

# *Discussion on the Healthy and Sustainable Development of Financial Markets—Illegal Public Deposit-taking as a Perspective*

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**Keywords:** Private Lending; Private Financing; Prevention; Illegal Public Deposit-taking Crime; Sustainability

**Abstract:** Borrowers complete the financing of monetary funds using direct financing with the help of private lending. Due to the lag of civil law, commercial law, financial law, and administrative regulations, the boundary between the civil and commercial attributes of private lending is blurred, and the borrower's private financing behavior is broadly intertwined with the illegal absorption of public deposits or disguised absorption of public deposits. The determination of "illegality" is blurred, and "deposit" is expanded to "funds." The boundary of the crime of unlawful absorption of public deposits straddles the domain of civil and commercial law. The criminal justice personnel has discretion in applying the crime. The expansion of discretionary power in applying this provision has resulted in "different sentences in the same case," which undermines the spirit of the criminal law of crime and punishment. To improve the civil, commercial, and financial legislation on private lending, to achieve the guidance, evaluation, prediction, education, and enforcement functions of the preceding regulations, and to maintain the modesty of criminal law, is to adhere to the rule of law state, the rule of law government, the rule of law society as a whole construction of the right. Through the efforts of many aspects, we can effectively prevent the crime of illegal public deposit-taking and promote the active and healthy sustainable development of the financial market.

## 1. Introduction

In 1992, the 14th Congress of the Communist Party of China put forward the ambitious goal of establishing a socialist market economy system. Chinese small and medium-sized enterprises began to take the stage in history. With China's economic system's significant transformation, private and township enterprises have sprung up. The successful development of enterprises has accelerated the flow of capital and driven the demand for capital in the financial market. "Hot Money" <sup>[1]</sup>emerged

as an emerging financial player in the international financial market. In order to adapt to the new situation, on March 14, 1997, the Fifth Session of the Eighth National People's Congress of the People's Republic of China was amended to add the crime of illegal absorption of public deposits.

The crime of unlawful absorption of public deposits in the formulation of the provisions of the Criminal Law provides the basis for the crime and sentencing penalties but does not provide for specific crimes. Article 176 sets out the principle of the crime, which lacks the operability of the Law. With the rapid development of China's economy, the financial market has become more active with each passing day. The lag of financial regulations and the imperfection of civil and commercial laws have led to private financing wandering the border between administrative violations and criminal offenses. The trend of committing the crime of illegal public deposit absorption is increasing year by year.

From the perspective of judicial practice, according to the search of the judicial docket search system of Beihang University, there were 67,017 cases from January 1, 2014, to May 24, 2023, under the title of "Illegal Absorption of Public Deposits." [2]The following chart has 1 set of related data analyses.

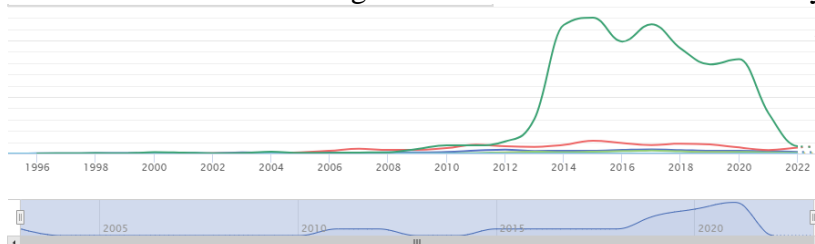


Data source: China Beida Law Treasure-Judicial Case Database

Figure 1: Case Year Trend

From the above figure 1 can be seen: since 2014, the crime of illegal absorption of public deposits has been surging, and it is getting more and more intense and high, with a record high of 12,851 cases in 2020. The statutory maximum penalty for illegal public deposit absorption is less than ten years of fixed-term imprisonment, which is not within the jurisdiction of the intermediate people's courts to accept criminal cases of the first instance. [3]However, the proportion of intermediate courts at the trial level is close to that of the primary courts, indicating that the crime of illegal public deposit absorption involves a large amount of money, a large number of people involved in the case, and more cases of challenging and complex circumstances.

From an academic research perspective: Since the 1990s, Chinese scholars have made specific research results. According to the Super Star Discovery System search, there were 941 academic achievements by May 24, 2023, titled "Illegal Public Deposit Taking." Among them were 647 journals, 86 dissertations, four books, 28 academic conferences, 19 yearbooks, 97 information articles, and 60 other articles. [4]The following chart has 1 set of related data analyses.



Data source: China SuperStar Database

Figure 2: Academic research trends

From Figure 2 above, it can be seen that: since 2010, the academic theoretical community has paid more attention to the discussion of the crime of illegal public deposit-taking, with three small climaxes in 2012, 2017, and 2021, and the publication of journals and dissertations has increased year by year. There are some theoretical results in the economic academia on the causes and prevention of illegal public deposit-taking crime. But more research results are concentrated in the fields of science and education.

The boundaries of criminal legislation on illegal public deposit-taking are blurred. When handling financial lending cases, criminal justice officials are prone to "different judgments in the same case" between different courts or judges of the same court due to the expansion of discretionary power. In disguise, this has increased the cost of credit in the financial financing field and undermined the judiciary's authority. This affects the healthy and orderly development of the economy and society and undermines the application of the principle of criminality, which is not conducive to the construction of a society based on the rule of Law.

## **2. Definition and distinction of related concepts**

What is the definition of "deposit" in the crime of illegal public Deposit? What are the differences and connections between it and "funds" and "money"? What are the specific manifestations of "illegal"? Before discussing the boundary of the crime of illegal public Deposit, the following concepts must be clarified.

### **2.1. Currency, funds, and deposits**

#### **2.1.1. Currency**

As explained in the Chinese Dictionary of Market Economics, money is "an instrument of exchange, which is a medium of exchange and a standard of value, readily accepted by all. It has the essential function of expressing and measuring all commodities and exchanging directly with all commodities."<sup>[5]</sup>

#### **2.1.2. Funds**

Money is explained in the Dictionary as "the monetary expression of property and materials. The main object of financial management."<sup>[6]</sup> In the Chinese Dictionary of Market Economics, it is explained that "capital is a basic category in traditional socialist economics. Its connotation: (1) capital is "money", that is, currency; (2) is the monetary expression of things; (3) is the property invested by investors in the enterprise, which can guarantee the operation of the enterprise and guarantee the repayment of debts. The specific form of funds can be money, but also can be physical, intangible assets, etc."<sup>[7]</sup>

#### **2.1.3. Deposits**

A deposit is explained in the Dictionary as "a form of credit activity in which an enterprise, institution, organization or resident deposits money in the custody of a bank or other credit institution on a collectible basis. According to the term and type of Deposit, the bank pays the depositor a certain amount of interest."<sup>[8]</sup> In the Chinese Dictionary of Market Economics, it is interpreted as "Deposit refers to a credit activity in which banks or other financial institutions absorb the idle money funds of the society. Deposits are the liabilities of banks or other financial institutions to the public and are the most important liability business of banks, which generally account for more than 60% of the total liabilities and capital of banks, so they are of special

importance to banks, being the source and basis of their asset business and largely affecting the scale of their asset business."<sup>[9]</sup> "Deposit" is a credit activity, and the Chinese Dictionary of Market Economics explains the term credit as "credit, an act of borrowing and lending. This economic behavior is characterized by the payment of capital and interest on the condition of recovery, or the acquisition of capital and interest on the obligation of return."<sup>[10]</sup> Therefore, the essence of "deposit" is that financial institutions absorb funds from the public for monetary operations, which is a credit activity protected by public authority, and this is its essential characteristic, which is qualitatively different from funds.

It follows that the typical manifestation of funds is money, and deposits are specific money deposited in the accounts of banks or other credit institutions; funds are not certainly deposits, but deposits are necessarily a manifestation of funds; funds enter the accounts of banks or other credit institutions and become deposits, and deposits leave the accounts of banks or other credit institutions and become funds; funds exist in the pool of money of the public, and deposits are fixed in the pool of money protected by public power. Deposits are a special kind of borrowing and lending, a currency operation, and funds are an expression of property. Deposits are a financial term, and funds are a financial accounting term but belong to the same economic category. Therefore, funds entering and leaving the money pool of social people and financial institutions protected by public power should first be regulated and adjusted by the current civil, Commercial, and financial laws and regulations. Then the criminal Law should be the final guarantee. Deposits are different from funds, and the two currency pools are not ipso facto one against the other. When applying the Law, criminal justice officials should first identify the nature of the currency involved, whether it is a currency operation or ordinary private lending funds, so as to avoid the expansion of the criminal law regime and to contribute to the prosperity of the economy, social stability and the progress of the rule of Law.

## **2.2. Direct financing, indirect financing, private financing**

Financing is explained in the Dictionary as the financing of monetary resources. The term "financing" is used in the Dictionary. Financing is divided into direct and indirect financing, depending on the form of transfer of the right to use the funds.

### **2.2.1. Direct financing**

Direct financing is explained in the Dictionary as "the direct transfer of the right to use funds without financial intermediaries, and the main financing methods are issuing stocks and bonds."<sup>[11]</sup> The Chinese Dictionary of Market Economics explains that "direct financing is the symmetry of indirect financing, which refers to the way of capital financing without the intervention of financial intermediaries. In this financing method, the surplus funds are provided to the demand units for a certain period of time through direct agreement with the demand units or by purchasing the marketable securities issued by the demand units in the financial market. Commercial credit, issuance of stocks and bonds by enterprises, as well as direct lending between enterprises and individuals are all direct financing. Direct financing is a direct way of supplying funds, and both investors and financiers have more freedom of choice compared to indirect finance. Moreover, it is more profitable for investors and less costly for financiers. However, the creditworthiness of funders is very different, resulting in very different levels of risk for creditors, and some direct finance funds are irreversible."<sup>[12]</sup>

### **2.2.2. Indirect financing**

Indirect financing is explained in the Dictionary as the transfer of the right to use funds indirectly

through the role of financial intermediaries, the main financing methods are bank deposits and loans. In the Chinese Dictionary of Market Economics, it is explained as "Indirect financing refers to the fact that there is no direct relationship between the unit with surplus funds and the unit with shortage of funds, but an independent transaction with financial institutions respectively, that is, the unit with surplus funds provides its temporarily idle funds to these financial intermediaries first by making deposits or purchasing marketable securities issued by banks, trusts, insurance and other financial institutions. To these financial intermediaries, and then these financial institutions provide the funds to these units for use in the form of loans, discounts, etc., or through the purchase of marketable securities issued by the units in need of funds, thus realizing the process of funds financing."<sup>[13]</sup>

Private financing is the financing of monetary funds utilizing direct financing of funds that are straying from the monetary pool of the social population, which is done in the form of private lending.

### **2.3. Private lending and its civil and commercial attributes**

Private lending has existed since ancient times, and today it refers to the financing form of raising funds by natural persons, legal persons, or other organizations other than the financial institutions approved by the state according to the Law. Private lending is divided into different forms depending on the scale of funds raised, such as private lending and "silver in or silverback," intermediate forms, such as pawnbrokers, mutual aid societies, joint loans, and capital raising, and advanced forms, such as underground money changers. Among them, private lending has civil and commercial attributes, depending on whether it is for profit. Civil lending refers to transferring funds with or without compensation without profit; civil commercial lending refers to the act of money circulation with the purpose of profit, i.e., to collect interest. Suppose a natural person, legal person, or other organization makes the issuance of loaned money an occupation. In that case, it has profitability and recurrence, and the private lending behavior has commercial attributes.

In terms of the laws and regulations to be adjusted and applied, the judgment standard of commercial subjects and the rule of exclusion of commercial acts should be adopted to distinguish civil lending from commercial lending. In other words, civil lending by commercial subjects is commercial lending unless the commercial subjects prove that their borrowings are for civil life. Clarifying the two attributes of civil borrowing and lending can highlight the legal interests protected under different attributes. Civil lending focuses on protecting the borrower's legitimate interests, and the borrower, as a socially weak person, should ensure that his or her life is not affected by the loan. In contrast, commercial lending should balance the protection of the legitimate interests of the borrower and the lender and focus on the coordination of the interests of both, focusing on the balance of interests between the two parties, and the borrower must bear a heavier interest agreement. The borrower must bear the heavier interest agreement and recovery responsibility.<sup>[14]</sup>

Under the existing framework of civil and commercial laws and regulations, the characterization of private lending is vague, resulting in the blurred boundary between its civil and commercial attributes. At the same time, in practice, civil and commercial legal relations and criminal legal relations partially compete because of the lagging financial laws and regulations. When "deposit" is expanded to "funds," its essential characteristics are ignored. When the borrower's capital chain is broken, and the lender reports and petitions are filed, there is a risk that the private financing behavior will evolve into illegal public deposit-taking or disguised public deposit-taking.

### **3. The evolution of the identification and conviction of the crime of illegal public deposit-taking**

Suppose financial crimes are analyzed only from the criminal law articles in isolation from the current state policy, domestic and foreign economic environment, civil Law, Commercial Law, and Financial Law. In that case, they will lose their legal soul and fall into the quagmire of metaphysics. This paper attempts to restore the evolution of the identification and conviction of the crime of illegal public deposit-taking from the perspectives of the legislative origin of the crime of illegal public deposit-taking, preceding regulations, and judicial interpretations, highlighting the objects of punishment and legal interests protected by the crime, and analyzing the root causes of its blurred boundaries. The Law also highlights the target of punishment and the legal benefits of protection and analyzes the root of the blurred boundary.

#### **3.1. The legislative origin of the crime of illegal public deposit-taking**

##### **3.1.1. The Law of the People's Republic of China on Commercial Banks provides for the first time**

On May 10, 1995, the Standing Committee of the Eighth National People's Congress adopted the Commercial Bank Law of the People's Republic of China (from now on referred to as the "Commercial Bank Law") at its 13th meeting, Article 79(1) of which provides that "Any person who establishes a commercial bank without the approval of the People's Bank of China, or illegally absorbs public deposits or public deposits in disguise, shall be investigated for Criminal liability; and the People's Bank of China shall be banned." What are the specific manifestations of "illegal absorption of public deposits or disguised absorption of public deposits"? How to determine the "public," "deposits," "illegal," "disguised"? The Commercial Bank Law does not have a specific code of crimes and penalties. "There is no single or special criminal law in 1995 or before to make specific criminal and penal regulation of this act. How to identify the act of "unlawful absorption of public deposits or disguised absorption of public deposits"? And "illegal absorption of public deposits or disguised absorption of public deposits" will produce or bring what consequences?

All in all, regardless. Illegal and criminal go hand in hand; private financing and illegal absorption of public deposits or disguised absorption of public deposits are thus intertwined. The expansion of Criminal Law into the field of civil and commercial matters and financial financing is contrary to its guideline of modesty, resulting in the lowering of the threshold of criminalization of "illegal absorption of public deposits or disguised absorption of public deposits" and the application of the principle of criminality is in an awkward situation, making it difficult for criminal justice officials to achieve the unity of the rule of Law and social effects.

##### **3.1.2. The Decision on Punishing Crimes against the Financial Order clarifies for the first time**

The Decision on Punishing Crimes against the Financial Order (from now on referred to as "the Decision") was adopted at the 14th meeting of the Standing Committee of the Eighth National People's Congress on June 30, 1995. Article 7 of the Decision provides that: "Anyone who illegally absorbs public deposits or disrupts the financial order by absorbing public deposits in disguise shall be sentenced to fixed-term imprisonment of not more than three years or detention and shall be sentenced or If the amount is huge or has other serious circumstances, he shall be sentenced to fixed-term imprisonment of not less than three years and not more than ten years and shall be fined not less than 50,000 yuan and not more than 500,000 yuan.



Suppose a unit commits the crime in the preceding paragraph. In that case, the unit shall be sentenced to a fine, and the provisions of the preceding paragraph shall punish the person in charge and other persons directly responsible. The purpose of the Decision is to "punish counterfeiting and financial instrument fraud, letter of credit fraud, illegal fund-raising fraud and other crimes that undermine the financial order." Therefore, the object of "illegal absorption of public deposits or disguised absorption of public deposits" should be the state's financial management regulations, and the objective aspect of the performance should be in the market economy or economic management activities; illegal absorption of public deposits or disguised absorption of public deposits activities, reaching a certain amount of crime or with serious circumstances, and Disturbance of the financial order.

The Decision to combat the crime of illegal absorption of public deposits is the unity of the act and the result of the crime. However, the objective aspects of the Decision are vague, the specific crime amount or serious circumstances are not provided for, the criteria for determining the criminal act, the criteria for determining the disruption of the financial order, with the supporting predecessor financial regulations are not complete, the "approach" only gives the basis for the penalty for the crime of illegal absorption of public deposits.

### **3.1.3. The Criminal Law of the People's Republic of China**

Article 176 of the Criminal Law, which came into force on October 1, 1997, directly follows the provisions of Article 7 of the Decision and identifies "unlawful absorption of public deposits or disguised absorption of public deposits" as the crime of unlawful absorption of public deposits, providing for the crime, but still does not provide for the specific crime. From the literal meaning of the Law, the objective aspect of this crime is that the perpetrator has committed the act of unlawful absorption of public deposits or disguised absorption of public deposits, but how to identify the act of "unlawful absorption of public deposits or disguised absorption of public deposits"? The crime object is public deposits; how to identify the "public" and "deposits"? 97 The Criminal Law does not give the criteria for identification.

### **3.1.4. The 2003 amendment to the Commercial Bank Law proposed**

The Commercial Bank Law was amended on December 27, 2003, in Article 81; paragraph 1 provides that "without the approval of the banking supervision and management agencies of the State Council, the establishment of commercial banks, or illegal absorption of public deposits, disguised as public deposits, constitutes a crime, criminal liability shall be investigated; and the banking supervision and management agencies of the State Council shall be banned." The revised Commercial Bank Law still does not specify the crime, "constitutes a crime," should be applied to the 97 "Criminal Law," but the 97 "Criminal Law" does not give the "illegal absorption of public deposits, disguised absorption of public deposits" behavior is determined by the standard.

It is easy to see from the above legislative path: the state regulates and introduces the crime of illegal public deposit-taking in the monopolistic protection of commercial banks. The crime of unlawful absorption of public deposits is a financial crime. According to the theory of secondary offense, the unlawful absorption of public deposits or disguised absorption of public deposits violates administrative regulations such as the Commercial Bank Law. It constitutes a crime before Article 176 of the Criminal Law is applied. Suppose the illegal or disguised absorption of public deposits does not violate administrative regulations such as the Commercial Banking Law. In that case, it does not constitute a crime, and Article 176 of the Criminal Law cannot be applied. However, there is no specific crime of illegal absorption of public deposits in the Commercial Bank Law, which cannot prevent and regulate crimes in the field of financial financing and sow the

hidden danger of blurring the boundaries of the crime of illegal absorption of public deposits.

### **3.2. Predecessor regulations, judicial interpretations, and normative legal documents for the crime of illegal public deposit-taking**

#### **3.2.1. The Measures for the Suppression of Illegal Financial Institutions and Illegal Financial Business Activities defines for the first time**

On June 30, 1998, the State Council adopted at its 5th executive meeting the Measures for the Suppression of Illegal Financial Institutions and Illegal Financial Business Activities (hereinafter referred to as "Measures"), in which Article 4, paragraph 2 of the Measures clarifies the determination of illegal absorption of public deposits and disguised absorption of public deposits: "Article 4 The illegal absorption of public deposits referred to in the preceding paragraph refers to the activities without the approval of the People's Bank of China Approval, the absorption of funds from unspecified objects in society, the issuance of certificates, promising to repay the principal and interest within a certain period of time; the so-called disguised absorption of public deposits, refers to the People's Bank of China without approval, not in the name of public deposits, the absorption of funds from unspecified objects in society, but the commitment to fulfill the obligations of the same nature as the absorption of public deposits."<sup>[15]</sup>

For the first time, "public" is clearly defined as an "unspecified social object"; "deposit" is expanded to "funds. The "deposit" is expanded to "funds," ignoring the essential characteristics of the Deposit, namely "absorbing funds for monetary operations," defining the scope of "illegal" and "disguised," seemingly It seems to provide a basis for criminal justice officials to determine the application of Article 176 of the Criminal Law. However, from a jurisprudential perspective, as a subordinate law, the Measures expand the scope of the Commercial Bank Law's determination of "deposits" and "socially unspecified objects" Is it a definite majority or an uncertain quantity? Is "public" and "people" in the same category? It seems to define "public," but it is not clear. In judicial practice, according to the theory of secondary violation, any violation of Article 4(2) of the Measures is an illegal or disguised act of absorbing public deposits. Any violation of Article 4(2) of the Measures and the provisions of the Commercial Bank Law constitutes the crime of illegal absorption of public deposits. The determination of the crime of illegal absorption of public deposits depends on the Measures and the Commercial Bank Law, but the "law" of the principle of the Law of crime and punishment is ignored in a narrow sense, and this "law" can only be a law and not an administrative regulation. This "law" can only be a law and not an administrative regulation, while the "Measures" is an administrative regulation, which determines the illegal absorption of public deposits or disguised absorption of public deposits, can only be applied to the punishment of administrative violations, but not to the punishment of criminal offenses.

#### **3.2.2. The Supreme People's Procuratorate and the Ministry of Public Security first identified the standards (Gong Tong Zi [2010] No. 23)<sup>[16]</sup>**

On May 7, 2010, the Supreme People's Procuratorate and the Ministry of Public Security made regulations on the criteria for filing and pursuing prosecution for the crime of illegal absorption of public deposits to be investigated and handled by public security organs, and for review and approval of arrests and prosecution by procuratorial organs. Nearly 13 years have passed since the crime of illegal absorption of public deposits was established by the Criminal Law, which came into effect on October 1, 1997, as can be seen from the annual trend of cases in Figure 1: before that, all levels of before that, the trial authorities were cautious about the determination of this crime. The reasons for this are the lagging civil, commercial, and financial laws and regulations and the vague



basis for determining the suspected offense.

### **3.2.3. The Supreme People's Court first proposed to find(Law Interpretation [2010] No. 18)**

Following the introduction of the "Measures" on June 30, 1998, to November 22, 2010, the Law Interpretation [2010] 18 was issued, a gap of more than 12 years. The first article of this explanation is to identify the criteria of "illegal public deposit or disguised public deposit," that is, the "four characteristics - illegal, public, public, lucrative."<sup>[17]</sup>

Among them, the determination of "illegality" is the core, which is the watershed between legitimate and illegitimate, criminal and non-criminal private financing. The criteria for its determination are: "violating the provisions of national financial management laws, absorbing funds without the approval of the relevant departments according to law, or borrowing the form of legitimate business." Without the approval of the relevant departments, following the Law is a formal criterion, and the boundary is clear; borrowing the form of legitimate business is a substantive criterion, and the boundary is blurred, and its high generality leads to the boundary between legitimate and illegitimate private financing, and between crime and non-crime is still blurred. At the same time, "absorbing funds," the Law Interpretation [2010] 18 directly expands the interpretation of "deposits" to "funds" in the crime of illegal absorption of public deposits, which, like the Measures, discards the essential feature of "absorbing funds." The essence of deposits is "absorbing funds for monetary operation." It simplifies the monetary function, regardless of the purpose of the people's private financing for production, operation, and related activities. In this way, the crime of illegal absorption of public deposits has lowered the threshold of incrimination and the difficulty and standard of proof for the judiciary. Illegal absorption of public deposits has rightly evolved into a pocket crime. This is one of the reasons why the crime of unlawful absorption of public deposits has spurted in recent years.

"Public" is determined by the following criteria: "to the public, that is, the social unspecified objects to absorb funds. Not publicly advertised to the community, within the family, friends or units for specific objects to absorb funds, does not belong to the illegal absorption or disguised absorption of public deposits." Here, the specific object is also a highly general term; in this explanation only extended to "friends and relatives, internal staff of the unit" these two categories. This implies two possibilities: to a specific object to absorb funds, even if the number of people, the amount involved is enormous, but also cannot be punished for the crime of illegal absorption of public deposits; the name of "friends and relatives, internal staff" to absorb funds, even if the number of people, the amount involved is enormous, but also cannot be punished for the crime of illegal absorption of public deposits.

### **3.2.4. Notice of the Supreme People's Court on the Determination of the Nature of Criminal Cases of Illegal Fund Raising (Law [2011] No. 262)<sup>[18]</sup>**

In order to hear criminal cases of illegal fund-raising in a legal, accurate, and timely manner, the Supreme People's Court issued a notice on August 18, 2011, on the determination of the nature of illegal fund-raising, proposing that "the administrative department's determination of the nature of illegal fund-raising is not a mandatory procedure for illegal fund-raising cases to enter the criminal process." This is contrary to the theory of financial crime secondary offense. The crime of illegal public deposit-taking is an administrative offense, which can only be criminalized for "violating national financial management regulations and disrupting the financial order." Financial crime is very professional, involving a broad and profound; theoretically, the central administrative (supervision) department's determination is authoritative, while the Law [2011] 262 notices "the people's court on the basis of the administrative determination of the relevant departments on

whether to meet the technical standards of the industry, according to the facts of the case and the provisions of the Law to make the nature of the determination." The notice of the Supreme Court, although the civil Law, Commercial Law, and financial regulations lagging, cannot meet the judicial application of the current financial crime law, but it undermines the guidance, evaluation, prediction, and education function of the Law, leaving only the Law's mandatory function.

### **3.2.5. The Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security joint opinion ( Gong Tong Zi [2014] No. 16)**

This opinion has narrowed the scope of the "specific object" of the Law Interpretation [2010] 18 and has expanded the scope of the crime of illegal public deposit-taking. At the same time, the subjective aspect of this crime adds the consciousness factor "knowingly" and the will factor "recklessly" to refine the principle of unity of subjectivity and objectivity, and this psychological factor of subjective proof raises the difficulty of judicial proof.

### **3.2.6. The Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security issued "Opinions on Several Issues Concerning the Handling of Criminal Cases of Illegal Fund Raising" (High Prosecution Council [2019] No. 2)**

On January 30, 2019, the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security jointly issued the "Opinions on Several Issues Concerning the Handling of Criminal Cases of Illegal Fund Raising," which clarifies that the basis for determining "illegality" is: "National laws and regulations on financial management should be used as the basis. For the national financial management laws and regulations only in principle, according to the spirit of the Law and reference to the People's Bank of China, the China Banking and Insurance Regulatory Commission, the China Securities Regulatory Commission, and other administrative departments in accordance with national financial management laws and regulations, departmental regulations or national financial management regulations, measures, implementation rules and other regulatory documents to be determined. "Because the "Decision on Punishing Crimes Against the Financial Order" and the "Commercial Bank Law" on illegal absorption of public deposits or disguised absorption of public deposits only in principle, which means that judicial officers in handling such cases have a discretionary power of space and greater flexibility, according to the spirit of the provisions of the Law and reference to the relevant administrative regulations and normative documents to determine the "illegality of." The result, as shown in Figure 1, was a record high of 11,361 cases of illegal public deposit-taking crimes handled in 2019 alone. As expected, the percentage of "different judgments in the same case" in the 11,361 illegal public deposit crimes in 2019 alone is higher than in previous years.

What is the "spirit of the law"? Criminal justice personnel is the safeguard law's implementers, and the principles of legal guilt and punishment, equality before the Law, and compatibility of crime and punishment are the spirit of criminal Law that they must strictly abide by in handling any criminal case. Civil Law regulates personal and property relations among natural persons, legal persons, and unincorporated organizations of equal subjects. The spirit of civil Law is reflected in the seven principles of equality, meaningful autonomy, fairness, honesty and credit, public order and morality, prohibition of abuse of rights, and the green principle. <sup>[19]</sup>Both private lending and private financing should operate legally under the general adjustment of civil Law and in compliance with the above seven basic principles. What is the spirit of commercial Law? What is the spirit of financial Law? Different legal departments should adopt different basic principles due to the different objects they adjust, and different legal spirits are inevitably reflected in the Law's legislation, judicial and legal activities. The Law does not impose, cannot require criminal justice

personnel on the one hand, the accurate application of criminal Law; on the other hand, in the sectoral law lag or jurisdictional conflict, the accurate application of civil Law, Commercial Law, Financial Law, and other different sectoral Law. This kind of criminal Law active expansion behavior damages the guidance, evaluation, prediction, and education function of the Law and is against the spirit of criminal Law.

In addition, this opinion refines the scope of the "specific object" of Gong Tong Zi [2014] No. 16 and again expands the scope of the crime of illegal absorption of public deposits.

From the perspective of the legislative origin of the crime of unlawful absorption of public deposits and the introduction of the preceding regulations and judicial interpretations, it can be seen that the core of the crime of unlawful absorption of public deposits, the determination of "unlawfulness," is vague, which is the root cause of the vague boundary of the crime of unlawful absorption of public deposits. The administrative regulations and judicial interpretations ignore the essential characteristics of deposits and expand the interpretation of "deposits" to "funds"; the Measures and judicial interpretations identify the act of unlawful absorption of public deposits, and the threshold of criminalization is lowered, and the crime of unlawful absorption of public deposits evolves into the crime of "pocket money." This is one of the reasons for the criticism of the academic and theoretical circles.

## **4. Feasible legislative ideas**

### **4.1. Improve civil and commercial legislation on private lending and delineate the legal and illegal lending boundary**

The civil and commercial legislation on private lending should be improved to encourage the healthy and orderly development of private financing under civil, commercial, and financial laws and regulations. Especially for civil commercial lending, because it is an act of money circulation for profit, it is especially important to balance the legitimate interests of borrowers and lenders and focus on the coordination of their interests and should regulate lenders with one hand and borrowers with the other, so that the behavior of both lenders and borrowers are subject to the corresponding laws.

In private commercial lending, the vast majority of lenders, to obtain high-interest rates, know that usurious lending is an illegal investment behavior and still takes a chance, resulting in rampant usurious lending; the national financial order suffered damage.<sup>[20]</sup>The lender's behavior according to the 2002 "People's Bank of China on the banning of underground money changers and a crackdown on usury" standard, even if it is considered usurious lending behavior, but there is no follow-up protection law to regulate this behavior to combat, the lender's usurious lending behavior is still not curbed, the wind of usurious lending also intensified. July 23, 2019, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice jointly issued Opinions on Several Issues Concerning the Handling of Criminal Cases of Illegal Lending, which criminalize and punish illegal lending without the approval of regulatory authorities or beyond the scope of business as an illegal business depending on the circumstances.

The "Opinions" determine whether usury lending is illegal lending from three aspects: the illegality of lending, the professionalism of lending activities, and the unspecificity of lending objects, but the illegality of usury lending is still lacking in the previous Law to regulate it, and the lender's sense of investment speculation is still higher than the sense of investment risk, which is still the driving force of disrupting the financial order. Once the borrower's capital chain is broken, the lender will be transferred to the state's criminal responsibility for the borrower's act of absorbing public deposits, the state criminal justice to bear the cost of credit in the field of financial financing,

<sup>[21]</sup>and the lender not only because of the modesty of the Criminal Law and get away with it, and some even group petition, affecting social stability and the construction of a harmonious society. The judicial authorities in handling such cases, lenders or even become victims, but the crime of illegal absorption of public deposits is the object of the state financial management regulations; the object of the crime is the public deposits rather than public and private property ownership, the identity of the lender is misplaced, but also to increase the people's sense of investment speculation, weakened the people's awareness of the risks of investment; the financial credit health environment has been damaged.

Similarly, borrowers know that usurious lending is illegal financing, but for their survival and development, in the absence of the country's formal financial channels of financial support, they have to use high-interest rates to attract private funds to maintain production, business, but also because of the civil Law, Commercial Law, Financial Law, and other predecessor law of this illegal behavior lagging, holding a fluke to use the means of direct financing to obtain funds. Usury lending is inevitably hemlock to quench thirst, cannot solve the fundamental problem, and will essentially evolve into the last straw to crush the borrower's capital chain. Illegal financing behavior due to the lender's report or petition, the borrower's illegal behavior evolved into a criminal act, the borrower carrying usurious lending into the pocket of the crime of illegal public deposit-taking.

Therefore, strictly preventing the lender's identity from being misplaced and cracking down on the lender's usurious lending behavior is the proper way to improve the civil and commercial legislation on private lending. Let the behavior of both borrowers and lenders be within the regulation of the Law, cultivate people's awareness of the risks of investment, clarify the boundary between legal and illegal private lending, let private financing develop healthily under the sun, and reduce the intersection of the crime of illegal absorption of public deposits and private lending.

#### **4.2. Improve financial legislation and draw the line between financing violations and crimes**

Financial legislation is very professional, as the predecessor regulations should be based on the characteristics of the times, international and domestic financial status, efforts to set the sparse density of the legal network, reduce the principle of setting, and enhance the operability of the Law. Criminal Law is a safeguarded law; it is not appropriate to take the initiative to expand into the field of finance; different sectoral laws whose legal spirit is necessarily reflected in the law legislation, judicial and legal activities, different sectoral laws should each have their role in their respective fields to regulate and adjust their respective legal relationships. Based on the special nature of financial crimes, the guidance, evaluation, prediction, education, and enforcement functions of its predecessor law should be reflected in its legislation and judicial and legal activities. Improve financial legislation, clarify the criminal elements and coercive means of financial financing, increase the cost of violation, enhance the public's awareness of financial investment risks, increase the fight against administrative violations and publicity and education so that the formation of lenders and borrowers are afraid, will not, and unwilling to take risks due to the high cost of violation and clear crime boundaries.

At the same time, financial legislation should not legislate behind closed doors. It should draw on and study the mature and operable systems of countries around the world in the field of financial financing. The use of good fetishism takes the essence of its dross to increase the cost of violations, reduce the cost of justice, which is conducive to the punishment of crime, and maintain the healthy and orderly development of the financial market.

#### **5. Conclusion**

The crime of illegal absorption of public deposits is a severe economic crime whose criminal

behavior is mainly manifested through false propaganda or promises of high returns to lure the public to deposit funds into their so-called companies, institutions, or personal accounts for illegal appropriation or misappropriation, resulting in public property losses. It also undermines the sustainable and healthy development of the financial market. In order to prevent the crime of illegal absorption of public deposits, the following aspects need to be strengthened:

Firstly, strengthen publicity and education to raise public risk awareness. Secondly, Improve relevant laws and regulations and strengthen judicial supervision. Thirdly, strengthen regulation and risk prevention. Fourthly, strengthen the credit system and improve the cost of failure to trust. Last but not least, strengthen the monitoring and investigation of the flow of funds. Strengthen the monitoring and investigation of the flow of funds, find problems and take timely measures, strengthen the linkage and collaboration with relevant departments, break the information silos, and improve the effectiveness of the fight against crime.

Although clarifying the boundary of the crime of illegal absorption of public deposits cannot be solved overnight, adopting the method of excessive intervention of criminal Law in financial and legal relations to adjust the tension between the demand for private financing and criminal control is not only detrimental to cultivating the public's awareness of investment risks and the rule of Law but also brings the risk of expansion of the discretionary power of criminal justice personnel and undermines the spirit of the Criminal Law of crime and punishment.

To solve the problem of illegal public Deposit taking and to clarify its criminal boundary, we should improve the civil and commercial legislation on private lending and delineate the boundary between legal and illegal lending; at the same time, we should improve the financial legislation, delineate the boundary between illegal and criminal financing, and realize the guiding, evaluating, predicting, educating and enforcing functions of the preceding regulations, which is the right thing to do to adhere to the rule of law state, the rule of law government and the rule of law society as a whole. At the same time, the prevention of the crime of illegal public deposit-taking needs to start from many aspects, and it is essential to strengthen publicity and education, improve laws and regulations, strengthen supervision and risk prevention, strengthen the construction of credit system, and strengthen the monitoring and investigation of the flow of funds.

Only through the efforts of many aspects can we effectively prevent and combat the crime of illegal public deposit-taking and promote the active and healthy sustainable development of the financial market.

## Acknowledgments

Thanks go to Qinghai Minzu University and Yangtze University for their help in this research.

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