On the Judicial Dispute and Perfection of “Illegal Possession Purpose” in the Crime of Fund-raising Fraud

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Abstract

To determine whether the perpetrator has committed the crime of fundraising fraud, the main focus is on examining whether they had the “intent of unlawful appropriation.” The determination of whether the fundraiser has the “purpose of illegal possession” is often inferred through judicial interpretation, symposium minutes, and other pertinent judicial documents. However, judicial presumption has its limitations. In practice, there are some disputes about the circumstances under which the perpetrator is presumed to have the “intent of illegal possession”. For example, can the objective inability to return identify the perpetrator with an “illegal possession purpose”? Does “borrowing the new to return the old” imply an “illegal possession purpose”? How should we understand the concept of “profligate”? This paper mainly discusses three controversial points and proposes some practical suggestions regarding the presumption process in criminal law. It advocates following the modest requirements of criminal law, rejecting the theory of harm only, adhering to a comprehensive judgment of the entire case, and allowing the use of counterevidence to challenge the presumption. The aim is to offer theoretical guidance for judicial practice.

Keywords

Crime of fund-raising fraud, The purpose of illegal possession, Judicial presumption

As the subjective component of the crime of fund-raising fraud, “illegal possession purpose” is the key to distinguishing it from the crime of illegally absorbing public deposits. The subjective purpose lies deep in the heart of the perpetrator and is not easy to detect, which brings certain difficulties to the judicial organs when handling cases (Liu Wei, 2021). Therefore, the judicial presumption has become the main method to determine whether the perpetrator has an “illegal possession purpose”. In 2001, the Supreme People's Court issued the Summary of the National Court's Work Symposium on the Trial of Financial Crime Cases (hereinafter referred to as the Summary), in 2010, the Supreme People's Court issued the Supreme People's Court on Several Issues concerning the Specific Application of Law in the Trial of Criminal Cases of Illegal fund-raising (hereinafter referred to as the Interpretation), and in 2017, the Supreme People's Procuratorate on Handling Internet-related finance The judicial interpretation and the minutes of the Meeting on Issues related to criminal Cases (hereinafter referred to as the 2017 Minutes) have stipulated the identification of the “purpose of illegal possession”. However, there are still many differences in the standard of presumption in judicial practice. Therefore, this paper studies the presumption dispute of “illegal possession purpose" in judicial practice and gives corresponding suggestions to improve it.
1. Fund-raising fraud crime "illegal possession purpose" basic theory explanation

There are several viewpoints about "the purpose of illegal possession" in the Chinese criminal law circle: (1) illegal profit theory. This view holds that "the purpose of illegal possession" is to obtain property interests for oneself or others, and its subjective elements are not for the purpose of illegal possession, but for the purpose of illegal profit (Liang Yiru, 2021). (2) Doctrine of intentional possession. According to criminal law scholars who hold this view, the purpose of illegal possession is to indicate that the property is known to be public or other people's property, with the intention of illegally transferring it to oneself or a third party (Research Group of Beijing Chaoyang District People's Procuratorate & Zhang Zhaoxia, 2021). (3) Illegal possession. As a general viewpoint in the criminal law circle of our country, this viewpoint holds that illegal possession refers to illegal possession in the sense of civil and commercial law. Its "possession" in criminal law should be interpreted to be expanded, not only as one of the property rights in civil law but also including the possession, use, income, and disposal of property rights, so as to completely exclude the victim's control of property (Zhang Yuan & Yu Xiaohang, 2020).

2. The judicial determination of "illegal possession purpose" dispute

2.1 Whether the objective inability to return has the "purpose of illegal possession"

In judicial practice, it is often assumed that the perpetrator's objective cannot be returned and that the perpetrator has an "illegal possession purpose". In a large number of cases, the court often regards the objective inability to return as the perpetrator knowing that he does not have the ability to repay. Under normal circumstances, when the fund-raiser breaks the capital chain and is unable to repay the investor, the judicial organ will intervene in this case due to the investor's report. Since the funds that cannot be returned to the investor occur after the fundraising, once the investor's losses are caused, the judicial organ will intervene in this case. It can be directly presumed that the fundraiser does not have the ability to repay the money when it raises the funds. This kind of method is easy to cause objective imputation, which is not desirable.

For example, in the Xu fund-raising fraud case1, Xu, as the chairman of Zhilong Company, uses the online "P2P" investment platform and the way of signing offline lending contracts, publicizes through the Internet and other ways, and promises high interest to absorb funds from the public. The raised funds were used for the company's daily operating expenses and to repay investors' interest. Later, due to the failure of target review and risk management and control, the platform suffered losses, resulting in a total of 79.51 million yuan for investors. Xu and his defenders believe that Xu used a large amount of funds raised in the smart finance platform for the normal business activities of the company, and the platform's financial products are real and guaranteed, if some projects can be disposed of, its profits are enough to repay investors' losses, so it does not subjectively have the purpose of illegal possession, and does not constitute a crime of fund-raising fraud. The court held that Xu used high interest as bait to entice him to sign a loan contract and illegally raised funds from an unspecified majority of people in society through the Internet and other means. The funds raised were mainly used for company operations and high-interest payments, which resulted in the inability to return the funds raised by investors at the time of the crime, resulting in huge losses for the victims. Xu Mou's illegal fund-raising by fraud method and subjectively has the purpose of illegal possession, its behavior has constituted the crime of fund-raising fraud. Similar to this case, there are many similar cases in which the court refuted with brief reasons, which indicates that there are certain problems in the court's determination of the subjective purpose of the perpetrator. If the provisions of judicial interpretation are only applied mechanically in practice, it is difficult to achieve a fair judgment.

2.2 Whether "borrowing the new and returning the old" has the "purpose of illegal possession"

The Interpretation does not directly list "borrowing the new and returning the old" as one of the seven cases presumed to have an "illegal possession purpose", the author believes that "borrowing the new and returning the old" type of illegal fund-raising behavior should be discussed according to the situation when determining whether it has "illegal possession purpose", and can not be generalized. If the perpetrator does not have the repayment ability, he will fabricate the business project, package himself, and convey to investors the appearance of having a certain economic strength, so as to use the money of new investors to repay the principal and interest to old investors, and so on and

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1 Guangdong Higher People's Court (2020) No. 519, 520, 521.
on, when finally unable to raise new funds, resulting in the failure to return the principal and interest to investors. It can be determined that the fundraiser had an "illegal possession purpose", and was finally convicted and punished for fund-raising fraud. If the perpetrator uses part of the illegally raised funds to repay old debts, and the other part is used for more urgent business projects, and then fails to return the principal and interest to the investor due to commercial risks and other reasons, it should be more careful when determining that it subjectively has the "purpose of illegal possession". If there is illegal behavior in the process of fund-raising, it is more appropriate to identify it as the crime of illegally absorbing public deposits.

In the case of Wang's fund-raising fraud, Wang claimed to be a bank employee and claimed that the loan interest was high and there was no risk, and entered into a loan contract with many fund-raising participants for reverse lending and repayment of fund-raising participants, and after the court found out that Wang's illegal fund-raising, most of the fund-raising funds were used to return the loans of fund-raising participants and pay high interest. Making up for the huge deficit caused by previous borrowing is a typical case of "robbing Peter to pay Paul" and borrowing new debt to repay old debts. And Wang's use of fund-raising funds is an improper business behavior, which shows that once Wang's capital chain is broken, it will inevitably cause huge economic losses. To this end, Wang Mou knows that it does not have the corresponding ability to return funds and belongs to the "Interpretation" to use the funds for illegal and criminal activities, which should be identified as having "illegal possession purpose", His defenders' defense that "borrowing the new to repay the old" is not one of the seven circumstances presumed in the Interpretation and that it was not used for squandering and absconding with the money without the "purpose of unlawful possession" is clearly not valid.

2.3 How to grasp the identification of "profligacy"

In judicial practice, there are some disputes regarding the identification of "wanton consumption". For example, whether the perpetrator used the proceeds of illegal fund-raising not for business activities but for the purchase of goods such as real estate, automobiles, antique calligraphy, and painting or for investment is "wanton consumption of capital collection" in the Interpretation. According to the author, "profligacy" should be understood as the perpetrator raising funds for large unreasonable expenditures. For example, without risk assessment, the collected funds are used to invest in a large number of stocks, funds, etc., or are used to purchase luxury cars and luxury goods that cannot be returned, which can be identified as "profligacy" in the Interpretation. The fund-raiser will use the company or the company entrusted individuals in the name of the purchase of goods that are not easy to depreciate under normal circumstances, such as real estate, gold, and other commodities, for normal production and business activities, should not be identified as "profligate."

In the case of the crime of Fang's illegal absorption of public deposits, Fang's illegal raising of funds used part of the proceeds to purchase real estate, automobiles, and other commodities, and the court of first instance held that he did not use the proceeds for production and business activities and that he had "illegal possession purposes"; while the court of second instance held that Fang's purchase of real estate and automobiles was a duty act on behalf of the company. It belongs to the normal business activities within the scope of business, and most of the collected funds are returned to the investors, so it can not be presumed that it subjectively has the "purpose of illegal possession", and eventually the crime of fund-raising fraud is changed to the crime of illegally absorbing public deposits.

3. "illegal possession purpose" identification and improvement suggestions

3.1 Comply with the modest requirements of the criminal law in the process of presumption

When determining whether the perpetrator has the "purpose of illegal possession", it is generally necessary to consider whether it has a punishment and the punishment. For the punishment, we should consider whether it involves collective legal interests, social legal interests, personal legal interests, and other legal interests, whether it is significant, and whether it must be protected by the crime of fund-raising fraud. For punishment, the main consideration is whether legal interests can be protected by other laws when they are infringed, and criminal law can only be protected when civil laws and administrative regulations cannot be protected. Criminal law, as the last line of defense for protection interests, can only be used when other laws cannot be adjusted, which is also the modest requirement of

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2 Hebei High People's Court (2020) No. 82, Jixendong.
criminal law. Specifically for the determination of "illegal possession purpose", the judicial presumption is mainly based on the basic facts of the case, and the use of certain rules to deduce the presumption of facts, in this process, should also pay attention to the evaluation of punishment and punishment (Xing Hongxia & Tian Ran, 2019).

3.2 Reject the theory of only damaging results and adhere to the comprehensive judgment of the whole case

In judicial practice, the most considered factors for the presumption of "illegal possession purpose" include the use of the funds, whether the actor has the ability to make profits, whether the principal and interest are returned, etc., but the subjective willingness of the actor to return the principal and interest and make up for the damage of the participants is rarely considered. To this end, once the perpetrator in the process of operation of the fund break, a time can not return the principal and interest of the participants, it is very likely to be filed and investigated, presumed to have the subjective "illegal possession purpose." This kind of objective imputing method of consequence theory is very common in practice. Although the presumption of whether the perpetrator subjectively has an "illegal possession purpose" requires certain basic facts after the fact, it is easy to lead to the misunderstanding of heavy punishment in practice, which presumes that the behavior does not have the subjective intention of "illegal possession purpose". It may even raise some civil economic disputes to criminal cases, thus making the criminal law too instrumentalist.

Judicial organs should adhere to a comprehensive judgment on whether a case constitutes a crime of fund-raising fraud. The identification of crime requires strict logical reasoning and argumentation. The constitution of any crime should deal with the relationship between form and substance, accusation and defense, objective and subjective, static and dynamic, and norm and experience (Xing Hongxia & Tian Ran, 2019). The 2017 "Summary" also pointed out that the purpose of illegal possession and the use of fraud methods to illegally raise funds are the essential characteristics of the crime of fund-raising fraud. Whether it has the purpose of illegal possession is the key element to distinguish the crime of illegally absorbing public deposits and the crime of fund-raising fraud, which should focus on the authenticity of financing projects, the whereabouts of funds, the ability to return and other facts to make a comprehensive judgment. In practice, the fund-raising crime presents the characteristics of a large amount of money involved, a large number of people involved, complex fund flow, etc., which puts forward higher requirements for judicial workers, and various factors should be considered when determining whether the perpetrator has "illegal possession purpose". In the end, if the perpetrator can not return the serious consequences of the illegal fund-raising, then the use of the funds, and the direction of the key factors need to be examined.

3.3 To allow the use of counterevidence to overturn the presumption

The counterevidence of "illegal possession purpose" should focus on the corresponding basic facts, if there are no basic facts, there are no presumptive facts, and naturally, there is no counterevidence (Zhou Guangquan, 2010). For example, for those who cannot be returned due to profligacy, a comprehensive judgment should be made according to the specific situation of the perpetrator, so as to have a substantive understanding of profligacy. If the perpetrator has strong assets and the amount of funds raised is particularly large, it should be treated with caution when it is identified as "illegal possession purpose" when it purchases real estate, luxury cars, luxury goods, and other commodities. The personal consumption and investment habits of the fundraiser may be different from that of ordinary people, and the purchase of real estate and luxury cars may be an investment behavior (Liao Qizhi, 2017). For instance, in cases involving withdrawal, fund transfer, property concealment, and failure to return funds, where funds collected for a specific project are diverted to other company projects, it is essential to assess whether there was an intention to withdraw and transfer funds based on the perpetrator's financial situation at the time of fundraising and the fund utilization. In addition, for enterprises that are unable to repay the principal and interest to investors, judicial authorities can provide them with some breathing room and the chance to transform losses into gains.

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