendant, which will lower the prosecutor's standard for illegal charges of gang-related property, and it is easy to appear false accusations.

Finally, the distribution rule of criminal burden of proof established by the principle of «presumption of innocence» is the foundation of criminal procedure law, reflecting the state's respect for and protection of the criminal accused, and not to break through the distribution rule of criminal burden of proof. If the public prosecution brings charges of property recovery unfavorable to the defendant, the public prosecution should bear the burden of proof. First, from the nature of the charge of recovery of gang-related, the public prosecution organ on behalf of the state to recover the property involved in the litigation request, the purpose is to realize the «right of state forfeiture». On behalf of the state, the legal charges against the criminal pursuer are unfavorable.¹⁷ Second, in the comparison of litigation capacity, the prosecution has far more proof ability and litigation resources than the accused. Generally, for the gang-related, the defendant has personal experience, it is easier to explain the legal source of the property, but it cannot be ignored that gang-related spans a long time and has a large number, and the defendant also has objective difficulties in proving its legality.

3. The regulation of the fictitious burden of proof of gang-related property

In the distribution of the burden of proof, we should not only consider the balance of litigation forces of both prosecution and defense, but also pay attention to the particularity of the factual proof of property. From two aspects of primary equality and corrective equality, Article 45 (3) of the Anti-organized Crime Law, examines the allocation of the burden of proof for the property involved in gangland and its wrong risk distribution.

3.1. Accurately grasp the allocation mechanism of the burden of proof in Article 45 (3) of the Anti-organized Crime Law

Article 45 (3) of the Anti-organized Crime Law sets three basic conditions for the identification of illegal property, namely: the facts of conviction and sentencing have been ascertained, there is evidence to prove that the property obtained by the defendant during the crime is highly likely to be illegal gains and its fruits and benefits, and the defendant cannot explain the legal source of the property. These three basic conditions have a progressive relationship in

¹⁵ Lin Yu-xiong. Strict Proof and Criminal Evidence. Beijing : Law Press, 2008. P. 168.

¹⁶ See: Long Zong-zhi. Issues Concerning Burden of Proof in Criminal Cases [J] // Modern Law Science. 2008 (4). P. 110.

¹⁷ See: Chen Rui-hua. The Type and Validity of the Criminal Action [J] // Legal Forum. 2019 (4). P. 54.

logic, the first is «the facts of conviction and sentencing have been found out», which not only indicates that the nature of the underworld organized crime has been established, but also means that the facts of the property involved in the underworld have been independent of the facts of conviction and sentencing, and need to be different from the procedure of conviction and sentencing, for separate identification.

Secondly, there is «evidence to prove» and «highly likely» two normative statements, which belong to the evidence conditions and standard conditions of proof for the public prosecution organ to bring illegal charges involving property, different from the conviction facts need to meet the «evidence is true, sufficient» evidence standard and «beyond reasonable doubt» proof standard. Finally, «the defendant can not explain the legal source of property», the defendant can not explain the legal source of property as the basic condition of illegality of property, obviously different from the basic obligation of the defendant in criminal proceedings without declaration, there is a prominent emphasis on the significance of the defendant to explain the legal source of property.

To classify the constituent elements of substantive law, and on this basis, divide the burden of proof, «classification of legal elements» (normative classification) has become a pillar theory in the academic circle of civil procedure law, and is widely used in civil judicial judgment, but whether the normative classification can be applied to the distribution of criminal burden of proof, there are two controversial views: negative and positive. The main viewpoint of the negative theory is that civil litigation pursues the principle of equal confrontation between the parties, and it is difficult to realize the equality between the prosecution and the defense in the substantive sense in criminal litigation,¹⁸ so it is not appropriate to use the standard classification theory to assign the burden of proof. And the affirmative claim that the essence of the burden of proof is a judgment method that is unclear about the truth or fallibility of the case, and does not need to consider the litigation forces of both parties. Secondly, the classification of legal elements is different from the classification method of legal elements.

Criminal litigation can still apply the classification of legal elements to analyze the distribution of the burden of proof, but it is necessary to explore an independent classification method of legal elements.¹⁹ Although the proof procedure is attached to the proceedings against persons, it does not involve the facts of conviction and sentencing, and focuses more on the judgment of the legal nature and ownership of the rights and interests of the gang-related property. It is a

typical «criminal action against the object», and then the proof mechanism of civil litigation can be applied.²⁰

The recovery of gang-related property initiated by the public prosecution has both criminal and civil attributes, and the proof mechanism of civil litigation is adopted in the proof mechanism, which means that in the analysis of the proof responsibility of gang-related property, there is no need to explore an independent and new classification method of legal elements, and it can be applied by analogy according to the existing «standard classification theory».

With the help of the standard classification theory, it can be concluded that the burden of proof of the gang-related property is still borne by the public prosecution. According to the «normative classification theory», that is, if the parties want to apply the legal norms favorable to themselves, they must fully clarify the preconditions of the legal norms, otherwise they will bear the adverse consequences of not applying the legal norms favorable to their own parties. The determination of illegality of property involved in gangland needs to meet the following requirements:

The facts of conviction and sentencing have been found out and there is evidence to prove that the property obtained by the defendant during the crime is highly likely to belong to the illegal income and its fruits, income and the defendant can not explain the legal source of the property. These are the prerequisites for the public prosecution organ to apply the confiscation norm in favor of its own side, and the public prosecution must bear the burden of proof for the application of the favorable norm.

To sum up, paragraph 3 of Article 45 of the Anti-Organized Crime Law still insists on the principle that the burden of proof is still borne by the public prosecution organ on behalf of the state, positively negates the phenomenon of the burden of proof in judicial practice, and also provides new ideas and positions for the theoretical circle to disagree on the burden of proof of gang-related property. Although this article stipulates that «the defendant cannot explain the legal source of the property», ostensibly adding the adverse consequences of the defendant failing to explain the legal source of the property, it does not change the traditional rules of distribution of criminal burden of proof, but only takes it as a constituent element of the norm of paragraph 3 of Article 45 of the Anti-Organized Crime Law.

3.2. Insist that the public prosecution bear the burden of proof of gang-related property

Article 45 (3) of the Anti-organized Crime Law determines the burden of proof for the public party to bear the property involved in triad crimes, which is

¹⁸ Long Zong-zhi. The Idea, System and Method of Evidence Law. Beijing : Law Press, 2008. P. 260.

¹⁹ See: Sun Yuan. Classification of Elements to Law and the Distribution of the Criminal Burden of Proof [J] // The Jurist. 2010 (6). P. 105.

²⁰ Chen Rui-hua. Primary Research on the Criminal Action in Rem [J] // China Legal Science. 2019 (1). P. 216.

a proper choice based on the public party's litigation ability and litigation responsibilities. It adheres to the traditional rules of distribution of criminal burden of proof, and moderately reduces the burden of proof of the public party by lowering the conditions of evidence and standards of proof.

First of all, the public prosecution has procedural convenience and functional advantages in obtaining evidence related to gang-related property. Due to the strong social harm, large scope of influence, large number of people involved, and complex cases, the public prosecution organs often take the initiative to intervene in criminal investigations according to their functions and powers, and the early intervention rate of the public prosecution organs is very high. Take the data of the procuratorate organs in Shanxi Province from 2018 to 2020 as an example. The early intervention rate of procuratorate organs in all gang-related cases and major crime-related cases reached 100 %, and the early intervention rate of crime-related cases reached 95.3 %.

By intervening in the criminal investigation stage in advance, the public prosecution organs can support, assist and supervise the investigation organs in ascertaining the criminal facts, and guide the investigation organs to collect and fix evidence legally and comprehensively in accordance with the requirements of the trial. Therefore, when a gang-related case enters the criminal procedure, the public prosecution organs can exercise a series of public prosecution functions with the «power of public prosecution» as the core, so as to realize the comprehensive ascertain of the gang-related property.

Secondly, assigning the burden of proof to the public prosecution party not only makes up the core of the disposal procedure of the gang-related property, but also forces the public prosecution organ to actively perform the functions of public prosecution and legal supervision, and strengthens the standardized disposal of the gang-related property in the pre-trial procedure. Before the promulgation of the Anti-Organized Crime Law, judicial practice had already shown a trend of attaching equal importance to criminal crimes from conviction and sentencing to conviction and sentencing and disposal of gang-related property.

However, the insufficient supply of the burden of proof for the disposal of gang-related property resulted in the deficiency of different procedures for the traditional burden of proof in criminal cases, and the lack of clear legal provisions on whether the standard of proof could be lowered. The promulgation of the comprehensive «*Guiding Opinions on Several Issues concerning the Handling of Criminal Cases of Mafia Forces*» to the special «*Opinions on Several Issues concerning the disposal of Property in Criminal Cases of Mafia Forces*» shows that more attention has been paid to the gang-related property.

However, the opinions on property disposal focus on clarifying the scope of property disposal and the

subject of disposal responsibility, and also create a system of custody, trusteeship, estimation and equivalent property confiscation, but the burden of proof and the standard of proof for the disposal of property involved in gang-related crimes are insufficient.

Finally, in Article 45 (3) of the Anti-organized Crime Law, the normative terms «proved by evidence» and «highly likely» are adopted, which alleviates the difficulties of the prosecution in proving gang-related property in terms of evidence and proof standards. On the one hand, in terms of the evidence conditions for charges involving criminal property, the second trial draft of the Anti-Organized Crime Law adopts the term «there is sufficient evidence to prove», «enough» is higher than «there», obviously, in terms of the amount of evidence, but compared with «sure and sufficient», «enough» is lower. From the slight changes in legislative terminology. It can be seen that the three words «have», «enough», «indeed, sufficient» represent the requirements of the three levels of evidence. Article 45 (3) of the Anti-organized Crime Law finally adopted the minimum level of evidence requirement, that is, «there is evidence». The legislation did not set a higher amount of evidence requirement for the public prosecution organ, it relaxed the requirement of the charge of gang-related property in the evidence level.

3.3. The defendant only bears part of the obligation to explain the legality of gang-related property

The Anti-Organized Crime Law assigns the burden of proof to the public prosecution, negates the phenomenon of the void of the burden of proof in judicial practice, and clearly limits the evidence conditions and standards of the public prosecution organs in criminal litigation against objects centered on the disposal of gang-related property. However, the defendant is not without task and pressure in the identification of the gang-related property. The public prosecution organ can make the judge form temporary proof of the illegality of the gang-related property with low evidence and proof standards. In this regard, the defendant must actively explain the legal source of gang-related property to shake the judge's temporary proof and avoid the damage of its legitimate property rights and interests.

This explanation of the legal source of property, in fact, belongs to the defendant to bear the legal property of the case to clarify the obligation. The setting of the obligation to disclose cases also reflects the correction of primary equality by corrective equality, and appropriately balances the tasks of both the prosecution and the defense in the identification of gang-related property, so as to achieve the goal of attaching equal importance to the confiscation of illegal property and the protection of defendants' legitimate property rights and interests.

First of all, the obligation to explain a case aims to solve the problem of proof in cases where evidence is biased by giving a party who does not have the burden of proof an obligation to explain. The obligation to explain the case is the litigation obligation imposed on the party who does not have the burden of proof. According to the definition of Taiwan scholars, the obligation to explain the case of the party who does not have the burden of proof refers to: When the party bearing the burden of proof is unable to specifically state its claims or the subject of evidence and the method of evidence, the other party has the obligation to state the relevant facts, present evidentiary materials and endure the investigation.²¹

This kind of obligation is also called by some scholars as «obligation of positive denial of claims» or «transfer of concrete responsibility», which is the «legal necessity» imposed on the parties to prove their claims through special provisions under the framework of subjective burden of proof, focusing on the parties' specific litigation evidence. It does not change the distribution of burden of proof and emphasizes the burden of proof of the party who does not bear the burden of proof, which is more stable and operable than presumption, inversion of burden of proof, conditional transfer of burden of proof.

Secondly, in the proof of the gang-related property, the introduction of the case to clarify the obligation to define the «defendant can not explain the legal source of the property» legislative terms, in line with the distribution rule that insists that the public prosecution bear the burden of proof, imposed on the defendant to cooperate in the obligation of legislative intent. The public prosecution organ bears the burden of proof while the defendant does not bear the burden of proof, but this does not mean that the defendant can «lie flat» by negative evidence and negative denial in the procedure of identifying the nature of gang-related property.

Article 45 (3) of the Anti-Organized Crime Law uses the phrase «the defendant can't explain the legal source of the property» to actually urge the defendant to put forward the claim of the legality of part of the gang-related property, provide the opportunity to cross-examine and debate its claim of legitimate property rights, and provide the final procedural guarantee for the confiscation of the gang-related property. And the use of the term is also to make the defendant bear a heavier obligation to explain, to avoid the defendant's negative evidence to delay the litigation process, and then realize the principle of equality correction, which is actually to make the defendant in the cross-examination of gang-related property to put forward the «gang-related property legality claim» of the obligation to explain.

Finally, the introduction of the obligation to explain the case, can explain the legislative phrase»

the defendant cannot explain the legal source of the property» and impose the requirement of explaining the legal source of the property on the defendant who does not have the burden of proof. In the proof of the nature of the gang-related property, there exists the situation that evidence — information is biased. Generally speaking, property matters belong to the most secret matters of the individual citizen, only the citizen himself can and easily provide the best answer to the property condition, so there is often a problem of information bias in the proof of the property nature.

Specifically, in the underworld organization crimes, its crime cycle is long, the members of the organization are numerous, and the criminal behavior is diversified, which leads to the extensive and large number of involved property sources that need to be sealed, seized and frozen in the handling of the crime. However, the source, nature and other matters of personal property belong to the most secret matters in the private life of individuals, and the public prosecution is at the periphery of the disputed matters, and can only directly or indirectly prove the nature of the disputed property from the outside through bank statements, payment, consumption vouchers, various property rights certificates or witness testimony and other evidence with traces of property transfer. The result of its determination may have the risk of error.

Epilogue

As a basic human right, protecting the legal property rights of the criminal accused is to protect the human rights of the accused. The effective proof of the nature and ownership of the gang-related property is related to the accurate application of physical disposal measures such as return, confiscation and recovery. In Underworld and Organized Crimes, due to the absence of the theory of burden of proof, the proof and judgment of gang-related property are often fictitious, and the legitimacy of the disposal measures of gang-related property is criticized. It is necessary to insist that the public prosecution bear the burden of proof, at the same time, more emphasis should be placed on the defendant to participate in the identification of the property nature through explanation, and properly handle the relationship between the defendant's property description and the prosecution party's responsibility to find out the facts.

As a typical criminal action against property, the action against property is different from the action against person, and the proof method of the action against person cannot be copied in the action against property. The configuration of the proof method of the action against property should be deepened by combining the theory of action against property.

²¹ Wu Ze-yong. The obligation of parties who do not bear the burden of proof to explain their cases [J] // Peking University Law Journal. 2018 (5). P. 1361.

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