

Преступления, связанные с незаконной предпринимательской деятельностью в уголовном праве Китая: законодательство и судебная практика

Crime of Illegal Business Operation in Chinese Criminal Law: Legislation and Judicial Practice

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Аннотация. Преступления, связанные с незаконной предпринимательской деятельностью, предусмотренные Уголовным законом 1997 г., являются одними из наиболее типичных мелких преступлений. С развитием экономики и общества, а также углублением системы социального управления проблемы, вытекающие из преступлений, связанных с незаконными предпринимательскими операциями, постоянно обновляются, что делает эти преступления все более сложными с точки зрения судебного разбирательства. В статье кратко излагается история правового регулирования раскрытия и квалификации преступлений, связанных с незаконной предпринимательской деятельностью.

Обсуждается возможность смягчения наказаний за эти преступления после обнародования и применения Поправок к уголовному законодательству (XI), на основе рассмотрения 330 дел. Анализируется феномен расширения рассмотрения дел, связанных с такими преступлениями в судебной практике, изучаются пути разумного подхода к их разрешению. Спорные вопросы, связанные с такими преступлениями, всегда были в центре внимания судебной практики.

Ключевые слова: преступление, связанное с незаконной предпринимательской деятельностью; поправка к уголовному законодательству (XI); ограниченное распространение.

Abstract. The crime of illegal business operation stipulated in the Criminal Law of 1997 is one of the most typical pocket crimes in the Criminal Code. With the development of the economy and society, and the deepening of the social governance system, the problems regulated by the crime of illegal business operations is in a state of constant change, which makes this crime increasingly challenging in terms of judicial application. The article briefly introduces the legislative history of the crime of illegal business operation and discusses the limitation of this crime after the promulgation and implementation of the Criminal Law Amendment (XI), combining with 330 case samples collected, analyzing the phenomenon of expanding the application of this crime in judicial practice from three aspects based on the current stage, and exploring the path of reasonably limiting the underpinning provisions of this crime. The controversial issues in this crime have always been the focus of judicial practice, and how to solve the problem of expanding the application of the crime of illegal business is particularly important at present.

Keywords: crime of illegal business operation; Criminal Law Amendment (XI); miscellaneous clause; restricted extension

In the current era of rapid development of the market economy and continuous innovation in science and technology, more and more new forms of economy have emerged, and the behavior of disturbing the market order has become diverse under the urging of different situations. The application of the various provisions in the crime of illegal commercial operation depends mainly on the judgment and discretion of the judicial staff, which inevitably leads to the problem of enlarging the application. This situation increases the risk of this crime becoming a pocket crime. The legislative model of the blank of crime and miscellaneous clauses makes it highly ambiguous, so the question of criminal profiling becomes increasingly difficult. Moreover, because of the ambiguity of legal provisions, there is a lack of unified recognition and application standards in judicial practice, and different understandings of the charge in practice can lead to the issue of different judgments in the same case. Charges in judicial interpretation cannot in practice fully and promptly address a variety of complex and varied specific issues, which is somehow contrary to the fundamental principle of legality. The expansion and application of charges also violate the principle of modesty, and is not conducive to the protection of human rights. In the long run, it will inevitably undermine the credibility of the law, easily lead to the abuse of penalty power, and cause judicial chaos. Therefore, it is necessary to analyze the problems of illegal business operation crime in judicial practice and explore the root causes of the problems.

1. Legislative history of illegal business offenses and current judicial status

The crime of illegal business operation evolved from the crime of speculation which has been abolished, and its establishment at the beginning was to solve the drawbacks of the blurred boundary of the crime of speculation and the confused judicial application. However, with the development of the national economy and the improvement of people's living standards, a large number of new criminal means have emerged. Due to the lag of statutory law, the crime of illegal business operation has been controversial since the criminal law was revised and established in 1997, and it has been constantly adjusted and changed to adapt to the development of practice. In the following, the evolution and development of the crime of illegal business operation from the legislative history, and analyze the limitations of the current criminal law on this crime.

1.1. Legislative history

In the early days of the founding of the People's Republic of China, the economic foundation was still relatively weak, social life materials were still in an extremely insufficient state, and the state implemented a strict planned economy and distribution according to the work system. Some lawbreakers seek huge profits by hoarding materials, causing serious price chaos, resulting in more serious damage to the already unstable market order. Therefore, the state strictly prohibits individual citizens from seeking illegal benefits through scalping or other forms, and prohibits any form of exploitation. It was in this era and in this political context that the crime of speculation was born. In the 1960s and 1970s, the precursor to the crime of illegal business speculation crime mainly referred to the sale of state-planned materials.¹

In 1964, the Central Government's Report on the Handling of Corruption and Speculation identified the business behavior of hoarding materials and selling them at high prices as a «political crime», and Article 117 of the Criminal Law in 1979 clearly stipulated the crime of speculation: «Whoever, in violation of the laws and regulations on finance, foreign exchange, gold and silver or the administration of industry and commerce, speculates and profiteers, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and may also, or shall only, be fined or have his property confiscated.»

As the reform and opening-up process has progressed, the market economy system has gradually been established. In 1992, China proposed to establish a socialist market economic system. In 1994, the Central Committee of the Communist Party of China issued a demand for economic system reform. China has adopted an increasingly open attitude and actively integrated into the development trends of the world economy, with citizens freely buying and selling goods and individuals opening factories and enterprises. The concept of speculation and profiteering has lost its rational basis and is incompatible with the market economy system, and numerous illegal acts in the past have been legalized, so some illegal acts in the crime of speculation stipulated in the Criminal Law of 1979 have lost their substantive illegality, and the crime has become no longer suitable for social development.

After the promulgation of the Criminal Law in 1997, the speculation crime was formally abolished, and the illegal business crime stipulated in the 1997 Criminal Law is indeed the product of the abolition of the speculation crime, and it is commonly believed that the illegal business crime is a crime separated from the speculation crime,² the relationship between

¹ Xie Dong-Hui. The Legal History of «Speculation» Review [J] // The Northern Literary Studies. 2010 (3). P. 155—159.

² Gao Ming-Xuan. The Birth and Development and Perfection of the Criminal Law of The People's Republic of China. Beijing : Peking University Press, 2012. P. 439.

the two is inextricably linked. Moreover, «illegal business crime continues the pocket crime function of the speculation crime».³

While the two are similar in content, they do not each protect the same legal interests. Article 225 of the Criminal Law, the relevant provisions of the crime of illegal business operation, detailed provisions of the four constituent elements, of which, the first three are mainly for franchising and special licensing, with a strong focus, while the fourth provides for the «other serious disruption of the market order of the illegal business behavior,» this provision with the 1987 The State Council promulgated the «Interim Regulations on Administrative Punishments for Speculation» in the provisions of the eleventh «other speculation that disrupts the order of the socialist market economy» is very similar, but also the provisions of this article, so that the crime in the judicial practice triggered a large controversy, is often considered to have the suspicion of pocket crime.

1.2. Reflection of the restrictive application of the Criminal Law Amendment (XI) to the crime

The Amendment (XI) to the Criminal Law, which came into effect on March 1, 2021⁴ updates and adjusts individual crimes and articles in China's criminal law, in which, although it does not directly reflect the limitation or modification of the relevant provisions of article 225 of the criminal law on the crime of illegal business operation, it explicitly stipulates that the behaviors that have been recognized as illegal business operation crimes for a longer period of time in the past are clearly stipulated as a certain less serious crime, and even though it does not directly make pocket crime. Even though there is no direct amendment to the pocket crimes, the new crimes added therein all reflect the legislative spirit of limiting the pocket crimes, which is manifested in the following three aspects:

First, the current crime of obstructing drug administration in the Criminal Law Amendment (XI) regulates the illegal operation of medicines, which used to be dealt with under the crime of illegal business operation, and restricts the expansive application of the underpinning provisions of the crime of illegal business operation. It is specifically reflected in the provisions of Article 142, one of the following: «Whoever violates the drug control regulations and has one

of the following circumstances, which is sufficient to gravely endanger human health, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; (1) producing or selling a drug whose use is prohibited by the drug regulatory department under The State Council; (2) producing or importing drugs without obtaining relevant approval documents for drugs, or knowingly selling such drugs...»⁵ The changes in the law for the production and sale of drugs without obtaining the relevant approval documents to regulate the behaviour, so this behaviour should not be recognized as the crime of illegal business operation, otherwise the provisions of this article will lose its significance. Moreover, «medicines» are not, as stipulated in article 225 of the criminal law, «monopoly, monopoly items, or other restricted items stipulated by laws and administrative regulations», so it is obviously inappropriate to recognize such acts as the crime of illegal business operation.

Secondly, the current offence of dangerous operations in the Criminal Law Amendment (XI) regulates the illegal operation of dangerous goods, which used to be dealt with as an illegal business offence. In past judicial practice, there have been cases where illegal operation of dangerous goods has been punished as an illegal business crime.

For example, in the case of repeated illegal sales of gasoline to others for profit without obtaining a hazardous chemicals business license, although the defendants were ultimately exonerated of criminal penalties in the individual cases, the unauthorized sale of gasoline was characterized as an illegal business crime. Regarding this type of operation of refined oil products, the Supreme People's Court has given the following guidance: «conducting wholesale operation of refined oil products without obtaining a legally valid Certificate of Approval for Wholesale Operation of Refined Oil Products belongs to the act of violating the state regulations and operating, without authorization, goods whose sale and purchase are restricted by laws and administrative regulations. For those who disturb the order of the market and the circumstances are serious, they may be held criminally liable for the crime of illegal business operation.»⁶

The State Council «Regulations on the Safe Management of Dangerous Chemicals»⁷ (hereinafter re-

³ Chen Xing-Liang. Crime of Speculation: Death and Birth of a Pocket Crime [J] // Modern Law Science. 2019 (4). P. 137—141.

⁴ Adopted at the 24th Meeting of the Standing Committee of the 13th National People's Congress on December 26, 2020, and Decree No. 66 of the President of the People's Republic of China of December 26, 2020 is hereby promulgated and shall come into force on March 1, 2021.

⁵ Refer to Article 142 Clause 1 of the Criminal Law of China // URL: <https://flk.npc.gov.cn>. [accessed: March 3, 2023].

⁶ Refer to the Supreme People's Court «Opinions of the Second Criminal Trial Chamber of the Supreme People's Court on Whether the operation of the Wholesale Business of Refined Oil Products without administrative approval constitutes an illegal operation Crime». [2008] No. 108 // URL: <https://www.pkulaw.com/> [accessed: 10 February 2023].

⁷ Refer to Article 1 of the Regulations on the Safety Administration of Hazardous Chemicals // URL: <https://flk.npc.gov.cn> [accessed: 3 March 2023].

ferred to as the «Regulations on Dangerous Chemicals»), article one provides: «In order to strengthen the safe management of dangerous chemicals, prevent and reduce accidents involving dangerous chemicals, safeguard people's lives and property, and protect the environment, formulate the present regulations.» It can be seen that the act violates the legal interests of the state safety management system of dangerous chemicals, should be considered first in the chapter of the criminal law of endangering public security crimes, and Article 136 of the crime of dangerous goods, «Violations in the management of explosive, flammable, radioactive, toxic and corrosive substances in the production, storage, transportation and use of major accidents causing serious consequences shall be punished with a jail term of not more than three years. Serious consequences, up to a fixed term of imprisonment of not more than three years, or criminal detention; the consequences are particularly serious, shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years», it does not regulate the operation of dangerous goods, so the judicial organs can only look for alternative legal basis.

Moreover, Article 33 of the Regulations on Dangerous Chemicals states: «The State shall implement a licensing system for the operation of dangerous chemicals, without authorization, no unit or individual may operate dangerous chemicals». Therefore, in the past practice, the sale and operation of dangerous chemical substances without serious consequences will be assessed according to the crime of illegal business. This essentially ignores two problems: First, the above behavior has not yet caused actual harmful results, but only an abstract danger, but in accordance with the illegal business crime, and the statutory penalty for the illegal business crime is five years as the cut-off point, but if the behavior has not reached a particularly serious degree of specific danger, according to the provisions of Article 114 of the criminal law of the crime of endangering public security by dangerous methods, the statutory penalty for the crime is more than three years and less than ten years of imprisonment; Secondly, such behavior was convicted and sentenced, the main reason is that it is a great threat to public safety.

From the perspective of infringement of legal rights, the production and operation of hazardous chemicals is a criminal act that has a negative impact on public safety.⁸ However, it is ultimately evaluated as the crime of illegal business operation, ignoring that the protection of legal interests in the crime of

illegal business operation is market order, and the importance of public safety is obviously higher than market order. The above two points have exposed the obvious irrational aspects of the past definition of unauthorized operation of dangerous goods as the crime of illegal business operation.

In this regard, one of the current Article 134 of the Criminal Law Amendment (XI) provides for the crime of dangerous operation: «Anyone who engages in one of the following circumstances, with a real danger of a major casualty accident or other serious consequences, shall be sentenced to fixed-term imprisonment of not more than one year, criminal detention, or control (3) engaging in highly dangerous production activities such as mining, metal smelting, building construction, and the production, operation and storage of dangerous goods without approval or license in accordance with the law».⁹ Which on the production and operation of dangerous goods without legal approval or license to regulate the behavior, and compared to the past according to the illegal business crime sentenced, the penalty for the crime of dangerous operations is definitely lighter than the crime of illegal business. Therefore, criminalizing the illegal operation of dangerous goods as a crime of illegal operation sometimes inevitably leads to mismatched behavior with the charges and excessive sentencing.

The increase of new charges also provides additional space for judicial officers to make choices when dealing with related cases, and they cannot approach the crime of illegal business operation to all the business behaviors without obtaining relevant licenses in practice, and they should consider whether the goods they operate belong to the scope of regulation of the crime of illegal business operation. If there are provisions in the criminal law that provide clearer guidelines, the application of the offence should be carefully considered.

Third, the Criminal Law Amendment (XI) amended Article 217 on the crime of copyright infringement to regulate the illegal sale of «plug-ins», which used to be dealt with as illegal business operation. The identification of illegal online game plug-ins has been a controversial issue, as individual copyright infringement crimes have been characterized as illegal business operation crimes. We usually speak of online plug-ins, which generally refer to the intentional preparation of online games or online games to include a series of programs that are intended to have a direct or indirect effect, rather than the client programs of the online game itself.¹⁰

⁸ Gao Lan-Jun, Yue Sui-Yuan. Analysis on Crime of Illegal Business Operation and Crime of Dangerous Operation — Impact of the Criminal Amendment (XI) on Qualification of Operating Product Oil without a License [J] // Journal of Shenyang Normal University (Social Science Edition). 2023 (2). P. 33—39.

⁹ Refer to Article 134 Clause 1 of the Criminal Law of China // URL: <https://flk.npc.gov.cn> [accessed: March 3, 2023].

¹⁰ Shou Bu, Huang Yi-Feng, Zhu Ling, Yang Wei et al. Definitional Characteristics and Classification of Plug-in Programs [J] // Electronic Intellectual Property. 2005 (8). P. 14—17.

However, not all online plug-ins are malicious and illegal. The illegal act of «plug-ins» refers to the act of destroying, without permission or authorization, the technical protection measures of legally published and copyrighted Internet game works, modifying the data of the works, setting up servers privately, making game rechargeable cards, and operating or connecting to operate legally published and copyrighted Internet game works, thereby seeking profits and infringing on the interests of others.¹¹

The Internet plug-in does not belong to the scope of the provisions of the crime of illegal business operation. As a program, it does not belong to the «monopoly, exclusive goods or other restricted goods stipulated by laws and administrative regulations», and it should not belong to the scope of the regulation of the fourth underlining provision, because «Internet plug-in» does not have the equivalent nature with the behavioral mode stipulated in the first three clauses; In addition, malicious internet plug-ins are more likely to infringe on the copyrights of others, to undermine the fairness of the game program itself, and to violate the interests of the game developer, rather than the market order protected by the crime of illegal business. Therefore, the past identification of such conduct as an illegal business operation is inevitable to expand the interpretation.

In Article 217 of the Revised Criminal Law Amendment (XI), it is stipulated that: «Anyone who, for the purpose of making profit, infringes on copyright or copyright-related rights in one of the following circumstances, moreover, if the amount of unlawful proceeds is relatively large or there are other serious circumstances, shall be sentenced to fixed-term imprisonment of not more than three years, and shall be fined concurrently or singly; moreover, if the amount of unlawful proceeds is huge or if there are other particularly serious circumstances, he shall be sentenced to three to ten years' or shorter fixed-term imprisonment and a fine: ... (6) without the permission of the copyright owner or copyright-related rights holder, a person intentionally avoids or destroys technological measures taken by the rights holder to protect cop-

yright or copyright-related rights to his or her work, sound and video recordings, etc.»¹²

In the past, it was considered incongruous to treat a small number of crimes related to intellectual property infringement as crimes against market order. The amended crime of infringement of copyright incorporates the unauthorized avoidance or destruction of technological measures taken by the right holder into the modes of behavior of infringement of copyright, which provides a more definite way to solve the problem of the characterization of crimes related to the category of online game plug-ins, and in turn restricts the application of the crime of illegal business operation.

2. Current status of the expanded application of illegal business offenses and problems

According to the Article 225 of China's Criminal Law,¹³ the specific types of conduct enumerated therein are mainly directed at exclusive and restricted items for sale and purchase, as well as business licenses and other business credentials. If the crime of illegal business operation were strictly limited to this scope, the constituent elements of the crime would be clear and specific, and the scope of the crime would thus be narrow.¹⁴ However, the legislature has established a fourth miscellaneous clause thereafter to avoid the omission of the previous clause of the law in the enumeration, which increases the ambiguity of this crime in terms of the constituent elements. With the diversified development of practice and the legislative mode of blank crime, many problems have been exposed in judicial practice:

2.1. Expanding the application of «violation of state regulations»

One of the conditions for the establishment of the crime of illegal business operation is «violation of state regulations», a business behavior can only be further evaluated as an illegal business operation

¹¹ Refer to the Notice of the Press and Publication Administration and the National Copyright Administration the Special Management of «Private Service» and «Plug-in». [2003] 19 // URL: <https://www.pkulaw.com/> (accessed: 10 February 2023).

¹² Refer to Article 217 of the Criminal Law of China // URL: <https://flk.npc.gov.cn>. (accessed: March 3, 2023).

¹³ Article 225 of the Criminal Law stipulates that «whoever, in violation of state regulations, commits one of the following illegal business operations and disturbs market order, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention and shall also, or shall only, be fined not less than one time but not more than five times the illegal gains: (1) dealing without permission in articles exclusively or exclusively provided for by laws or administrative regulations or other articles restricted from sale; (2) buying or selling import or export licenses, certificates of origin for import or export, or other business licenses or approval documents prescribed by laws and administrative regulations; (3) Illegally engaging in securities, futures or insurance business, or illegally engaging in fund payment and settlement business without the approval of the relevant competent department of the State; (4) Other illegal operations that seriously disrupt market order.

¹⁴ Chen Xin-Liang. The Expansion and Limitation of the Crime of Illegal Business Practices: A Survey from the Perspective of Administrative Licensing [J] // The Jurist. 2021 (2). P. 56.

crime if it violates state regulations first, which is a necessary precondition for the crime, and «violation of state regulations» is a blank of crime established for the crime of illegal business operation. «Violation of state regulations» is a precondition for the establishment of the crime of illegal business operation, but it is not the only condition, not that the behavior of the perpetrator violates the «state regulations» constitutes the crime of illegal business operation. In addition, other constitutive elements of the crime of illegal business operation should also be examined.¹⁵

Determining an illegal business crime requires reference to additional laws and regulations, as well as whether other laws and regulations fall within the scope of state regulations. It is the inability to pinpoint the scope of state regulations in judicial practice that has led to the expansion of the crime of illegal business operation. Therefore, it is great significance to clarify the connotations of this concept. Under the guidance of the legal concept of the administrative licensing system, sometimes the judicial organs apply departmental regulations as state regulations, and the element of «violation of state regulations» stipulated in Article 225 of the Criminal Law is alienated into «violation of administrative licenses». Moreover, it should be noted that, matching with the «violation of state regulations», but also requires its behavior caused by the «threat to the market order» results. It is impossible to unilaterally magnify an act while ignoring its pernicious consequences, which could easily lead to the blurring of the lines between criminal and non-criminal, leading to the abuse of the criminal law.

Article 96 of China's Criminal Law obviously stipulates that: «By violating State regulations, this

Law means violating the laws and decisions enacted by the National People's Congress and its Standing Committee, and the administrative regulations, rules and administrative measures enacted, and decisions and orders issued, by the State Council». It should be noted that local regulations enacted by local people's congresses at all levels and their standing committees, as well as regulations formulated and decisions and orders issued by various ministries and commissions of The State Council, do not fall within the scope of the state regulations referred to in Criminal Law. However, in judicial practice, there are cases in which judicial organs have applied departmental rules and regulations approved by the General Office of the State Council, or even the departmental rules and regulations authorized a second time, as state regulations. There are also cases in which the implementing rules and measures of administrative regulations are treated as administrative regulations, or in which acts that should be subject to administrative law are categorized as violations of state regulations, which exposes the blurring of the boundaries between administrative violations and criminal violations, and which tends to confuse this crime with general administrative violations.

Through the collection of relevant data to more intuitively reflect the criminal situation of the objects of illegal business operations, data from the JuFa Case website.¹⁶ The search conditions are illegal business crime, the nature of the instrument is judgment, and the judgment date is 2021 to 2022. A total of 1,299 cases were searched, 400 cases were selected and 330 valid samples were retained after manual screening. The specific illegal business crimes are shown in the following table.

Statistical table of criminal targets of illegal business operations

Market segmentation of types of legal interests	Classification of the first three acts in judicial practice (frequency: cases)	Categorization of «other» acts in judicial practice (frequency: cases)
State monopolized commodities	Refined oil (64), tobacco (126), liquefied petroleum gas (3)	—
Basic national necessities	Salt (1), slaughterhouses (3),	—
natural resources	Wildlife (2)	
Franchise or prohibited special goods, special business services	Lottery tickets (11), fireworks (13)	Gambling equipment (3), network information services (2), television network reception equipment (1)
Items related to national security, producer safety or public safety	Hazardous chemicals (36),	—

¹⁵ Wang En-Hai. The Logical Interpretation of 'Violation of National Regulations' in the Crime of Illegal Business Operations — Investigation from the Perspective of Specific Cases[J] // Issues on Juvenile Crimes and Delinquency. 2023 (1). P. 67—76.

¹⁶ Refer to the Jufa case's official website. URL: <https://www.jufaanli.com/> [accessed: March 1, 2023].

Market segmentation of types of legal interests	Classification of the first three acts in judicial practice (frequency: cases)	Categorization of «other» acts in judicial practice (frequency: cases)
Health and hygiene items	Medicines (15), masks (1)	—
Banking, insurance, securities and other financial market order services	Foreign exchange (17), funds settlement (15), futures (7), securities (4)	Loans (4), bank card cash-outs (2)

Although it is, clear from the judgments that the crime violates relevant state regulations, few judgments directly elaborate on the specific names of the state regulations violated. For example, there are expressions such as «violation state regulations» and «violation state regulations on foreign exchange management» in the judgments, but they do not specifically elaborate on the names of the relevant state regulations. It resulted in an insufficient citation of the reasoning part of the court's decision and a lack of direct statutory provisions to serve as a basis.

The fundamental principle applied in our criminal law is the principle of legality, and one of the essential features of this principle is the clarity of the crime, which means that the criminal law must provide for the concept of a crime or the composition of a crime in advance, so as to enable people to judge in advance the legal acts that they are going to do. Article 225 of the Criminal Law of China stipulates that the terms «violation state regulations», «serious circumstances» and «other business activities» are highly vague in themselves, which makes it difficult to recognize the crime in individual cases. In judicial practice, Article 225 of the Criminal Code is commonly cited in trials, but without elaboration as to what state regulations have been violated. The number of cases involving this offence in judicial practice has been rising year after year, and what should have been a complementary clause has in practice become the principal one applied in adjudication. Therefore, based on the above problems, it is necessary to additionally analyze the root causes of the problems in the judicial application of the crime of illegal business operation and put forward targeted recommendations for improvement, which will provide reasonable explanations for the handling of similar cases in the future, and make the application of this crime in practice more in line with the requirements of the principle of legality and the needs of social development.

2.2. Unclear criteria for determining «serious circumstances»

Every illegal business operation is first of all an administrative offense, but not every administrative offense can reach the standard of the crime of illegal

business operation, and the key point to distinguish between the two lies in whether or not the behavior can constitute the «serious circumstances». According to China's criminal law on illegal business operations, the first thing that constitutes such a crime is the act of disturbing market order, followed by consideration of the seriousness of the act. The law and judicial interpretation of «serious circumstances» provisions are not clear and complete, its connotation and extension are very vague, it can be a distinction between crime and non-crime boundaries, but also can be a distinction between felony and misdemeanor boundaries.¹⁷ In judicial practice, the determination of whether an illegal business activity is «serious circumstances» depends on the discretion of the judicial workers, and the different understanding of the law by the staff of the judicial organs will not only lead to the waste of judicial resources and affect the efficiency of the case, but also result in the occurrence of different judgments in the same case.¹⁸

Judicial personnel are easy to rely only on whether the behavior meets the amount required to be punished, while ignoring whether the behavior constitutes a disturbance of social order, and the handling of relevant cases is easy to fall into the «conviction based only on amount», but the larger amount involved is only one of the reference materials to judge the «serious circumstances», if the circumstances are Judicial personnel are significantly minor, and the harm is not large, it cannot constitute the crime of illegal business operations.

For example, Wang Lijun's illegal business operation retrial and re-sentencing to acquittal (Supreme People's Procuratorate Guidance Case No. 97). At the end of 2014, Wang privately purchased corn and sold it without applying for the relevant permits and without approving the registration in accordance with the law, and the court of first instance found that it constituted the crime of illegal business operation.¹⁹

And sentenced it to one year's fixed-term imprisonment with two years' probation. Later, due to the media reports and other public opinion pressures, the Supreme Court designated a retrial. The court changed the sentence to acquittal on the grounds that the behavior did not meet the criteria for determining

¹⁷ Chen Xing-Liang. Philosophy of Criminal Law (Sixth Edition). Beijing : China Renmin University Press, 2017. P. 649.

¹⁸ Yang Shui-Qing. Exploration of Judicial Application Problems of Illegal Business Offense [J] // Economic Research Guide. 2022 (25). P. 159—161.

¹⁹ Refer to the Linhe District People's Court of Bayannur City [2016] 0802 No. 54 Criminal judgment // URL: <http://www.pkulaw.com/> (accessed: 10 February 2023).

serious disruption of social order, and did not possess considerable social harm and criminal punishment.²⁰ One of the controversial issues of the crime in judicial practice exposed by the above typical cases is that the identification standard of «serious circumstances» in the miscellaneous clause is not clear and reasonable, which also involves the protection of legal interests and the determination of social harmfulness, and does not take into account whether it has caused substantial infringement of legal interests.

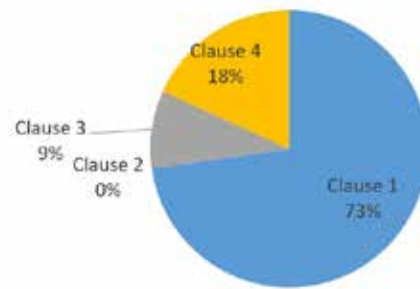
2.3. The risk of becoming a «pocket crime»

"The concept of 'pocket crime' first appeared in the mid-1990s."²¹ The «pocket crime» of the crime of illegal business operation is one of the most serious problems in our criminal justice. The predecessor of the crime of illegal business operation is called «pocket crime» because of the ambiguity of the constituent elements of the crime, and the crime of illegal business operation as a new crime separated from the crime of speculation. First, we should affirm the mode of legislative design of crime, which combines blank crime and miscellaneous clause. At the same time, although the setting of the fourth miscellaneous clause has made-up for the lack of lag in the provisions of criminal law to a certain extent, but on the other hand, the understanding of «whether the circumstances are serious» and «other acts that disturb market order» has a large explanatory space, which leads to excessive judicial discretion of judges. If it is applied improperly, it will violate the principle of legality, threaten the clarity of criminal law, and may repeat the mistake of «pocket crime». Moreover, in the judicial interpretations of this miscellaneous clause, some of them still contain the word «other», which not only makes the fourth miscellaneous clause still ambiguous, but also leads to the miscellaneous clause being «pocketed» again.

There are four clauses for the crime of illegal business operation, the first three of which are the types of crimes expressly stipulated in the criminal law, while the fourth is a miscellaneous clause. Thus, during the course of the search, a distinction was made by excluding from the sample of 330 cases only those in which Article 225 of the criminal law was cited without specifying the specific provision cited in the judgment. It was verified that 220 cases explicitly stated the provision cited, including 180 sentences related to the first three clauses of Article 225 of the criminal law and 40 sentences related to the fourth clause of Article 225 of the criminal law.

In the foregoing statistics, the vast majority of cases have resulted in convictions and sentences on the basis of clause one of article 225, i.e., the unau-

Article 225 cited in the conviction



thorized operation of articles monopolized or exclusively sold, or otherwise restricted from sale and purchase as provided for in the law and administrative regulations. The sample cases were mainly related to unauthorized operations of refined oil, diesel fuel, tobacco, medicines and hazardous chemicals; those convicted under clause three were mainly about illegal business activities related to futures, fund settlement, and securities; moreover, about the citation of legal provisions in the fourth clause, which included foreign exchange, tobacco, hazardous chemicals, loans, wildlife, lottery tickets, masks, slaughterhouses and fireworks. While organizing the data, it was discovered that there were individual cases involving targets of illegal business operations. Although they fall within the content specified in the first or third clause, the fourth clause is cited in the conviction and sentencing. For example, in some cases involving illegal tobacco and hazardous chemicals, some people were convicted under the first clause, while others were convicted under the fourth.

This results in crimes with the same offense having the same plot and object of conduct, but with different legal provisions based on which they are convicted. The above situation also exposes the issue of the fourth clause of this crime being sometimes inappropriately cited in judicial practice. As a miscellaneous clause, it should be applied with greater caution. Although static legal provisions inevitably have limitations in dealing with specific cases, it is possible to refer to the relevant case to make the legal provisions on which the judgment is based more relevant and clearer.

3. Path to solving the problem of judicial application of the crime of illegal business operation

Through the above analysis of the existing problems in the crime of illegal business operation. It can be seen that the expansion of the application of the

²⁰ Refer to the Inner Mongolia Autonomous Region Bayannaoer City (League) Intermediate People's Court (2017) No. 08 Criminal judgment // URL: <http://www.pkulaw.com/> [accessed: 10 February 2023].

²¹ Gao Ming-Xuan, Zhao Bing-Zhi. The Development of Criminal Law Research in the People's Republic of China in Recent Sixty Years. Beijing : China Renmin University Press, 2009. P. 175.

crime of illegal business cannot only be attributed to its legislative mode, but mainly due to the differences between the understanding and application of judicial interpretations by the judges in practice. Therefore, we should focus on the solution of the problem from the level of judicial application. The following will find an exit from the aspect of reasonable understanding of judicial interpretation, and explore the path to limit the judicial application of the crime of illegal business operation.

3.1. Clarifying the meaning of «violation of state regulations»

The key to constituting the crime of illegal business operation is to consider whether the act violates the state regulations, on what is «violation of state regulations», China's Criminal Law, Article 96 has been precisely defined, the main body of its formulation is only the National People's Congress, the Standing Committee of the National People's Congress and the State Council. Combined with the above issues, in practice there are still departmental regulations and local laws and regulations that apply only to individual districts and individual business areas as a basis for criminalization and sentencing. It should be clear that the judicial interpretation of this crime is not the scope of the «state regulations», the main body of the judicial interpretation is the supreme people's court and the supreme people's procuratorate, and the main body of the «state regulations» does not match, so the judicial interpretation can only be used as a reference and basis for adjudicators to decide cases. While legislative interpretations are formulated by the Standing Committee of the National People's Congress, which is consistent with the subject of the «state regulations» and belongs to the scope of the «state regulations». In this regard, regarding the scope of «state regulations», there are two main points of view in the academic community. One is the «restrictive theory», which holds that the subject of the formulation should be strictly limited to the National People's Congress, its Standing Committee and The State Council in strict accordance with the scope of the provisions of Article 96 of the Criminal Law. If the act only violates departmental rules or local regulations, it does not fall within the scope of violations of state regulations. The second is the «expansion theory», which holds that national regulations can be extended to departmental regulations, local regulations, autonomous regulations, etc. Obviously, in the discrimination of the two theories, the «restrictive theory is more in line with the principle of legality, and the strict interpretation of restriction can avoid the excessive expansion of illegal business crimes to a large extent, but the second view is often

adopted in judicial practice, which inevitably causes problems in the application of law.

The law is the last line of defense to maintain fairness, justice and social stability, and the criminal law, as the most severe means of social governance, should be modesty, and when effective governance of society can be achieved without criminal punishment measures, such as solving the problem through civil or administrative means, the criminal penalty will not be used. Concerning this crime, the unlawful conduct in the crime of illegal business operation is the first of all unlawful conduct in the law of administration. If the perpetrator of illegal business behavior is only with general administrative violations, and the judge uses the criminal law to deal with it, it will inevitably make the public question the rationality of the application of law, which is obviously contrary to the concept of modesty of the criminal law. What needs to be noticed is the following:

First, administrative licenses established in violation of state regulations do not necessarily comply with the «violation of state regulations» in article 225 of the Criminal Law. According to the Criminal Law, the crime of illegal business operation consists of four independent constituent elements, i.e., «violation of state regulations», «illegal business behavior», «disturbing the market order» and «serious circumstances». In practice, it is usually confuses the protection of the legal interest of this crime is the administrative licensing system, and the concept of «violation of state regulations» provided for in this crime will be replaced by «violation of administrative license», which will lead to any violation of administrative license will be identified as a violation of state regulations.

Second, unauthorized business practices do not necessarily constitute «illegal business behaviors» under article 225 of the criminal law. «Criminal law should protect pre-determined legal interests, not combat violations of specific state regulations. These state regulations do not protect any pre-existing substantial legal interest, but merely serve the public order and welfare».²² For behavior that should be penalized, the focus is on whether the legal interest violated by the behavior is the legal interest protected by criminal law. It can be seen that not all the «state regulations» in the form of article 96 of the criminal law of China are «state regulations» stipulated in article 225 of the criminal law, the latter only includes those «state regulations» for the protection of the basic order of the market. Under the mainstream view of the legal interest of the administrative licensing system, «illegal» in the crime of illegal business operation is equated with «violation of state regulations», which is also equated with violation

²² *Ivo Appel*. Legal Interest Protection Through Criminal Law? — Commentary from the Perspective of Constitution. Translated by Ma Yin-Xiang. Edited by Zhao Bing-Zhi, Song Ying-Hui et al. Research on Contemporary German Criminal Law (2016, Vol. 1). Beijing : Law Press, 2017. P. 52—53.

of administrative licensing, resulting in the judicial alienation of this crime.

Thirdly, engaging in business activities without authorization does not necessarily «disrupt the market order», and business conduct that violates state regulations and threatens the market order does not constitute the crime of illegal business operation if it does not result in disrupting the market order. The requirement of «disrupting market order» is limited to the basic order that concerns the interests of all market participants. Wang Lijun acquisition of corn case, for example, the defendant unauthorized acquisition of corn and then resold to the grain and oil company, the amount of illegal business amounted to more than 200,000 yuan, profit of 6,000 yuan, the court of first instance that the defendant constitutes the crime of illegal business operation. However, in fact, the defendant's behaviour objectively between the grain farmers and grain purchase enterprises play a bridge and link role, reducing the burden of farmers selling grain, conducive to market exchanges. The retrial court subsequently reversed the acquittal on the grounds that «the degree of harm has not yet reached the level of seriously disrupting the market order». It is impossible for a criminal law to maintain a market order that does not benefit anyone, or to disturb it if an act does not cause economic loss to anyone.²³ It is clear that engaging in business activities without authorization does not necessarily «disturb the market order», so the judicial practice of equating «violation of administrative authorization» with «disturbing the market order» is worth reflecting on.

The criminal law is the severest of laws, and once the decision of conviction and sentence is made, it has an irreversible effect upon the parties. So the determination of the scope of the «state provisions» in the criminal law must be made strictly and cautiously. If it is difficult to identify individual cases and there are relatively large disputes, it shall exercise discretion carefully in the trial and seek instructions from the Supreme People's Court step by step in accordance with the requirements of the Notice on the Application of «State regulations» in Criminal Law issued by the Supreme People's Court in 2011, and the provisions of «State regulations» on which the judgment is based shall be clearly stated in the judgment, and be able to be organized and well-reasoned.

3.2. Criteria for scientific identification of «serious circumstances»

Illegal business crime as a typical plot crime, the miscellaneous clause must be required to reach a serious degree of social harm. In China's criminal law, there is no clear identification standard for «serious

circumstances», and the interpretation right of «serious circumstances» is left to the discretion of the judicial organ, then we should grasp two points: First, the seriousness of the circumstances is a constituent element of the crime. If the circumstances are not serious, it does not constitute a crime; Second, whether the case is serious or not should be fully judged by analyzing all the circumstances of the case.²⁴ In practice, it is commonly easy to be influenced by the thought of heavy penalty doctrine, resulting in the expansion of discretionary power, and the constitutive elements of «serious circumstances» is changed into «large amounts» under the influence of the conviction based only on amount.

Under the guidance of the legal interest view of the basic market order, the function of the «serious circumstances» element is specifically limited to the fact that the behaviour of the actor has severely disturbed the basic market order, because the basic market order is related to the interests of numerous market participants, so the degree of «serious» here can be judged by the number and degree of damage to the interests of the injured. Judicial staff should make judgments based on specific cases, although some behaviours can be objectively evaluated as illegal business behaviours, for those behaviours that have not caused substantial damage, even actively promoted market development, they should first consider whether appropriate administrative penalties can be taken in light of the actual situation, instead of using punishment easily.

The «serious circumstances» of the crime of illegal business operation refers to the act of disturbing the market order. It is thus clear that, when an act is incriminated, it must first constitute a «disturbing market order» before the degree of harm can be further considered. If the behavior only violates the state regulations guided by the blank crime, and does not disrupt the market order and cause substantial damage, then it can not take any punitive measures against it.

However, in judicial practice, the judgment of the seriousness of the crime of illegal business is mostly attributed to the simple circumstances such as the amount standard or the number of administrative penalties prescribed by the judicial interpretation, and too much emphasis on the seriousness of the illegal business operation, and did not take into account whether the behaviour disrupts the market order, and has considerable social harm. In the case mentioned above, Wang Lijun illegal business amount of more than 200,000 yuan, in line with the amount of the crime of illegal business operation to reach the starting point of 50,000 yuan. The reason why the

²³ Zhang Ming-Kai. Restrictions on Pocket Crime by «Criminal Law Amendment [11]» and Its Significance [J] // Contemporary Law Review. 2022 (4). P. 3—18.

²⁴ Zhang Ming-Kai. On «Serious Circumstances» as a Constituent Element in the Specific Provisions of China's Criminal Law [J] // Studies in Law and Business. 1995 (1). P. 15.

crime can not be incriminated, because compared with the crime of the first three clauses of this crime, his behaviour does not have the same social harm, did not cause losses to food and grain and oil companies, and did not cause bad social impact, etc. Taking this into account, its behaviour has not seriously disturbed the market economy, so it does not have criminal illegality.

Although the «serious circumstances» stipulated in the criminal law provisions are ambiguous, on the other hand, it also gives the law a certain degree of flexibility. While there is still debate about what factors should be considered to determine whether the circumstances of a crime are serious, it is clear that the practice of determining the circumstances by the amount of the crime is obviously not justified. The criterion of «serious circumstances» should not only consider the amount of money involved, but also the motive and means of the crime, and whether the act substantially infringes on the legal interests protected by the criminal law, to judge whether it is a general administrative offense, and if the substantial damage caused is relatively minor, then the situation cannot be generalized. In addition, the type, quantity and circulation of goods can be used as a reference for determining «serious circumstances», and it can also be combined with the level of local economic development to define whether the circumstances are serious according to the specific case.

3.3. Adherence to the principle of «Systematic Interpretation»

With regard to the types of legal interpretation methods, the four most uncontroversial so far are: systematic interpretation, literal interpretation, teleological interpretation and historical interpretation. Systematic interpretation is not a search for text, but a logical exploration within the legal system without contradiction. The problem to be solved is that there may be tension between legal norms and other social norms, and between law and society, politics and culture.²⁵ The miscellaneous clauses, which commonly appear in criminal law, are a legislative technique adopted by legislators to cope with the dilemma of «law is limited but situation is infinite».²⁶ Because of the inevitable ambiguity characteristics of the miscellaneous clauses, it is easy to produce disputes when it is applied concretely, so the principle of systematic interpretation should be adhered to.

In order to apply the law more appropriately, we must treat the problem with systematic thinking and

adhere to the openness of the law. «Reconceptualization means studying law not only as the sum total of existing norms, but also as a system of values, culture, and symbolism, as well as its constitutive significance in social action».²⁷ Systematic interpretation is not simply related to the context, but the intrinsic presentation of the referee's systematic thinking through legal methods.²⁸ When a judicial officer makes a legal value judgment, he or she is able to determine the precise meaning of a particular legal provision based on the relationship between different legal provisions and between the various articles of the same legal provision to ensure the consistency within the legal system. The criminal law, as the last resort for the protection of legal interests, must not interfere too much in social and economic life in order to prevent its abuse.

The connotation of systematic interpretation focuses on the consistency of the internal value orientation among the laws. According to the rules of systematic interpretation, there should be types of behaviours that can summarize the same attributes before the miscellaneous clause of the crime of illegal business operation. The other illegal business acts stipulated in the miscellaneous clause of the crime of illegal business shall be as harmful to society as the provisions of the preceding three clauses, and shall be criminalized only to the extent of seriously disrupting the order of the market economy. With regard to the determination of the seriousness of the crime, substantive consideration should be given to the degree of infringement of the market order, with separate judgments being made on the basis of the national provisions violated by the different acts, and the determination of whether or not there has been a considerable degree of social harm should not take into account the amount of the operation alone, but instead the substantive social impact caused by the act should be considered in a comprehensive manner.

As a central requirement of legal interpretation, systematic interpretation is the categorization of the nature of an act, and the specific application of a provision should maintain the same identification criteria as the first three items. That is, the application of «other acts of illegal business operation that seriously disrupt the market order» as stipulated in the fourth clause of Article 225 of the criminal law, shall be judged on the basis of whether the relevant acts have comparable social harm, criminal illegality and necessity of criminal punishment to the acts of illegal business operation stipulated in the first

²⁵ Chen Jin-Zhao. Attitude of Systematic Thinking and the Application of Systematical Interpretation Method [J] // Journal of Shandong University (Philosophy and Social Sciences). 2018 (2). P. 71.

²⁶ Che Hao. Legal Dogmatics and Systematic Interpretation [J] // China Law Review. 2022 (4). P. 103—119.

²⁷ Liora Israël. L'arme Du Droit. Translated by Zhong Zen-Yu. Beijing :Social Sciences Academic Press (2015). P. 81.

²⁸ Song Bao-Zhen. Chinese Application of Systematic Interpretation [J] // Journal of University of Jinan (Social Science Edition). 2018 (6). P. 33.

three clauses of Article 225 of the criminal law. In judicial practice, the greatest reason why this crime is liable to judicial confusion is that the application of the miscellaneous clause is not carefully based on principles of systematic interpretation. Considering the nature of the case in a holistic way and adhering to the systematic interpretation rules can effectively avoid unreasonable phenomena in the application of the law. In addition, to determine whether the violation of the relevant provisions of the administrative management of the business behaviour constitutes the crime of illegal business operation, we should be considered in a comprehensive manner whether the business behaviour is in violation of the criminal law provisions of the «state regulations» and constitute a serious disruption of the market order, and judge whether the criminal circumstances are serious, which cannot be conviction based only on amount of money. For although the violation of state regulations to disrupt the market order, but the circumstances are significantly minor, the harm is not great, not yet gravely disrupt the market order of the business behavior, should not be considered the crime of illegal business operation, which is precisely in the systematic interpretation needs to be expressed.

Conclusion

The original intention of setting the crime of illegal business operation is to comply with the development of the socialist market economy in the current era, to make-up for the backwardness and defects of the crime of speculation, to be more in line with the requirements of the principle of legality, and to enhance the clarity of the criminal law I. It cannot be denied that at the beginning of the establishment of the crime of illegal business operation, it did effectually play an active part in restraining. However, with the emergence of a large number of new types of illegal business operation and disrupting market order, inevitably exposing many problems in judicial practice, resulting in the blurring of the boundaries between the crime and the non-crime, this crime and that crime, which will lead to improper expansion of the scope of punishment. It is contrary to the fundamental principle of legality, detrimental to the maintenance of the modesty of the criminal law, and contrary to the modern requirements of the development of China's market economy. Therefore, it is necessary to restrict the application of the crime of illegal business operations. To analyse the current situation of expanding and application of the crime of illegal business operation and explore the specific connotation of the constituent elements of this crime is the key to grasp the meaning of «violation of state regulations» and «serious circumstances» in the law, and it is also to comply with the requirements of the development of the market economy.

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