

An Empirical Study on the Use of Justice for Implicated Offenders — Targeting 117 Criminal Judgments

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Abstract

In China's criminal law theory, implicated offenders are defined as "a crime to be punished", and unless otherwise provided for in the criminal law, they are to be punished as "a felony". In judicial practice, the number of implicated cases is increasing, and there are many controversial points. The first is the contradiction at the theoretical level, because it has become a trend in traditional civil law countries to abolish implicated offenders, and the controversy over the existence and abolition of implicated offenders is constantly controversial in legal theory. The second is the contradiction at the practical level, in terms of the application of specific cases, the existing legal provisions of the implicated offender cannot exhaust the current practical needs, and there is no clear and comprehensive legal basis for determining the implicated offender.

Keywords: implicated offense, dispute over retention or abolition, dispute over application, implicated relationship

1. Basic Information on Implicated Offender Cases from 2010 to 2022

1.1 The Overall Proportion of Cases Is Small, But There Is an Increasing Trend

According to China Judgment Document Network, from 2010 to 2019, the proportion of implicated offender cases showed an increasing trend. In 2021, it suddenly decreased. In 2022, there were only 12 related criminal judgment documents. The sudden decrease in 22 years was mostly due to the influence of epidemic background, so the data reference in 2022 was of little significance. Based on the number of 117 pieces in 2021, the overall number still shows a large increase compared with 2010. In recent years, the total number of cases has remained at around 200, accounting for less than 0.019% compared with 613,627 criminal cases in 2021.

1.2 The Application Rate of the Second Instance Procedure Is High and the Case Is Generally Complicated

According to the data of China Judgment Document Network in 2021, there are 117 cases involving implicated offenders, including 69 cases in grass-roots courts, 42 cases in intermediate courts and 6 cases in high courts. Among them, there are 85 judgments, 31 rulings and 1 notice. Among them, there are 2 cases of retrial procedure and 79 cases of second instance procedure. Implicated crimes generally involve more than two charges, so the case is more complicated than ordinary cases. As can be seen from the published judgment, joint crimes account for a relatively high proportion, the cases involve more parties, and the evidence materials are too complicated, so we strive to be comprehensive and rigorous in legal application and legal argumentation. Some implicated offenders are often involved in multiple crimes, and the boundary between the act of identifying means and the act of consequence is often blurred and not clearly distinguished. Therefore, in the process of hearing such cases, the court consumes a lot of judicial resources, which often causes controversy on whether it constitutes an implicated relationship. After the judgment of the first instance, the case is often handled by appeal or protest.

1.3 Economic Property Crimes Account for a Relatively Large Proportion

In the adjudicated cases in 2021, the overall crimes involved are relatively extensive. Among the crimes against property, the crimes of fraud and theft involve a large number of implicated offenders, and the related cases involved are not the same, such as the crimes of fraud and infringement of citizens' information, fraud and forging the seal of state organs, theft and helping network information activities, etc., and the crimes involved in means behavior are widely distributed; Among the crimes of disrupting the order of the socialist market economy, the cases involving means and behaviors are relatively centralized and unified, such as the crime of defrauding export tax rebates and falsely issuing value-added invoices, the crime of false advertising and the crime of selling fake and inferior products.

1.4 The Majority of Sentencing According to a Crime

For implicated offenders, the general provisions of China's criminal code are not clearly stipulated. If the specific provisions of the criminal law specifically stipulate the principle of discretion for some implicated crimes, they shall be punished according to a certain crime. For example, in Article 399 of the Criminal Law, if the crime of bending the law for selfish ends is implicated in Article 385 of the Criminal Law, it shall be convicted and punished according to the heavier punishment. Combined with the sentencing principle at the theoretical level, implicated offense is defined as a crime to be punished, and the specific provisions of criminal law apply to some special implicated crimes. If there is no provision, it shall be punished according to one felony. In most cases, it is not punished according to several crimes, but only according to one crime. A relatively mature criminal law theory has been formed in judicial practice, and according to this theoretical principle, the judicial practice department handles related cases. For example, in case No.13 of the 23rd new criminal sentence (2020), the crime of defrauding export tax rebates and the crime of falsely issuing special invoices for value-added tax were involved. The so-called felony choice is not simply to choose the heaviest penalty, but to compare the specific circumstances and choose the corresponding penalty according to the law. China's criminal law stipulates that the sentencing of the crime of defrauding exports and tax refund is divided into three grades, namely, the amount is large, the amount is huge, and the amount is particularly huge. According to the specific amount of crimes, the corresponding grades of statutory punishment are applicable. The crime of falsely issuing special invoices for value-added tax stipulated in China's criminal law is also divided into three grades according to the amount and circumstances of the crime. In this case, the defendant made him think that he falsely made out special invoices for value-added tax, and used the falsely made special invoices for value-added tax to apply for export tax refund, which constituted the implication relationship between purpose and method. The defendant falsely made out tax amounts of 6,016,504.77 yuan and 1,775,692.84 yuan respectively, and defrauded export tax refund of 5,289,216.38 yuan and 1,628,899.89 yuan respectively, which were huge crimes and large crimes.

2. First, the Conviction Level, the Application Dilemma of Implicated Offense Theory in Specific Cases

2.1 The Lack of Sufficient Legal Basis for the Determination of Implicated Offense

2.1.1 Theoretical Research and Relevant Legal Provisions of Implicated Offense in China

In the classification of the number of crimes, the implicated crime, the absorbed crime and the continuous crime are classified as a crime of discretion (See Criminal Law edited by Gao Mingxuan and Ma Kechang, Peking University Press, Higher Education Press, 2016, p. 194). As a crime of discretion, it is because of the special provisions of the legal level, but the perpetrator still committed several crimes, and according to the usual state, it should be convicted and sentenced separately for several crimes. Specifically, it is characterized by an ultimate criminal purpose, that is, several criminal acts committed by the perpetrator have a psychological attitude to achieve a certain criminal result; There are more than two criminal acts, that is, the perpetrator has committed more than two harmful acts stipulated in the independent criminal law; Commit more than two different crimes, that is, the behavior of the perpetrator constitutes different criminal constitutions as stipulated in the specific provisions of the criminal law; There is an implicative relationship between two or more crimes committed, that is, one crime or several crimes is the means or result of other crimes, and this relationship must have the usual relevance, that is, the implementation of a crime is often accompanied by such implicative behavior. For a few cases, the number of crimes that seem to be the means or result of a crime is another crime, such as the bombing for the purpose of intentional homicide, it is not usually implicated, because there are many ways to kill, and most criminals are usually involved.

Typical implicated offenders, such as the specific provisions of China's criminal law, the crime of judicial staff taking bribes and bending the law for selfish ends, the crime of bending the law in civil and administrative cases, the crime of executing judgments and ruling dereliction of duty, and the crime of executing judgments and ruling abuse of power, also constitute the crime of accepting bribes, which is convicted and punished according to the provisions of heavier punishment. The crime of accepting bribes has the same legal interests as the crime of dereliction of duty to protect public legal interests, so the case of dereliction of duty due to accepting bribes naturally belongs to the crime of evaluation. (Li Haiying & Wang Yanfeng, 2021) The provisions of the specific

provisions of the criminal law on the crime of accepting bribes and some crimes of dereliction of duty are mainly concurrent in practice. The purpose of dereliction of duty of judicial staff is often for bending the law, and the means of dereliction of duty is bribery. However, there is no clear stipulation in the law for those who indulge in smuggling after accepting bribes, and the reason is that it is not usual in practice. Therefore, we should combine punishment for several crimes according to the crime of bribery and the crime of indulging in smuggling.

The stipulation of implicated offense is only a specific charge in the specific provisions of criminal law, but not in the general provisions, and the charges of implicated offense are not detailed, but only some common implicated charges are stipulated. There is often a lack of uniform norms and standards in the identification of implicated offense. As the standard for the identification of implicated offense, “usually” violates the principle of legally prescribed punishment for a specified crime. “Usually” is a very vague word. In the process of specific identification, what is “usually” and its frequency, concept, scope and rules are subjective. Criminal law is a law with the unity of subjectivity and objectivity. If only subjective factors are considered, the criteria for judging cases in practice are arbitrary, and the determination of “usually” by judicial workers varies from person to person. In specific cases, it seriously violates the basic principles of criminal law and runs counter to the legal system construction in China. If we only consider the objective factors and take the legal implication as the unified standard, then in some special cases, it will be difficult to achieve substantive justice and fairness, which violates the basic spirit of the law and will hinder the further legal construction of the country. The lack of legal basis for the unity of subjective and objective is one of the problems faced by implicated offenders at present.

2.2 The Identification of Implicated Relationship Is Highly Dependent on Practical Experience

2.2.1 There Is a Tendency to Expand the Application in Practice

According to the data of China Judgment Document Network, since 2010, the number of cases related to implicated offenders has increased explosively, reaching 255 in 2015 and 437 in 2019. However, after 2020, the number of cases has decreased. The main reason is that the overall number of cases tried by the courts has decreased due to the epidemic, but the proportion of implicated offenders still shows an expanding trend. In judicial practice, the cases of implicated offenders are still expanding and increasing. According to the statistics in 2021, among the 117 cases concerning implicated offenders, the High Court tried 6 cases, including (2021) No.95 of the new sentence, which rejected the appeal and upheld the original judgment; (2021) The original text of undisclosed judgment document No.25 at the end of Tibetan punishment; (2021) Lu Penalty No.4 revoked the original judgment and declared the defendant innocent; (2020) No.125, Beijing Penalty Terminal, dismissed the appeal and upheld the original judgment; (2020) No.51 was sentenced to imprisonment, and the sentence was changed.

Theoretically, a person who asks for or illegally accepts the property of others as stipulated in the preceding paragraph of Article 229, paragraph 2 of the Criminal Law and commits the crime mentioned in the preceding paragraph shall be sentenced to fixed-term imprisonment of not less than five years but not more than ten years, and shall also be fined.. If a judicial officer accepts bribes and commits the acts mentioned in the preceding three paragraphs, and at the same time constitutes the crime stipulated in Article 385 of the Cost Law, he shall be convicted and punished in accordance with the heavier provisions. Here are different views in academic circles. Zhang Mingkai believes that these two items do not conform to the characteristics of implicated offense, and are not the provisions of implicated offense. They should be understood as the fictional provisions of making several crimes into one crime, which are special provisions and exceptions. (Zhang Mingkai, 2020)

2.3 The Theory of Identification of Implicated Relationship

One is subjective theory, that is, the implicated relationship of several acts should be based on the subjective intention of the actor. If the actor carries out the act based on a criminal intention, then there is an implicated relationship between several acts; If the perpetrator’s implementation of several acts is not based on a criminal meaning, then there is no objective implicated relationship between several acts. Subjectivity theory fully considers the subjective meaning of the actor. Secondly, it is objective theory, that is, whether the actor’s number behavior is implicated is not based on the subjective meaning of the behavior, but on whether the crime committed by the actor is objectively implicated with the means behavior or the result behavior. Objectivity emphasizes practicality and objectivity, and should be considered according to the facts of the case. The third is the compromise theory, that is, the identification of implicated relationship should consider both objective and subjective, not only according to the subjective meaning of the actor, but also according to whether there are means or results involved in the actual implementation of several crimes, and should follow the unity of subjective and objective. That is, the behavior that needs to be implemented objectively is usually a means behavior or a result behavior; Subjectively, it is the behavior that is carried out, and this behavior has the intention to continue.

The above three theories have both positive elements and negative elements. In this paper, it seems that the

subjective theory takes the subjective intention of the actor as the only standard of implicated offense, which lacks reasonable basis in theory and judicial practice. For example, the perpetrator committed theft with the intention of illegal possession, and then committed robbery, and then committed fraud. The perpetrator was subjectively based on the same criminal purpose, but several acts were not involved, and there was no reason for the involvement between the behavior and the result behavior, and the behavior of means and the behavior of purpose. Therefore, it should not be considered as an implicated offense, and each act should be evaluated separately and punished for several crimes. Therefore, when identifying the implicated relationship, we can't simply rely on subjective meaning. The objective theory pays attention to the identification of the implicated relationship and considers the objective behavior of the actor, regardless of the subjective meaning of the actor. This kind of theory is contrary to the basic concept of criminal law and does not conform to the basic principle of the unity of subjective and objective. Not only that, if we only look at the facts objectively without subjectivity, it is difficult to judge whether there are causes and results, means and purposes involved in the implicated relationship. Comparatively speaking, the compromise theory is the most reasonable, and the implicated relationship needs the identification of the unity of subjective and objective. Ignore the subjective and only look at the objective, then several criminal acts that occur at the same time but are not related subjectively may be identified as implicated offenders; If we only pay attention to the subjective from the objective, then we will treat several behaviors that have no usual implication as implicated offense, thus expanding the application of implicated offense.

For the identification of implicated relationship, we should not only base on the principle of unity of subject and object, but also strictly grasp the unified specific standards, so as to strictly grasp the basic principles of criminal law. Those cases that appear to be implicated offenders, but the specific provisions of criminal law, legislative interpretation or judicial interpretation stipulate the combined punishment of several crimes, as well as those cases in which means behavior and cause behavior are clearly defined as aggravated crimes constituted by purpose behavior and result behavior, should be excluded from the concept of implicated offense (Zhang Mingkai, 2022), strictly control the tendency of expanding application in judicial practice. Objectively, the constitutive requirements of a crime should be regarded as the standard of objective factors. This standard has both theoretical basis and accurate basis of legal reality. Subjectively, the actor must carry out the act based on a criminal purpose. For example, the act of forging the certificates of state organs for the purpose of committing fraud, and objectively forging the certificates of state organs for others, belongs to the fictional facts of fraud and the objective aspects of concealing the truth, that is, the two acts constitute two crimes respectively, and the former act is included in the constitutive requirements of the latter act, which is in line with the objective factors of the constitutive requirements of the crime and belongs to the implicated offender.

2.4 The Tendency to Expand the Application in Practice Is Hard to Avoid

On the one hand, it is in the field of legislation. Because implicated offense is a theoretical problem, like most countries, implicated offense is not explicitly stipulated in the general provisions of criminal law, but listed by examples in the specific provisions of criminal law. Therefore, in the implementation, the judicial organs have certain discretion to determine the implicated relationship according to the general characteristics of implicated offense. Since 2013, the number of cases of implicated offenders has increased linearly. As of 2019, the number of cases has increased from 65 in 2013 to 437, and it has remained at a high level since then. Comparatively speaking, the related cases of implicated offense have increased obviously, and there is a tendency to expand their application in practice. Due to the difference of judicial level, there are many disputes about whether the implicated relationship exists, and there is also a lack of legal basis in the argument of whether it exists. At the same time, the application of the second instance procedure also tends to expand. When the discretion of a class of cases tends to expand, not only the legislative level should reflect on whether the law is divorced from reality, but also the judicial level should examine whether the application of the law violates the original intention of legislation and whether the theoretical level of judicial personnel needs to keep pace with the times.

3. Constructive Legal Suggestions on Implicated Offense

3.1 The Perspective of Legal Norms

3.1.1 Perfection of Legal Theory

As a theoretical level of law, implicated offense still has legal loopholes in specific legislation, and the specific provisions of criminal law have not exhausted the examples of implicated offense. With the increase in the number of cases tried in recent years and the increase in appeals and protests, relevant judicial interpretations should be issued, especially for cases involving economic property crimes, and the specific norms of implicated offense should be clarified. The theoretical circle should discuss the dispute over the existence or abolition of implicated offense, and combine the legislative tradition of implicated offense in civil law countries to show the legal basis for its existence, further clarify the difference between implicated offense and other forms of crimes in theory, and abandon the unnecessary disputes in theory for the areas where there is no substantial difference

between absorbed offense and implicated offense in practice.

3.2 Promotion of Legislative Work

Scientific legislation is an important link in the construction of a country ruled by law, and perfect legislation is a sufficient basis for law enforcement and judicial practice. On the road of building the rule of law, it is urgent to make up for the legislative shortcomings of implicated offense. The lag of the law itself makes the lack of relevant legal basis in specific cases, which leads to mass disputes. We should respond to the voices of the masses and listen to scientific suggestions. According to judicial practice, we should carry out supplementary interpretation of the relevant laws of implicated offenders, improve the quality and efficiency of legislation, put the work of amending and explaining implicated offenders on the agenda, and further promote the rule of law.

3.3 For the Refinement of Judicial Practice Identification Steps

A case of combined punishment for several crimes may simply be punished according to a felony, which may lead to a tendency to neglect the crime. At the same time, it is also the primary reason why most people advocate abolishing implicated offense. At present, the norms listed by examples in the specific provisions of criminal law have a clear basis for the determination of implicated offenders, which should be strictly followed in judicial practice and the principle of punishment should be in accordance with the law. For the implicated crime that is not clearly stipulated in the specific provisions of criminal law, the judicial organs should have sufficient legal basis in the process of identification, and at the same time, they should learn from the guiding cases issued by the Supreme Court, not just based on the “usual” subjective judgment, but on sufficient argumentation basis. As for the determination of implicated relationship, according to the relevant authoritative theories, it is strictly limited to whether there is “implication between means and purpose”, such as fraud by forging official seal, and “implication between cause behavior and result behavior”, such as buying foreign exchange for smuggling. In the absence of provisions in the general principles of criminal law, according to the current theoretical research and general views on implicated offenders, according to the legislative intent and according to the typical implicated charges listed in the specific provisions of criminal law, the so-called “usual” situation is determined.

4. In-Depth Study of Judicial Precedents

For the application of punishment, it should be punished according to the principle of “from a felony” in the absence of legal provisions, but it should be demonstrated in detail in the judgment documents, which is a clear legal basis and convinces the parties. Considering the complexity of the criminal law revision and the strictness of the procedure, the judicial organs should refer to the existing judicial precedents and typical cases when trying such cases, so as to prevent them from sticking to conservatism and deciding cases mechanically, and from being too flexible and isolated. They should adhere to the inner professional ethics of legal workers, strengthen their professional quality, and study and study according to the latest legal norms and guiding cases to fully ensure the fairness and justice of each case.

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