

An Empirical Analysis of the Relationship Between the Uncertainty of Chinese Economic Criminal Law and the Crime of Private Entrepreneurs

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Abstract

Chinese economic criminal law embraces the blank description of crime and the special forms of normative constituent elements and the distribution of miscellaneous provisions, which has violated the clarity principle of the criminal law and is contrary to the scientific legislative guidelines. The results of the study show that not all unclear provisions will lead to the increase in the criminal risk of Chinese private entrepreneurs, that the simple blank description of crime will not lead to a sharp increase in the related crimes and that the special form of the normative constituent elements and miscellaneous provisions have greatly increased the judicial application of related crimes to private entrepreneurs.

Key words: Blank description of crime; Normative constituent elements; Miscellaneous provisions; Private entrepreneur

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INTRODUCTION

The clarity principle of criminal law has a significant impact on judicial activities as the substantive aspect of the law of crimes. The degree of clarity principle of the criminal law should be combined with whether the average person can predict the consequences of his

actions, whether the legislators do their “maximum possible clarity” obligations, and whether the judicial person has a clear three-point comprehensive judgment through judicial interpretation. Different from the fact that foreign countries incorporate economic crime into the subsidiary criminal law, Chinese criminal legislation adopts a unitary system and attempts to incorporate all criminal acts into the criminal code, which makes it difficult to reconcile the contradiction between the clarity and stability of the law. The legislator finally chooses to sacrifice the clarity and keep the stability and security, which is the reason why the clarity of economic criminal law most deserves discussing (Yang, 2010, p.59).

Chinese economic criminal law mainly refers to the crime of undermining the socialist market economic order. Its crimes account for about a quarter of the total number of criminal law crimes in China, and the relevant legislative interpretations, judicial interpretations and academic explanations are complicated so as to create obstacles to examining the clarity of economic criminal law. According to the academic status quo, this article will focus on the blank description of crime, normative constituent elements and the clarification of miscellaneous provisions to help the criminal law system control the market economy order.

1. UNCLEAR CHARACTERIZATION IN CHINESE ECONOMIC CRIMINAL LAW

1.1 Blank Description of Crime

The blank description of crime means that the criminal law provisions need to refer to other laws and regulations to determine the specific criminal constitutive elements. It is mainly concentrated on statutory criminals. The third chapter of the Criminal Law, undermining the socialist market economic order, also known as the economic criminal law, is statutory criminals (Liu, 2001, pp.40-50).

Although China's criminal law widely uses the description of "violation of regulations" and "violation of laws and regulations", it is not a blank description of crime to use "violation of national regulations" or "violation of laws and regulations". There are also quite a few parts that suggest that there are illegal reasons for obstruction, emphasizing the illegal nature of the behavior, etc. (Zhang, 2011, pp.533-564), and the idioms of the relevant expressions; nor is it that all the guilty statements of the blank description of crime must be "violation...provisions", "violation...regulations», such as the crime of counterfeiting registered trademarks, smuggling crimes, etc. Therefore, judging whether a provision really belongs to a blank description of crime cannot be based only on the form of a stipulation, but should make a substantive judgment on the legal provisions, and whether it needs to refer to other laws and regulations to determine the type of behavior of the constituent elements of the crime. At the same time, it is necessary to tell the blank description of crime from the citation description of crime. (Liu, 2002, p.44)

At present, although many scholars have made statistics and analysis on the blank description of crime in the crime of undermining the socialist market economic order, their statistical results are still inconsistent. Some commentators have drawn a total of nine blank descriptions of crime against the socialist market economic order. (Lv & Yang, 2009, pp.40-49) Some commentators have compiled 25 crimes, Hei Jingjie (2016, pp.93-105) and other commentators have compiled 21 crimes (Wang, 2006, p.3).

The author has found out that Articles 151, 152, 153, 159, 174, 179, 185, 186, 189, 190, 208, 216, 225, 228 of China's Economic Criminal Law involve a total of 22 counts containing blank description of crime, while the total number of crimes containing blank description of crime in China's Criminal Law is 63, and the proportion of blank description of crime in economic criminal law reaches 34.92%.

1.2 Special Circumstances of Normative Constituent Elements

The normative constituent element refers to the constituent elements of the scope of the word that must be judged by the judge's normative and evaluated value judgment. Although inevitable in the criminal law norm, the normative constituent elements are not worthy from the perspective of the legality of the crime. (Otani, 2008, pp.120-121) Therefore, some scholars pointed out that when adopting the normative constituent elements, it is necessary to take corresponding measures to limit the scope of the semantic meaning of the normative constituent elements. According to this, the scholar put forward four principles and four opinions to implement the clarification of the normative constituent elements, and that there is a priority between the elements of the

description of the constituent elements, the evaluation elements of the law, the evaluation elements of the rule of thumb, and the evaluation elements of the society. (Zhang, 2007, pp.76-93) The author agrees with this point of view and believes that among the three elements of the normative constituent elements, the legal evaluation elements are more specific in the case of clear provisions of relevant laws and regulations, such as "fake drugs" and "inferior drugs", and the rules of thumb. The evaluation factors and social evaluation factors are relatively unclear, and it is considered that in the crime of destroying the socialist market economic order, the normative constituent elements are relatively low in the following two criminal laws:

The first form is the situation of statutory criminals that are illegally targeted. Non-statutory purposes offence refers to the sub-rule clause which does not stipulate the special purpose of the crime and requires the judge to supplement according to the principles of criminal law, such as fraud, theft, robbery. (Liu, 2002, pp.47-59) Because the purpose of the crime itself belongs to the constituent elements of the norm, the illegal purpose is regarded as the unconstituted element of the essential elements, and it should belong to the category of the constituent elements of the norm. However, not all illegal purposes will reduce the clarity of criminal law. For example, natural criminals are more common in life. Generally, nationals can make general predictions about the illegal purpose of natural criminals based on common sense of life and social ethics. The criminal law regulates that there is no crime. The purpose of making provisions will not affect the national understanding of the criminal law norms. On the contrary, when a statutory offender is identified, the violation is an administrative norm confirmed by the criminal law. So the social rheology is high and the ethical color is low, and it requires relatively complete legal knowledge. (Zhang et al., 2011, p.159) The illegal purpose of statutory offenders cannot be predicted by ordinary nationals in most cases, and its criminal law is less clear. In the crime of destroying the socialist market economic order, the crime of falsely invoking the special invoice for value-added tax, defrauding the export tax rebate, and deducting the tax invoice is a statutory criminal who is illegally targeted, and requires the purpose of defrauding the tax deduction.

The second form is that the description of the crime is purely based on the elements of the normative constituent elements, the non-narrative elements of the elements, the examples of items and the interpretation of the normative specifications. The normative constituent elements need the judge's supplementary judgment because it has the diversity of experience and value, and the scope of semantic meaning is open. It is not as stable and clear as the elements of the description. Therefore, in the case of adopting normative constituent elements, it is necessary to use the elements of the descriptive constituent elements,

the example items and the explanatory norms to limit the scope of the semantics, and avoid the arbitrariness of the judges. Purely adopting the normative elements of the elements, indicating that the legislators do not have the greatest clarity obligations, and the general nationals are not likely to accurately divide the boundaries between crime and non-crime. In the crime of undermining the socialist market economic order, the crimes that meet this condition include the crime of illegally absorbing public deposits, the crime of fund-raising fraud, and the crime of virtual invoicing.

1.3 Miscellaneous Provisions

Whether miscellaneous provisions will conflict with the principle of criminal law clarity is still to be debated in the academic world. The author believes that within the framework of discussing the principle of the clarity of criminal law, the terms of the stipulation only refer to the type of behavior within the elements of the crime, and do not include the object of action, the subject of the act, and the plot of behavior, because the criminal law tends to be much clearer. Qualification and high degree of clarity of criminal law will not create barriers to understanding for the public. The principle of clarity in criminal law is relative. It can tolerate the existence of a few sub-claims, but it must not allow all provisions to contain a clause. Moreover, the clarity of criminal law includes two aspects of whether the average person can predict the consequences of his actions and whether the legislators do their "maximum possible clarity" obligations. From the perspective of the legislative experience of Western countries, the terms of the law can be tried by the efforts of legislators. To reduce the number of terms of miscellaneous provisions, those who believe that the terms of the slogan will not have an impact on the clarity of the criminal law are precisely the degree of abuse of the relative clarity. The author believes that the widespread existence of the provisions in the criminal law of China will reduce the clarity of the criminal law. We should try to reduce the number of clauses and improve the quality of the terms.

According to statistics, there are 23 crimes in the crime of destroying the socialist market economic order, including the type of behavior. There are 53 criminal charges in all of the provisions of the criminal law, and the crimes in the economic criminal law accounted for 43.4%. Even if the statistics on the number of miscellaneous provisions in the criminal law are formally counted, whether the constituent elements of the basic offense contain the elements of the elements of "other" and "etc." as the standard, and the crime of destroying the order of the socialist market economy is counted. A total of 51 crimes included the miscellaneous provisions, accounting for the highest proportion of the total number of criminal law, reaching 41.5%. Followed by the crime of hampering social management order, with 29 counts,

accounting for 23.6%. It can be seen that the stipulations of the crime of undermining the socialist market economic order are the most of the various chapters of the criminal law, accounting for the largest proportion and the highest ambiguity.

2. AN EMPIRICAL INVESTIGATION INTO THE CRIME OF PRIVATE ENTREPRENEURS BREAKING THE UNCLEAR CLAUSES IN ECONOMIC CRIMINAL LAW

According to the statistics of the China Entrepreneur Crime Prevention Research Center of Beijing Normal University, in 2014, there are 677 private entrepreneurs who committed 26 crimes of undermining the socialist market economic order, accounting for 50.98% of the total number of crimes committed. Among them, the crimes related to the relatively unclear criminal law are mainly false special VAT invoices, fraudulent use of export tax rebates, tax deductions for tax invoices 109 times, illegal absorption of public deposits 64 times, contract fraud 40 times, smuggling of ordinary goods 18 times, fund raising 14 crimes of fraud, 13 false capitals of registered capital, 12 false capital contributions, 12 capital crimes, 10 illegal business crimes, 3 other crimes, and 63.03% of the total number of private entrepreneurs who committed crimes against the socialist market economy.

In 2015, 403 private entrepreneurs committed 32 crimes of undermining the socialist market economic order, accounting for 53.66% of the total number of private entrepreneurs and 61.54% of the total number of criminals, including the relatively unclear criminal law. There are 104 times illegally absorbing public deposits, falsely opening special invoices for value-added tax, 95 times for defrauding export tax rebates, tax deductible invoices, 52 times for contract fraud, 12 times for fund-raising fraud, 9 times for illegal business crimes, 9 times for illegal business, 5 times that falsely funded and escaping capital, and 10 times for other crimes, accounting for 71.22% of the total number of private entrepreneurs who committed the crime of destroying socialist market economic order.

In 2016, there are 1007 private entrepreneurs who committed 39 crimes of undermining the socialist market economic order, accounting for 55.7% of the total number of criminal offences. The crimes involving relatively unclear criminal law are mainly false invoices for VAT. 279 times for defrauded the export tax rebate, mortgage tax invoice, 232 times for illegally absorbed public deposits, 107 times for contract fraud, 81 times for muddled ordinary goods and articles, 45 times for fundraising fraud, 20 times for illegal business, false registration of registered capital for 4 crimes and 14 other

crimes, accounting for 77.66% of the total number of crimes committed by private entrepreneurs in breaking the social socialist market economic order.

In 2017, there are 1,341 private entrepreneurs who committed 43 crimes against the socialist market economic order, accounting for 57.33% of the total number of crimes. Among of them, the crimes related to the relatively unclear criminal law are mainly smuggling waste for 2 times, smuggling countries banned import and export of goods and articles for 8 times, smuggling ordinary goods and articles for 41 times, illegal disclosure of important information for 2 times, false capital contribution. Abolishing for 3 times, illegally absorbing 414 public deposits, illegally issuing loans for 2 times, fundraising fraud for 68 times, loan fraud for 6 times, fraudulent export tax rebate for times, false value-added tax invoices, used for fraudulent Export tax rebate, tax deductible tax invoice for 334 times, virtual invoicing for 2 times, purchase of forged VAT special invoice for 3 times, infringement of commercial secrets for 2 times, contract fraud for 133 times, illegal business for 30 times, illegal transfer The crime of reselling land use rights was twice, accounting for 80.62% of the total number of crimes committed by private entrepreneurs in breaking the socialist market economic order.

It can be seen that in the past four years, private entrepreneurs have violated the crime of undermining the socialist market economic order and have been stable at about 50% of the total number of crimes committed. In the crime of breaking the socialist market economic order, the criminal law is relatively unclear. The number of people involved in the crime has soared from 63.03% to 80.62%, showing a trend of increasing year after year.

CONCLUSION

Through the above statistics, it can be found that in the case of clear reference laws and regulations, the simple blank description of crime does not cause judicial expansion of ambiguous criminal law provisions, such as smuggling crimes. The reference regulations for the elements of "smuggling" are mainly concentrated in The Customs Law, in its Articles 82 and 83, divides it into direct smuggling and indirect smuggling. The indirect smuggling regulations are completely coincident with the 155th article of the Criminal Law, and the direct smuggling uses blank description of crime and miscellaneous provisions. The terms are combined in a way that is stipulated, but even so, the boundaries of smuggling can still be clarified through interpretations such as system interpretation and purpose interpretation. For example, the Article 86 of the Customs Law provides for the general violation of the Customs Law. The difference between it and the smuggling behavior is that the general illegal act only requires the offender to

evade customs supervision, while the smuggling requires Smugglers evade customs supervision and avoid customs duties, and the degree of violation of the socialist market economic order is different. It also can be confirmed in judicial practice. In the crime of smuggling ordinary goods and articles that there are 81 times private entrepreneurs who violated in 2016, they all evaded customs supervision and avoided customs duties. In addition to legal business crimes and smuggling crimes, private entrepreneurs also violated the crimes of including blanks description, such as false capital contribution, evasion of capital contribution for 2 times, and illegal loan law for once. It can be seen that the blank description of crime does not inevitably lead to a significant increase in the criminal risk of private entrepreneurs.

Based on the above findings, we can conclude that only the use of blank description of crime does not increase the criminal risk of private entrepreneurs. The special circumstances of the essential elements and normative elements of the elements will lead to an increase in the frequency of judicial application of related offences. For private entrepreneurs, the risk of falsely opening special VAT invoices, defrauding export tax rebates, and mortgage tax invoices stems from the high degree of concealment of illegally targeted offenders, the crime of illegally absorbing public deposits, and the crime of fund-raising fraud. There are institutional reasons such as financial management standards and formal financing channels, and the criminal risk of contract fraud and illegal business crimes mainly comes from the generality of the terms of the pocket. In the face of unclear criminal law norms, there are misunderstandings in the interpretation or application of the judicial organs. The ambiguity of abuse of the criminal law norms is even contrary to the content of the upper-level law, which leads to the violation of the socialist market economic order. The frequency of unclear crimes accounts for more than 70% of the total frequency. It is not clear that the expansion of criminal law provisions in judicial practice applies, which exposes private entrepreneurs to huge criminal risks. It is clearly contrary to the direction of market reform that allows the market to play a decisive role in resource allocation.

REFERENCES

- Hei, J. J. (2016). The degree of observance of the principle of clarity of criminal law - the measurement index of the principle of clarity of criminal law and the investigation of facts. *Politics and Law*, (11), 93-105.
- Liu, S. D. (2001). Question of Blank Description of Crime in the Principle of a Legally Prescribed Punishment for a Crime. *Law Research*, (2), 40-50.
- Liu, S. D. (2002). *Deconstruction of crimes - The unfolding of criminal law interpretation* (1st ed., p.44). Law Press.
- Liu, Y. H. (2002). On the structure and application of the

- constitutive elements of illegal targeted offenders. *Law Science*, (5), 47-59.
- LV, T., & Yang, H. N. (2009). Combating and dividing the crime of destroying the socialist market economic order. *Politics and Law*, (8), 40-49.
- Otani (2008). *General principles of criminal law* (2nd ed., pp. 120-121), In H. Li (Trans), China Renmin University Press.
- Wang, H. L. (2006). *On the crime of blankness* (Master's Thesis). Anhui University.
- Yang, J. B. (2010). *Study on the clarity principle of criminal law* (1st ed., p.59). People's Public Security University Press.
- Zhang, M. K. (2007). Normative constituent elements. *Law Research*, (6), 76-93.
- Zhang, M. K. (2011). *Principles of interpretation of criminal law* (Part 2, 2nd ed., pp.533-564). Renmin University of China Press.
- Zhang, Y. H., & Wu, Z. X., et al. (Eds.). (2011). *Special topics in criminology* (1st ed., p.159), Beijing Normal University Press.