

# *Study on Judicial Determination of Narcotic Drugs and Psychotropic Substances*

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**Abstract:** In recent years, as China's efforts to combat drugs have continued to intensify, some of the narcotic drugs listed in prescriptions have begun to become objects of abuse, and the question of whether and how to criminalize the sale of narcotic drugs constitutes a crime has become a focal point. By analyzing the three different criminalization paths of illegal trafficking of narcotic drugs, it is concluded that the core reason for the controversy over the criminalization of this act is the unclear identification of the concept, attribute and use of narcotic drugs. On the basis of clarifying the concept, attributes and uses of narcotic drugs, illegal trafficking in narcotic drugs is recognized as a crime of obstructing the management of medicines, illegal business operation, or a crime of smuggling, trafficking or transporting drugs, as well as as a joint crime of robbery, rape and other crimes, in accordance with the perpetrator's use for medical purposes, trafficking in drugs and other illegal purposes.

## **1. Formulation of the problem**

In recent years, the problem of abuse of narcotic drugs with legitimate uses such as medical treatment, mental refreshment and weight loss has arisen frequently. The Amendment (XI) to the Criminal Law of the People's Republic of China (hereinafter referred to as Amendment (XI)) introduces a new crime of obstructing the administration of medicines, which to a certain extent narrows the scope of the crime of illegal business operation.<sup>[1]</sup> The boundaries between the crime of obstructing the administration of drugs and the crime of illegal business operations are blurred in dealing with cases of illegal trafficking in narcotic drugs and psychotropic substances. In judicial practice, there are controversies over the judicial determination of cases involving narcotic drugs and psychotropic substances. Individual cases have aroused great public concern, and there is an urgent need to regulate the lack of a clear basis for law enforcement and handling of cases. For example:<sup>[2]</sup>

Case 1: In the case of “Iron Horse Glacier Drug Purchase”, the defendant Hu violated state regulations, knowing that Xipao Ning, Clobazam and Rapamycin and other psychotropic substances controlled by the state must be approved and authorized before they can be sold, offered preferential treatment to the purchasers, and guided the collectors to circumvent the customs inspections, with a total amount of more than 500,000 yuan, disrupting the normal business order of the drug market, constituting the crime of illegal business operation. The amount involved exceeded half a million

dollars, disturbing the normal business order of the drug market and constituting the crime of illegal business operation. However, the drugs sold were mainly used to save epileptic patients, the degree of social harm was low, and the circumstances were relatively minor, so the court decided not to impose criminal penalties on them, and sentenced them accordingly.

Case 2: Between September 2019 and December 2020, Defendant Cheng trafficked large quantities of tylenol (containing the ingredient oxycodone) to a number of people through e-commerce and timely communication tools, which constitutes the crime of drug trafficking.

The main reason for the difference in the results of the above cases is the different purposes of the perpetrators of trafficking in narcotic drugs, case one defendant for medical purposes and did not obtain far more than the normal operation of the profits that can be obtained from the drugs, the “Amendment (XI)” promulgated and implemented by the Hu's behavior constitutes the crime of illegal business depends on the relationship between the crime of illegal business and the crime of impeding the management of medicines. The defendant in Case 2, Cheng, did not have the legal qualification to sell psychotropic drugs, and the sale of “Tylenol” was not for medical purposes, and did not carry out the necessary examination of the purpose of the buyer, and presumed to use the network transaction as a cover, and had a laissez-faire attitude towards the psychotropic drugs into the abuse channel, constituting the crime of drug trafficking. If it is for the purpose of treatment of disease trafficking in nationally controlled narcotic drugs, and did not sell directly to drug users, then the narcotic drugs are not directly equivalent to drugs, should be characterized as illegal business crime or obstruction of drug management crime. In this regard, a few scholars are in favor of the parallelism theory that illegal trafficking of narcotic drugs may constitute the crime of illegal business operation when it is not in line with the crime of obstructing the management of medicines, because the two crimes protect different legal interests, the crime of illegal business operation is aimed at maintaining the economic order of the market of specific goods or services, while the crime of obstructing the management of medicines is committed to safeguarding the public's physical health. Just because the statutory penalty for the offense of obstructing drug administration is relatively light, we cannot assume that it is not enough to constitute a misdemeanor and at the same time will not constitute a felony.<sup>[3]</sup> The majority of scholars are in favor of the exclusionary theory, believing that when illicit trafficking in narcotic drugs does not constitute the crime of obstructing drug administration, it should not be recognized as the crime of illegal business operation either. In dealing with cases of trafficking in such controlled and addictive narcotic drugs.<sup>[4]</sup> In order to avoid over-criminalization, criminalization criteria should be strictly controlled and sentencing should take into full consideration factors such as the pharmacological effects of the drug, the degree of dependence and harm, the state of abuse, and its medical value.<sup>[5]</sup>

## **2. Disputes over the criminalization of illicit traffic in narcotic drugs**

### **2.1 Status of criminalization pathways**

#### **2.1.1 Criminalization paths that focus on drug smuggling, trafficking and transportation crimes**

The following three conditions should be met in order to find that the smuggling and trafficking of state-controlled narcotic drugs constitutes the crime of smuggling, trafficking and transporting drugs: first, the perpetrator recognizes that his or her act involves narcotic drugs that are under strict control by the state; second, the perpetrator plans to sell these drugs as substitutes for drugs rather than for the treatment of diseases; and third, the perpetrator's target customer is the drug user or the market for the drugs, who, by means of high profits from such illegal transactions, which are usually much higher than the profits from the sale of legal drugs. For example, Zheng repeatedly

purchased large quantities of compound tramadol on behalf of other drug users for profit. Tramadol hydrochloride, the main ingredient in compound tramadol, is a class II psychotropic substance under national control and has addictive properties. Zheng repeatedly sold drugs to drug addicts for profits, the circumstances are serious and constitute the crime of drug trafficking.

### **2.1.2 Path to criminalization with a focus on drug control offences**

In November 2022, Huang trafficked “smoke gall” containing anesthetic drugs strictly controlled by the State. Etomidate was identified in these “smoke guts”. The State Drug Administration, the Ministry of Public Security and the National Health and Wellness Commission jointly issued the Announcement on the Adjustment of the Catalog of Narcotic Drugs and Psychotropic Substances, which included etomidate in the Catalog of Class II Psychotropic Substances. Thereafter, illegal trafficking, possession or smoking of etomidate will be regarded as a criminal offense and will be punished by law. In this case, Huang violated the regulations on drug management, knowing that “Smoke Guts” is an anesthetic drug produced without the relevant approval documents for drugs, and sold it as a substitute for drugs. This behavior may lead to the abuse of etomidate, which is sufficient to endanger human health and disrupt the socialist market economic order, therefore, Huang's behavior constitutes the crime of obstructing drug administration.

### **2.1.3 Path to criminalization based on the offence of illegal business operation**

In judicial practice, there are still many cases in which the production and sale of nationally controlled narcotic drugs have been punished as crimes of illegal business operation. For example, since 2005, Zhang Zhengbo and Yang Zhaohui have co-founded Wuhan Kaimen Chemical Company Limited, which produces products such as “3, 4-methylenedioxymethcathinone”, “2, 5-dimethoxy-4-bromophenethylamine” and “4-methylethyl cathinone”. 2, 5-dimethoxy-4-bromophenethylamine” and ‘4-methyl ethyl cathinone’. The court of first instance ruled that the company's behavior constituted the crime of smuggling, trafficking, transporting and manufacturing drugs. The Hubei High Court said that Wuhan Kaimen violated national drug management regulations by manufacturing and selling state-controlled Class I psychotropic drugs without authorization, disrupting the market order, and that the e-mails retrieved by the investigating authorities between Yang Zhaohui and some of the overseas buyers were not sufficient to prove the identities of the overseas buyers, nor could it be determined whether the real purpose of their purchases of psychotropic drugs was for legitimate medical purposes or for illegal drug trading. The evidence in the case was insufficient to prove that Wuhan Kaimen Company and Yang Zhaohui and others had the subjective intent to sell state-controlled psychotropic substances as drug substitutes, or to prove that the psychotropic substances sold by the company had flowed into the drug market. The drug-related charges were eventually withdrawn and the conviction for illegal business operation was changed.

## **2.2 Causes of the dispute over the conviction**

### **2.2.1 Unclear conceptualization of anaesthetic drugs**

The key reason for the controversy over the characterization of illicit trafficking in narcotic drugs lies in the confusion between the concepts of narcotic drugs and drugs. If the perpetrator smuggled or trafficked common drugs such as opium, heroin and methamphetamine, they would be directly recognized as drugs and there would be no objection. Anesthetic drugs have the dual attributes of drugs and medicines. From the general social conception, it is firstly used for surgery and treatment of mental illness drugs before it may be used for human smoking. Most people are not even sure

whether they are drugs or not. The fact that narcotic drugs are classified as under national control does not mean that they automatically become drugs under criminal law. They could only be characterized as drugs under criminal law if they undermined the very interests that the law on drug offences was designed to protect.

In judicial practice, there have been disputes over convictions arising from unclear identification of the concept and dual attributes of narcotic drugs; in the case of the production, smuggling and sale of State-controlled psychotropic substances in category I of the Wuhan Kaimen Chemical Co. Ltd. set up by Zhang Zhenbo and Yang Zhaohui, as described above, the court of first instance held that a category I psychotropic substance under State control was the same as a narcotic drug, and that their actions constituted the crime of smuggling, trafficking, transporting or manufacturing narcotic drugs. The “No. 4” produced by Zhang Zhengbo's company can be used to make drugs as well as medicines, and the prosecution failed to identify the whereabouts of the “No. 4” and prove that it went to drug addicts and traffickers, so it cannot be recognized as a “drug”. The Hubei Higher People's Court held that Wuhan Kaimen violated the state drug management regulations, unauthorized manufacture and sale of a class of psychotropic substances under state control, disrupting the market order, and that its behavior constituted the basic facts as determined by the original judgment were clear, the evidence was true and sufficient, and the trial procedures were legal, but the conviction was not allowed to lead to inappropriate sentences, which was corrected according to the law, and the final verdict was to revoke the previous drug-related charges, and to convict the four people for the crime of illegal business operation instead. The final judgment revoked the previous drug-related charges and convicted four people of the crime of illegal business operation. In summary, the unclear identification of the conceptual types of narcotic drugs in judicial practice led to wrongful conviction, and the court of first instance did not fully consider the dual nature of psychotropic drugs in its judgment, i.e. they can be used for medical treatment as well as being abused as drugs. Only when these drugs are circulated illegally and bring harm can they be identified as drugs in the criminal law sense.

### 2.2.2 Uncertainty in the identification of the use of anaesthetic drugs

The perpetrator's unclear identification of the various uses of the state-controlled narcotic drugs led to the phenomenon of inadmissible conviction and inappropriate sentencing in judicial practice, as in the case of Case 1, Hu, who sold Xibao Ning, Clobazam and Rapamycin and other state-controlled psychotropic drugs for medical purposes, and was criminally detained by the Public Security Bureau of Zhong County on July 5, 2021, on suspicion of smuggling of drug crime. The Public Security Bureau charged Hu with the crime of smuggling and trafficking in drugs and brought the case to court. The first trial found that Hu subjectively did not have the intent to commit the crime of smuggling and trafficking in drugs. Objectively, the psychotropic substances he sold did not reach drug addicts but were used to treat disease. The case happened at a time when there were no imported or generic drugs, and was an act of self-help and mutual assistance by the sick community. Therefore, Hu's behavior constitutes the crime of illegal business operation. The Public Security Bureau and the Procuratorate's characterization of the case as a drug smuggling and trafficking crime was due to the unclear identification of the use of the narcotic drugs, recognizing only the use of the narcotic drugs in question as drugs and ignoring their use as medicines for the treatment of disease. Although Jiang knew that the Japanese production of prescription sleeping pills flunitrazepam is subject to China's legal control, in order to help his mother to treat insomnia to buy 3 boxes of sleeping pills. In order to avoid regulation, both parties removed the packaging of the drugs and mailed them into the country in newspaper parcels. In this case, Jiang only recognized the use of flunitrazepam for the treatment of insomnia, ignoring the fact that flunitrazepam has the properties of a drug. In daily life through the doctor's prescription to buy a small amount of sleeping

pills for the treatment of insomnia symptoms or for medical purposes in accordance with the prescription to buy the right amount of narcotic drugs does not constitute a crime.

### 3. Conceptualizing and defining the use of anesthetic drugs

#### 3.1 The concept of anesthetic drugs

Narcotic drugs refer to narcotic drugs and psychotropic drugs, narcotic drugs refer to drugs, medicinal plants or substances that have a certain degree of anesthesia on the central nervous system, but after continuous use, they can produce physiological or mental dependence, and once addicted to the use of such drugs, they not only produce physiological needs, but also have more spiritual and psychological needs, and will produce a strong desire to continue to use the drug. Psychotropic substances are drugs or substances that act directly on the central nervous system, causing it to become excited or inhibited, and the continuous use of which can produce dependence, including stimulants, hallucinogens, sedative-hypnotics and so on. China's current catalog of controlled varieties of narcotic drugs is formulated and published in accordance with the list of schedules of the United Nations drug control conventions and in the light of the relevant laws and regulations governing drug management in China.<sup>[6]</sup> The cases cited herein, such as chlorpazan, rapamycin, tylenol, compound tramadol, tramadol hydrochloride, etomidate, sleeping pills containing flunitrazepam, and “3, 4-methylenedioxymethcathinone,” are listed in the Catalogue of Narcotic Drug Varieties and the Catalogue of Psychotropic Drug Varieties, and belong to the narcotic drugs under the explicit control of the State. . The determination of whether a perpetrator has committed a drug crime or a pharmaceutical crime depends on whether the trafficking of narcotic drugs is for medical or other illegal purposes.

#### 3.2 Use of anesthetic drugs

Anesthetic drugs have a dual nature: when used for medical purposes, they are medicines for the treatment of disease; however, once abused by drug users, they are transformed into drugs. These drugs are not limited to the treatment of disease, but may also be used for a variety of effects, such as weight loss, antidepressants, treatment of insomnia, etc., and have legitimate uses in the fields of veterinary medicinal use, teaching and scientific research, which are clearly defined in the Veterinary Pharmacopoeia of the People's Republic of China and the Quality Standards for Veterinary Drugs.

According to Article 7 of the 2015 Summary of the National Symposium on the Trial of Drug Crimes in the Courts, if the perpetrator sells narcotic drugs capable of becoming addictive to drug smugglers or traffickers or to drug addicts, he or she will be punished for the crime of smuggling or trafficking in drugs. If the perpetrator illegally sells these drugs for medical purposes in violation of the Drug Administration Law, seriously disrupting the market order, he or she will be punished for the crime of illegal business operation. If the perpetrator is only using the drugs to alleviate a medical condition such as insomnia or pain, and the actual amount used does not exceed a reasonable medical dosage, the drugs are still considered to be for “medical purposes” and should not be considered a crime. Therefore, in such cases, it is necessary to clarify the purpose of the perpetrator's trafficking in narcotic drugs; if it is for the purpose of drug trafficking, it constitutes a drug crime; if it is for medical purposes, it constitutes the crime of operating an illegal business, the crime of obstructing the administration of medicines, or the crime of illegally supplying narcotic drugs or psychotropic substances; if it is for other illegal purposes, such as rape or robbery, then it constitutes a joint criminal offence with the crime of rape or robbery.



## **4. Qualitative criteria for illicit trafficking in narcotic drugs**

### **4.1 Characterization of trafficking in narcotic drugs for medical purposes: crimes of obstruction of drug administration and illegal business operations**

The Criminal Law Amendment (XI) added the crime of obstructing drug administration, and whether Hu in Case 1 constituted the crime of illegal business operation or the crime of obstructing drug administration depended on the relationship between the two crimes. First, if the perpetrator's illegal sale of anesthetic drugs is sufficiently harmful to human health to constitute the crime of obstructing drug administration, he or she may be punished according to the heavier of the crime of obstructing drug administration and the crime of illegal business operation. If the perpetrator provides funds, account numbers and other assistance for the illegal sale of anesthetic drugs, it constitutes a joint crime of illegal business operation or obstruction of drug administration. Secondly, if the illegal sales behavior does not constitute the crime of obstructing drug administration, but the business amount, sales amount or other illegal income reaches a certain standard, whether it can be convicted and punished as the crime of illegal business operation, there are currently two viewpoints in the academic community: the viewpoint of the parallelism theory believes that if the behavior is in line with the crime of illegal business operation, it should be dealt with as the crime of illegal business operation, and that the purpose of the crime of obstructing drug administration is to safeguard the life and health of the unspecified majority of the population. The purpose of the crime of obstructing drug administration is to safeguard the lives and health of an unspecified majority of people, while the crime of illegal business operation is aimed at maintaining the order of market transactions in respect of specific goods or services.

The viewpoint of parallelism holds that if the behavior is in line with the crime of illegal business operation, it should be punished as the crime of illegal business operation. The purpose of the crime of obstructing drug administration is to safeguard the life and health of an unspecified majority of people. The purpose of the crime of illegal business operation is to maintain the order of market transactions of specific goods or services.<sup>[7]</sup> The shortcoming of this view is that it violates the principle of the balance of crimes and penalties. For example: selling drugs without obtaining a license to operate drugs, if the drugs in question pose a serious threat to human health, they will be characterized as the crime of obstructing drug management, for which the maximum penalty will be seven years' imprisonment; if the drugs have a lesser impact on human health, they will constitute the crime of operating an illegal business, for which the maximum penalty will be up to 15 years' imprisonment. The exclusion theory asserts that the illegal sale of narcotic drugs should not be criminalized as an illegal business offence if it does not meet the constituent elements of the offence of obstruction of drug administration, and that it should only be subject to administrative penalties. However, administrative penalties alone could hardly serve as a sufficient deterrent. Most scholars tend to adopt a compromise view, that is, to agree with the exclusionary theory in most cases, but to advocate the parallelism theory when it comes to cases involving the illegal sale of nationally controlled narcotic drugs. If the illegal proceeds reach the standard of the crime of illegal business operation, even if it does not constitute the crime of obstructing drug administration, it should be convicted and punished as the crime of illegal business operation.<sup>[8]</sup>

### **4.2 Characterization of trafficking in narcotic drugs for drug trafficking purposes: crimes related to smuggling, trafficking, transporting and manufacturing of drugs**

The legal interests protected by drug crimes are multifaceted, involving multiple dimensions such as law, health and social order, and the subjective elements for determining that the perpetrator's illegal trafficking in narcotic drugs constitutes a drug crime include direct intent and

indirect indulgence. In case two, Cheng utilized the qualifications of another person's village health office to traffic in large quantities of nationally controlled psychotropic substances through an online platform. His frequency and quantity have clearly exceeded the normal dosage, and the transaction price far exceeds the profit that can be obtained from the normal operation of drugs. He adopted an online platform in his transactions in an attempt to evade regulation and failed to verify the purpose of the purchasers. Subjectively, he was indirectly permissive of the diversion of anaesthetic drugs controlled by the State into illicit channels. It can be inferred that Cheng subjectively has the purpose of trafficking in drugs, and at the same time, his objective behavior infringes on the legal interests protected by drug crimes, disrupts the social order, and poses a threat to public security, and he should be held criminally liable for the crime of trafficking in drugs.

#### **4.3 Characterization of trafficking in narcotic drugs for drug trafficking purposes: crimes related to smuggling, trafficking, transporting and manufacturing of drugs**

There are four scenarios for the use of narcotic drugs for other illicit purposes: first, if the perpetrator, knowing that the purchaser intends to use the narcotic drugs to commit a crime such as robbery or rape, intentionally sells them to him or her as a means of committing the crime, the perpetrator commits the crime of trafficking in narcotic drugs, and also constitutes an accessory to the crime committed by the purchaser, which is punishable by a single felony. Secondly, if the perpetrator only aims to profit from the sale of narcotic drugs, and is unaware of the type and content of the specific crime to be committed by the purchaser, such behavior is usually regarded as a drug crime. In judicial practice, some people sell anesthetic drugs to unspecified persons on online platforms, and they do not constitute an accomplice, although they are generally aware that the purchasers may use the drugs for illegal acts such as rape or indecent assault. However, if the perpetrator, with the intent to commit robbery or rape, provides another person with unlawfully possessed anesthetic drugs, then the perpetrator constitutes an accomplice to the crime of robbery or rape. Thirdly, if the perpetrator smuggles the narcotic drugs into the country and knows that the purchaser intends to use the drugs to commit crimes such as robbery or rape, and still provides them to him, then he shall be punished for the crime of drug smuggling as well as the crime of robbery or rape in accordance with the law, provided that he meets the conditions for the identification of accomplices. Fourthly, if the perpetrator is motivated only by profit-making, such as adding etomidate privately in order to make the e-cigarettes for sale taste better, which seriously jeopardizes human health, it constitutes the crime of obstructing the administration of medicines.

In addition, it should be noted that the characterization of illicit trafficking in narcotic drugs should follow the principle of subjective-objective consistency, and its subjective knowledge can be judged through the following aspects: firstly, the purchase of nationally controlled narcotic drugs should be based on the diagnostic certificates issued by the doctors of the regular hospitals with the corresponding qualifications, and if the perpetrators intentionally avoided supervision during the purchase process, it can be inferred that their subjective intent to commit a crime existed. Secondly, the perpetrator obtains the nationally controlled narcotic drugs through the regular way or illegal means is also an important reference to judge the subjective knowledge of the perpetrator. Lastly, the sale of anesthetic drugs, as a substitute for new drugs, often leads to soaring prices due to its difficulty in obtaining them, and it can be judged whether the perpetrator subjectively has the intent to sell drugs through whether the transaction price is reasonable. Objectively, the subjective and objective elements are combined to determine whether the perpetrator sold the drug to the drug-addicted group.

## 5. Conclusion

As a result of the high-pressure crackdown on drug-related crimes, the traditional mode of drug supply has been subject to many restrictions. Nationally controlled narcotic drugs have the dual attributes of drugs and medicines. In such cases, the principle of subjectivity and objectivity should be applied in determining whether the goods in question are drugs or medicines. The offenses committed by the perpetrator when trading in the drug for medical, drug trafficking or other illegal purposes are also different. When sentencing them, consideration must be given to their subjective malice, social harm and personal danger. At the same time, it should reflect the law of heaven, the law of the land and human feelings, resolve the conflict between law and reason, and safeguard the seriousness of China's laws and regulations, so as to achieve the unity of adjudication effect and social effect.

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