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SYSTEMIC CONVICTIONS: CHINA'S FUNDRAISING CRIMES AND ITS FINANCIAL SYSTEM

Abstract

Fundraising crimes are legion in China. And this is not only a criminological observation as the respective provisions of the Criminal Law can be applied in an extremely broad scope of cases, ranging from personal loans or brokering investments for small businesses to platform-based P2P lending operations. Its unclear demarcation produces legal uncertainty that has its root cause not only in vague provisions of the Criminal Law or broad legal interpretations of the judiciary, but also in the systemic function of these crimes. This paper argues that normative analyses about legal (un)certainly and regulatory necessities in the field of illegal fundraising in China need to be widened and additionally include a perspective of political expediency. The financial sector in China is highly dominated by state actors and state-owned banks, which inevitably follow policy directives and form a cornerstone of the regime's control over the economic system. For the purpose of maintaining this status quo, it is extremely valuable to retain the possibility to criminalize a wide range of financial interactions that would circumvent the state-dominated banking system. Particularly, the crime of "Illegally Absorbing Public Savings" provides the authorities with such a device and should therefore be understood as an important foothold of China's authoritarian legality in its capital markets. This crime is therefore positioned at the intersection of China's Leninist notion of ubiquitous control and its market-based economy.

KEYWORDS

China; economic crimes and criminal law; fundraising crimes; e-Zubao case; illegally absorbing public savings; fundraising fraud

SŁOWA KLUCZOWE

Chiny, przestępstwa gospodarcze i prawo karne, przestępstwa związane z pozyskiwaniem funduszy, sprawa e-Zubao, nielegalne wykorzystanie oszczędności publicznych, oszustwa związane z pozyskiwaniem funduszy

INTRODUCTION

Since its first promulgation in 1979, the Chinese criminal law has encompassed numerous crimes and stipulations, which provided for very broad criminalization and unclear demarcations. This vagueness has certainly been much stronger in the Criminal Law of 1979, which contained the catch-all crimes of “Hooliganism” (Art. 160)¹ and even explicitly allowed the use of analogy (Art. 79). The major revision of China’s Criminal Law in 1997 certainly reduced the degree of uncertainty as *inter alia* the use of analogy was abandoned, while pocket crimes such as “Picking Quarrels” (Art. 293) can still be found. Conceptually, this broad criminalization of underdefined deviance can be understood – applying Fraenkel’s notion of a dual state² – as systemic openings in China’s normative state for the unfettered power of the prerogative state to exercise its capabilities of social control³. These systemic openings are most evident in the persecution of political opposition, when, e.g., the crime of “Inciting the Subversion of State Power” (Art. 105) is used to incarcerate non-violent political dissidents for more than ten years⁴.

¹ This crime could be used against any deviance behavior, ranging from violent breaches of public peace to homosexuality or a subcultural lifestyle such as being a punk. For a broader analysis of this crime, see H.M. Tanner, *The Offense of Hooliganism and the Moral Dimension of China’s Pursuit of Modernity, 1979-1996*, ‘Twentieth-Century China’ 2000, Vol. 26, pp. 1–40.

² E. Fraenkel, *Der Doppelstaat*, Hamburg 2012, pp. 49–51.

³ H.L. Fu, *Duality and China’s Struggle for Legal Autonomy*, ‘China Perspectives’ 2019, No. 1, pp. 3–9.

⁴ Most prominent example is the Nobel Peace Prize Laureate Liu Xiaobo, who was sentenced to eleven years’ imprisonment for his involvement in drafting the “Charta 08”.

While the party-state never stopped to closely monitor and suppress political opposition and social deviance under the shibboleth of “spiritual civilization”⁵, China’s pragmatic and gradual approach of economic transformation was mostly acquiescent towards non-conformist or experimental entrepreneurship⁶. China’s emerging business community could count on a *laissez-faire* policy of the regime, as long as the overarching goal of economic development was met⁷. However, the Criminal Law also maintained very broad and vague economic crimes such as “Speculation” (Art. 117) until 1997 or since then the crime of “Illegal Business Activity” (Art. 225)⁸.

The most prolific of these economic crimes today is certainly the crime of “Illegally Absorbing Public Savings” (Art. 176), which can be applied in an extremely broad scope of cases, ranging from personal loans or brokering investments for small businesses to platform-based P2P lending operations. Many of the financial scandals in China in recent years, like the prosecution of the world’s biggest exchange platform for rare earth, Fanya Youse in 2019⁹ or the Henan Banking Scandal in 2022¹⁰, are related to this crime. Chinese crime statistics, however, do not specifically list this crime¹¹, but a cursory examination of case numbers in the Supreme People’s Court (SPC) database¹² showed that this crime made up for roughly 1/6 of all court cases of economic crimes in 2020, while its overall number rose from 5,534 in 2016 to 11,916 in 2020¹³. After 2020, the case numbers have starkly fallen again so that in 2021 only 4,296 and in 2022 just 982 cases were registered. These numbers can only provide an approximation of the

⁵ B. Bakken, *The Exemplary Society: Human Improvement, Social Control, and the Dangers of Modernity in China*, Oxford 2000, pp. 53–59.

⁶ V. Nee, S. Opper, *Capitalism from Below: Markets and Institutional Change in China*, Cambridge 2012, pp. 23–34.

⁷ Z.S. Chen, *The Revival, Legitimization, and Development of Private Enterprise in China: Empowering State Capitalism*, New York 2016.

⁸ R.B. Wu, *On Several Questions Regarding the Crime of Illegal Business Activities*, ‘Politics and Law’ 2010, No. 2, pp. 51–57.

⁹ Radio Free Asia, *Fool’s Gold. Government-Run Metals Exchange Defrauds Chinese Citizens out of Billions of Dollars*, <https://www.rfa.org/english/news/special/fanyaincident/> (accessed 19.05.2023).

¹⁰ ZX. Wang, A. Ramzy, *Security Forces in China Attack Protesters Seeking Frozen Funds*, <https://www.nytimes.com/2022/07/11/business/china-bank-protest.html>, 11.07.2022 (accessed 19.05.2023).

¹¹ Additionally, the reliability of Chinese crime statistics is highly questionable and susceptible to political influence. See J.H. Xu, *Legitimization of the Imperative: The Production of Crime Statistics in Guangzhou, China*, ‘British Journal of Criminology’ 2018, Vol. 58, pp. 155–176.

¹² China Judgments Online, wenshu.court.gov.cn (accessed 19.05.2023).

¹³ *Sensu stricto* as only cases in the category of “Crimes Harming the Socialist Market Economic Order” are considered here, which is one chapter of the Chinese Criminal Law and contains 101 Articles.

actual situation¹⁴, especially as the COVID pandemic and the extensive measures in China also heavily impacted the orderly functioning of the courts. Nevertheless, a decline in cases could have been expected, as the State Council had promulgated “Regulations on the Prevention and Handling of Illegal Fundraising” in 2021, which were meant to establish a new framework for the suppression and prevention of illegal fundraising. The main purpose of this new legislative act was to broaden the state’s capabilities by introducing a wide variety of (coercive) administrative measures and stopping to solely rely on judicial criminal persecution in this field.

In the literature, illegal fundraising or the specific crime of Illegally Absorbing Public Savings is mainly discussed under the premise of its (growing) risk for Chinese investors and the stability of the financial system. Authors frequently acknowledge the vagueness of this crime and argue for its substantial amendment and a clear demarcation from its sister crime of “Fundraising Fraud”¹⁵ or for a coherent framework of a criminal and civil regime for addressing the risk associated with illegal fundraising, while at the same time acknowledging that the prevalence of this crime is deeply rooted in China’s current banking system, which provides for very little opportunities of external financing for private small and medium-sized enterprises (SME)¹⁶. Most of these discussions focus on the phenomenon of P2P lending services and stress the need for more comprehensive regulation in China¹⁷ or point toward the high prevalence of fraud in this field¹⁸. The academic discourse in China takes a similar normative stance on the need to limit the reach and uncertainty of the crime of illegal fundraising¹⁹ or the neces-

¹⁴ The database in question shall in general provide comprehensive judicial transparency, but cases can be excluded from publication on various and broad grounds. See B. Ahl, D. Sprick, *Towards Judicial Transparency in China: The New Public Access Database for Court Decisions*, ‘China Information’ 2018, Vol. 32, pp. 3–22. Additionally, cases that are considered sensitive after their publication, can also be deleted retroactively.

¹⁵ X.L. Peng, X.S. Luo and J. Jian, *Meaning Construction and Judicial Identification: Difficulties and Countermeasures of Criminal Regulation of Illegal Fundraising Behavior on Online P2P Lending Platforms*, ‘International Journal of Legal Discourse’ 2019, Vol. 4(1), pp. 61–65.

¹⁶ X.M. Liu, F. Huang and H. Yeung, *The Regulation of Illegal Fundraising in China*, ‘Asia Pacific Law Review’ 2018, Vol. 26(1), pp. 89–90, 96.

¹⁷ X. Lei, *Improving China’s P2P Lending Regulatory System: An Examination of International Regulatory Experience*, ‘US-China Law Review’ 2016, Vol. 13(6), pp. 463–465.

¹⁸ T.L. Wing and K.W. Sang, *How to Win Trust: The Case of P2P Financial Fraud in China*, ‘Journal of Criminology’ 2023, Vol. 56(1), pp. 116–135.

¹⁹ E.g. W.Y. Xie, K.J. Zhang, *Studying Crucial Issues of the Crime of Illegally Absorbing Public Savings*, ‘Law Review’ 2011, Vol. 29(6), pp. 138–144; W.P. Si, *Judicial Determination of Illegal Fund-raising Crimes — Comments on Amendment to Said Crime in Amendment (XI) of the Criminal Law (Draft)*, ‘Western Law Review’ 2020, No. 5, pp. 93–103; L. Wang, W.L. Sun, *On Correcting the Generalization of the Crime of Illegally Absorbing Public Deposits*, ‘Law and Economy’ 2023, No. 1, pp. 151–164.

sity to shift at least part of the regulation away from the criminal law²⁰. Additionally, Chinese authors frequently approach the problem of over-criminalization from a teleological perspective and stress that the current practice also punishes behavior that is not per se producing undue financial risk or social harm²¹.

This paper, however, argues that normative analyses about legal (un)certainly and regulatory necessities in the field of illegal fundraising in China need to be widened and additionally include a perspective of political expediency. The financial sector in China is highly dominated by state actors and state-owned banks, which inevitably follow policy directives and form a cornerstone of the regime's control over the economic system. For the purpose of maintaining this status quo, it is extremely valuable to retain the possibility to criminalize a wide range of financial interactions that would circumvent the state-dominated banking system. The crime of Illegally Absorbing Public Savings provides the authorities with such a device and should therefore be understood as an important foothold of China's authoritarian legality in its capital markets and can even be understood as exemplary for China's ambiguous concept of a "Socialist Market Economy". The crime of Illegally Absorbing Public Savings is therefore positioned at the intersection of China's Leninist notion of ubiquitous control and its market-based economy.

In the following, this article will provide a brief sketch of grey financing in China as this is the biotope, in which the myriad forms of illegal fundraising are developed. Further, the highly prevalent issue of Ponzi schemes and their prosecution under the crime of Fundraising Fraud will be presented for the purpose of illustrating the overlap with the crime of Illegally Absorbing Public Savings and the need for much clearer demarcation between these two crimes. The crime of Illegally Absorbing Public Savings and the numerous efforts of China's SPC and other organs to clarify the short and vague provision of the Criminal Law will be examined. Finally, a preliminary assessment of the "Regulations on the Prevention and Handling of Illegal Fundraising"²² of 2021 will be offered before the concluding remarks of this article.

²⁰ E.g. B. Peng, *Study on the Regulation of Illegal Fundraising Activities*, 'China Legal Science' 2008, No. 4, pp. 43–55; Y.X. Li, J.H. Fan, *On the Standard for Unspecified Objects in Illegal Fundraising: A New Explanation from the Perspective of Private Placement*, 'Journal of Zhejiang University', 2011, Vol. 41(5), pp. 127–137.

²¹ E.g. Z.J. Hu, *On the Normative Purpose and Scope of the Crime of Illegally Absorbing Public Deposits*, 'The Jurist' 2021, No. 6, pp. 161–173 and 196; S.S. Zhao, *A New View on the Legal Interest of the Crime of Illegally Absorbing Public Deposits and Its Influence on the Judicial Application—Review of the Amendment (XI) to the Criminal Law in the Light of Capital and Banking*, 'Criminal Science' 2021, No. 2, pp. 97–113.

²² Regulation on the Prevention and Treatment of Illegal Fund-raising, 1 May 2021.

GREY FINANCING IN CHINA

When the European Union was forced to update its anti-dumping regime vis-à-vis China and resorted to the concept of “significant distortions” in 2016, one core argument for this “significant distortion” was the strong presence of the state in China’s financial system, which “imposes [...] a number of policy objectives”²³. These policy objectives, however, distinctly favor investment in and loan activities for larger and state-owned enterprises. For this reason, SMEs in China regularly experience substantial obstacles in procuring external financing through regular loan operations of Chinese banks²⁴. This problem has at least been partly acknowledged in China and the financial system started to mitigate its impact by inter alia providing more digital financing services targeting SMEs²⁵.

However, in this environment, China’s growing private sector since the 1980s has created high demand of external financing, which could not be met on the supply side of official loan, lending and investment services. At the same time, some local administrations were extremely dependent on the growth of the private sector for meeting their centrally mandated development goals and were therefore more inclined to tolerate an informal finance sector. Actors in this field could, however, only rely on this tolerance when they maintained a low profile and did not produce political risks by e.g. pursuing an unsustainable business model that would eventually result in a (shadow) bank run and negatively impact social stability²⁶. The political risk of shadow banking can be very well exemplified by the case of Wu Ying, who – as a very young woman without any experience or education in finance – had managed to form an investment conglomerate worth RMB four billion (USD 640 million) in about a year’s time. She was eventually arrested for Illegally Absorbing Public Savings and Fundraising Fraud in 2007, but the courts did only pursue the count of Fundraising Fraud as her business empire had apparently been a Ponzi scheme. The case was of high interest to the Chinese public as not only the sudden wealth and youth had made Wu Ying a media persona even before her arrest, but she had also presented herself as a very charitable and generous character to the public. The attention rose even more when Wu Ying started to name high-ranking officials who she had allegedly bribed and it culmi-

²³ Commission Staff Working Document, *On Significant Distortions in the Economy of the People’s Republic of China for the Purpose of Trade Defence Investigations*, SWD (2017) 483 final/2, 20 December 2017.

²⁴ W.R. Lam, Y. Liu, *Tackling Small and Medium-Sized Enterprises (SMEs) Financing in China*, ‘Annals of Economics & Finance’ 2020, Vol. 21(1), pp. 211–220.

²⁵ Z.Q. Lua, L.J. Wu, H.Y. Lia, D.K. Nguyen, *Local Bank, Digital Financial Inclusion and SME Financing Constraints: Empirical Evidence from China*, ‘Emerging Markets, Finance and Trade’ 2022, Vol. 58(6), pp. 1718–1719.

²⁶ K. Tsai, *Back-Alley Banking. Private Entrepreneurs in China*, Ithaca 2002, pp. 31–38.

nated when she received the death sentence²⁷. Even though Wu Ying's criminal behavior could hardly be disputed, she was seen by the public as a scapegoat, who should be put to death for a service she provided that the regime withholds from private businesspeople, while it protects its own cadres from being punished in a comparable way for their involvement in Ponzi schemes and their corruption²⁸. Wu Ying's high profile produced immense political risk as public pressure is even in China a force that needs to be reckoned with, as it can – and in this case did – influence legislation and adjudication alike²⁹. In the end, the SPC followed the public's opinion and did not accept the immediate death sentence³⁰ and in 2015, China even abolished the death penalty for the crime of Fundraising Fraud.

The size of shadow banking in China can hardly be ascertained, but, e.g., Moody's estimates that shadow banking assets as a share of China's nominal GDP are at 46.7% in 2019, whereas stricter regulations (or even crackdown in case of P2P lending) resulted in a significant recent decline while still standing at 41.6% of the nominal GDP and RMB 50.3 trillion (c.a. 6.95 trillion USD) in 2022³¹. This volume is, however, not only generated within the private sector and outside the regular banking channels. Another important feature of grey financing in China is its entanglement with the official banking sector and even local governments. Chinese banks are *inter alia* using trust companies, wealth management products or other non-banking financial institutions to obscure that they are providing substantial amounts of credit money to the grey financing sector³². Furthermore, in recent years local governments have started circumventing centrally prescribed austerity programs and tightened loan regulations (especially for real estate, infrastructure and development projects) by using some of the very non-banking

²⁷ The law was not completely clear on this matter, as the degrees of punishment were linked (as is often the case in Chinese economic criminal law) to a certain but yet unspecified amount of (here) acquired funds. But after the W.U. Ying case, the SPC issued an Interpretation on Several Questions Regarding the Specific Handling of Criminal Cases of Illegal Fundraising, 2010 (No. 18), 13 December 2010, which stipulated that the highest degree of punishment, i.e. life in prison or death penalty, was already warranted at the amount of RMB 5 million.

²⁸ H.M. Cheng, *Financial Crime in China Developments, Sanctions, and the Systemic Spread of Corruption*, New York 2016, pp. 92–94.

²⁹ D. Sprick, *From Populism to Professionalism: The Media and Criminal Justice in China*, (in:) B. Ahl (ed.), *Post-2013 Reforms of Chinese Courts and Criminal Procedure*, Cambridge 2021, pp. 258–284.

³⁰ Wu Ying received the death penalty with a two-year suspension in 2012, which was commuted to life imprisonment in 2014.

³¹ M. Tayler, L. Li, *China's Shadow Banking Sector Continues to Shrink Amid Tight Regulatory Oversight*, Moody's Investor Service, 28.03.2023, https://www.moody's.com/research/Moodys-Chinas-shadow-banking-sector-continues-to-shrink-amid-tight-Research-Announcement-PBC_1362639 (accessed 27.05.2023).

³² D. Elliot, A. Kroeber, Y. Qiao, *Shadow Banking in China: A Primer*, 'Economic Studies at Brookings' 2015, pp. 16–19.

institutions, which are provided with money by the regular banking system, for the purpose of continuing their expansive support for the construction industry³³.

PONZI-SCHEMES AND THE CRIME OF FUNDRAISING FRAUD IN CHINA

The opacity and fluidity in China's realm of grey financing evidently produces huge and mostly unsecured risks for investors. The regulatory vacuum in combination with a diversity of investment products necessarily leads to an information deficit on the side of frequently inexperienced investors. In such an environment, fraudulent behavior easily thrives and in a rampant competition for the promise of the highest yield, the occurrence of Ponzi schemes is inevitable. The prevalence of such frauds may have been heightened even further, when information technologies are employed for the purpose of scaling up innovative business models as was the case of P2P lending in China³⁴.

In the late 2000s the P2P industry was heralded in China as a key solution for overcoming SMEs' financing problems³⁵. But the idea of connecting China's growing number of people, who were eager to invest their modest savings, with cash-strapped private entrepreneurs soon proved to be fraught with problems of fraud and unsustainable business models. China's laissez-faire policy until 2016³⁶ certainly exacerbated this issue, which culminated in one of the biggest Chinese economic crimes until today. According to the leaked judgment of the Beijing High Court in 2017, the Ponzi scheme of the e-Zubao platform run by Yucheng Holding managed to attract investments by more than 1.15 million lenders, which amounted to more than RMB 762 billion (ca USD 10 billion) of which roughly only 50% could be recovered by the court. The extent of this fraud was certainly conducive to the end of P2P lending in China in 2020, which was orchestrated

³³ G.F. Sun, *China's Shadow Banking: Bank's Shadow and Traditional Shadow Banking*, BIS Working Papers 2019, No. 822.

³⁴ D. Chen, S. Deakin, A. Johnston, B.Y. Wang, *Too Much Technology and Too Little Regulation? The Spectacular Demise of P2P Lending in China*, 'Accounting, Economics, and Law: A Convivium' 2021, <https://doi.org/10.1515/acl-2021-0056> (accessed 27.05.2023).

³⁵ *Ibid.*, p. 3.

³⁶ On 17 August 2016, the China Banking Regulatory Commission, the Ministry for Industry and Information Technology, the Ministry of Public Security and the Cyberspace Administration of China issued "Interim Measures for the Administration of the Business Activities of Online Lending Information Intermediary Institutions", which provided for strict rules for the scope of activities of P2P lending platforms and aimed at reducing this business model to a mere match-making service between lender and borrower.

by People's Bank of China and its campaign for the prevention and dissolution of financial risk³⁷.

The risk associated with P2P lending was, however, not only financial, many P2P platforms actively and successfully sought for a highly visible profile that showed their association with local governments or state-owned enterprises³⁸. This elevated the risk of a business failure and loss of unsecured investment by thousands of citizens to the level of a political hazard in a system that draws much of its legitimacy from the claim of being a guardian of its people's interests. This dynamic intensified after 2016 when local governments became *de jure* the primary regulators of this business, but mostly failed to establish an efficacious regulatory framework. After all, the growth of the industry and its business model was further in the interest of local governments, but any problem within the P2P market could now be seen as either government failure or collusion with the industry, which would immediately also trigger the suspicion of corruption. This growing political risk of P2P lending was further fueled when the fintech-giant Ant Group (Alibaba) under its charismatic founder Jack Ma announced its IPO in 2020. Through its broad portfolio of services and platforms, the Ant Group would have been able to provide many financial services which P2P customers were interested in. In comparison with most P2P platforms, the Ant Group had much better safety procedures in place that would have limited the risk of default but still outside China's state-dominated financial system³⁹. In autumn 2020, it became, however, clear that Jack Ma had fallen from grace, when he used his last public appearance for a remarkably open criticism of China's financial system and its dominating SOE banks⁴⁰, before he disappeared for several months and the Ant Group's IPO was stopped by the regulators. The crackdown of the P2P industry in China in 2020 has certainly prevented many fraudulent business models from flourishing, but it also cemented the status quo of a state- and therefore policy-dominated financial system.

Cases like e-Zubao also touch upon a doctrinal issue in Chinese criminal law and its impact on judicial practice. In many cases the crimes of Fundraising Fraud and Illegally Absorbing Public Savings are handled simultaneously or rather as concurrent offences. The Chinese jurisprudence treats these crimes as one category (fundraising crimes)⁴¹, which are mainly differentiated by their respective subjective side. The Criminal Law stipulates for the crime of Fundraising Fraud

³⁷ Core Achievements of the Campaign for the Prevention and Dissolution of Financial Risk, https://www.gov.cn/zhengce/2020-11/07/content_5558566.htm, 07.11.2020 (accessed 27.05.2023).

³⁸ J.L. Jiang, L. Liao, Z.W. Wang, X.Y. Zhang, *Government Affiliation and Peer-To-Peer Lending Platforms in China*, 'Journal of Empirical Finance' 2021, Vol. 62, p. 104.

³⁹ D. Chen et al., 2021, *op. cit.*, pp. 36–38.

⁴⁰ Jack Ma's Bund Summit speech (9.11.2020) can be found in translation at <https://interconnected.blog/jack-ma-bund-finance-summit-speech/> (accessed 27.05.2023).

⁴¹ Q. Li, *Differentiation Between the Crime of Illegally Absorbing Public Savings and Fundraising Fraud*, 'Oriental Law' 2017, No. 2, pp. 145–146.

the requirement of a *dolus directus* by prescribing the “purpose of illegal possession” as constituent element of the crime, which evidently marks the fraudulent character of this crime.

In the e-Zubao case, e.g., the founders and heads of operation were convicted for Fundraising Fraud, while more than a dozen of the operating personnel – for whom apparently a fraudulent behavior could not be ascertained – were convicted for Illegally Absorbing Public Savings. It almost seemed as if the court would consider the latter group of perpetrators as merely complicit to the crimes of the former group, abetting them in their fraud. This can also be seen in the levelled sentencing, so that those convicted for illegal fundraising were sentenced between 4 years’ imprisonment and life, while those convicted of Illegally Absorbing Public Savings received prison sentences between 3 to 9 years. This structured relationship between these two crimes can also be seen in the SPC’s Interpretation on Fundraising Crimes⁴². This normative document first outlines specific acts, which would constitute the crime of Illegally Absorbing Public Savings (Art. 2) before stipulating that the same acts are to be considered as Fundraising Fraud, when the “purpose of illegal possession” is additionally given (2010: Art. 4; 2020: Art. 7). The Criminal Law additionally distinguishes these two crimes by their objective side as the crime of illegal fundraising is committed by “employing fraudulent means”, but the judicial practice rarely applies this stipulation for the purpose of demarcating these two crimes⁴³, which is hardly surprising as the aforementioned SPC Interpretation also remains silent on the specifics of this aspect.

Just as it can be seen in the e-Zubao case, the crime of Fundraising Fraud is, however, considered more severe as it can carry heavier punishments⁴⁴. Beside the higher culpability of the subjective side of Fundraising Fraud, the Chinese literature also argues that this crime has a more severe effect on the general trust of the public in the financial system as respective acts pretend to use official instruments of the financial system for a criminal operation, while the crime of Illegally Absorbing Public Savings simply circumvents such official instruments altogether⁴⁵. It is however highly unlikely that the mostly inexperienced investors in China’s grey finance can always distinguish between these different types of risk or actually experience a different kind of breach of trust. It is rather the interplay of under-regulated financial products and an unresponsive state-dominated financial system, which prevents trust and compels many investors to take higher risks.

⁴² Interpretation Regarding Several Questions of the Specific Application of Law in Criminal Cases of Illegal Fundraising, 4 January 2010, amended 1 March 2022.

⁴³ Q. Li, 2017, *op. cit.*, p. 151

⁴⁴ The maximum sentence for Fundraising Fraud is life imprisonment, while Illegally Absorbing Public Savings is punishable with a fixed-term prison sentence of more than ten years (Art. 45 of the Criminal Law limits this sentence to 15 years).

⁴⁵ Y.R. Liang, *The Distinction and Application Between the Crime of Illegally Absorbing Public Deposits and the Crime of Fundraising Fraud: Based on Trust as Law Interests*, ‘Hebei Law Science’ 2021, No. 8, p. 185.

THE CRIME OF ABSORBING PUBLIC SAVINGS

Being charged with the crime of Illegally Absorbing Public Savings in China results in an almost certain conviction. Out of ca. 62,000⁴⁶ cases of Illegally Absorbing Public Savings published in the SPC's database, not even 50 cases resulted in an acquittal. In the majority of these cases, just one of the defendants was found not guilty⁴⁷ or the case against one acquitted defendant had already been separated from other cases in which said crime was ascertained. In mere eight out of those 62,000 cases, the courts found that the conduct in question was not punishable and fully acquitted the defendant(s). Chinese conviction rates are traditionally notoriously high⁴⁸, but it is so unlikely to be found not guilty when prosecuted for the crime of Illegally Absorbing Public Savings that even the most prudent doctrinal reasoning or legal interpretation of the judiciary is capable of maintaining a window for acquittals in such cases. In the following, the character of the crime of Illegally Absorbing Public Savings as a pocket crime will be assessed and its role in maintaining the status quo of China's state-dominated financial system will be examined.

The Criminal Law stipulates in Art. 176 that “absorbing public savings illegally or in disguise absorbing public savings, disrupting the financial order” constitutes a crime. The brevity and lack of specificity in this wording is clearly inadequate for the complexities of a financial crime and necessarily produces legal uncertainty. This deficit was, however, also acknowledged by the SPC, when it issued its aforementioned Interpretation on Fundraising Crimes in 2010. In an accompanying publication in the official court journal “People's Judicature”, the SPC judge Liu Weibo explained that this Interpretation should not only be understood as an instrument to fight certain criminal phenomena but that it was promulgated to create legal certainty by offering further definitions and demarcations of the respective crimes⁴⁹. For this purpose, the SPC defined “illegality”, the “openness”, the “lure of gain” and the “publicity (literal: of social character)”

⁴⁶ 61,974 cases were retrieved, but a certain number was redundant as they were uploaded multiple times. The vast majority of cases were from the years 2014 and onwards, as this is the year the SPC database started its operation, but the oldest cases were decided as early as 1997. wenshu.court.gov.cn (accessed 19.05.2023).

⁴⁷ Mostly the respective corporation, which was used by the perpetrators as the crime of Illegally Absorbing Public Savings can also be committed by a corporation or, in Chinese, a “unit crime”.

⁴⁸ Analytic Report on Cases of Acquittal in Proceedings of People's Courts, 24.10.2022, https://www.sohu.com/a/595049200_121190055 (accessed 7.06.2023).

⁴⁹ W.B. Liu, *Explanation and Application of the Interpretation Regarding Several Questions of the Specific Application of Law in Criminal Cases of Illegal Fundraising*, ‘People's Judicature’ 2011, No. 5, pp. 24–25.

as the four core elements of the crime of Illegally Absorbing Public Savings⁵⁰. Shortly after this Interpretation was issued, critical voices among China's legal scholars pointed out significant shortcomings of this normative guiding document for the judicial practice. One particular trenchant commentary criticized the Interpretation *inter alia* for broadening the scope of application of this crime when it conflated the original wording of the Criminal Law “savings” with the term “funds”, so that – in conjunction with additionally establishing the element of promising investment returns (“lure of gain”) – significantly more and not less legitimate finance activities could be subsumed under this crime⁵¹.

Another heavily criticized aspect, which was considered to promote a judicial practice that made the crime of Illegally Absorbing Public Savings evolve into a pocket crime, was the uncertainty surrounding the aforementioned element of “illegality”⁵². In its 2010 Interpretation, the SPC defined this element in Art. 1 (1) as “absorbing funds without the legal approval of the relevant department or under the disguise of lawful business operations” and clarified later that a separate declaration of illegality by such departments was not necessary for⁵³ or that a failure to determine the illegality by an administrative department does not preclude criminal prosecution⁵⁴. Given the *laissez-faire* policy and the vast expanse of China's grey finance system, the judiciary was certainly overburdened with determining the legality of every financial product that could be subsumed under the crime of Illegally Absorbing Public Savings. The SPC apparently acknowledged the problem of an under-regulated system, when it issued further guidance in 2019, which at least broadened the discretionary scope of the courts by allowing decision-giving on the issue of illegality based on the “spirit of legal provisions”⁵⁵. But only with its most recent amendment of the 2010 Interpretation in 2022 the SPC seemed to pivot back to the prerequisites of an authoritative decision of China's financial regulators in determining legality by replacing the word approval with the word permit.⁵⁶ While the effect of this change in judicial practice cannot yet be observed, this amendment suggests that courts may in the future rely on

⁵⁰ Art. 1 Interpretation on Fundraising Crimes.

⁵¹ X.M. Liu, *On the Decriminalization of the Crime of Illegally Absorbing Public Savings*, ‘Jiangsu Social Science’ 2012, No. 3, pp. 131–132.

⁵² W. Xin, *Standardized Application of the Crime of Illegally Absorbing Public Savings*, ‘Legal Science’ 2019, No. 5, pp. 103–118.

⁵³ Notice of the Supreme People's Court on the Determination of Nature of Criminal Cases on Illegal Fund-Raising, 18 August 2011.

⁵⁴ Opinions of the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security on Several Issues concerning the Application of Law in the Handling of Illegal Fund-raising Criminal Cases, 25 March 2014.

⁵⁵ Notice by the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security of Issuing the Opinions on Several Issues Concerning the Handling of Criminal Cases of Illegal Fundraising, 30 January 2019.

⁵⁶ Issued on 23 February 2022.

the existence or lack of a formal permit issued by an administrative department in determining the element of illegality.

In analyzing the aforementioned acquittal judgments, the elements of openness and publicity were the only two aspects, which were at least in a very limited scope capable of averting a criminal conviction (in six out of the eight acquittals). Pursuant to Art. 1(2) of the 2010 (2022) Interpretation, “openness” means the act of “publicizing by means of ([2022:] internet,) media, recommendation fairs, leaflets or mobile phone text messages, etc.”, so that the intention of attracting further investors through advertising becomes apparent. Further, “publicity” is defined in Art. 1(4) as “absorbing funds from the general public, i.e. unspecified people”. In the case against a certain Sheng Chenggui, e.g., the court ascertained that the defendant had simply attracted funds from a limited number of friends and family at an interest rate of 1.5 to 2% per month so that neither the element of openness nor the aspect of absorbing funds from unspecified people were given⁵⁷. This decision is certainly in line with one strand of Chinese literature, which vehemently warns against the blending of the crime of Illegally Absorbing Public Savings and the legitimate social practice of private loans⁵⁸.

Another acquittal case points toward a doctrinally rather underdeveloped element of the crime of Illegally Absorbing Public Savings. The respective provision of the Criminal Law stipulates a qualification that is necessary for committing said crime: disrupting the financial order. In a case against a certain Liao Wen, the court decided that his act of absorbing funds for the purpose of constructing a bridge did not disrupt the financial order because the respective funds were directly used for productive means, so that he was not convicted⁵⁹. This solution for cases where courts may recognize the legitimate interests of all parties involved was first sketched out by High Court of Zhejiang as early as 2008, if the respective funds are used for production and in due time returned (with interest) to the investor⁶⁰. Accordingly, Art. 3(IV) of the 2010 SPC Interpretation provides for an exemption of punishment, when the absorbed funds are used for the “primary purpose of normal production and business operation”. This provision was, however, amended in 2022 (as Art. 6) and additionally requires now the return of funds before the criminal prosecution has started for an exemption of punishment, which is in line with the latest amendment of the Criminal Law (2020)⁶¹ that allows for a reduced or mitigated punishment under the same circumstances.

⁵⁷ Judgment in the Criminal Case of First Instance (2019) in the Nanling County People's Court in Anhui Province No 68.

⁵⁸ X. Wang, *The Boundary of Criminal Legal Risk of Private Financing*, 'Contemporary Law Review' 2021, No. 3, pp. 61–70.

⁵⁹ Judgment in the Criminal Case (2017) in the Huitong County People's Court in Hunan Province No 25.

⁶⁰ ZY. Chen, *Difficult Issues of Economic Crimes*, Beijing 2018, p. 184.

⁶¹ 11th Amendment of the Criminal Law, effective since 1 March 2021.

Chinese scholarship points out that this outcome-based qualification is intertwined with the different (mainly numeric) threshold and standards for the levelled punishment of this crime⁶². The lowest punishment threshold of this crime may therefore be considered the only substantial limitation for the prosecution and therefore conviction of the crime of Illegally Absorbing Public Savings. According to Art. 3 of the amended SPC Interpretation of 2022, criminal liability starts either at RMB 1 million of absorbed funds or at 150 depositors or at RMB 500,000 of economic loss of the depositors⁶³. This threshold is, however, lowered to RMB 500,000 of absorbed funds or RMB 250,000 in losses, if the perpetrator is a recidivist, had received an administrative punishment for illegal fundraising or “had caused any adverse social effects or any other serious consequence”. These standards for criminal liability are significantly higher than those of the 2010 Interpretation⁶⁴, so that a certain impetus for decriminalization by the SPC can certainly be observed. Nevertheless, the simple fact that the crime of Illegally Absorbing Public Savings can be committed even without an economic loss of a depositor (and without any fraudulent element) clearly exhibits the objective of this crime to protect the financial system and not individual participants of this system.

THE REGULATIONS FOR THE PREVENTION AND HANDLING OF ILLEGAL FUNDRAISING

On 1 May 2021, China’s State Council enacted Regulations for the Prevention and Handling of Illegal Fundraising. In a commentary on the Ministry of Justice’s website, a delegate of the National People’s Congress explained that these Regulations are intended to ease the burden of the judiciary single-handedly fighting illegal fundraising by establishing additional administrative measures so that criminal prosecution shall become the *ultima ratio* for such cases. He further stressed the objective to “strike early and strike few”, meaning that preventive measures are at the core of these Regulations, so that penalties are only used in a limited number of cases⁶⁵. While the impact of these Regulations can yet hardly be assessed, a cursory analysis of its provision rather suggests that they will significantly broaden the personal and objective scope of application for China’s

⁶² E.g. S.S. Zhao, *A New View on the Legal Interest of the Crime of Illegally Absorbing Public Deposits and Its Influence on the Judicial Application*, ‘Criminal Science’ 2021, No. 2, p. 16.

⁶³ The punishment on the level would be up to three years of imprisonment or detention and/or a monetary fine.

⁶⁴ Art. 3: An individual was criminally liable if RMB 200,000 of funds were absorbed or funds from 30 depositors were taken in.

⁶⁵ H. Cai, *An All-Encompassing Governance for the Preventing and Handling Illegal Fundraising has Reached a New Level*, 28.09.2021, http://www.moj.gov.cn/pub/sfbgw/fzgz/fzgzxzlz/fzgzlfgz/202109/t20210928_438524.html (accessed 26.06.2023).

anti-illegal fundraising regime so that coercive measures will probably be used more and not less for respective acts.

The definition of illegal fundraising in these Regulations is based on the SPC's aforementioned Interpretation, but it does not include the necessity of "openness", so that even fundraising activities that don't actively seek further participants would fall under this definition (Art. 2). Furthermore, the element of "illegality" is also broader than in the SPC's Interpretation as it is not limited to the lack of a permit, but is already given when rules of financial administration are violated. While "openness" is not a constituent element of illegal fundraising under these Regulations, Art. 19 stipulates that even the illegal public dissemination of information on fundraising itself triggers an administrative sanction. Accordingly, even internet service providers or advertisement agencies can receive an administrative punishment, when they provide information services to illegal fundraisers (Art. 34) and have to return their gains from respective publicity operations (Art. 26, No. 5). Their liability hinges on their obligation to prevent illegal fundraising, which is also given for numerous other entities that are not directly tasked with regulatory oversight in the financial system⁶⁶. Under these Regulations even business associations (Art. 14), resident committees (Art. 17) and media outlets (Art. 15 IV) are required to participate in preventive measures such as monitoring or public awareness campaigns. Lastly, these Regulations also establish legal liability for "illegal fundraising assistants", which include everyone who knowingly supported an illegal fundraising operation and while doing so obtained economic benefits. Without determining the character and quality of such support, the personal scope of application is likely targeting almost every business associate of an illegal fundraiser.

These Regulations also clarify the role of participants or investors in illegal fundraising operations. This group does not bear any legal liability in the sense that they could be subjected to an administrative fine. Additionally, the fundraiser has to return the invested funds before any administrative fine is paid (Art. 32), so that the funds of the participants cannot be used for paying the administrative fine. At the same time, the Regulations stipulate a general prohibition to obtain any economic gain from the fundraising and provide that fundraising participant shall bear any economic loss stemming from their participation themselves (Art. 25). Reports from the legal practice indicate that these principles had already been the standing procedure of Chinese courts as they regularly allocate the economic risk evenly for participants in illegal fundraising operations and focused on the restitution of the originally absorbed funds⁶⁷. Participating in illegal fundraising

⁶⁶ Local governments shall establish a risk assessment and warning mechanism (Art. 8), which is supported by the Administration for Market Regulation (Art. 9) while financial institutions have to strengthen their respective supervision and reporting system (Art. 13).

⁶⁷ J. Zeng, *The Regulations for the Prevention and Handling of Illegal Fundraising Explained: Administrative Penalties for Illegal Fundraising are Henceforth Established*, 19.02.2021, <https://zhuanlan.zhihu.com/p/351519013> (accessed 26.06.2023).

remains, therefore, exempt from criminal or administrative punishment, but the economic risk remains with each participant.

While these Regulations certainly shift the main thrust of China's anti-illegal fundraising efforts away from the criminal courts, de-criminalization or rather de-penalization can hardly be construed from this legislative step. Its regulatory approach is not to sketch out possible avenues for legal fundraising or wealth management operations that serve legitimate interests of Chinese investors. These Regulations rather establish a very broad framework for control and substantially widen the group of people who can be subjected to penalizing measures. This may prevent criminal punishments to a certain degree as criminal prosecution is not the only mode of control anymore, which is evidenced by the aforementioned declining number of criminal cases of this crime. The absence of a (e.g. numeric) threshold for the administrative measures against illegal fundraising as well as the lack of explicit exemptions clearly indicates these Regulations' objective to put an extremely broad part of China's grey financing sector under stricter and coercive control. As penalties for illegal fundraiser include fines between 20% and 100% of the absorbed funds and the suspension of business licenses or permits (Art. 30), these Regulations carry substantial legal consequences so that they cannot be taken lightly and will probably have a chilling effect on the respective field of private (and grey) financing in China.

CONCLUDING REMARKS

Even if financial fraud may be rampant in China, excessively criminalizing or penalizing wealth management products and services, that are not even damaging the economic interests of its participants or investors, can hardly solve this issue. As long as China's financial system does not meet the demands of its (private) businesses, an under-regulated and therefore risk-laden market for financial products is inevitable. Especially given China's post-COVID economic situation, a varied and adaptable financial system with multiple actors is indispensable, but systemically unlikely to evolve as the regime appears to be eager to maintain its extensive control through its state-dominated banking system. The crime of Illegally Absorbing Public Savings forms a crucial part in this control architecture and is therefore not only an economic but also a political crime. The new Regulations for Preventing and Handling Illegal Fundraising may have a discernible effect of de-criminalization, but they should rather be understood as another tool to enhance control mechanisms for the purpose of protecting the status quo of China's financial system. Furthermore, these Regulations did not affect the potential reach of the crime of Illegally Absorbing Public Savings, so that many

financial service providers continue to operate under this sword of Damocles and the regime maintains a powerful instrument to subdue many forms of perceived deviance in the financial system.

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