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On Rational Response of Criminal Law to a "Risk Society"

FU Xiaorong[a][b],*

[a]Lecturer. Law School, Southwest University, Chongqing, China.
[b]PhD candidate. Southwest University of Political Science and Law, Chongqing, China.
*Corresponding author.

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Abstract

Currently, on the basis of a generalized understanding of " Risk Society Theory" by Ulrich Beck, the notion of responding to "risk society" through expanding criminal legislation and judicature to attain risk control and prevention is put forward by Chinese scholars. This notion, however, will definitely break through the traditional concept of culpability and shake the foundation of traditional criminal law in such respects as legal interests infringement, causal relationship and doctrine of liability fixation, leading to a risk in criminal law application. In consequence, the priority now is to truly grasp the definition of "risk society" and rationally deal with social risks. In the face of risk, the criminal law shall not only face up it, but also rationally strike a balance between risk prevention and protection of human rights, scrupulously abiding by the fundamental philosophy of criminal law.

Key words: Risk society; Risk criminal law; Responding; Sentencing

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INTRODUCTION

In the 1980s, German sociologist Ulrich Beck put forward the concept of "risk society", on which basis the theory of "risk criminal law" was built. Since then, "risk society" has gradually become the theoretical foundation for Japanese and German scholars of criminal law to testify the preposition of legal interests protection and strengthen punishing potential damage offense. It might be the coincidence of Beck's "criminal law risk" with some particular social phenomena in China and its enormous explanatory power for some criminal law interpretation and construction that brought about its immediate attention among Chinese scholars upon its introduction. A series of debates on whether the risk society has come, whether China is in this state and how criminal law should respond to it have been unfolded, with three camps of favor, opposing and neutrality rapidly formed. However, before furthering this discussion, a series of questions have to be systematically answered, i.e., a. What is "risk society"; b. Is there any difference between the social risk China faces and the risk proposed by Beck? c. In order to deal with the social risk we are facing, shall we adjust our concepts in criminal legislation and judicature? d. Are the adjustments we made to criminal law through amendments in recent years in coincidence with some notions of "risk society"? e. How to properly balance the relationship between risk response and human rights protection?

1. BASIC CONNOTATION AND CHARACTERISTICS OF "RISK SOCIETY"

In the book *Risk Society* Beck has summarized the characteristics of contemporary society, pointed out that the society we are now living in is a risk society and detailed the its substantive characteristics. He believed that the risks in this society are different from those in previous times, as the former are imbued with

the two distinguishing features. Firstly, these risks are imperceptible and their consequences are uncertain. For instance, the risks of added toxin in our food, pollution of air and water as well as radioactive substance are usually beyond what we can perceive and furthermore, their consequences cannot be assessed by traditional calculating methods. Secondly, these risks usually appear in wholeness. While risks in a traditional society often came from some particular person or social groups and some people were able to keep out of the affair based on their individual reasons, the risks in a modern society stem from modern social system or can even be labeled as the by-products resulting from the mutation process in the internal development of this society, imposing a threat to the humans as a whole. Therefore, risks in this modern society bear the qualities of equality and being global, unlimited by nation boundaries, thus demanding institutionalized measures by the whole society in their efforts of prevention and control. Consequently, we can conclude that the risks by Beck are the ones associated with the social industrialization process, mixed with such elements as modern social politics, ethnics, technology and culture and directed at social and ecological risks brought about by modern civilization system and technological development.

Against the backdrop of widespread anxieties and restlessness, the theory of risk society by Beck on its entry has aroused large reaction. It is widely acknowledged among the majority of criminal law scholars that risk society has begun and various interpretations are given concerning the definition of "risk", on basis of which they constructed new concepts of risk criminal law. They have almost inclusively put all social problems under the category of risk, ranging from traffic accidents, food and drug safety to information security events or even the mass incidents, payment in arrears and violent crimes. Thus, as can be seen, scholars on the fundamental philosophy of risk criminal law have put much less stress on its individual freedom protective function than on that of social security defense. When it comes to the illegality of the doer, more emphasis is put on norms than on results, leading them to paying less attention to the doer's subjective culpability in their understanding of imputation. What they highlight is strict liability. Specifically speaking, in terms of criminal legislation, in order to achieve legal interests protection, they try to expand the scope of elements in a criminal act and make adjustments to doctrine of liability fixation. With regard to criminal judicature, they advocate to amplify the control risk of crime application to dissolve crisis. Regarding concrete measures, they stand for a more severe punishment on preparatory crime, taking an unfulfilled crime as a fulfilled one and particularly, augmenting the incrimination of potential damage offense and increasing the strength and rate of punishment. Therefore, compared with the various principles of crimination and measurement of penalty in traditional criminal law, the theory of risk criminal law has made a breakthrough in fundamental philosophy and concrete measures, resulting in an all-round expansion of crime circle.

Judging from the Chinese scholars' understanding of risk society and their discussion on corresponding measures, the notion taking traffic accidents, medical accidents, food safety and nuclear power utilization as risks is not unreasonable. Nonetheless, equating these risks with the risk by Beck tends to generalize the risks in risk society. In fact, risks discussed by scholars in China are primarily those in a traditional society, among which the majority of them came into being with the rapid development of the society, i.e the application of machines, use of vehicles and the development of railway and aircraft industry with which come both convenience and rates of accidents, bring threats or even harm to people's life. Nevertheless, no country on the earth will prohibit such acts in the form of legislation as they know risks are part of their life, these dangers being an unavoidable price that has to be paid in the pursuit of progress. It is only through the balance and selection in the fight against these dangers that progress is made. Casual prohibition of an act associated with risk will result in ultimate stop in human progress rather than seemingly fewer risks. As a result, on one hand, as for the risks abovementioned, the existing criminal law and other department laws have already provided articles concerning the regulation of some of them. On the other hand, "turning pale at the mention of risk" and constant stress of expanding criminal legislation and judicature to adapt to risk society is very likely to increase the criminal law risk, if used improperly.

2. TRACE AND REFLECTION OF THE DEVELOPMENT OF CRIMINAL LEGISLATION IN CHINA

In China, opinions on the connotation of "risk society" as well as whether China has started its "risk society " still vary, but it is undeniable that there is a widespread concern over such growing technological risks and environmental risks in China's modernization process, as endless incidents of environment pollution and food safety emerge. Many scholars proposed a tougher hand on such illegal activities and raise their crime cost to control such criminal behaviors. Faced with such real danger and public voice, either on purpose or in coincidence, China's criminal legislation displayed a trend conforming to risk society, namely, incriminating potential damage offense and constantly creating new accusations to expand the crime circle, and sending up crime penalty by lowering the threshold for constituting a crime.

A concrete analysis could find us that, since the amendment in 1997, from the first amendment passed

in November 1999 to Amendment to Criminal Law (VIII) in 2011, eight amendments have been completed. Each of these amendments has highlighted a trend of legislation named enlargement of crime definition, which is reflected in following aspects. Firstly, the number of names of crime has increased. After several amendments, the number of name of crimes in criminal law has increased to 451 in 2011 from 413 in 1997. What deserve our particular attention are the first seven criminal law amendments as they, directing at the specific provisions of the criminal law and regulations on crimes, realized the legislation idea of increasing incrimination and enhancing penalty by modifying the constitutive elements of individual crime or statutory sentence, or expanding the crime category. Secondly, when it comes to the details of amendments, on one hand, the incrimination of potential damage offense has been on the rise. For example, eight clauses in *Amendment to Criminal Law of the People's Republic of China (III)* have made modifications concerning nine crimes that endanger public security, highlighting social defense function; Stipulations on crime of dangerous driving in *Amendment to Criminal Law (IIIV)* demonstrates a stressed concern over risks. On the other hand, in order to strengthen the penalty of such behaviors, the amended criminal law changed the actual damage offense into potential damage offense and potential damage offense into behavioral crime, as demonstrated in *Amendment to Criminal Law of the People's Republic of China (IV)* where the actual damage offense of producing and selling medical equipments below standards in Clause 145 has been changed into specific potential damage offense. The Clause 11 in *Amendment to Criminal Law of the People's Republic of China (VII)* has also stipulated that the actual damage offense of impairing epidemic prevention and quarantine on plants and animals be changed into two types of determination that combine actual damage offense and specific potential damage offense. The crime of producing and selling quack medicine as potential damage offense in Article one of Clause 141 in *Amendment to Criminal Law of the People's Republic of China (VII)* have been changed into behavioral offense, which means in determining the crime, if the doer produces a quack medicine, he will be charged with a crime, even without the danger of specific damage. It thus can be seen that China's criminal legislation in recent years has lowered the threshold of being defined a crime by expanding the constitutive elements of a crime, enlarging the crime circle, strengthening crime penalty and broadening the horizon of criminal regulation.

To proactively deal with potential damage offense and enlarge crime circle in the form of legislation is probably a responsive act based on the needs of criminal policy to answer the social reality. However, based on the strengthening of social defense, this legislation idea put its emphasis on the danger of criminal, which tends to neglect an assessment of illegality of the behavior itself, being even against the fundamental philosophy of determining a crime. The subjective aim and objective effect of this legislative act, while usually resulting in relieving public anger and pacifying public mood and shortening the distance between criminal judicature and the public, failed to address the realistic questions that demand solutions. Looking back at China's criminal legislation in recent years, we noticed that there is a need to contemplate on the act of enlarging the penalty scope of criminal law simply on the basis of vengefulness, emotionality, contingency and utilitarian motivation, without a legal basis. The rational thing to do is, on the one hand, to gain an accurate understanding of the social reality. It might be right to say, as some scholars claimed, "'risk society' is not necessarily the true state of our society, but a product of culture or governance". On the other hand, even if our society is full of risks, the risks perceived by domestic scholars differ greatly from those of Beck, therefore, the act of applying the same measures to different objects is in itself not proper. Moreover, even the risks we are facing are enormous, we shall be cautious about the application of criminal law, the jus cogens, as the last resort. In consequence, we shall continue stressing or reiterating the fundamental philosophy of criminal law.

3. CRIMINAL LEGISLATION IN A "RISK SOCIETY" SHALL ABIDE BY THE FUNDAMENTAL PHILOSOPHY OF CRIMINAL LAW

We must bear in mind that values like justice, civilization, modesty and humanity are crystallization of hundreds of years of exploration, which should not be abandoned in this modern society. Every time of expansion of crime circle shall be able to stand the test of justified question and interrogation. We shall abide by the fundamental philosophy of criminal law even we are truly in the "risk society".

3.1 Stick to the Principle of Modesty of Criminal Law

One of the prominent characteristics of the theory of risk criminal law is the expansion of the scope of crime and the strengthening of penalty to realize social defense. However, it is well-known that the penalty by suffering pain is in itself an evil and the same is true to the realization of social defense by imposing depriving-like pain, a forced act through "evil for evil". Consequently, based on the character of evil of penalty, it is universally suggested among scholars on criminal law that criminal law shall be modestly restrained, rather than be expanded casually. The application of criminal law shall be confined to a particular scope so that a maximum degree of civil liberty can be attained with the least intervention of

criminal law. Bentham once said that "mild law could make a people's life style more humane and the spirit of government is more likely to be respected by its people". In order to restrain the legislative power of a nation, he proposed four situations where penalty shall not be applied: a. The accusation is groundless, namely, there is no occurrence of crime; b. The penalty is effectless, namely, that penalty shall not be used if it is futile; c. It is not necessary, namely, the penalty would be excessive if such milder means as guidance, demonstration, request, suspension and award could achieve the same effect; d. It is too costly, namely, if the evil of penalty exceeds that of the crime, the penalty would be unnecessary. Japanese penologist Ryoichi Hirano stressed that "only when there are needs for use can the penalty apply". In a word, the doctrine of modesty of criminal law shall cover such content as complementariness, imperfection and tolerance. Complementariness demands that the criminal law be the last resort in protecting legal interests, imperfection requiring the application of criminal law to be confined to the protection of the basic value of social order, tolerance asking for an actual infringement of legal interest and if the penalty is unnecessary, the infringement shall not be treated as a crime.

In reality, however, once a social relation gets complicated, as demonstrated by the case of penalizing drunk driving, the state will apply the criminal law as the last resort to meet the needs fro maintaining social control and social order. What must be admitted is that penalizing drunk driving, compared with the other way around, has indeed yielded some effect in preventing such dangerous acts. However, in order to forestall a crime, the price behind the legislation shall not be ignored by the legislators. Therefore, when faced with risks and penalizing some particular act, besides considering the actual needs, the qualities of complementariness, imperfection and tolerance of criminal law shall also get adequate consideration. Namely, we shall enforce the principles of justified ends, necessary means and their proper ratio, handling the risks calmly, rationally distinguishing these risks, and adopting the criminal law in the face of risk-taking behaviors that are generally acknowledged to be seriously dangerous while excluding those that are part of the social progress and can be resolved by other means. The characteristics of "the law as the last resort" and "guarantee law" have voted the criminal penalty out as the first means to handle risks as many risks could be resolved more effectively by other means like counseling and persuasion than the forbidding criminal law or cruel punishment. The ultimate end for penalizing drunk driving is to reduce and prevent the occurrence of traffic accidents, however, on one hand, with its strict implementation, the way of preventing traffic accidents by criminal punishment is bound to criminalize a large group of people, which will eventually affect the benign development of our society. On the other hand, detention under six months with a fine is, as a matter of fact, of limited effect to some people. The truth is that, what penalizing drunk driving brought about is the rise of chaotic industry of hiring driving and other sorts of ways of escaping inspection. In contrast to pure criminal punishment, means like improving traffic facilities, enhancing the performance of traffic tools, standardizing the traffic management rules and cultivating good driving habits and awareness of drivers could prove more effective and rational in the long run. In consequence, even if we are in a "risk society", we shall not overstress the criminal law in regulating the society, as the task of controlling risk shall be firstly undertaken by administrative departments and pubic administration. At the law level, the first defense line shall be infringement laws and regulations. Secondly, only going through the administrative regulations can we go up to criminal law level. Risks regulated by criminal law must be those that impose a severe threat and damage to social security, because it is only the criminal law that can prevent such occurrences. When penalty does not ensure the end being met, it must stop its casual intervention as penalty costs could be very high. Furthermore, a balance between the depriving punishment by criminal law and the legal interests protection needs to be achieved to decide whether the criminal punishment is necessary and justified or not.

3.2 Correctly Handle the Relationship Between Human Rights Protection Function and That of Social Defense of Criminal Law

In accordance with the basic proposals of theory of risk criminal law, to attain social defense and citizens' safety is considered to be the most important mission for the criminal law, in other words, the basis of penalty is not the liability of the doer, but the need for prevention, thus the social defense function of criminal law has been strengthened. However, the dual mission carried by criminal law demands not only the declaration and application of penalty to protect society, but also a limited use of itself in order to safeguard civil liberty. How to correctly understand and deal with the relationship between the function of human rights protection and that of social defense has been a question for discussion in the long-term exploration of the theory of criminal law. And this question cannot be separated from the study on individual-based thought and society-based one of criminal law. While the former believes that the existence of human is in itself the end, namely, we must limit our inclination to constrain and intervene individual freedom in order to meet the needs for individual development and defense, the latter stresses social defense and protection, taking essentially humans as the tool to achieve social defense by punishing the criminals in ignorance of the dominant position of humans. For a long time, the thought of state-based criminal law has been deep-rooted in China, highlighting the indispensable needs for safeguarding

the whole interests of the state, in other words, civil liberty can be sacrificed to protect the state and social interests, giving rise to the doctrine of severe punishment. Lawmakers tend to hold the belief that criminal law is all-powerful, thus, expanding the regulatory scope of criminal law is a must for responding to the current social situation. Then, it is no wonder to see that, whenever there is an act imposing a threat or damage to the social order, there is always some voice calling for severe punishment and corresponding act. Ever since the announcement of criminal law in 1997 to the eight amendments, the government's intent has been the expansion of the state's power to impose punishment and limitation of civil liberty. Considering the important transformation era of our society and economy and to deal with the risks our society faces, this purpose is not inappropriate, however, purely basing the function of criminal law on fighting crimes and protecting society may temporarily contain criminal activities with a tough hand, but it is running against the goal of building a nation of human rights and rule of law.

For civilized countries around the world, they all aim for the protection of human rights and legal construction. The civil criminal law has become an important trend as its theory advocates propose that a breakthrough of the function of criminal law as a political tool for the rule of a nation should be made. To be specific, the protection of individual rights shall be put in the first place, state power of punishment being strictly limited and criminal law serving as a powerful guarantee for civil liberty so that criminal law pays essential attention to human rights, humanity and human nature. In contrast, the theoretical starting point of risk criminal law takes civilians as a source of danger, the limit of civil liberty as a principal way for social defense, thus advocating the restriction or even deprivation of civil liberty to achieve social defense. Consequently, with regard to crime determination, the risk criminal law breaks through the traditional standard of an offense, puts more weight on policies, and emphasizes more on the danger of doer than his liability, thus weakening the criteria of the system of crime theory itself and regarding crime as "not a specific damage, but restlessness". In order to attain risk prevention and control, in the allocation of penalty, their perspective has shifted from retribution to punishment, and many of them propose adding an abstract potential damage offense. In consequence, while the function of social defense of criminal law has been extended indefinitely, the function of protecting human rights has contracted substantially, which is inconsistent with the international megatrend of human rights protection. Meanwhile, based on the development status of rule of law in China against the backdrop where thoughts and measures of human rights protection are absent, we shall put the emphasis on the function of human rights protection rather than the penalty of criminal law to control risk as an important mission of legislation and judicature, and bear in mind that he ultimate goal of safeguarding social order is to better achieve the protection of civil interests and liberty.

"Criminal law, a measure based on society for social management, shall answer for the needs of society and be restrained by public policy". Therefore, in the face of "risk society" and according to the basic requirements of risk control, it is natural for scholars to put forward the notion of revising criminal law to handle risk society. Nonetheless, while using criminal law as a countermeasure to risk, to what degree can the criminal law, as we shall think, play an important part in dissolving risks? What we must know is that risk criminal law might work in responding to risk; however, an aimless application will surely result in greater criminal law risk. Therefore, we shall have a rational understanding of the social reality and do not hesitate to use the criminal law as a means of social management if necessary, at the meantime, we shall stay wide awake and not use risk society as an excuse for the over-expansion of criminal law. We must strictly stick to the principle of modesty and restraint in the process of criminal legislation and judicature. The rational thing to do is to believe in but not have a blind faith in criminal law, not to regard the criminal law as an all-powerful tool. When criminalizing the behavior, we shall abide by the principles of modesty, restraint and obligation, rigorously practice the doctrine of legality so that the civil liberty can get its due respect and essential defense.

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