

Study on the Legal Application of the "Bottom Clause" of the Crime of Illegal Operation

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Abstract—From the "one-dimensional" perspective of "bottom clause" as the research center to the "two-dimensional" perspective of the relationship between "bottom clause" and the principle of clarity of criminal law, this paper establishes the principle of balance between "violating state regulations" and the principle of relative clarity. This imbalance is one of the reasons for the unlimited expansion of the "bottom clause" of the crime of illegal operation, which is mainly manifested in the imbalance between the "bottom clause" and the principle of clarity, the "bottom clause" and the statutory illegal business behavior, the "serious" circumstances of the "bottom clause" and the three principle of clarity. The abolition of the crime of illegal operation and the application of the principle of absolute clarity cannot solve the dilemma of judicial application of the crime of illegal operation. Only by solving the applicable dilemma of the law and judicial interpretation of the "bottom clause" of the crime of illegal operation, and clarifying the balanced relationship between the former and the principle of the clarity of criminal law, can it be available to find the solution path. By perfecting the legal application of the "bottom clause" of the crime of illegal operation from three aspects, namely by restricting the "bottom clause" of the crime of illegal operation and the law application of bottom, the method of analogy reasoning is adopted appropriately, and the legal provisions such as the judicial interpretation related to the crime of illegal operation are cleaned up, which provides a relatively reasonable, pragmatic and appropriate angle.

Keywords—*illegal operation; bottom terms; legal punishment; application of law*

I. INTRODUCTION

First, the issue of China's criminal law No. 225 provisions, in violation of state regulations, there is one of the relevant illegal business practices, disrupting the market order, serious circumstances, constitute the crime of illegal business. The term "other illegal business practices that seriously disrupt the market order", as referred to in subparagraph (iv) of the article, is the "bottom clause" referred to in our criminal law theory. All along, the academic circles have done a lot of research work on the characteristics of the crime of illegal operation, such as the bottom clause, the element of crime quantity and the blank crime, and generally think that the "bottom clause" of the crime of illegal operation is easy to lead to the expansion of the application of law because on the one hand, the judicial practice circle provides the basis for the "bottom clause" to

combat the emerging economic crime according to Law, and solves the dilemma which cannot be relied upon, on the other hand, because the scope of application of the "bottom clause" is not clear, it sows the hidden danger for the expansion of the crime of illegal operation. As Bodenheimer it: "The law is a building with lots of halls, rooms, recesses and corners, and it is extremely difficult to illuminate every room, recess and corner with a searchlight at the same time, especially when technical knowledge and experience are limited and the lighting system is inappropriate or at least incomplete. [1] Human exploration and research of law is limited by the level of social practice, legal technology, cognitive level and other elements, so the exploration and research of knowledge will be far from endless.

At present, the research on the "bottom clause" of the crime of illegal operation mainly focuses on the existing problems of the "bottom clause", and it is rare to discuss the peripheral concept of this problem in depth. Based on the limitations of the research perspective, it is neither possible to fully explain the various expansion and application phenomena of the "bottom clause" in judicial practice, nor to clarify the boundaries and reasons for the application of such expansion. From the perspective of the study to the source of the deep connection between the "bottom clause" of the crime of illegal operation, from the "one-dimensional" perspective of "bottom clause" as the research center to the "two-dimensional" perspective of the relationship between "bottom clause" and the basic legal principle, it can provide a new perspective for exploring the theoretical research of the "bottom clause" as a result, the principle of the clarity of criminal law on the principle of legality of crime and punishment has entered the field of research. The reason why the principle of clarity of criminal law should be used as the theoretical research dimension of the "bottom clause" of illegal business crime is mainly based on the following three points: firstly, the crime of illegal operation is a kind of legal crime, and its "administrative regulations are the source of the law applicable to criminal law, in any case, it cannot go around" whether or not [2]. Second, "bottom clause" as a common legal expression in China's legislative technology, "bottom clause" does not provide for the full content combined with judicial interpretation, administrative regulations and other legal provisions to cooperate. And the process of this cooperation is the essence of realizing the principle of clarity of criminal law. As some scholars have suggested, "in order to implement the

principle of clarity of criminal law, we should make great use of perfect subsidiary criminal law and administrative criminal law to achieve the same goal." [3] Third, criticizing only the current situation of the expansion and application of the "bottom clause" of the crime of illegal operation cannot solve the problems existing in the process of the application of the crime, and only by placing the constituent elements that cause the ambiguity of the "bottom clause" in the research field of the legal principle of crime and punishment can we find the cause and solution of With the implementation of the policy of the State focusing on supporting the development of small and medium-sized enterprises, strengthening the theoretical study of the "bottom clause" of the crime of illegal operation and clarifying the legal applicable boundary of the "bottom clause" will help to avoid the dilemma of private enterprises facing "frequent research".

II. SCOPE AND BOUNDARY: FROM THE PRINCIPLE OF CLARITY OF CRIMINAL LAW

From the principle of clarity of criminal law, some scholars believe that the principle of legality of crime and Punishment has two aspects: the formal side and the substantive side, among which, the formal side includes "legalism, prohibition of ex post Law, prohibition of analogy interpretation, prohibition of indefinite (period) punishment", the essence of the aspect includes two aspects, one is the principle of the content of the penalty law is appropriate. [4] Second, for the connotation of the principle of clarity, there is no unified view in the theoretical circle at present, the United States, Germany, Italy, Japan have affirmed the principle of clarity from different aspects. [5] In the comprehensive view, the principle of clarity refers to the need for the law to be specified in the manner of whether it is illegal, whether or not to constitute a crime, what constitutes an offence, and the decision not made in the manner expressly stated is unreasonable.

A. *The Principle of Clarity of Criminal Law and the Connotation Definition of the Crime of Illegal Operation*

The principle of clarity of criminal law applies to the definition of the connotation of the crime of illegal business it is stipulated that the provisions of criminal law should be standardized in a way that the general public can understand, and it is easy to fall into two misunderstandings when applying the "bottom clause" of the crime of illegal operation: The first misconception holds that the crime of illegal operation is fuzzy and uncertain, which is contrary to the principle of clarity of criminal law. This misconception confuses the boundaries of "clarity" in the principle of clarity. The second misconception is that the standard of clarity on the principle of criminal law is too broad, and that as long as the "bottom clause" is stipulated in the language of the provisions, that is, in accordance with the principle of clarity of criminal law, such as Wang's acquittal of the purchase of maize was acquitted [6]. Further, in the course of the trial, the original court of the case did not accept the principle of proportionality in the application of criminal law in the pursuit of substantive justice of the rational way

of thinking. [7] Therefore, in order to correctly deal with the relationship between the "bottom clause" of illegal business crime and the principle of legality of crime and punishment, the key lies in trying to balance the relationship between state regulations and the principle of relative clarity.

B. *The Dispute over the Existence and Abolition of the Crime of Illegal Business*

There has been a view that in judicial practice, the crime of illegal operation has been artificially expanded by judicial interpretation, and the trial organ has formed a case after the judgment of illegal business crime, which makes the crime of illegal operation "step by step into an almost unlimited crime", [8] it is proposed To carry out criminal laws and regulations on the operation of goods that violate the order of market management, and to set up the charges separately. The author believes that under the current judicial practice environment, it is not appropriate to abolish the crime of illegal operation. First, at present, China's socialist market economy has not yet developed mature, such as the abolition of illegal business crime, it is very easy to make many new commodity business crimes into the vacuum field, "The contemporary problem is not the existence of discretionary politics, but how to 'limit, construct and inspect' its proper exercise." [9] Second, the perfection of the application of the law cannot be resolved in a "one-size-fits-all" manner; "All punishment itself is evil. If it should be allowed, it is only because it has the potential to rule out some kind of greater evil. " [10] Third, the crime of illegal business has a strong economic law attribute, such as the abolition of illegal business crime, may lead to administrative punishment behavior and criminal punishment behavior between the poor connection, affecting China's administrative criminal justice connection system. Although the crime of hasty cancellation of illegal business will lead to adverse chain reaction, but the problem criticized by this view actually exists, the "bottom clause" of the crime of illegal operation, such as unlimited expansion interpretation without restriction, will conflict with the principle of clarity in the substantive aspects of the principle of legality of crime. [11]

III. PRINCIPLES AND CONFLICTS: THE CRIME OF ILLEGAL OPERATION "BOTTOM CLAUSE" AND THE DILEMMA AND THEORETICAL ANALYSIS OF THE APPLICATION OF LAW

A. *The Dilemma of the Law Application of the Crime of Illegal Operation "Bottom Clause"*

The first is the application of the law at the legal level subparagraph (iv) of the crime of illegal operation. In our No. 225 criminal law provides for "other illegal business practices that seriously disrupt market order only illegal business practices "violate state regulations" may constitute an offence of illegal business. However, in the application of the "bottom clause" of the offence of illegal business, it is necessary for the perpetrator to violate which state provisions are likely to constitute a crime, a legal judgment that requires recourse to the specific scope of application of "violation of state provisions". Although it increases the

flexibility of the application of the law and closes some of the legal loopholes, it also adds to the danger of expanding the scope of the application of criminal law by administrative regulations, which is the hard injury of the "bottom clause" of the crime of illegal operation. Therefore, the application of law depends on the interpretation of law, and the interpretation of law depends on the method of interpretation of law. As Carl Lalen: "If the result of the continuation of the hope law can be regarded as the 'law' in the current law order, the continuation of the law must follow certain methods." [12]

The second is the dilemma of the application of judicial interpretation. In April 8, 2011, the Supreme People's Court issued the notice on the accurate understanding and application of the relevant issues of "State provisions" in criminal Law (hereinafter referred to as the notice on "state regulations"), requiring "all levels of the people's courts to hear cases of illegal business crimes, and the relevant judicial interpretations are not clearly defined Should be applied to the Supreme People's Court as a matter of law application." In judicial practice, the judicial organs, in the face of a large number of pending cases, have no energy to consult the Supreme People's Court on a single case, and, out of the dual considerations of the principles of fairness and efficiency, turn to the discretion of the three types of business practices enumerated in the crime of illegal business, if it is true that the statutory requirements It is determined that it does not constitute an offence of illegal business to be closed. In addition, the above-mentioned notice on "State provisions" does not make clear the status of judicial interpretation of the crime of illegal business issued by the "two high", while the judicial organs, because of the need of judicial practice, often find the crime of illegal operation on the basis of the relevant judicial interpretation. On the basis of the predecessors' summary, the author combs 13 kinds of relevant provisions of the crime of illegal operation issued in the form of judicial interpretation, approval, passage and summary in recent years.¹ The introduction of these judicial interpretations, on the one hand, makes violations of the state regulations to disrupt the market order violations have been regulated, maintaining the fairness and stability of the market competition order, on the other hand, to a certain extent, the extension of illegal business behavior has been extended interpretation, so as to deviate from the legal principle of crime. In applying the above judicial interpretation, the judicial organs are faced with such an awkward situation.

¹ Among them, the "judicial interpretation" as the text of the publication of a total of 10 legal provisions, involving illegal foreign exchange, publications, international Telecommunications, salt, special drugs, POS machines, tobacco, lottery, information services and other illegal business activities, as well as in the epidemic period of infectious diseases inflate prices illegal business practices; "Minutes of meetings" Published in the form of text there are 1 legal provisions relating to international telecommunications operations (including Hong Kong, Macao and Taiwan); 1 legal provisions issued in the form of "approval" relating to illegal engaging in (disguised) MLM activities; and 1 legal provisions for the publication of "notices" in the form of texts relating to the illegal operation of internet Internet services.

B. Theoretical Analysis of the Application of the Law "Bottom Clause" in the Crime of Illegal Business

The first is the theoretical dispute. On whether the "bottom clause" of the crime of illegal operation violates the principle of legality of crime and punishment, and theoretically has different views such as "definitely saying", "denying" and "restricting speaking". [13] [14] [15] The author agrees with the view of "restriction", the "bottom clause" of illegal business crime and a series of legislative and judicial interpretations issued by the legislature and judicial organs are formulated on the premise of carrying out the principle of clarity, but because there is no system between the legal provisions, there are practical constraints and restrictions on the principle of legality of crime and punishment. And "definitely say" point of view, the illegal business crime "bottom clause" absolute, that judicial interpretation of the "bottom clause" interpretation, is a phenomenon of after-action interpretation, in fact, the author believes that although China's illegal business crime "bottom clause" of some judicial interpretation of the "bottom clause" It makes a breakthrough to explain the original meaning of the crime of illegal business, but if the corresponding judicial interpretation of the "bottom clause" of the crime of illegal operation is completely eliminated, it will make it impossible for the judicial organs to apply the relevant legal provisions on the crime of illegal business. "Negation" reveals to a certain extent the necessity of the existence of the elements of the crime of illegal operation, but at the same time, it should also pay attention to the balance between the principle of clarity and the "bottom clause".

The second is the Balance between the Principle of Definiteness and the "Around the Bottom Clause". As early as the ancient Greek period, Aristotle proposed: "The rule of law should include double meaning: the law that has been established is universally obedient, and the law that everyone obeys should itself be a well-formulated law." [16] This famous classical formula of the rule of law shows that the rule of law should conform to the requirements of the principle of clarity of criminal law, and that the representation of criminal law provisions should be clear, specific and citation. The crime of illegal operation with the "other ..." type "bottom clause" as a supplementary provision to illegal business practices, and the principle of clarity of criminal law is extremely easy to conflict, mainly manifested as: first, how the "bottom clause" should be on the other three listed ways to provide for illegal business practices bottom; second, the offence of illegal business "bottom clause" There is a formal conflict with the principle of clarity of criminal law; third, the crime of illegal operation "other illegal business behavior" needs to achieve the harm degree of "serious circumstances", but the "bottom clause" itself cannot be clear "serious circumstances".

1) *Balance between "bottom clause" and the principle of clarity of statutory illegal business conduct:* In the case of the alleged illegal operation of corn seeds by Wang, Professor Ranzillin made it clear that "this judgment is inappropriate in that it does not conform to the requirements

for judicial interpretation and the rules of interpretation of the "bottom clause" of criminal law. [17] As Beccaria's once said, "strict adherence to the troubles of criminal law prevents people from carrying out lethal and free interpretations, which are the source of breaking and favoritism". [18] Thus, the restrictive interpretation of the "bottom clause" of illegal business conduct can conform to the essence of the principle of clarity of criminal law. As mentioned earlier, the "bottom clause" of the crime of illegal operation, because of its inherent fuzziness, is called "small pocket crime", which has a formal conflict with the principle of clarity of criminal law, which has been widely demonstrated by the academic circles and is not redundant.

2) *The balance between the "serious circumstances" of the "bottom clause" and the principle of clarity:* The crime of illegal operation takes "serious circumstance" as its constituent element, but the "bottom clause" itself can not specify "serious circumstances", and the relevant legal provisions and judicial interpretation of our country do not provide for this issue, so how to apply the "serious circumstances" of "bottom clause" in judicial practice, that is, become a judicial difficult problem. In the case of the acquittal of the former king for the purchase of maize without a license, [6] among the constituent elements of the crime of illegal operation, it includes both "violation of state regulations" and "serious circumstances", while the latter is more difficult to balance with the principle of clarity of criminal law. Therefore, in applying the "bottom clause" of the crime of illegal operation, we should pay attention not only to the balance between the "bottom clause" and the principle of clarity of statutory illegal business behavior, but also to the balance between "serious circumstances" and the principle of clarity.

IV. PATH AND STRATEGY: MY OPINION ON THE APPLICATION OF THE LAW OF "BOTTOM CLAUSE" IN PERFECTING THE CRIME OF ILLEGAL OPERATION

Through the above analysis, it is not difficult to see that the frequent modification itself shows that there are many defects in the legislation of illegal business crimes, but at the same time, it is more appropriate to face up to the problem of the legal application of the crime of illegal operation. It is based on such a line of thought, the author intends to improve the judicial application, the use of analogical reasoning methods, judicial interpretation of the law to clean up the legal application of the concept of perfecting the "bottom clause" of illegal business crimes.

A. *Legal Application of the "Bottom Clause" on the Offence of Restricting Illegal Business*

The first is restricting the Crime of Arbitrage. The crime of illegal operation, because of its "bottom clause", which has "other illegal business practices that seriously disturb the market order", makes it naturally become the bottom of the crime of disrupting market order in judicial practice, which is competing with the crime of producing and selling

fake and shoddy commodities and the crime of undermining the order of financial management. In applying the "bottom clause" of the crime of illegal operation, the judicial organs should face up to the legal status of their bottom charges, and at the same time, they should make the necessary restrictions on the scope of application of the bottom charges. At present, some judicial interpretations in China have stipulated that the crime of illegal operation is in cooperation with other laws that undermine the crime of market economy order, that is, the principle of adopting a felony, but there are still some judicial interpretations that do not provide for the competition between the crime of illegal business and the law of related offences, and the judicial organs should combine the specific case To make a correct analysis of the phenomenon of legal competition in fact, if there is no relevant judicial interpretation, we should promptly consult the Supreme People's Court in accordance with the provisions.

The second is restricting the "Around the Bottom Clause". In judicial practice, the legal application of the "bottom clause" of the crime of illegal operation should be restricted. Based on the more expansive interpretation of the "bottom clause" of the crime of illegal operation in judicial interpretation, in the course of judicial practice, this part should be restricted and applied beyond the reasonable scope of expansion interpretation, so as to avoid the "two expansion" caused by expansion interpretation. For example, the 2003 judicial interpretation of obstruction and control of outbreaks of infectious diseases will, during the outbreak of outbreaks of infectious diseases, disrupt the order of market price management and serious circumstances, and stipulate that the crime of illegal operation, when in fact, inflate prices criminal acts in our criminal law sub-rules do not have relevant provisions, This kind of illegal act is more appropriate and more targeted by the price management department to regulate. Because "the act of Illegal business is an act of operation, it can only be prohibited and, in turn, become an illegal business act if the law has a prohibited express provision." [19] Therefore, for such violations, the legal application of the "bottom clause" of the offence of illegal business should be restricted and can be regulated by non-penalty measures.

B. *Appropriate Use of Analogical Reasoning*

Necessity of applying analogical reasoning method: Some scholars believe that analogy is only a simple method of reasoning, that is, the method of analogical reasoning. The so-called analogy reasoning method, is a logical way of thinking, some things in the attribute or nature of the characteristics of the similarity, according to this thing to infer that the other things have the same attributes. [20] The author agrees with this. The so-called principle of analogy interpretation, which is forbidden by the principle of legality of crime and punishment, actually goes beyond the constituent elements of criminal behavior and carries out an expansion interpretation outside the extended boundary of the constituent elements, so that the analogy is far away from the core of the constituent elements and thus prohibited by the principle of legality of crimes. As some

scholars have pointed out, we should avoid the trend of excessive instrumental criminal law, and "the excessive expansion of criminal judicial discretion and criminal law interpretation" [21] will lead to great damage to the legal principle of crime and punishment in our country.

As far as the "bottom clause" of the crime of illegal operation is concerned, the analogy reasoning method is more applicable. First, the legal benefits infringed by the crime of illegal operation are the market transaction order and the market competition environment, and its behavior characteristics have the characteristics of violating state regulations, engaging in commercial business behavior, serious circumstances and so on, so the crime of illegal operation has a high degree of difference with other charges to a certain extent. Therefore, it has the basis of applying analogical reasoning method. Second, there is also a high degree of difference between the three illegal business behaviors enumerated in the crime of illegal business, which is understood by ordinary people in general, and therefore, in the course of the legal application of the "bottom clause" of the crime of illegal operation, the analogy reasoning can be made by reference to the three illegal business behaviors enumerated in the crime of illegal operation. Thus, criminal acts which should be regulated by the crime of illegal business are incorporated into the criminal law system. Of course, the author believes that the application of the bottom clause of the crime of illegal business should not be limited to a certain method of interpretation, but should be combined with various methods of interpretation "comprehensive application."

Analogical reasoning method of "Around the Bottom Clause": First of all, the illegal business behavior to be applied to the "bottom clause" should be measured and compared with the constituent elements and the severity of the legal illegal business behavior. The analogy reasoning method should start from the core and essence of the constituent elements, according to the understanding level of the general population, and can not surpass the ordinary people's understanding of the characteristics of criminal behavior to expand the interpretation. In the analogy reasoning of the "bottom clause" of the crime of illegal operation, we must first make clear the characteristics of the constituent elements of the above three kinds of illegal business acts.

Second, it is necessary to strictly grasp the scope of the analogy of the "bottom clause" and, in applying the "bottom clause", impose strict restrictions on the scope of the legal provisions that "violate the provisions of the State". It is necessary to take the scope of "national regulations" as the scope of application of law, and not to break through the scope of the above-mentioned "state provisions" for analogical reasoning. In the interpretation of analogical reasoning, the object of the crime of "other" illegal business behavior should be explained in combination with administrative regulations. For example, in the case of the alleged illegal operation of Li and Hu, [22] the case was finally applied for by the procuratorial organ to withdraw the indictment, and the court ruled that the withdrawal should be granted after trial. The act of collect borrowing by

the perpetrator cannot be applied as a basis for "violating state regulations". This case is in the application of analogical reasoning method, the wrong application of departmental regulations as a national provision.

Third, analogical reasoning should follow the legal rank. The administrative regulations on the business behavior, the mode of operation of the provisions and the actual business activities of the distance, so has a greater flexibility, and thus more in line with judicial practice, so only in the above administrative regulations, departmental regulations cannot be applied under the premise of analogical reasoning. Such as the relevant administrative regulations, departmental regulations directly on the crime of illegal business "bottom clause" analogical reasoning, easy to lead to the illegal business activities of the boundaries of conflict. Due to the accelerating economic development in all areas of society and the increasing number and variety of departmental regulations, the public and even legal professionals lack knowledge of the relevant contents of departmental regulations. In judicial practice, many administrative penalty cases are incorrectly imported into criminal proceedings by public security organs, resulting in elevation treatment.

C. Liquidation of Legal Provisions Such as Judicial Interpretations

The clean-up of the law refers to the activities of the competent organ (state legislature or authorized organ) to systematically analyze, classify, collate and examine a certain range of normative documents in accordance with certain procedures and in a certain way, and to make waste or modify them, and to redefine their legal effects. [23] In view of the judicial interpretation and other legal provisions of large volume, complex content of the outstanding issues, can be compared with scholars put forward by analogy interpretation and expansion interpretation of the boundaries of the boundary, to distinguish and clean up the relevant legal interpretation, that is, "the specific crime of the purpose of protection as an effective distinction between the expansion of interpretation and interpretation [24]. Therefore, from the top-level design point of view, in view of the illegal business crime "bottom clause" involved in the relevant judicial interpretation and other legal provisions of the comprehensive combing, according to the illegal business crime "bottom clause" of the constituent elements of the screening: first, with the current upper law and the spirit of the law contrary; second, the judicial interpretation of the "two expansion interpretation" of the "bottom clause" should be amended for the legal provisions such as judicial interpretation, and the third is that the content of conflicts between legal provisions, such as judicial interpretation, should be based on the principle of legality of crime and punishment, so as not to break through the National People's Congress and Standing Committee. The legal provisions established by the State Council shall be limited to the confirmation of continued validity after liquidation.

V. CONCLUSION

From the point of view of the balance between the "bottom clause" of the crime of illegal operation and the principle of the clarity of criminal law, a deep study of the relationship between the two can find a solution to the judicial dilemma of the application of the law of illegal business crime in China. Therefore, we cannot claim the principle of absolute clarity, nor abolish the crime of illegal operation altogether, but should balance the relationship between the two and limit the expansibility of its "bottom clause". It is thought that the legal application of the bottom clause of the crime of illegal operation should be perfected from three aspects, first, the "bottom clause" of the crime of illegal operation and the law application of bottom should be restricted, and secondly, the analogy reasoning method should be used appropriately, and the legal rank should be followed. With the continuous strengthening of the policy support of private enterprises in China, China's private enterprises will take various measures to enhance innovation and financing ability in the critical period of transformation and upgrading, and with it, it is the applicable boundary judgment between the innovative profit model of private enterprises and the "bottom clause" of illegal business crime. And that will be one of the directions of our future research.

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