THE DISAPPEARANCE OF THE "PRIVATE" ELEMENT FROM THE CONCEPT OF THEFT: A HISTORICAL EXPLANATION

Hırsızlık Kavramından "Özel" Unsurunun Kaybolması: Tarihsel Bir Açıklama

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Abstract

According to the unique public and private law division standards in Roman law, the concept of theft in Roman law has a dual nature of public and private. Ordinary theft is considered to reflect private legal relations and is a *delictum*, while aggravated theft reflects the legal relations dominated by the will of the state and is a public crime. The duality of this theft also affected the development of the concept of theft in the Middle Ages, both Canon law and Germanic law distinguished between ordinary theft and aggravated theft, but ordinary theft was no longer regarded as *delictum*. Germanic law upheld the idea of "public peace", while Canon law legitimized the criminalization of theft based on the idea of "atonement" and finally integrated the concepts of theft in Roman law, Canon law and Germanic law through the promulgation of the *Constitutio Criminalis Carolina* at the end of the Middle Ages. Ultimately, Germanic jurists reinterpreted the conception of theft expounded by classical jurists and transmuted the notion of theft into one invested with the character of a public crime. This thereafter constituted the prototypical paradigm of modern German theft legislation.

Keywords: *Delictum*, Ordinary theft, Aggravated theft, Canon law, Germanic law.

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Özet

Roma Hukuku'nun kendine özgü kamu hukuku ve özel hukuk ayrımı uyarınca, Roma Hukuku'nda hırsızlık kavramı kamusal ve özel olmak üzere ikili bir karaktere sahiptir. Adi hırsızlığın özel hukuk ilişkilerini yansıttığı ve bir *delictum* (özel suç) olduğu kabul edilirken nitelikli hırsızlık devletin iradesinin hakim olduğu hukuki ilişkileri yansıtmaktadır ve bir kamu suçudur. Hırsızlığın ikili yapısı, Orta Çağ'da hırsızlık kavramının gelişimini de etkilemiştir. Kanonik Hukuk ve Cermen hukuku, adi hırsızlık ile nitelikli hırsızlık arasında ayrım yapmıştır, ancak adi hırsızlık artık *delictum* olarak kabul edilmemeye başlamıştır. Cermen Hukuku'nda "kamu barışı" fikri üstün tutulmaktayken Kanonik Hukuk, hırsızlığın suç olarak kabul edilmesini "kefaret" fikri üzerinden meşru kılmış ve nihayetinde Orta Çağ'ın sonunda *Constitutio Criminalis Carolina*'nın çıkarılmasıyla, Roma Hukuku, Kanonik Hukuk ve Cermen Hukuku'nun hırsızlık kavramlarını birbiriyle kaynaştırmıştır. Sonuç olarak Cermen hukukçular, Klasik Dönem hukukçuları tarafından ortaya konan hırsızlık anlayışını yeniden yorumlamış ve hırsızlık kavramını bir kamu suçu niteliğine büründürmüştür. Bu ise daha sonrasında hırsızlığa ilişkin çağdaş Alman mevzuatının öncül örneğini teşkil etmiştir.

Anahtar Kelimeler: *Delictum*, Adi hırsızlık, Nitelikli hırsızlık, Kanonik Hukuk, Cermen Hukuku.

I. Premise

It is now a consensus that modern law regards theft as a concept of public crime. In fact, historically in Western law, if only considering the theft concepts that were formally legislated and comprehensively theorized, the earliest origin was *furtum* in Roman law, which was a concept with dual public-private nature.

In the Middle Ages, whether in Canon law or Germanic customary law, although theft was still occasionally regarded as a *delictum*, theft as a public crime had become the consensus. Since the *Constitutio Criminalis Carolina*, theft had been fully transformed into a public crime with modern connotations.

Then, in these three historical stages, did the transition of theft in the public's general awareness from a *delictum* under private law to a crime under public law have historical connections? What factors influenced this transition? This article attempts to explore these issues from the perspectives of history and comparative law.

II. The Dual Public-Private Nature of Theft in Roman Law

A. Etymology and Definition

In Latin, theft is *furtum*. The analysis of its etymology can reveal characteristics of theft in its legal formation stage. In fact, the etymology of theft may have three sources.

The first theory holds that *furtum* comes from *furvo* (darkness). The jurist who mentioned this view in his writings was Labeo. He says that *furtum* is derived from *furvus*, that is, black, because it is done secretly, obscurely, and mostly at night[1]. According to scholars' research, this view may have originated from the Roman writer Varro. In *Noctes Atticae*, Gellius mentioned: "This is what Varro wrote in the first part of his book, with great skill in the explanation of words, with wide knowledge of the usage of both languages, and marked kindliness towards Aelius himself. But in the latter part of the same book, he says that *fur* is so called because the early Romans used *furvus* for *ater* ('black'), and thieves steal most easily in the night, which is black. Is it not clear that Varro made the same mistake about fur that Aelius made about *lepus*. For what the Greeks now call κλέπτης, or 'thief', in the earlier Greek language was called φώρ. Hence, owing to the similarity in sound, he who in Greek is φώρ, in Latin is *fur*.[2]" Another evidence comes from Nonius: "Varro explained that the name of the thief comes from *furvum* (black), because the ancient Romans called black *furvum*. Thieves steal in the dark of night, so they are called thieves.[3]" The Roman poet Horace had the same view: "Some think *furvae* stands for black, whence comes the word *furtum*, because these acts are committed in the dark.[4]" In fact, secrecy may be related to the infringement of the subject of the family. In any early civilization, invasion of the family at night (representing secrecy) was a serious illegal act[5].

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1 D. 47.2.1 pr.

2 "Gellius: Attic Nights book I. 18. 3-5," University of Chicago, accessed May 5, 2023, see 89, https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Gellius/1*.html.

3 Nonius Marcellus, *De Compendiosa Doctrina Libri XX* (Vercelli: digilibLT, 2017), 44, https://digiliblt.uniupo.it/opera.php#.

4 "Q. Horatius Flaccus: Carmina 2, 13, 21," the Latin Library, accessed May 5, 2023, https://www.thelatinlibrary.com/horace/carm2.shtml.

5 In the Laws of Eshnunna, entering another person's house at night would be punished by death, while during the day a fine would be imposed, see Reuven Yaron, *The Laws of Eshnunna* (Jerusalem: the Magnes Press, 1988), 268-275. Article 21 of the Code of Hammurabi stipulates that a person who enters another person's house by breaking

The second theory holds *furtum* originates from *fraude* (fraud). Sabinus was a proponent of this theory[6]. The original meaning of *fraude* was to cause objective harm, and later developed to mean "intentional harm". In addition, *fraude* also meant breach of good faith. Therefore, Sabinus actually constructed the scope of theft based on this: first, acts with the intent to harm, and second, acts in breach of contractual relations. Some scholars believe that *fraude* was used to indicate the secrecy of theft[7], but this view is not correct. On the contrary, Sabinus argued that theft does not necessarily have secrecy. He says in *De Iure Civili*: "I do not think it should be omitted how carefully and religiously the most prudent men have defined what "theft" is, lest anyone think that only he is a thief who secretly takes away or stealthily pilfers.[8]"

The third theory holds that theft originates from *ferre* (carrying away)[9]. The proponent of this theory was Paulus. After citing the etymological theories of Labeo and Sabinus, Paulus gave his own explanation: "Theft comes from *ferendo* (carrying) or *auferendo* (taking away), or comes from the Greek word for thief φῶρας, and φῶρας was derived by the Greeks from ἀπὸ τοῦ φέρειν φῶρας (taking away)[10]." Paulus' etymological view was actually to support his theory that the object of theft is limited to movable property, because only movable property can be carried away, to refute the views of jurists who supported land theft[11].

These three explanations of etymology can illustrate the characteristics of theft from three levels. First, theft has secrecy, which implies the possibility of intruding into the family. Jurists had different views on whether theft in

through the wall will be killed and buried outside the house. Similar provisions exist in Athenian law, where the victim can kill the intruder or hand him over to the magistrate, see Laura Pepe, *Ricerche sul Furto nelle XII Tavole nel Diritto Antico* (Milan: CUEM, 2004), 30.

6 D. 47.2.1 pr.

7 Alfred Pernice, "Der verbrecherische Vorsatz im griechisch- römischen Rechte," *Zeitschrift der Savigny- Stiftung für Rechtsgeschichte* 17 (1896): 217.

8 "Gellius: Attic Nights book XI. 18. 13/19," University of Chicago, accessed May 5, 2023, see 347 and 349, https://penelope.uchicago.edu/ Thayer/E/Roman/Texts /Gellius/11*.html.

9 Hubert Niederländer, "Die Entwicklung des furtum und seine etymologischen Ableitungen," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 67 (1950): 185; Max Kaser and Rolf Knütel, *Römisches Privatrecht: Ein Studienbuch* (München: Verlag C. H. Beck, 2014), 299.

10 D. 47.2.1 pr.

11 For example Sabinus, see Gellius: 11.18,13; and Gaius, see Gai. 2.51.

Roman law had secrecy, but the current consensus is that secrecy was an element of theft before Sabinus[12]. Secrecy actually reflected the general perception of the concept of theft in early Roman society. Second, theft has the subjective intent to defraud, but *fraude* is not the only word that means fraud. *Dolus malus*, which is close to it, is often used interchangeably[13]. Finally, the objective element of theft is "carrying away", reflecting that theft was originally limited to movable property[14], because the collective ownership of land in early Rome made theft impossible, while movable property belonged to private individuals, so theft could only target movable property. All these interpretations reflect that the earliest concept of theft was aimed at acts that violated *paterfamilias* or private property.

Two classical jurists defined theft. First, Paulus defined it as: "*Furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus eius possessionisve.*[15]" The key to this definition is to reveal the subjective and objective elements required for theft. Its subjective element is "for the purpose of gain" (*lucri faciendi*), which comes from Labeo of the Proculian school[16]. He believed that theft could be established as long as there was *lucrandi causa* (intent to gain). Its objective element is "touching", *contrectatio* in Latin. In the literature of the Republican era, words similar in meaning to touching

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[12] Niederländer, "Die Entwicklung," 193; Abundant evidence proves that, at least before Sabinus, theft was commonly understood as secretly taking away property: "In this book there is also written a thing that is not commonly known, that thefts are committed, not only of men and movable objects which can be purloined and carried off secretly, but also of an estate and of houses; also that a farmer was found guilty of theft, because he had sold the farm which he had rented and deprived the owner of its possession." "Gellius: Attic Nights book XI. 18. 13," University of Chicago, accessed May 5, 2023, see 347, https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Gellius/11*.html.
"But I think I ought not to pass over the highly ethical and strict definition of theft made by the wisest men, lest anyone should consider him only a thief who privately purloins anything or secretly carries it off." "Gellius: Attic Nights book XI. 18. 19," University of Chicago, accessed May 5, 2023, see 349, https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Gellius/11*.html.

[13] Niederländer, "Die Entwicklung," 250.

[14] Bernardo Albanese, "La nozione del furtum fino a Nerazio," *Annali del Seminario Giuridico della Università di Palermo* 23 (1953): 8; Niederländer, "Die Entwicklung," 185; Kaser and Knütel, *Römisches Privatrecht*, 213; H. F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (London: the Eastern Press Ltd., 1971), 169.

[15] D. 47.2.1.3：*Furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus eius possessionisve.*

[16] A. J. B. Sirks, "Furtum and manus/potestas," *The Legal History Review* 81 (2013): 502.

included *tangere*, *adtrectare*, etc., *contrectatio* denotes an act with legal implications, commonly referring to illegal, unethical, or crude touching[17]. For example, as reflected in this passage from Cicero:

Cicero, De Deor. Nat. 1.77: cur non gestiret taurus equae contrectatione, equus vaccae?

(Why would a bull not desire mating with a mare, or a stallion with a cow?)

Second, Sabinus' definition was more accepted in Roman law: "*Qui alienam rem adtrectavit, cum id se invito domino facere iudicare deberet, furti tenetur.*[18]" The difference between this definition and Paulus' lies in that it does not emphasize the intention to gain from theft. As with Sabinus' view that the word *furtum* originates from *fraude*, this definition only emphasizes "intent to harm" and does not further point out that the ultimate purpose of "intent to harm" is gain. But its objective elements remain consistent with Paulus, that is, theft is the "touching" of property.

Paulus and Sabinus' definitions both pointed to theft as an extremely broad concept in Roman law. In addition to the abstract definition, Paulus also specifically listed that theft also included *furtum usus*, that is, using borrowed or deposited property without agreement, as well as *furtum possessionis*, that is, stealing one's own property legally possessed by others also constitutes theft. Sabinus' definition did not enumerate specific types of theft, but it can be inferred from its objective elements of "touching" and "without the owner's consent" that Sabinus' definition must have included *furtum usus* but not *furtum possessionis*, because *furtum possessionis* does not really violate the owner's will.

Although these definitions reflect the nature of theft in the Classical Period, they can provide a unique perspective on the concept of theft from the perspective of legal scholars. That is to say, the essence of theft lies in violating the will of others, whose purpose is to gain profit or simply to harm the interests of others. This shows that the concept of theft originally reflected the legal relationship between Roman citizens and was a kind of private law relationship.

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[17] W. A. J. Watson, "The definition of furtum and the trichotomy," *Tijdschrift voor Rechtsgeschiedenis* 28 (1960): 198.

[18] "Gellius: Attic Nights book XI. 18. 20," University of Chicago, accessed May 5, 2023, see 349, https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Gellius/11*.html.

B. Ordinary Theft was Regarded as a *Delictum*

Judging by the legal liability, *furtum nec manifestum*[19], *furtum conceptum* and *furtum oblatum*[20] in the Twelve Tables were regarded as ordinary theft, because these three thefts were subject to fines. However, ordinary theft in the Twelve Tables was not equivalent to private offense. Based on the object of infringement, *furtum manifestum*[21] as an aggravated theft was also an infringement of personal interests and essentially a *delictum*. Some scholars point out that the internal mechanism of the distinction between ordinary theft and aggravated theft in the Twelve Tables was whether the theft could be directly proven under the judicial conditions at that time, and whether it had indisputable illegality[22].

In the Classical Period, theft that infringed personal interests or did not pose a serious threat was regarded as ordinary theft. Jurists discussed this theft within the framework of private law and regarded it as a *delictum*: Gaius first systematically arranged private offenses in the Institutes, classifying four species: *furtum*, *rapina*, *iniuria*, and *damnum*[23]. By the space accorded *furtum*, it was the most significant *delictum*. Gaius' classification of *furtum* largely followed the Twelve Tables, distinguishing *furtum manifestum*, *furtum nec manifestum*, *furtum conceptum*, and *furtum oblatum*, adding only *furtum prohibitum*[24].

Classical jurists also had different views from Gaius, such as Sulpicius and Sabinus, who held theft encompassed only *furtum manifestum*, *furtum nec manifestum*, *furtum conceptum*, and *furtum oblatum*, while Labeo saw but two species: *furtum manifestum* and *furtum nec manifestum*[25]. Justinian's law also adopted Gaius's *delictum* classification, classifying theft as one such specie[26].

In addition, the private nature of ordinary theft was also reflected in the right of action of the victim and the legal liability of the thief.

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[19] Tab. 8.16.
[20] Tab. 8.15.
[21] Tab. 8.12-13.
[22] Franz Wieacker, "Endoplorare: Diebstahlsverfolgung und Gerüft im altrömischen Recht," *Festschrift Wenger*, no. 1 (1944): 158.
[23] Gai. 3.182.
[24] Gai. 3.188.
[25] Gai. 3.183.
[26] I. 4.1 pr.

In early Rome, the legal consequences of *delictum* did not directly obligate the offender to the victim, but rather subjected the offender to vendetta or talionic vendetta by the victim, which was a kind of vendetta right between families. The Twelve Tables preserved remnants of vendetta in *furtum manifestum*, e.g. "*si nox furtum faxsit, si im occisit, iure caesus esto*[27]", and daylight theft at weapon-point, where the thief, witnessed, might be killed[28]. Yet the Twelve Tables confined such vendetta to *furtum manifestum* and grave threat, reflecting gradual curtailment of familial vengeance as state power grew.

The Twelve Tables already had three types of theft lawsuits. The legal liability for the lawsuit of *furtum nec manifestum* was double fines, while *furtum conceptum* and *furtum oblatum* were triple fines. After the Twelve Tables, these three lawsuits continued to be retained by the praetor. The personal punishment of killing thieves in *furtum manifestum* was gradually abolished. Praetors created the *actio furti manifesti*, replacing vengeance with quadruple fines[29], In addition, the praetors also introduced the *actio prohibiti furti* through edicts, with triple fines.

Besides fines, praetors set *condictio ex causa furtiva*, *condictio furtiva* and *actio ad exhibendum* for theft. Needing only damages, these were more enforceable.

As theft's legal consequences shifted from private vengeance to systematized fines, the act now obliged actor to victim[30]. The classical jurist Gaius legally determined it as a cause of debt, he further induced that "*omnis enim obligatio uel ex contractu nascitur uel ex delicto*[31]". *Obligationes ex delicto* arose from *res*, acts, as Labeo said, by hands as contracts by mouth[32]. Therefore, like contract, theft became a debt's cause, fines the debt's object, imposed upon the actor[33].

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27 Tab. 8.12.
28 Tab. 8.13.
29 Kaser and Knütel, *Römisches Privatrecht*, 300.
30 Kaser and Knütel, *Römisches Privatrecht*, 296.
31 Gai. 3.88
32 Guodong Xu, *Commemtarius ad Institutes Iustinianorum* (Beijing: Beijing University Press, 2005), 465.
33 Kaser and Knütel, *Römisches Privatrecht*, 296.

C. Aggravated Theft was Regarded as a Public Crime

As early as the principate, Augustus set two urban prefects - *Praefectus Urbi* and *Praefectus Vigilum* - wielding criminal punishment for aggravated theft cases or those with social harm[34].

By Severan Dynasty (AD 193-235) at latest, public criminal prosecution against thieves could be initiated through the extraordinary procedure for night theft[35], picking pocketing, and theft in other people's dining rooms, places where property were kept or public baths[36].

The punishments for aggravated theft were rather cruel. Under Hadrian, cattle rustlers would be sentenced to death or forced labor[37]; night thieves, if armed, would be sentenced to forced labor in mines, and those of higher rank would be exiled[38]. To some extent, this meant the revival of ancient punishments, except that the entity carrying out the punishments became the state instead of persons[39].

In addition to those thefts against personal property that are considered aggravated thefts because of their greater harmfulness, those acts that damage the public interest, such as *peculatus* (embezzlement), are also considered aggravated thefts.

According to the *Lex Iulia peculatus*, *peculatus* refers to acts that damage the property of the gods, religious groups, or the state[40]. There is no doubt that its victims are parts of the Roman public system, so it belongs to public crime under Roman law. However, these acts also meet the requirements for theft, such as fraudulent intent (*sciens dolo malo*) and certainly touching (*contrectatio*). In addition, those who work in the mint and privately mint coins or steal already minted coins are considered to have stolen public money, of course, it is also a kind of embezzlement[41].

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[34] Ivana Jaramaz Reskusic, "Theft in Roman Law: Delictum Publicum and Delictum Privatum," *Zbornik Pravnog Fakulteta u Zagrebu* 57, no. 2 (2007): 327-330.
[35] D. 47. 17. 1.
[36] D. 47. 17. 3.
[37] D. 47. 14. 1.
[38] D. 47. 17. 1.
[39] Aleksandar Arsic, "Furtum in Roman and Contemporary Law," *Ius Romanum*, no. 2 (2016): 463; also see Jaramaz Reskusic, "Theft in Roman Law," 342.
[40] D. 48. 13. 1.
[41] D. 48. 13. 8.

In traditional Roman law, "the distinction between public law and private law originated from the ancient contradiction between the state community and the family community[42]". Public law adjusted social relations limited to issues related to the constitution, while private law covered all legal relations between individuals[43]. Theft involved infringement of one person's property by another, naturally included in the category of private law. But in the imperial period, the priority of protecting interests changed: the powerful public power under the empire led to the socialization of some legal relations. The state actively intervened in the personal lives of citizens[44]. In this narrative of the socialization of law, the social harm of theft, especially aggravated theft, was highlighted. Therefore, the individual-individual legal relationship structure emphasized by civil law in the Republican era transformed into individual-society, and part of theft that belonged to the private law field previously was reinterpreted as infringement of public (social) interests.

D. Synthesis

The concept of theft in Roman law appeared to split at the levels of classical jurisprudence and judicial practice. Ordinary theft, if we may say so, refers to theft reflecting the private law relationship between Roman citizens. Of course, there were exceptions, such as theft that could pose a serious threat was also considered an aggravated theft during the imperial period. To some extent, ordinary theft can be said to be the concept of theft tacitly accepted by the classical jurists, as can be seen from the fragments of classical jurists excerpted in Justinian's Digest. It can be said that all concepts of theft involving theoretical depth in Roman law were concepts of theft in the sense of ordinary theft.

Probably from about the same period, those thefts involving public interests or could pose a serious threat were regarded as aggravated thefts, reflecting a public law relationship. But unlike ordinary theft, jurists lacked interest in it. It more reflected a naked state will and a vulgarized theory of judicial practice[45].

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[42] Kaser and Knütel, *Römisches Privatrecht*, 54.

[43] Kaser and Knütel, *Römisches Privatrecht*, 295; also see Miroslav Frydek, "Terminology of Roman Criminal Law - Crimen et Delictum," *Journal on European History of Law* 1, no. 1 (2010): 69-72.

[44] Kaser and Knütel, *Römisches Privatrecht*, 6.

[45] Kaser and Knütel, *Römisches Privatrecht*, 5.

A passage from Ulpian reveals the ultimate solution to this contradiction:

D. 47.2.93(92): *Meminisse oportebit nunc furti plerumque criminaliter agi et eum qui agit in crimen subscribere, non quasi publicum sit iudicium, sed quia visum est temeritatem agentium etiam extraordinaria animadversione coercendam. Non ideo tamen minus, si qui velit, poterit civiliter agere*[46].

III. The Gradual Disappearance of the "Private" Elements in the Medieval Concept of Theft

A. The Influence of Roman Law on Canon Law

Since Canon law strictly followed Roman law, Roman law had a profound influence on Canon law in legislation on theft. This is reflected in two aspects:

In specific provisions: Firstly, Canon law had stipulations for night theft and daytime theft with weapons, just like Roman law. This involved the right to legitimate self-defense killing[47]. Secondly, Canon law also had provisions for "*abigeat*" (driving livestock away, causing livestock to disappear or be stolen by others), which was deemed as theft like in Roman law[48]. However, unlike Roman law's treatment of it as a special theft, Canon law regarded it as a general theft[49].

More importantly, canon law adopted the distinction between aggravated theft and ordinary theft in Roman law. Ordinary theft was regarded as delict, while aggravated theft was a public crime. But unlike Roman law, the connotations of ordinary theft and aggravated theft in Canon law changed. Its distinction between the two thefts was based on whether the theft involved sacrilege.

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[46] It must be remembered that now criminal proceedings for theft are common, and the complainant lays an allegation. It is not a kind of public prosecution in the normal sense, but it seemed proper that the temerity of those who do such wrongs should be punishable on extraordinary scrutiny. Still if that be the party's wish, he can bring civil proceedings for theft.

[47] Ingeborg Zillgen, "Geschichte und Sinn des schweren Diebstahls" (PhD diss., Friedrich-Wilhelms-Universität zu Berlin, 1940), 23.

[48] D. 47.2.50.4: *Cum eo, qui pannum rubrum ostendit fugavitque pecus, ut in fures incideret, si quidem dolo malo fecit, furti actio est: sed et si non furti faciendi causa hoc fecit, non debet impunitus esse lusus tam perniciosus: idcirco Labeo scribit in factum dandam actionem.*; D. 47.2.51: *Nam et si praecipitata sint pecora, utilis actio damni iniuriae quasi ex lege Aquilia dabitur.*

[49] Zillgen, "Geschichte," 21.

B. The Moralism of Canon Law Influenced the Concept of Theft

In Canon law, the illegality of both ordinary theft and aggravated theft rested on ethics and morals, stressing their subjective wickedness. For ordinary theft, Canon law stressed the moral grounds for its unlawfulness as a delict. Namely, liability for the delict relied on the theological doctrine that "the property wrongly obtained by a person must be restored to its original state for the sin to be forgiven.[50]" Thus, the actor could only find pardon by equally compensating the victim.

Aggravated theft overlapped with sacrilege in Canon law. The church commonly categorized sacrilege into four types: personal sacrilege, sacrilege against place, sacrilege against objects, and sacrilegious speech. Aggravated theft pertained to sacrilege against place and sacrilege against objects. Under the canonist Gratian's definition, stealing sacred objects in sacred and nonsacred places amounted to sacrilege against objects, while stealing nonsacred objects in sacred places constituted sacrilege against place[51]. Therefore, aggravated theft represented not only infringement of property but also irreverence and desecration of religion and belief. It harmed not individual interests but collective faith and values.

In fact, in Canon law, the essence of religious offenses was sacrilege[52]. Consequently, aggravated theft was inherently a kind of religious crime. However, the legal liability for such an offense was not criminal but moral. However, the legal liability for this crime was not penal but moral. The church takes a lenient stance towards thieves. Offenders can attain salvation as long as they make a full confession as demanded by the canon court. Only when they refuse to repent or continue to offend after two admonitions from the canon court will the church pronounce the final excommunication against them[53].

Canon law emphasized the immorality of theft. This immorality unified the sources of illegality for both ordinary theft and aggravated theft. The legal liability of thieves, whether criminal or civil, was aimed at achieving redemption.

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50 Yanxin Su, "The Formation of European Common Law in the Middle Ages," *Journal of Comparative Law*, no. 3 (2011): 132.
51 Zillgen, "Geschichte," 21.
52 Zillgen, "Geschichte," 21
53 Zillgen, "Geschichte," 21-22.

C. Germanic Law Considered Theft to Be a Breach of "Public Peace"

The theft legislation of the Germanic people was once directly influenced by Roman law. the Burgundian Code also divided theft into ordinary theft and aggravated theft, imposing multiple fines for ordinary theft and continuing the Germanic tradition of capital punishment for aggravated theft[54].

Following the collapse of the Frankish Kingdom in the 9th century, Germanic customary law gradually supplanted Roman law. The written laws of the Holy Roman Empire at that time represented a codification of Germanic customary law. In legal philosophy, it exhibited the hallmarks of publicism stemming from the traditions of tribal society. Germanic law did not differentiate between public and private property and did not consider theft a *delictum*[55].

While Germanic law in the Middle Ages formally maintained the fundamental distinction between aggravated theft and ordinary theft, the two offenses were no longer classified as *delictum* (under private law) and *crimen* (under public law). Instead, they were essentially deemed public crimes. This classification existed solely to assign legal liability.

The earliest constitutional document of the Holy Roman Empire, the Landfriedensordnungen, instituted corporal punishment for ordinary theft. The most common corporal punishment for minor theft was "punishment of skin and hair" (Ze hût und ze hâr). Aggravated theft was punishable by

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[54] The Burgundian Code treated the theft of important means of production as aggravated theft. For example, Article 4.1: If anyone solicits another's bondservant, or anyone, either native Burgundian or Roman, presumes to take in theft a horse, mare, ox, or cow, let him be killed: and let him who lost the bondservants and animals mentioned above, if he is not able to find them in the possession of the solicitor or thief, receive compensation in fee simple: that is, if he is not able to find that bondservant, for the bondservant, twenty-five solidi; for the best horse, ten solidi; for an ordinary one, five solidi; for the mare, three solidi; for the ox, two solidi; for the cow, one solidus.
The theft of other property was considered ordinary theft, as in Article 4.3: And if any native freeman, either Burgundian or Roman, takes in theft a pig, a sheep, a beehive, or a she-goat, let him pay threefold according as their value is established, and in addition, let him pay a fine of twelve solidi. Let the composition be for the pig, one solidus; for the sheep, one solidus; for the beehive, one solidus; for the goat, a tremissis. Indeed, let their value be paid threefold.

[55] Heinrich Janssen, "Der Diebstahl in seiner Entwicklung von der Carolina bis zum Ausgang des 18. Jahrhunderts" (PhD diss., Georg-August-Universität zu Göttingen, 1969), 2.

hanging[56]. Other Germanic laws, such as the Pax Moguntina in 1103, generally penalized theft by blinding and hand amputation. The Augsburger Stadtrecht in 1276 even made the death penalty the sole punishment for theft[57].

The publicist ideology of the Germanic peoples was reflected in the Roman Empire. This is also why theft did not become a purely Roman-style *delictum* in the barbarian codes. In the Middle Ages, this publicist ideology was encapsulated in the concept of "public peace".

For the Germanic peoples, safeguarding peace was vital to the nation's survival. Theft was viewed as an act of violence jeopardizing public peace and safety[58]. Thus, it was deemed a public crime.

However, although this "public peace" ideology arose from the shared ethos of the Germanic peoples and aimed to protect communal interests, after the establishment of the Germanic regime, especially with the rise of the monarchy, it evolved into an instrument for preserving royal authority. For theft, it was deemed a public crime because it harmed the king's interests rather than genuinely public societal interests.

D. The Fusion of Roman, Canonic and Germanic Law Concepts of Theft

The 15th century *Constitutio Criminalis Carolina* directly inherited from the canon criminal law "Bambergensis". As the first attempt to unify the criminal law of the Germanic world, its aim was to unify German law by processing Roman law, Canon law and Italian law.[59]

In this code, the inherent Germanic idea of regarding theft as a public crime combined with the Roman-Canon law's emphasis on the "immorality" of theft, enabling the public criminal attribute of theft to gain dual support from ethics and national customs.

First, at the specific normative level, the regulation of theft in the *Constitutio Criminalis Carolina* was mainly influenced by Canon law, and indirectly incorporated elements of Roman law through Canon law.

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[56] Claudia Händl, "Theft in The Codice Picturati of the Sachsenspiegel," *Brathair* 20, no. 2 (2020): 355; Karl Weitzel, "Diebstahl und Frevel und ihre Beziehung zu Hoch- und Niedergerichtsbarkeit in den alamannischen Rechtsquellen des Mittelalters" (PhD diss., Hohen Philosophischen Fakultät der Universität Leipzig, 1909), 24.

[57] Weitzel, "Diebstahl," 17.

[58] Zillgen, "Geschichte," 35-36; also see Aiguo Xu, "On the History of Tort Law," *Legal Science,* no. 1 (2006): 139.

[59] Zillgen, "Geschichte," 43.

Like the Roman law classification of theft, this code still divided theft into ordinary theft and aggravated theft, ordinary theft was largely penalized by fines. Although the Roman-inspired multiple fine was preserved in some provisions concerning ordinary theft, the *Constitutio Criminalis Carolina* no longer viewed it as a private wrong but as a public crime. Therefore, they were no longer matters between private parties[60].

The Canon law concerning sacrilegious theft was transposed wholesale into the code, as evidenced in Articles 171 to 174, which were nearly identical to the Bambergensis statutes. However, contrary to the former Canon law principle of leniency, the penalty for such theft in the *Constitutio Criminalis Carolina* was harsher, frequently punishable by death[61].

Moreover, Article 170 embodied the Roman law notion of *furtum usus*, based on the fact of custody.

Second, and most crucially, Canon law furnished a moral foundation for the Germanic notion that theft "imperils public peace".

Germanic law assessed the legal culpability of theft based solely on objective criteria such as the worth of the stolen property, the time of the theft, and even the identity of the perpetrator. The *Constitutio Criminalis Carolina* paid special attention to the intrinsic aspects of the criminal deed. Penalties for theft were commonly founded on the subjective factors pertaining to the perpetrator.

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[60] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Johannesburg: Juta & Co, Ltd., 1990), 944-945.

[61] Article 172: Jtem so einer ein Monstranzen stillt, da das heillig Sacrament des alltars jnnen ist, soll mit dem feur vom leben zum todt gestrafft werden. Stele aber einer sunst gullden oder Silberin geweichte gefess, mit oder one heilligthumb, oder aber kelleh oder patenen, vmb solliche diepstall alle, sie sein geschenn an geweichten oder vngeweichtenn Orten, auch so einer vmb stelens willen jnn ein geweichte kirchen, Sacramenthause oder Sacristey pricht oder mit geferlichen zeugen vffsperrt: disse diep seindt zum tod nach gelegenheit der sache vnnd Rate der Rechtverstendigen zu straffenn. (If someone steals a monstrance containing the Holy Sacrament of the altar, he shall be punished with fire from life to death. But if someone steals otherwise golden or silver consecrated vessels, with or without relics, or chalices or patens, for all such thefts, whether consecrated or unconsecrated, or if someone breaks into a consecrated church, sacrament house or sacristy for the sake of stealing or opens it with dangerous tools: these thieves are to be punished with death according to the circumstances of the case and the advice of legal experts.)

This moral imperative was first embodied in the provisions on sacrilegious theft in this code. Article 171 followed canon law's conceptualization of sacrilege and noted that sacrilegious theft was graver than common theft[62]. Legal scholars then contended that in ascertaining whether an act constituted the sacrilegious theft stipulated in Article 171, beyond contemplating objective elements such as whether the stolen goods were sacred objects or whether the location of the theft was consecrated ground, the most pivotal consideration was the thief's subjective disposition[63].

Furthermore, moral imperatives also suffused thefts unconnected to sacrilege. For instance, Article 162 designated repeated thefts as a distinct grave offense. Compared to other thefts, such thefts were not permitted to substitute corporal punishment for the death penalty but were sentenced to death without exception[64]. Legal scholars ascribed this to perpetrators of such thefts being deemed incorrigible, evincing greater moral turpitude[65].

E. Synthesis

The influence of Roman law on medieval theft legislation was mainly reflected in the influence of the binary model of ordinary theft and aggravated

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[62] Article 171: Jtem stelen vonn geweichten dingen oder stetten jst schwerer, dann anndere diepstall vnnd geschicht jnn dreyerley weyss: Zum ersten, wann einer ettwas heilligs oder geweichts stillt ann geweichten stetten; Zum Andern, Wann eyner etwas geweichts ann Vngeweichtenn stettenn stillt; Zum drittenn, Wan einer viigeweychte Ding ann geweichten stettenn stillt. (Stealing consecrated things or in consecrated places is more serious than other thefts and happens in three ways: First, when someone steals something holy or consecrated in consecrated places; Second, when someone steals something consecrated in unconsecrated places; Third, when someone steals unconsecrated things in consecrated places.)

[63] Zillgen, "Geschichte," 47.

[64] Article 162: Jtem wurde aber yemands bedrettenn, der zum drittenn mall gestolen hett, vnnd sollicher dreyfalltiger diepstall mit gutem grundt, Alls vor vonn erfarung der warheit gesetzt ist, erfundenn wirdt: das ist ein meherer verleumbter diep vnnd auch einem Vergewalltiger gleich geacht, Vnnd soll darumb, nemlich der mann mit dem strangk vund die fraw mit dem wasser oder sunst jnn anndere wege, Nach jedes lanndts geprauch, vom lebenn zum tod gestrafft werden. (But if someone has been convicted of theft for the third time, and such a triple theft is proven with good reason, as has been established before based on experience of the truth: that is a slanderous thief and also considered equal to a robber, And therefore, namely the man with the rope and the woman with water or otherwise in other ways, according to the custom of each country, shall be punished from life to death.)

[65] Zillgen, "Geschichte," 46.

theft. On the basis of drawing on this binary model, Canon law retained to some extent the private law concept of theft in Roman law. Canon law subsumed ordinary theft under torts mirroring private law relations, and its legal culpability also invoked the multiple fines of Roman law. However, aggravated theft was construed as a public crime.

The development of the concept of theft in canon law established the moral source of its illegality. Unlike Roman law and even Germanic law, Canon law's assessment of theft's illegality derived not from wholly objective criteria but Catholicism's moral imperatives. It emphasized the subjective "wickedness" in the act of theft, and its aim in imposing legal culpability was to attain moral redemption.

Steeped in Canon law, the *Constitutio Criminalis Carolina* was imbued with moralism, and subjective blameworthiness became the foremost consideration in adjudging theft illicit as well as the degree of unlawfulness. By absorbing the Germanic concept of “public peace”, theft was no longer deemed a *delictum* but matured into a Germanic public crime.

IV. The Formation of the German Theft Offense Concept

A. The Decriminalization of *furtum impropium*

Unlike the Germanic law at the level of substantive law, which regarded theft as a crime against public interest, at the theoretical level, medieval jurists' discussions on the concept of theft were still based on the theory of *delictum* in Roman law.

Based on Paulus' definition and cases in the Digest, they sought to equate Germanic theft with the Roman law concept of *furtum*. Following the *Constitutio Criminalis Carolina*, German criminal jurists equated the Article 170[66] with *furtum usus* in Roman law, and widely regarded *furtum possessionis* as an originally extant form of theft in Germanic law.

However, meting out the same penalty for *furtum impropium* as for *furtum propium* would result in gross disproportion between offense and

[66] Article 170: Jtem wellicher mit eins anndern guttern, die jme jnn gutem glaubenn zu behallten vnnd verwaren gegebenn sein, williger vnnd geferrlicher weise dem glaubiger zu schadenn handellt: solliche Missennthat jst einem diepstall gleich zu straffenn. (Whoever deals willfully and dangerously with another's goods, which have been given to him in good faith to keep and protect, in order to harm the creditor: such misdeed is to be punished like theft.)

retribution. In the wake of the 17th century, they progressively discerned that "the wide Roman definition might not provide an entirely satisfactory framework for the stiff sanctions of contemporary criminal law.[67]" Consequently, legal scholars needed to devise a theory to evince the distinction between *furtum impropium* and *furtum propium*, so as to apportion discrete legal liabilities to them severally.

The 17th century jurist Praktiker Berlich, while still classifying *furtum impropium* as theft, had already apprehended its distinctiveness. In his tome *Conclusiones Practicabiles* published in 1618, he delineated three kinds of deeds constituting *furtum impropium*: first was the appropriation or use of the goods of others under one's own custody; second was the appropriation or use of found property; third was the peculation or misappropriation of public property by civil servants[68].

Drawing on Matthäus Wesenbec's taxonomy, Benedict Carpzov embarked from Paulus' notion of *contrectatio* in his definition, and bifurcated theft into *contrectatio vera* (material touching) and *contrectatio ficta* (constructive touching)[69].

He opined that the cardinal distinction between *furtum propium* and *furtum impropium* lay in whether it was *contrectatio vera* or *contrectatio ficta*. *Furtum propium*, also known as *furtum rei*, was a genuine theft, while *furtum impropium* included three situations: the first situation was the appropriation or misappropriation of property inherently for religious belief or public activities that one administered; the second was embezzling, misappropriating, or using beyond permitted purposes the property of others in one's own custody; and the third was using found property. This was in essence consonant with Berlich's taxonomy[70].

He postulated that the essence of *contrectatio vera* consisted *in ablatio rei alienae* (the abstraction of another's goods), and only this species of theft warranted chastisement and ought to incur criminal culpability. Whereas *contrectatio ficta* merely amounted to *ad alium usum contra voluntatem*

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67 Zimmermann, *The Law of Obligations*, 946-947.

68 Janssen, "Der Diebstahl," 9-10.

69 Matthäus Wesenbec first divided *furtum* into *contrectatio vera* and *contrectatio ficta* in his book *Paratitla in Pandectas*, but he still did not depart from the scope of Roman law, and *contrectatio vera* included *furtum usus*. See Janssen, "Der Diebstahl," 6.

70 Janssen, "Der Diebstahl," 16.

domini (application to other use counter to the master's volition), so solely civil liability was necessitated[71].

Carpzov engendered the notions of *contrectatio vera* and *contrectatio ficta* via reinterpreting the objective constituent *contrectatio* in the Roman delineation. Thereby, he ratiocinated that *furtum propium* and *furtum impropium* constituted two genera of acts of discrete nature, gainsaying that *furtum impropium* and *furtum propium* commanded the same punishability in the *Constitutio Criminalis Carolina*. This likewise advanced objectively the segregation of *furtum impropium* from the conception of theft, transmuting theft into a genuinely public criminal conception.

B. Reconstruction of the Germanic Concept of Theft

Albeit jurisprudents such as Berlich and Carpzov embarked upon differentiating between *furtum propium* and *furtum impropium*, they still acknowledged *furtum impropium* as a species of theft. As certain contemporaneous jurisprudents remarking on the circumstances of that epoch commented, "no jurisprudent discerned the correlation betwixt theft and misappropriation of entrusted movable goods[72]". Consequently, later jurists began to try to return to the traditional Germanic law and attempt to clear *furtum impropium* from the conception of theft by applying this indigenous resource, so as to transmute theft into a juridical conception devoid of any factors of private legislation relations and invested with a purely public criminal essence.

Firstly, jurisprudents retraced to the archaic Germanic notion of theft. The most incipient protagonist was Johann Schilter. He opined that for the Romans, deeming the employment of borrowed articles beyond the stipulated purpose as theft was "to effectuate conformity with covenants through intensified threats". According to Germanic law, theft was punishable through demise. Since the Germans were more conscientious to their covenants than other populaces, in the event of rupture of covenant, it sufficed to resolve it through the *actio commodati*, and there was no necessity to inflict the cruel chastisement of theft for rupture of covenant. He cited Article 22 of Volume 3 of the Sachsenspiegel to validate this standpoint: "It may well be that a thing becomes stolen, yet he who has it does not become a thief, namely that one may not hang him for it.[73]"

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71 Zimmermann, *The Law of Obligations*, 947.

72 Janssen, "Der Diebstahl," 51.

73 "Es mag wohl sein, dab ein Ding diebisch wird, daran doch der welcher es hat nicht

The jurisprudent Kress ratiocinated from the stipulations of the *Constitutio Criminalis Carolina* that it personified the essence of the Germanic law itself. He opined that this code did not regard Article 170 as theft. Its discrete locution "missethatt, ist eynem diebstall gleich zu straffen" (shall be chastised akin to theft) validates that it was contemplated as peculation of confided movable goods rather than theft[74].

The Dutch erudite Johann Ortwin Westenberg likewise construed on the foundation of the *Constitutio Criminalis Carolina*. On the one hand, he ratiocinated that *furtum possessionis* was not contemplated as theft in this code, for the menace of capital punishment for specific qualified theft delicts in the *Constitutio Criminalis Carolina* did not accord with the inferior worth of such deeds[75]; on the other hand, *furtum usus* was not a theft either, for it lacked "violation of dominion over others" and did not fulfill the definition of theft in the *Constitutio Criminalis Carolina*.

Secondly, jurisprudents adopted Paulus' and Sabinus' definitions of theft in Roman jurisprudence as the foundation and construed and transformed them into the Germanic one. The most salient enterprise in this respect was discharged by Professor Tobias Jakob Reinharth of the University of Göttingen. He contraposed theft in Roman law and Germanic jurisprudence, and opined that the societal bases whereon the two concepts of theft depended were fundamentally heterogenous: the Romans paid greater attention to the gratification of individuals, so theft was regarded as a *delictum*, and its cardinal objective was to disburse pecuniary penalties to the victims. The Germans had invariably regarded theft as a public crime for it infringed upon public security. Ergo, he defined theft as "*Dolosa contrectatio ipsius rei alienae, invito domino, animo lucri faciendi commissa*" (the deed of touching the movable goods of others without the approbation of the proprietor with the intent of making earnings is immoral). The definition circumscribes the object of theft to "*rei alienae*" (movable goods of others), and likewise encounters the condition of "*invito domino*", that is, "without the approbation of the proprietor".

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zum Diebe wird, nämlich dab man ihn daran nicht henken mag." See Janssen, "Der Diebstahl," 26.

74 Janssen, "Der Diebstahl," 29.

75 Johann Ortwin Westenberg, *Meditatio Auspicii Caussa Suspecta de Furto Tertio Simplici, Prima Alteraque Vice Non Punito, Ne Carolino Quidem Iure Capitali* (Lugduni Batavorum, 1726), 6-8.

Other jurisprudents such as Westenberg[76] and Christian Friedrich Georg Meister[77] likewise preferred analogous definitions.

Jurisprudents epitomized by Reinharth precluded *furtum impropium* from the conception of theft in terms of the definitions whereon legal concepts rely, for *furtum possessionis* refers to the malefactor abstracting chattels to which he has title, and the provenance of *furtum usus* subsists in the entitlement of manipulation assented by the possessor. They ratiocinated that these acts were not violations of public security[78]. The concord attained by jurisprudents on this delineation eventuated in the compass of theft being circumscribed to theft that genuinely conformed to the Germanic notion and had a public criminal nature.

In essence, the novel theories conceived by Germanic jurisprudents reverting to Roman jurisprudence and conventional Germanic law no longer accounted *furtum impropium* as theft, because they were more prone to contravene consensual undertakings rather than endanger public security. This ratiocination likewise exerted influence over forensic practice. From the late 18th century and henceforth, tribunals conceived the quintessence of the conception of theft as "violation of custody over alien chattels", so for *furtum impropium*, they frequently adjudicated them as nonfulfillment of covenants[79].

C. Synthesis

So as to conform the conception of theft in Germanic jurisprudence to the definition of theft in Roman law, Germanic jurisprudents reinterpreted theft in conjunction with Article 170 of the *Constitutio Criminalis Carolina*. In the course of this, they discerned that if circumscribed to the Roman definition of theft, it was impracticable to flawlessly resolve the theoretical predicaments where theft was accounted as a public crime in forensic practice at that juncture. Consequently, some jurisprudents elected to revert to the conventional Germanic notion of theft. They construed the Germanic notion of theft as "violation of custody over alien chattels". Therefore, *furtum*

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[76] "*Contrectatio fraudulosa rei alienae mobilis, invito domino, per invasionem ipsius custodiae, lucri faciendi animo, facta*", See Westenberg, *Meditatio,* 8.

[77] "*Dolosa ablatio rei alienae, invito domino lucri faciendi caussa facta.*" See Christian Friedrich Georg Meister, *Principia juris criminalis Germaniae communis* (Gottingae, 1755), 163.

[78] Janssen, "Der Diebstahl," 32.

[79] Janssen, "Der Diebstahl," 44.

impropium was deemed as contravention of the spirit of the covenant. Its quintessence was the destruction of private confidence rather than the destruction of public order. Thereby, this notion was dissociated from theft and entered the domain of Civil law[80].

The reconstituted Germanic theft supplanted the conventional Germanic notion of theft and became the fundamental paradigm for the ratiocination and legislation of theft in the codification epoch. For instance, Article 215 of the Prussian Penal Code was greatly impacted by it, and Article 215 in turn deeply influenced the theft misdemeanor in the subsequent German Penal Code.

V. Conclusion

The change in the concept of theft from *delictum* to public crime was in fact based on the change in the general collective consciousness of the interests infringed by theft. Roman law distinguished theft into ordinary theft and aggravated theft according to an intuitive standard, i.e., whether the interests directly infringed by the theft were personal interests or state interests, resulting in the public-private dualism of the concept of theft. Roman law's view of ordinary theft as a *delictum* embodied the criterion in the infancy of jurisprudence that *delictum*, wrong or tort were considered harmful to the person rather than the State[81].

Both Canon law and Germanic law in the Middle Ages borrowed the basic classification of ordinary theft and aggravated theft in Roman law. But despite their different starting points, they both emphasized the damage to the public interest by theft. Canon jurisprudence contemplated theft, especially sacrilegious theft, as a violation against the public belief and value. Germanic jurisprudence has invariably stressed the harm wrought by theft upon public peace. Therefore, when *delictum* were viewed as infringements on the state or society, the distinction between *delictum* and public crime began to emerge[82]. Finally, Germanic criminal jurists shaped the modern concept of theft that belonged purely to the public law sphere by removing elements that belonged to civil law from the medieval concept of theft.

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[80] Zimmermann, *The Law of Obligations*, 947.

[81] Henry Sumner Maine, *Ancient law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (London: John Murray, 1908), 329-330; also see Jishu Wu, "A Brief History of Tort Law from the Perspective of its Function," *Journal of Southwest Petroleum University (Social Sciences Edition)*, no. 3 (2014): 53.

[82] Xu, "History," 139.

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