

Advocacy of Criminal Justice Restrictions

Tianyu Li *

School of Law, Anhui University of Finance and Economics, Bengbu, China

* Corresponding author Email: 691705013@qq.com.

Abstract: Under the influence of the current positive view of criminal law, China's criminal legislation actively participates in social governance, and the activities of legislative revision in the late past have shown the characteristics and trends of misdemeanor legislation and the expansion of the crime circle. This indicates, on the one hand, the proactive nature of the initiation of state penal power and, on the other hand, the need to be alert to the potential impact of legislative expansion. Therefore, a balance must be struck at the level of criminal justice, guided by the idea of protection of legal interests, using the method of substantive interpretation to determine the elements of crime, and adhering to the principle of modesty of criminal law, in order to avoid formal criminalization, resulting in the judicial criminalization of undue expansion of criminalization.

Keywords: Criminal Justice Limitation; Criminal Law Modesty; Substantive Interpretation.

1. Introduction

In the context of risk society, each country actively responds to the new issues that arise in the criminal law field in order to achieve the prevention and control of risks. China has actually been influenced by the criminal law theory of risk, and since the current criminal law was promulgated in 1997, criminal legislation activities have been very active, and the criminal law has undergone eleven amendments. When the Standing Committee of the National People's Congress formulated and drafted the "Amendment to the Criminal Law (XI)", it was clearly stated that "since the comprehensive revision of the Criminal Law in 1997, one decision, ten amendments to the Criminal Law and thirteen legal interpretations of the Criminal Law have been adopted to make timely amendments, supplements and clear application of the Criminal Law. Overall, the current criminal law to adapt to the current overall economic and social development in China and the need to prevent and punish crime. At the same time, it is also necessary to make local adjustments to the criminal law according to the new tasks, new requirements and new circumstances." It can be seen, for the amendment of the criminal law must make timely adjustments to the emerging situation and requirements, the frequency of amendments to the criminal law and the requirements of the content of the amendments to serve the purpose of prevention and punishment of crime, which has become the direction of legislative amendments. Successive amendments to the criminal law increasingly focus on the security of the risk society, the criminal law crime circle shows a trend of expansion, the risk society attaches importance to the protection of social security, the essence of the implementation of the concept of positive criminal law concept, the participation of criminal law in the governance of society is not to blame, but if the risk society as a justification for positive criminal legislation, I am afraid that leads to excessive interference in the freedom of the individual criminal law, but also It will not be able to perform the function of criminal law modesty, to achieve the convergence with other laws, and to maintain the good unity of the legal order. Society is in the process of change, new forms of crime are emerging, the traditional criminal law does not have a direct correlation between the pattern of behavior,

in the judicial application cannot be taken by simply interpreting the meaning of the provisions. So, the result is often, in the specific application, by expanding the meaning of the original article to explain, if the interpretation meets the requirements of the principle of the crime and punishment, is in line with the purpose of the interpretation of the article, naturally will not generate controversy. But in fact, the opposite result may occur, once the unreasonable expansion of the interpretation of the semantics of the criminal law provisions will break through the original range, although the conclusion of the problem, but this type of interpretation seems to be only to solve the problem and do not care about the reasonableness of the conclusion of the argument, only an analogous application. In this regard, since the criminal legislation has been oriented to the normative setting of risk prevention, if the judicial interpretation is allowed to be influenced by the positive criminal law view beyond the limit and unreasonably expanded, it will give rise to the phenomenon of judicial criminalization and cause the double expansion of criminal legislation and criminal justice. This is certainly not conducive to the governance of society, nor is it conducive to the restriction of penal power at the legislative and judicial levels, which in turn violates the freedom of legal interests. Therefore, we should take action at the judicial level and use the interpretation correctly and reasonably in judicial practice to amend the inappropriate criminalization.

2. Analysis of the Causes of Criminal Justice Restriction

As mentioned above, under the influence of the positive view of criminal law, the direction of criminal legislation has been determined, so the burden of reasonable restrictions on incrimination must be borne by criminal justice.

2.1. The Need to Balance Legislative Expansion under a Positive Criminal Law View

The positive view of criminal law is that "criminal law should actively intervene in everyday life to achieve the purpose of crime prevention by expanding the criminal law network." [1] The existence of 11 criminal law amendments to the current criminal law in China shows that the legislator

(the National People's Congress and its Standing Committee) has always implemented the concept of actively making criminal law adjustments to new situations that arise in the development of society, and that criminal law is not only an instrument of social governance, but also has to be involved in it in a dynamic "image". This problem-oriented awareness of legislators is also the face of criminal legislation under the positive view of criminal law, and the practice of criminal legislation in China has always demonstrated the concept of positive criminal law, as evidenced by the content of the current criminal law amendments.

The frequent amendments to the criminal law have sparked heated debates in the academic community, with the controversy focusing on whether such amendments undermine the modesty of the criminal law. For example, "most of the recent amendments to the criminal law have created minor and micro-crimes, and the statutory penalties are also minor, and such amendments can better reflect the modesty of the criminal law" [2], but this criticism is that China's recent criminal legislation has shown a clear tendency of "emotional legislation" "risk-driven" and "symbolic dominance" tendencies [3]. Regarding the harm of symbolic legislation, some scholars point out that "symbolic legislation undermines the function of protecting the legal interests of criminal law by serving too many security purposes, the function of safeguarding human rights of criminal law by insufficient modesty, and the function of pragmatism of criminal law by insufficient enforcement. in the context of the protection of social security at the same time whether it is also raising the danger of insufficient protection of legal interests, and whether such expansion is detrimental to the modesty of criminal law.

The creation of new crimes brings some new acts into the criminal law system, which originally belonged to other sectoral laws to regulate, but after the amendment of the criminal law, such acts must be subject to the review of the criminal law. Criminal law has a complementary character, whether the new crime cannot guarantee the modesty of the criminal law, whether it has become an established fact is not certain. Therefore, I believe that, leaving aside the symbolic legislation or not, the key is how to prove that the modesty of the criminal law has been impacted by the legislative practice of misdemeanors? Step back, regardless of the impact or not, since the expansion of criminal legislation to deep into the legislative practice, then only the specific application to show whether it has theoretical harm. Then in the criminal justice activities, must be alert to the trend of legislative expansion, strict control of incrimination, in order to achieve a balance between legislation and justice, to the "Criminal Law Amendment (XI)" to create the crime of throwing objects from a height, for example, the legislator is indeed a response to the frequent incidents of throwing objects from a height in society, but the scope of the elements of the crime, the concept of what is a height, what is thrown is indeed vague, then only rely on justice to explain the application of the crime. As a part of the modesty of criminal law, criminal justice modesty, in order to protect human rights, has at all times undertaken the mission of limiting the incrimination, but in the legislative context of the positive criminal law concept, this task is particularly important, so it is necessary to advocate the essence of limiting the incrimination at the criminal justice level, but it should be noted that this in no way means that the use of narrow interpretation, but only in the approach to incrimination to the principle of protection of legal interests

Hold the bottom line of criminalization.

2.2. The Need for Correction of Judicial Criminalization

A positive view of criminal law drives the expansive nature of criminal law and tends to adopt an expanded interpretation in the application of criminal law provisions to achieve positive incrimination. "The principle of statutory criminality does not prohibit expanded interpretation, but this does not mean that the conclusions of expanded interpretation are all in line with the principle of statutory criminality. In other words, the expanded interpretation method itself does not violate the principle of statutory crime and punishment, but its interpretation conclusion may contradict the principle of statutory crime and punishment. Because an unreasonable expanded interpretation may also violate the freedom of the nationals". It can be seen that within the expanded interpretation can be divided into reasonable expanded interpretation and unreasonable expanded interpretation. For the judiciary, the application of the law should not only be legal but also reasonable, but the judicial practice results in deviations from time to time. The positive view of criminal law does not only point to the expansion of criminal legislation, but can also be expressed as judicial expansion. Some scholars point out that there are two paths to the expansion of criminalization at the judicial level: one

It is to lower the standard of incrimination and expand the circle of criminal offenses through judicial interpretation; secondly, to dilute the substantive elements limiting the incrimination in case adjudication and actively incriminate [4].

With the emergence of the Internet economy and its vigorous development, the way of operating behavior in the socialist market economy is also constantly changing. Taking the crime of illegal business as an example, the expansion of this crime is reflected in the legislative level on the one hand, and the judicial level on the other hand has also intensified the expansion of this crime. First, the expanded interpretation of the crime of "violating state regulations" is an example. The Supreme People's Court's 2005 Interpretation on Several Issues Concerning the Specific Application of Law in Handling Criminal Cases of Gambling provides that issuing and selling lottery tickets without state approval constitutes the crime of illegal operation. However, the sale and distribution of lottery tickets is stipulated in the Interim Measures for the Administration of Internet Lottery Sales (hereinafter referred to as "Measures") issued by the Ministry of Finance in 2010, and according to Article 96 of the Criminal Law, "Violation of state regulations as referred to in this Law means violation of laws and decisions enacted by the National People's Congress and its Standing Committee, administrative regulations enacted by the State Council, and administrative measures and decisions issued by the State Council, Therefore, the "state regulations" do not include the departmental regulations of the Measures, so it cannot be considered that the unauthorized issuance and sale of lottery tickets violates the state regulations. The judicial interpretation, however, elevated some of the regulations as the basis for adjudication, expanding the scope of "state regulations", which is inconsistent with the provisions of Article 96 of the Criminal Law, resulting in the improper expansion of the scope of punishment for the crime, which is contrary to the principle of statutory crime and punishment. Second, one of the elements of the crime is "seriously

disrupting the market order", but the judicial judgment on this element is diluted in practice. Whether serious disruption of market order should be examined in addition to the amount of business, the amount of illegal income, the amount of damage caused and other factors, should also consider the social harm and the necessity of criminal punishment, especially in the invocation of Article 225 (4) of the Criminal Law must have and the first three equivalent social harm and the necessity of punishment.

Similarly, scholars believe that the "crime of collecting illegal debts" in judicial application ignores the serious legal benefits of the constitutive act itself and the crime of collecting illegal debts [5]; another example is the lack of normative understanding of the elements of the crime of throwing objects from a height, its low threshold of criminalization, in current judicial practice. In the current judicial practice, once the perpetrator throws objects from a height, it is directly punished with the crime, and the element of "aggravating circumstances" in the crime of throwing objects from a height is fictitious, and there is a tendency to generalize the application of [6].

Judicial practice is inadequate in how to materialize the interpretation of the constituent elements, often neglecting the judgment of the constituent elements, or downplaying them because they are more difficult to judge, which seems to achieve the general preventive effect of criminal law and achieve the effect of criminal law deterrence by lowering the threshold of incrimination, but this is not only contrary to the principle of modesty of criminal law and adaptation of crime and punishment, but also detrimental to the protection of human rights in the era of the rule of law.

3. The Criminal Justice Restriction of Countermeasure Thinking

Whether it is the improperly expanded interpretation of individual crimes of criminal law by criminal justice or the soft treatment of diluting the constituent elements of individual crimes to realize the criminal law system, it is a deviation from the principle of the law of crime and punishment. Justice should maintain restraint under certain conditions, and should not ignore the substantive judgment of illegality in order to achieve the criminal law purpose of prevention and deterrence. The criminal law is the basis for conviction and punishment, and in the process of judicial adjudication, the law cannot be created outside of this, otherwise the phenomenon of judicial criminalization will arise, and judicial criminalization means a breakthrough of judicial power, an arrogation of legislative power, contrary to the principle of protection of legal interests, and is also a product of alienation of a democratic society and a state under the rule of law. Criminal justice restriction is not only to correct the impact of the undue expansion of justice, but also to balance the expansion of legislation under positive criminal law to lead the direction of judicial interpretation.

3.1. Adhere to the Principle of Modesty of Criminal Law

The criminal legislative activity under the positive criminal law view, on the one hand, realizes the modesty of criminal law by creating a large number of misdemeanors, and on the other hand, represents the active penetration of the state's penal power into the management of social affairs. The modesty of criminal law can be reflected both in the current

practice of misdemeanor legislation and in the prudent use of discretionary power in judicial practice. The current practice of misdemeanor legislation can be said to be a challenge to the modesty of criminal law, the judiciary must maintain due restraint for the realization of justice, with a view to playing a complementary role of criminal law in social governance in due course. The scope of adjustment of criminal law is different from other sectoral laws, only when other parts of the law cannot effectively protect a social relationship, the criminal law can be activated to adjust, also means that the protection of the legal interests of the criminal law is the basis for the use of penalties justified, but also the requirements and embodiment of the principle of modesty of criminal law. Therefore, the modesty of criminal justice must also adhere to the idea of protection of legal interests.

The determination of the content of the legal interest has an important guiding role in the initiation of the penal power, and only when the act is legally infringing, the criminal law has the position to regulate social relations. The connotation of the concept of legal benefit has been expanded by the successive criminal laws, and the content of legal benefit has developed into collective legal benefit which is beyond individual legal benefit. But for the legitimacy of collective legal interests' protection, scholars hold different opinions. Some scholars question this, and believe that not all collective legal interests can be reduced to individual legal interests, "If we think that all collective legal interests can be reduced to individual legal interests, it is undoubtedly a cut of the provisions of criminal law for our use." The concept of legal interest essentially refers to individual legal interest in the sense of freedom of rights, rather than collective legal interest. The author believes that, according to the view that "only the punishment of infringement of rights can reflect the legitimacy of the state's penal power", when the protection of collective legal interests is beneficial to individual legal interests, then the legitimacy of the protection of collective legal interests should be recognized at this time. In the judicial practice, it is necessary to confirm whether the individual legal interest is infringed in this kind of crime to protect the collective legal interest, not just to protect the social security, and in fact there is no damage to the individual legal interest of the crime, it is directly criminalized. Therefore, the crime of collecting illegal debts, for example, is provided in the chapter of disrupting public order, but it should be recognized that the crime protects the legal interests of public order and the personal rights of citizens, and has the characteristics of protecting dual legal interests. The crime restricts the means of collecting illegal debts, i.e., the use of violence, coercion, restriction of personal freedom or intrusion into others' homes, intimidation, stalking and harassment; the crime, because it is stipulated in the chapter of disturbing public order, must violate this social legal interest in order to establish this crime. Therefore, in the specific judicial determination, the means of violating the personal rights of citizens and the impact of disturbing public order must both be present before the act of collecting illegal debts can be regulated by criminal law. In other words, if the perpetrator adopts the behavior specified in this crime to violate the personal rights of citizens but does not disrupt public order, or disrupts public order but does not cause harm to the personal rights of citizens, it is not possible to constitute this crime.

3.2. Substantive Interpretation of the Elements of Crime Composition

The interpretation of criminal law with the concept of legal benefit as the core is a substantive interpretation, a purposive interpretation method, which starts and ends with how the provision can maximize the purpose of legal benefit protection. In other words, the substantive interpretation method requires the normative purpose of the provision, to maximize the purpose of the protection of legal interests. At the interpretive level, "the concept of legal benefit as a means of limiting the interpretation of the facts constituting the crime".

The above-mentioned "throwing objects from a height", "collecting illegal debts" and "illegal business" all have "aggravating circumstances" as a condition for the establishment of the crime, and due to the qualitative and quantitative legislative model of China's criminal law, such aggravating circumstances account for more of the crimes in the sub-rule. The number of such crimes is relatively high. The reason for the judicial application of this type of circumstantial offense is the neglect of the elements of the crime, and another aspect is the lack of a basis for measuring the seriousness of the circumstances. China's "Criminal Law" General Article 13 for the concept of crime, which "proviso" means that "the circumstances are significantly minor harm is not considered a crime," the proviso is related to the issue of incrimination, incrimination: if the behavior is considered to be consistent with the pattern of behavior of the sub-rule at the same time also considered it's If the act is considered to be in accordance with the pattern of conduct in the sub-rule, but also considered to be not minor enough, then the perpetrator must bear the criminal responsibility, and vice versa, the act is considered to be significantly minor should be criminal treatment. Such as the circumstances of the crime or set other elements of the crime of individual crimes, in the criminal legislation has a natural ambiguity, then the specificity of the task must be accomplished through judicial interpretation or guidance cases. In view of the current situation that China's criminal law has been manifested as misdemeanor legislation since late, justice must seriously deal with this phenomenon of misdemeanor legislation expansion and avoid formal incrimination, so the elements of crime must be interpreted substantively on the basis of the principle of statutory crime and punishment, thus clarifying the scope of legal benefit protection and achieving the purpose of legal benefit protection.

4. Conclusion

Positive criminal law concept will not only affect the legislative activities will also affect the judicial activities, especially the current practice of misdemeanor legislation is prone to create judicial personnel in judicial activities to uphold the concept of expanding the circle of crime, under the influence of which is likely to result in the expansion of criminalization. The expansion of the crime circle is undoubtedly the depth of social governance, criminal law adjustment should be complementary role into the social management, excessive penetration on the one hand will make the alienation of the function of criminal law, on the other hand, will also cause other parts of the law on the cross-field provisions of the vapour, cannot achieve convergence and unity in the legal order. Criminal legislation and criminal justice are a community, the two together constitute the integrity of the criminal law system, so the criminal justice to cooperate and complement the criminal legislation, criminal justice must complete the task of limiting the crime circle, adhere to the requirements of the modesty of criminal law, the implementation of the concept of protection of legal interests in order to accurately play the complementary role of criminal law, to maintain the unity of the legal order in the rule of law social governance.

References

- [1] Fu Yuming. Legislative Control and Judicial Balance: Criminal Law Revision from the Positive Criminal Law View[J]. *Contemporary Law Review*,2021,35(05):15-27.
- [2] Yang Nan. Practice and reflection on misdemeanor legislation in China: From the perspective of Criminal Law Amendment (11) [J].*Oriental Law*,2022(06):126-135.
- [3] Tian Hongjie. Legislative expansion and judicial restraint: The development of criminal law moderation[J].*China Legal Science*, 2020 (01):166-183.
- [4] Xia Wei. Concept Transformation of Criminal Law in the Internet Age: From Positive Prevention to Passive Prevention [J]. *Journal of Comparative Law*,2022(02):59-71.
- [5] Zhang Pingshou. Application and path selection of the crime of collecting illegal debts[J]. *Criminal Science*,2022(01):158-176.
- [6] Wu Yunfeng, WU Qihong. Practical review and difficult exploration of high-altitude projectile crime[J].*Shandong Judges Training Institute Journal*, 2022,38(03):138-150.