

The legal structure of the meaning of the term "illegal" in mainland China in the context of the rule of law

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Abstract: It is an indisputable fact that the word "illegal" is often used in our legal norms. However, the word "illegal" is not appropriate to be included in the legal norms, because such use will affect or even hinder the construction of the rule of law in China. The specific reasons are twofold: First, the content of "illegal" contains the content of the law does not adjust the content of the content of the law does not belong to the regulation of the situation in the law and found to be illegal, which is clearly contrary to the spirit of the rule of law, because the law does not regulate the situation cannot be placed under the law, so as to avoid the impact of the generalization of the law; Second, the law illegal" in the norm refers to the law provides for the negative evaluation of an illegal situation, but the fact that the provisions of the illegal situation does not exist, then "illegal" refers to the content of the "fictional "norms, the forced application of the law will also appear the adverse effects of the generalized view, resulting in some of the wrong cases, seriously undermining the authority of the rule of law.

The formation and even maturity of the rule of law thinking is conducive to the construction of the rule of law system. However, under the current situation in China, some legal norms are vague and unclear, leading to serious differences in the application of the law, which in turn affects the resolution of cases. The vague and abstract content of legal norms is not operable^①, affecting the application of the law in individual cases, which is not conducive to the construction and unification of the rule of law system. This is typical of the problem of the meaning of the word "illegal" in legal norms. This problem seriously affects the establishment of the rule of law in China, blurs people's concept of the rule of law, and is not conducive to the construction of a society based on the rule of law.

1. The concept of the word "illegal" in the context of the rule of law

The word "illegal" means the same as it is interpreted as "unlawful" in the Chinese dictionary, which means that it does not conform to the provisions of the positive evaluation of the law, which can also be expressed as unlawfulness, in other words, it means the situation of unlawfulness and the law does not provide for two situations. In the Yuanzhao Anglo American Law Dictionary, the corresponding English words for "illegal" are "unlawful" and "illegal".^②From the dictionary, we can

^① The Legislative Law of the People's Republic of China clearly requires that "legal norms shall be clear, specific, relevant and enforceable", and therefore legal norms need to be clear and unambiguous.

^② "Unlawful" is interpreted as "illegal, mainly involving contract behavior. Although it is not illegal (i.e. actively prohibited), it is not allowed by the law and cannot be used as the basis of legal rights, or it is invalid in law because it is immoral or violates public policy. For example, a contract imposing restrictions on a marriage or transaction may be held to be invalid because it is illegal. As a general rule, unlawful agreements are unenforceable". See Bo Xue, editor in chief: English-Chinese Dictionary Of Anglo-American Law, Law Press, 2003, p. 1384.

"illegal" has been interpreted as: "unlawful; illegal; unlawful; against the rules. The term is widely used, and the semantics and responsibilities are not very clear. It can refer either to acts directly prohibited by law, such as murder, or to acts that violate legal obligations, etc., and are not compellable." Also in the dictionary, illegal acts is explained: "A universally applicable, all-encompassing term for acts that are suppressed. It is not appropriate to use in injunctions." See Bo Xue, editor in chief: English-Chinese Dictionary Of Anglo-American Law, Law Press, 2003, p. 659.

learn that "unlawful" involves the illegality of the effect, which is the same as the situation not provided for in the Chinese context, while "illegal" involves the illegality of the content, which is the same as the illegal situation in the Chinese context. However, the meaning of "illegal" is not very clear and should not be used in legal provisions, which is consistent with the view of the *Yuanzhao Anglo American Law Dictionary*.

The term "illegality" is closely associated with the behavior of people. The consequences of illegality (i.e., illegitimacy) are the following: first, the act is punished for violating the mandatory provisions of the law; second, the act is not recognized and protected by the law, and there is no way to generate rights and legitimate interests, and the resulting damage can only be remedied by the principle of legitimacy. The remedy about the principle of justification is also reflected in the processing of cases, such as substantive judgment based on the measurement of interests, value orientation, etc. to resolve.^①In China's legislative norms, the Legislative Technical Specification (for Trial Implementation) (No. 62 [2009]) formulated by the Legislative Affairs Commission of the Standing Committee of the National People's Congress also explains the term "illegal" in detail,^②so that: "illegal" in most cases means illegal in most cases, but more often used to refer to the situation without legal basis. It is clear from the NPC's legislative specifications that the term "illegal" is used in two situations: illegal and not provided for by legal norms. Its and "legal" is a pair of contradictory concepts, they belong to the relationship of either/or, the opposite of "legal" is "illegal", "illegal" The opposite of "lawful" is "unlawful", and "unlawful" is premised on the existence of "lawful", as stipulated in Article 52 of the original contract law, and the civil code that has come into force is also meant to do so. In this regard, the civil law system is consistent, such as the German scholar Kantorowicz believes that "illegal" and "legal" is also an either/or relationship, which is mainly for the evaluation of people's behavior.^{[2](P43)}

From the perspective of legal logic, as mentioned earlier, the term "illegal" also refers to the absence of legal norms. On the whole, the meaning of the word can be understood as not the content of positive evaluation of law, including the negative evaluation of law (illegal), but also the non evaluation and non evaluation of law. It is opposite to "legality" and is a concept of contradiction, which is consistent with the above view. What is easy to confuse here are the two legal terms of illegality and illegality. There are few scholars involved in the research on illegality. Some scholars equate illegality with illegal behavior ^{[3](P30)}, while others believe that illegality is the upper concept of illegality^[4], and the latter view is also held in this article.

Therefore, the complete concept of the term "illegal" is the violation of the mandatory provisions of the law and the situations not explicitly provided for by the law. The scope of this meaning can be summarized in two aspects: the negative evaluation of the law, i.e., the behavior to be sanctioned by the law; and the non-evaluation of the law, i.e., the behavior not provided by the law. Because of the existence of these two situations, law enforcement and judicial adjudicators often apply the law to the case, the word "illegal" in the legal norms using a narrow "illegal" situation, that is, the legal norms involving The word "illegal" is recognized as "illegal" in all cases, which is the first situation of improper application of the word "illegal"; the word "illegal This is the first situation where the word "illegal" is improperly applied; the word "illegal" is not explicitly stated in the Chinese "law", resulting in an incomplete legal system, which is the second situation where the word "illegal" is improperly applied in legislation. This is the second situation of improper application of the word "illegal" in the legislation.

^① In the specific legal norms, the violation of the law are more detailed provisions, which is conducive to the application of the law. Although the law has made more explicit provisions for illegal acts, due to the wide range of social relations and the complexity of interest relations, in addition to other explicit provisions, the law for illegal acts can not take an exhaustive enumeration of provisions, and there is more space can be based on the weighing of interests, value orientation, etc., so there is no legal basis for the act, mainly based on the substantive justification of the act to judge. See the Supreme People's Court's judgment in the case of North Founder v. High Art Software Infringement.

^② In the Technical Specification for Legislation (for Trial Implementation) (II) formulated by the Legislative Affairs Commission of the Standing Committee of the National People's Congress (LAC) (LAC No. 62 [2009]), it is determined that: "illegal" is usually used to violate the mandatory norms of law; "unlawful" is also illegal in general, but The main emphasis is on conduct that lacks a legal basis.

2. Question one: The situation of non legal adjustment is included in the illegal coverage

The original meaning of "illegality" in the norms of law is illegal and the law does not adjust, so the content that the law does not adjust should not and should not be included in the legal norms. In this regard, the use of the word "illegal" has expanded the legal role and scope of application, expanding the field of adjustment of law. The meaning of the word "illegal" is generally understood in practice to exclude situations not stipulated in the law, while the legal meaning of the word "illegal" in legal norms is obviously larger than the scope of understanding in practice. For example, there is no clear legal definition of the illegal property involved in the "confiscation of illegal property" in the administrative punishment in the newly revised administrative punishment law and the "confiscation of illegal property" stipulated in Article 6 (1) of the administrative reconsideration law, which is often recognized as illegal property in practice. We need to analyze the legitimacy of property that is not stipulated by law, at the same time, the civil behavior follows the principle of "freedom without prohibition by law". The content not regulated by law is the content not regulated by law. The behavior of private subject is free, but this behavior must be legitimate. In short, for the situation not stipulated in the law, the word "illegal" includes it in the adjustment of the law and recognizes it as illegal, which obviously has the spirit of illegal governance. Therefore, the civil act of "covering up the illegal purpose in a legal form" is not necessarily invalid at this point.

From the perspective of legal theory, the role of law is not omnipotent, and the breadth and depth of its adjustment are limited. There are many contents and scope in society that are not regulated and regulated by law. There are many reasons for this limitation of the law, among which three aspects are the most important: First, the lack of subjective understanding and mistakes of law makers or implementers or the diversity of objective environment; second, due to the time-space specific attribute of law, the content of legal norms lags behind, "the self-control of law is gradually out of touch with the times from the time it is published" ^{[5](P428)}, and the field of adjustment of law itself is limited. It can only adjust part of people's external behavior and activities, which is beyond the reach of people's inner thought, religion and other fields, that is to say, all social relations are not and cannot be adjusted by law, For example, the law should not intervene excessively in personal private life, otherwise it may violate human rights. On the issue of people's activity field and legal relationship, some scholars have conducted relevant division research, which has been quite exquisite for the hierarchical division and evaluation of people's behavior. Based on this, this paper can generally summarize people's behavior as follows: Acts permitted and supported by law, acts enforced by law (or acts sanctioned by law), and acts not stipulated by law. From the above categories of human behavior, illegal behavior is the behavior enforced by law and the behavior not stipulated by law. The illegal act regulated by the law can only be the act to be punished by the law. Therefore, the existence scope of the word "illegal" in the legal norms is wider than its actual application meaning, and it should be understood according to the intended meaning in the provisions of the legal norms. In short, it is impossible to evaluate the law of people's behavior in all aspects. Only the content of legal adjustment can evaluate the law. "In addition to guiding human behavior and providing critical standards for this behavior, it is only a useless attempt to further explore any more specific purpose for the law."^{[6](P230)}

3. Question 2: the legal provisions in the "illegal" content do not exist

"Illegal" is relative to "legal". If there is no "legal" content in the legal norms, there is no way to deduce the meaning of the existence of the word "illegal". Generally speaking, if the meaning of defining the word "illegal" is "illegal", but the law does not have relevant mandatory or rights norms, it is abandoned by the spirit of modern rule of law to set the legal responsibility of "illegal" out of thin air. At present, it is well known that the word "illegal" is frequently applied in China's legal norms, but few people study the premise of its existence, that is, the situation of "legal". Due to the limited ability of legislators, some normative contents are problematic. As mentioned above, "illegal" means not in accordance with the provisions of the law and not provided for in the law. The situation of non-compliance with the provisions of the relevant law must be based on the

existence of the provisions of the relevant law. However, due to the above reasons, the provisions of the law are not clear, and even the contents of its relevant provisions can not be found. China's socialist legal system has been established, but it is still in the stage of improvement and implementation. "After the formation of the socialist legal system with Chinese characteristics, the improvement and implementation of the legal system has become the focus of work" .^{[7](P182)}At this stage, there is serious confusion in some legal norms, which makes it impossible to adjust the "illegal" behavior without clarifying the content of the "legal" situation. This is the second important issue of the improper use of the word "illegal".

As for illegal fund-raising in the field of public law, it should correspond to the act of legal fund-raising, but unfortunately the author inquired and learned that the existing regulations do not regulate legal fund-raising, and there is no definition of illegal fund-raising at the legal level until the upcoming implementation of the Regulations on Prevention and Disposal of Illegal Fund-raising to provide a relevant definition of illegal fund-raising.^①This regulation also needs to clarify the content of the national financial management regulations, if they are not provided for, then the illegal fund-raising determination is contrary to the spirit of the rule of law. Another example is the criminal law and anti-terrorism law "illegal possession of terrorist, extremist materials" and other provisions are based on the actual needs of national security management set, their premises need to violate the existing law to set the lawful possession of the situation, but I read the existing law of China's situation, the results can not access the law involving Lawful possession of the relevant provisions and the relevant illegal possession of the clear provisions of the situation, then what is illegal possession of the provisions of the application will fall short, because this crime is not clearly stipulated in the law, shall not be penalized, otherwise it is contrary to the purpose of the construction of the rule of law in China. There are also some normative documents, citing laws and regulations and the use of the word "illegal", but because the source of "legal" provisions and the specific circumstances of the violation of the determination of the content does not exist, thus making the normative documents in the word "illegal" lost its meaning. For example, China's "Civil Unmanned Aerial Vehicle Real Name Registration Management Regulations" stipulates the circumstances that are considered to be illegal acts ^②,In this case, the content of the "regulations" in "its behavior will be regarded as an illegal act in violation of the regulations" is uncertain, and where is the illegal act in violation of the regulations. This is a special case, but most of the word "illegal" is based on the existence of the corresponding legal content and the existence of clear mandatory provisions of the law as a prerequisite. For example, the crime of "illegal possession of firearms and ammunition" in the criminal law is based on the premise of violating the relevant provisions of the administrative law "Law of the People's Republic of China on the Administration of Firearms".

Professor Mingkai Zhang also recognizes this point when he discusses the reason for the large number of "illegal" expressions in our criminal code, namely, our criminal law is a law of enactment, and "it provides for a large number of administrative offenses, and the acts of administrative offenses are premised on the violation of the legal norms of administration, so there are a large number of expressions of the word 'illegal'".^{[8](P535)}Administrative legal norms belong to public law, so I think the word "illegal" is often used in the field of public law.

In the field of private law, people's act according to the principle of "freedom without prohibition", that is, as long as the behavior does not violate the mandatory provisions of the law is free. The lawfulness of behavior indicates that the behavior will be recognized and affirmed by the law, while the content of the behavior regulated by the law cannot cover all situations of people's behavior, and the "illegal" prerequisite "legal" provisions and statutory circumstances cannot be fully and accurately reflected in the text of the law. In Taiwan, Professor Shixiong Zeng defines the resources of social life regulated by civil law as rights, legal interests and freedom

^①Illegal fund-raising referred to in this regulation, refers to the financial management department of the State Council without the permission of the law or in violation of national financial management regulations, to promise to pay interest or give other investment returns, etc., to unspecified objects to absorb funds.

^② Civil drone owners, if they do not implement real name registration and affix registration marks in accordance with these regulations, their behavior will be considered illegal acts in violation of the regulations, and the use of their drones will be affected.

resources.^{[9](P62)}They are protected by the law with different intensity.^①

It can be seen that in the legal system, "illegal" situation is based on the existence of "legal" and the legal circumstances, "legal" and legal circumstances of the normative content at all or unclear, the application of the word "illegal" in legal norms will only make the contents of the norms become "empty checks", which can not be applied, and is not conducive to the orderly construction of the rule of law in China.

4. Resolution of the application of the term "illegal"

The above situation involves a solution to the improper use of the word "illegal" in legal norms: replace the term "illegal" in legal norms with the term "unlawful". Such a solution is based on jurisprudence: if the word "unlawful" means a situation that does not belong to the law's affirmative evaluation, it involves content that is not regulated by the law and content that violates the law's mandatory provisions, and since the content that is not regulated by the law does not belong to the content covered by the law, the remaining content that violates the law's mandatory provisions belongs to the content regulated by the law, so the word "unlawful" in the law can be replaced by the word "illegal" to adjust the improper use of the word "unlawful". For example, the former General Principles of Civil Law and the former Contract Law provide that civil acts "in legal form to conceal illegal purposes" are invalid, and the use of the word "illegal" is obviously inappropriate.

The word "illegal" involves the existence of the provisions of the premise of the "legal" provisions and the existence of legal circumstances, but the "legal" provisions are not at all or unclear, resulting in the law cannot be applied, this is the second situation of the improper use of the word "illegal", which is also an important issue to be resolved. This occurs mainly in the context of the applicable legal norms, because the laws are distributed among different laws, and the meaning of the individual laws can only be understood by reading them together. As scholars say, laws are often composed of incomplete articles, which in combination with other articles constitute a complete content provision or are combined with each other and form a whole. The meaning of individual articles can be known only if they are considered to be part of the whole^{[10](P204)}, which means that the "illegal" legal provisions are related to the completeness of the legal system and can be solved by the corresponding strict legislative mechanism. In the legislative process, the legislator tests the completeness and clarity of the content of the law by means of strict logical reasoning about the applicable legal norms between the relevant laws. For example, the Supreme People's Court's Judicial Interpretation [2009] No. 18 found that "unlawful possession" refers to the situation where the possession is not in accordance with the law^①. Legal possession refers to the situation where the possession is in accordance with the provisions of laws and regulations, and it is concluded that the "laws" in legality refers to laws and regulations and does not include the provisions of laws and regulations below. The law on the management of firearms in China is the "Law of the People's Republic of China on the Management of Firearms", which stipulates the circumstances of legal possession, so that the "illegal" possession has the basis to be stipulated and implemented. Otherwise, the "illegal" holding provisions here may become a "blank check" specification. Therefore, in the legislative process, the legal concept used by the legislator must belong to a complete system, if not in the system, then it must be in line with the understanding of the general public meaning prevails, so unless otherwise provided by laws and regulations, the semantics of legal norms should be understood in accordance with the general situation of language usage, because it is not mysterious in the hands of the law enforcement, when it is to achieve the desired stability of the rule of law. When it is to achieve the desired stability of the rule of law, the first thing to respect is as ordinary people or the majority of people for its usual understanding.^{[11](P204)}

^① Rights refer to the complete and strong protection provided by law; legal interest refers to the specific living resources negatively recognized by the law, that is, it affirms its legitimacy but only provides relatively weak protection; and liberal resources are those resources that the law lets exist, neither recognizing them as legal nor finding them illegal.

It is worth noting that in solving the problem of improper application of the word "illegal" in the legal norms, it is necessary to adopt a logical thinking approach, specifically a two-step approach, the two methods should be applied simultaneously, namely: the first step will be the word "illegal" in appropriate cases to the word "illegal", the law does not adjust the content of the firm excluded from the scope of the law; the second step of the "illegal" content of this "law" content of the situation to review, mainly to review the existence of "legal" law and the existence of other law content. Only by using both approaches can we change the problem of improper application of the word "illegal" in the current legal system and make our legal system more complete.

As for who should solve these two problems, I think we should take measures from the following aspects: first, the main responsibility lies with the legislator, because the process of formulating the content of the term "illegal" is done by him, so he has the responsibility to ensure its scientificity and enforceability, otherwise the law of the legislation has problems, which will bring a series of follow-up problems. Secondly, the law enforcers and the judiciary also have the responsibility to verify that the term "unlawful" involves the systemic issues in the field of law, and that the law enforcers and the judiciary do not apply the law mechanically to solve cases, but flexibly and comprehensively consider the implementation and application of the law. The implementation and application of the law is flexible and comprehensive. The procedure for solving this problem can be referred to the procedure of legal interpretation in our country, i.e. through the procedure of law interpretation by the legislator and judicial interpretation by the two high courts.

5. Conclusion

For the legal norms in the word "illegal", the semantics of the word "illegal" has an open character^{[6](P117)} and a large "meaning space"^① makes the original seemingly certain legal provisions and become I believe that it does not meet the needs of the rule of law construction in China, for two reasons: First, the word "illegal" may include the content not adjusted by law into the track of law adjustment, and this part of the field into the "illegal" level, inadvertently expanding the adjustment of law. Second, because the "illegal" content is based on the premise of the legal situation, but due to the articulation of the legal system, resulting in no legal situation or unclear, resulting in the "illegal" legal norms may become a "blank check". May become a "blank check", and was put on the shelf, to the content of the norms can not be applied, or even the other extreme abuse of the situation, that is, the mandatory application of the law, resulting in the wrong case.

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^①There is often room for such connotations in the concept of evaluative or value judgments, see [German]Reinhold Zippelius, *Juridical Methodology*, translated by Zhenbao Jin, Law Press, 2009, page 30.

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