

Determination of the "Illegality" of the Crime of Illegal Public Deposit-taking

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Abstract

The crime of illegal public Deposit-taking is the most applied in China's long-term judicial practice against illegal fundraising and even reduced to a "bottom-up" crime of illegal fundraising. In the new situation of domestic finance, it is necessary to realize the regulation of transactions, but also we need to adhere to the principle of modesty of criminal law, reflect on the expansion of the crime in the application of criminal law boundaries, and prevent the excessive involvement of criminal means in the activities of social financing. Therefore, how to define the "illegality" of the crime will become the key to regulate the crime of illegal public Deposit-taking.

Keywords

Crime of Illegal Absorbing Public Depositsist; Illegality; National Financial Management Laws; Regulations; Legal Status; Judicial Application.

1. Introduction

In March 2020, the Supreme People's Procuratorate announced the seventeenth batch of guiding cases, one of which was the case of Yang Weiguo and others who illegally absorbed public deposits (Prosecution Case No. 64). The defendants were ruled by the court to have committed the crime of unlawful absorption of public deposits by collecting funds from an unspecified public, controlling and dominating the funds in the pool, and promising to repay the principal and interest, under the pretext of carrying out network lending information intermediary business, without legal approval. The People's Court ruled that the Wangzhou Group (the company set up by the defendant), in the name of providing network lending information intermediary services, actually engaged in direct or indirect pooling of funds, or even self-financing or disguised self-financing, which is essentially the act of absorbing public deposits. The illegality of financial business should be judged based on current criminal laws and financial management legal provisions, and there is no question of the defendants carrying out P2P business without prohibitive legal provisions. The behavior of Wangzhou Group has disturbed the financial order and damaged the national financial management system, which should be subject to criminal punishment. The court in the guiding case has pointed out that the national financial management laws and regulations applicable to the case are Article 11 of the Commercial Banking Law of the People's Republic of China, but not all cases in judicial practice are specifically marked as in the guiding case. Some scholars have statistically analyzed a total of 1485 adjudicated cases of illegal public Deposit-taking crimes between 2015 and 2017. Among them, 200 cases were based on "violation of relevant financial management regulations" as the basis for determining illegality, 442 cases were based on "not approved by relevant authorities", and the remaining 843 cases had no basis for determining illegality. Even if "violation of the relevant financial regulations" was used as the basis, it was only slightly mentioned in the "section of the Court's opinion", without specifying what kind of regulation was violated; and nearly 58% of the decisions did not specify the predicate financial regulation at all [2].

Article 176 of the Criminal Law of the People's Republic of China stipulates that illegal absorption of public deposits or disguised absorption of public deposits that disrupt the financial order constitutes the crime of illegal absorption of public deposits. The Criminal Law does not specify the definition of "illegality", so the criminal illegality of this crime must be judged in conjunction with the preceding financial regulations, but the preceding financial regulations are unclear in both legal rank and scope. In recent years, illegal fund-raising cases have been frequent, and the manifestations of the cases are diversified, such as the use of private equity investment funds, P2P network loans, equity crowdfunding, and other new financing models, and the crime of illegal absorption of public deposits has become a high-frequency crime involving private financing. The misconception of "illegality" in judicial practice is an important reason for the continuous expansion of the crime of "illegal public Deposit-taking". To prevent the crime of "illegal public deposit" from becoming a "pocket crime" of illegal fund-raising, it is urgent to characterize the "illegality". Organization of the Text.

2. The Controversy Over the Determination of "Illegality"

In judicial practice, the "Interpretation of the Supreme People's Court on Several Issues Concerning the Specific Application of Law in the Trial of Fraud Cases" promulgated in 1996 defined "illegality" for the first time as "without the approval of the competent authorities", but this standard was too narrowly applied. The Interpretation on Several Issues Concerning the Specific Application of Law in the Trial of Criminal Cases of Illegal Fund Raising promulgated in 2010, expanded the definition of "illegality" to "absorbing funds without the approval of the relevant authorities in accordance with the law or in the form of borrowing legitimate business", but set a higher requirement on the legal ranking, i.e. However, a higher legal ranking is required, i.e. a violation of "the provisions of the national financial management law". In 2019, the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security issued the Opinions on Several Issues Concerning the Handling of Criminal Cases of Illegal Fund Raising, which once again defined "illegality" as "violation of national laws and regulations on financial management". The "illegality" is once again defined as a "violation of national financial management laws and regulations"[3]. There are three main views on what constitutes "national laws and regulations on financial management", as follows.

One view is that only laws and regulations can be used as a legal basis for reference. The determination of the legal source of the "violation of state regulations" of the blank offense, although it must be defined based on the legislative reality, must not violate the principle of legal exclusivity derived from the principle of criminality. In the case of a blank offense, the gap in the criminal law depends on the referenced legislation to fill, i.e. the referenced laws and regulations assume the function of judging the illegality in the sense of crime composition, and thus the level of the referenced laws and regulations is directly related to the principle of legal exclusivity. From the principle of legal exclusivity derived from the principle of criminality, the law referred to by the blank crime should have a higher rank, and it is not allowed to use administrative regulations and administrative orders as the reference source of the elements of wrongfulness established by the blank crime[4]. Some scholars have even suggested that using regulations or even daily administrative discretionary conclusions as the basis for determining criminal illegality is a disguised transfer of the power to convict to administrative organs, which not only exacerbates the arbitrariness of judicial conviction and sentencing but also violates the constitutional principle that "the people's courts exercise judicial power independently by the law"[5].

Another view is that laws other than laws and regulations (e.g. regulations, administrative orders, etc.) can also be the legal basis for reference. Article 96 of the Criminal Law of the People's Republic of China provides: "Violation of state regulations as referred to in this Law

means violation of laws and decisions enacted by the National People's Congress and its Standing Committee, as well as administrative regulations, prescribed administrative measures, decisions and orders issued by the State Council". Although the Criminal Law defines the meaning of "violation of state regulations", it does not define the content of "violation of regulations", and "violation of regulations" does not have to equal It does not have to be the same as a "violation of a state regulation". Literally, "regulations" can include departmental regulations and industry regulations and other normative documents[6]. Therefore, the range of norms that can be added to the blanket offense includes laws, administrative regulations, departmental regulations, and other normative documents.

The compromise view is that financial management regulations are characterized by timeliness and versatility that vary from time to time and require constant adjustment of the normative connotations of blank provisions in conjunction with departmental regulations[7]. In the case of the offense of unlawful absorption of public deposits, relevant provisions such as the Commercial Banking Law of the People's Republic of China and the Measures for the Suppression of Unlawful Financial Institutions and Unlawful Financial Business Activities are not sufficient to support the connotation of the offense of unlawful absorption of public deposits in the context of the new era and must be supplemented by administrative regulations to clarify the relevant concepts. In other words, when the law on which it is based is itself vague and in need of interpretation, it needs to be interpreted and supplemented twice under the administrative regulations, and thus the application of the regulations is not excluded in the sense of interpretation.

3. My View on the Determination of "Illegality"

3.1. Scope of "Illegality"

The author agrees with the compromise view that the scope of financial management laws and regulations should include departmental regulations, and should not be extended to normative documents without restriction. The specific reasons are as follows.

Firstly, the traditional financial management order emphasized the regulation of finance in order to control the flow of social funds and bank interest rates and considered that any act of absorbing funds from the public without permission undermined the state's control of finance. It is in the spirit of this policy that judicial practice has overly expanded the scope of application of this offense. In recent years, the Chinese government has gradually relaxed its financial suppression strategy and explored financial system reform on all fronts. Under the new domestic financial situation, if the interpretation of the constituent elements of the offense is extended to local regulations and normative documents, the scope of application of the offense will be excessively expanded, making it possible for any act of absorbing funds for the public to constitute the offense. Such an interpretation would further exacerbate the problem of difficult financing for small and medium-sized enterprises, and would not effectively prevent the crime of illegal fund-raising, which would run counter to the trend of gradual legalization of private finance.

Secondly, the principle of "administrative priority and criminality comes second" reflects the principle of modesty of criminal law. It is generally believed that criminal law is the second line of defense for preventing and controlling social conflicts or resolving social disputes. Only when the first line of defense constructed by civil law, economic law, and administrative law collapses can the legislature set a certain violation of the law as a criminal act, the essence of which is to achieve the maximum effect of criminal law with the minimum penalty, i.e., to protect human rights and safeguard society. The modesty of criminal law requires that penalties should not interfere too extensively with social life and should instinctively remain "modest". In determining the scope of predecessor financial laws and regulations, the modesty of criminal

law should also be observed, and the criminal law should not be used to punish violations as soon as they occur.

Thirdly, the law of a State is valid within the sovereignty of that State, and the offenses covered by criminal law are valid nationally, provided that the content of the norms protected by criminal law is known to the public at the national level. The legal effect of sectoral regulations is national, and even though they may be limited to specific sectors and industries, their effect is considered national given the national scope of the jurisdiction of their authors. Thus, sectoral regulations meet the requirement that "the relevant invoked norm must have full effect throughout the country".

Fourth, the fact that judicial interpretations provide that reference may be made to departmental regulations formulated by financial regulatory authorities also recognizes the status of departmental regulations to a certain extent. 2019 The Opinions on Several Issues Concerning the Handling of Criminal Cases of Illegal Fund Raising promulgated in 2019 provide that the people's courts, people's procuratorates, and public security organs shall determine the "illegality" of the absorption of public deposits "shall be based on national laws and regulations on financial management; when the former only provides for principles, reference may be made to relevant departmental regulations formulated by the People's Bank of China, the China Banking and Insurance Regulatory Commission and other administrative authorities, or national regulations, measures, implementation rules and other normative documents on financial management, in accordance with the spirit of the law. In other words, the "law" is in principle "national laws and regulations on financial management", except for "departmental regulations".

3.2. Specific Application of "Illegality"

From the point of view of the function of criminal law, there are differences between administrative law and criminal law in terms of objective setting and protection of legal interests, which determines that criminal law cannot copy all the provisions of administrative norms and must make criminal law value trade-offs to the corresponding predecessor norms, otherwise it will not only deviate from the specific purpose of criminal law but also may lead to the loss of the function and independence of criminal law. In the case of illegal public deposits, the antecedent regulations must be filtered concerning the purpose of the offense, to avoid an excessive extension of the offense. From the perspective of the legal system, on the one hand, the interface between civil law - administrative law - criminal law should be done well, to speed up the improvement of the legal system of private lending and administrative regulation of the financial sector, to broaden the coverage of civil liability and administrative liability, to avoid the premature intervention of criminal law in the legal relationship, leading to the early criminalization; on the other hand, to deal with the network lending. On the other hand, it is necessary to be cautious when dealing with "mass incidents" caused by the breakage of capital chains after the launch of the business of online lending structures, to fully understand the circumstances of the case, to mobilise civil and administrative means of dispute resolution, to leave criminal law in the position of a safeguard law, to adhere to the modesty of criminal law, to provide a more relaxed space for the development of Internet finance, to encourage financial innovation and to promote the healthy development of the financial industry. healthy development of the financial sector.

Firstly, the reference to the predecessor departmental regulations should be premised on the criminal law. Article 9 of the Legislative Law provides for the principle of absolute legal reservation of crimes and penalties, and in China, the form of incrimination is a matter of absolute legal reservation. Secondly, as one of the basic principles of criminal law, the source of criminal law can only be the substantive legal norms of criminal law enacted by the highest legislative organ (the National People's Congress and its Standing Committee) following the

law. Apart from that, other normative legal documents cannot be used as sources of criminal law. If the People's Court's reference to the antecedent financial administrative norms directly connects the departmental regulations with the provisions of this crime, it will most likely lead to a formal confusion between administrative violations and criminal offenses at the level of normative judgment.

Secondly, the reference to the predecessor departmental regulations should preserve the safeguards of criminal law. One of the characteristics of criminal law is the severity of sanctions, which also determines the need for criminal law to comply with the principles of clarity and modesty, and the principle of statutory penalties, and requires that the prerequisites for the application of penalties (constitutive elements) be specific and clear while limiting the application of penalties as much as possible. At this time, the criminal law is the "last resort" for the protection of society, and it is only when the other branches of law cannot adequately protect a certain social relationship that the criminal law is applied. Therefore, criminal law is a guarantee of other laws and has a guarantee nature. The conviction of financial criminal offenses cannot be separated from the reference to the preceding administrative regulations, but because of their principle-oriented nature, it is not suitable for direct reference, and they are timely and changeable from time to time, when their content is vague, they need to be combined with financial regulations to supplement the constitutive elements of the offense, such as the type of illegal activity. However, financial regulations are characterized by different levels of hierarchy and different application effectiveness. To avoid the judicial organs in many different levels of financial norms arbitrary selective law enforcement, and give full play to the laws and regulations before the function, to build a good cornerstone for the security of criminal law. First, from the perspective of regulations and superior regulations, the departmental regulations should be reasonably used based on the principles of application of law in theoretical jurisprudence, and the departmental regulations should only be used as supplementary regulations to become the predecessor financial administrative norms (laws and administrative regulations) to be invoked in financial crime cases. When the antecedent financial administrative norms (laws and administrative regulations) invoked have clearly defined the constituent elements of the offense of illegal public Deposit-taking and no further interpretation is required, the application of the regulations is excluded [8]. Secondly, from the perspective of the regulations of the same rank, the purpose and background of different regulations should be rationalized, the timeliness and territoriality of the regulations should be grasped, the legality and reasonableness of the content of the regulations should be understood, the strength of the administrative penalties in the regulations should be considered, and the degree of reference of the regulations should be clarified, so that the crime can be incriminated with caution and the regulations can be fully effective while the purpose of safeguarding the criminal law can be achieved.

4. Conclusion

Criminal law is the last barrier to the protection of financial security, rather than an endless criminal involvement in the financing of social activities. "Illegality", as the boundary between criminal and non-criminal financing activities, is also the boundary of criminal law risks in financing. This paper analyses several controversial views in the academic community, and finally puts forward its insights, intending to correctly understand the criteria for determining "illegality" and its judicial application, and resolve the generalized application of the crime of illegal public Deposit-taking in judicial practice.

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