The Reflections of Limitations on the Restraint of Criminal Law

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Abstract: The theoretical basis and viewpoints of the restraint of Criminal law have certain limitations to some extents. The pursuit of the economic nature of criminal law is prone to lead to a deviation from the value of justice pursued in criminal law legislation and criminal justice. There is a palpable tension between the leniency of criminal law and the principle of proportionality between crime, responsibility and punishment, which may lead to the weakening of the function of criminal penalties. The ultima ratio of criminal law will undercut its independence as a means of crime governance and is not conducive to the timely prevention of certain behaviors that seriously jeopardize society by criminal law. The theoretical presupposition of the incompleteness of criminal law is difficult to hold, and its positive role is very limited. It is easy to cover up the legislative inertia of criminal law and vitiate the protection of legal interests by criminal law. The judgment criteria for various viewpoints of criminal law restraint are rather ambiguous, resulting in weak operability and difficult to implement.

Keyword: Restraint of the Criminal Law; Utilitarianism; Economical Efficiency; Obscurity

1. Introduction

Since the restraint of the Criminal law (also known as the "principle of Criminal Law minimalism", "Creed of Criminal Law minimalism", "the minimalism of criminal law", "the spirit of criminal law minimalism", etc. Domestic scholars usually adopt different expressions according to the needs of their own research.) was introduced into China in the 1980s, it has increasingly become one of the paramount issues of concern in the field of criminal law. In the manifold expressions advocated by different scholars, restraint of the Criminal law has different positions and functions. It may be understood as the value implications, or revered as the fundamental principles of criminal law, or defined as the legal nature of criminal law [1], or comprehended as the basic spirit of criminal law [2], etc. Although the opinions are different, it does not prevent restraint of the Criminal law from having widely received encomiums and plaudits from the academic circle, and even regarded as a fundamental theoretical tool for analyzing criminal law issues. Since the revision of the Criminal Law in 1997, the legislative body of China has made relatively frequent amendments to the Criminal Law, almost once every two years on average. Regarding this rapid progress in criminal legislation, a considerable number of scholars have criticized it using criminal law restraint tools, especially arguing that criminal legislation in recent years has deviated from the restraint of the Criminal law. Some other scholars, however, assert that "modesty and restraint are not the essence of criminal law" [3] and "legislative modesty and restraint are bound to be reduced to a certain extent"[4]. The activation of criminal law legislation and the continuous expansion of the criminal circle form a stark contrast with criminal law minimalism centered on the use of criminal law. This contrary scene makes it very necessary to question whether the legislation of criminal law should be procrustean and what limitations the theory of criminal law restraint has. In view of this, this article intends to analyze the limitations of criminal law restraint and elaborate on them from the following aspects.

2. The Narrowness of the Theoretical Basis of Criminal Law Restraint

The construction of criminal law restraint is not groundless but is proposed based on a certain philosophical foundation. From the perspective of genesis, it can be traced back to the Roman law that "judges do not get bogged down in trivial matters" Some scholars discuss from the aspects of human rights theory, democratic theory and the thought of the rule of law [5], while others explain from broader historical

perspectives such as the Enlightenment period, the classical school, the modern school and modern criminal law[6]. Although the theoretical basis of restraint of the criminal law seems quite solid, at present, at least the theoretical basis of criminal law restraint has the following narrow aspects.

2.1 The Defects of Utilitarianism

Jeremy Bentham's propositions on utilitarianism are often quoted by scholars to demonstrate the restraint of criminal law. In a certain sense, this theory is a very important support for criminal law restraint. According to Jeremy Bentham's proposition, from a utilitarian perspective, first, criminal law should be applied only when it is possible to eliminate evil greater than punishment in order to be recognized. Second, even if such a punishment is imposed, it should not be applied when it is ineffective in preventing evil harm. Thirdly, when the evil harm caused by the application of punishment is greater than that caused by the crime, punishment should not be applied. Fourth, in situations where other means may prevent such illegal acts, criminal penalties should not be applied. [7]

Criminal legislation usually takes utilitarian factors into account. However, it is difficult to achieve the result of scientific legislation by legislating only in accordance with utilitarian propositions. In "The German Ideology", Marx pointed out: "It seems very foolish to reduce all kinds of human interrelationships to the sole utilitarian relationship." [8] Rawls, in criticizing Bentham and other classical utilitarianism, put forward three insightful arguments: First, from the contrast between the principle of total welfare and the principle of rights, utilitarianism allows the interests of certain people to be sacrificed in order to obtain a greater total benefit, and even deprives a few people of their freedom and rights for greater benefits; Secondly, from the perspective of the contrast between the concepts of individuals and society, utilitarianism naturally extends the principle of individual choice to society, while "fair justice" holds that the principle of social choice is the goal under the original contract. Thirdly, from the perspective of the contrast between teleology and non-teleology, the teleological theoretical system of utilitarianism cannot provide the ultimate goal that encompasses all purposes and thus cannot form a unified theoretical system. [9]

According to Jeremy Bentham's proposition, it can be seen that in the application of punishment, he particularly emphasizes the comparison and balance between the evil of punishment and the evil to be excluded. In criminal legislation, the premise of such a trade-off is that there should be certain trade-off standards for evil and harm. In other words, evil should have a certain general agreement. But in fact, "it is impossible for us to measure and compare all values and items on one scale." [10] Evil itself can also lead to different outcomes depending on people's criteria for judgment. For instance, when it comes to the act of insulting a person's character, it is hard to say whether imposing ordinary detention or set term of imprisonment on such crimes is more likely to eliminate such evil harm. From the perspective of the role of punishment, whether it is effective in preventing evil harm depends on who it is targeted at. A certain form of punishment may work for one person but not necessarily for another. As for the view that "criminal penalties should not be applied in situations where other means may prevent such illegal acts", it completely abandon the independent status of criminal law, only considering the issue from the perspective of prevention and ignoring other needs for the realization of social justice.

2.2 The Prominence of the Value of Freedom

Another important theoretical basis of criminal law restraint is liberalism and individualism. It views the country from an individual perspective and emphasizes the protection of individual freedom and human rights by criminal law. The protection of individual freedom and human rights is one of the important tasks of criminal law. However, the values that criminal law aims to protect are not circumscribed to these. There are also very important values such as order, fairness and security. In criminal law legislation, merely highlighting the protection of individual freedom values obviously cannot give full play to the function of criminal law. "Overemphasizing the value of freedom may improperly undermine other equally important social values."[11] Especially in recent years, due to the advent of the risk society, the criminal law that previously only accentuated the protection of individual freedom values has been unable to meet the challenges of various crimes faced by the risk society.

The concept that "freedom gives way to security"

has increasingly taken root in people's hearts. Facing environmental crimes, terrorist crimes, biosecurity crimes, cybercrimes, artificial intelligence crimes and other hazards brought about by a risky society, the uncertain security risks have grown geometrically. Criminal law legislation has shifted from highlighting the protection of individual freedom to emphasizing the guarantee of security values. "The object or standard of criminal law evaluation has also shifted from the actual harm that has emerged to the potential or high criminal law danger, in order to form an early protective effect. This is precisely the origin of the concept of security criminal law." [12] The overall national security outlook was put forward precisely under such a background, emphasizing the resolute safeguarding of "national security". In short, liberalism and individualism, which serve as the theoretical basis of criminal law restraint, merely highlighting the value of freedom cannot meet the current needs of criminal law legislation.

3. The Bias of the View of Criminal Law Restraint

Regarding the proposition of criminal law restraint, different scholars have disparate expressions based on their own understanding. For instance, Japanese scholar Ryuichi Hirano summarized it as the complementarity, incompleteness and tolerance of criminal law,[13] while Professor Hiroshi Kawabata expounded it as complementarity, fragmentarity and tolerance.[14] Professor Chen Xingliang, a Chinese scholar, expressed it as the tightness, complementarity and economy of criminal law, [15]while Professor Mo Hongxian interpreted it as the incompleteness of the scope of criminal law adjustment, the finality of the criminal control means and the restraint of criminal penalty sanctions. [16] Some scholars have summarized it as the economy, tolerance, finality and limitation of criminal law. [17] From the commonalities advocated by many scholars, the viewpoints of criminal law restraint can be summarized as the economy, tolerance, finality and incompleteness of criminal law. Here, the author discusses the bias of the main viewpoints of criminal law restraint.

3.1 The Economic Claims Regarding Criminal Law

The economy of criminal law refers to "obtaining the greatest criminal law benefit with the least cost input".[18] The effectiveness of criminal law refers to "effective prevention and control of crimes". [19]The formation of this view is based on the application of economic analytical law in the field of criminal law. The legislation and judiciary of criminal law need to take economic factors into account to achieve a proportional relationship between the input of criminal law resources and the benefits of criminal law, thereby optimizing or optimally allocating criminal law resources and avoiding the waste of criminal law wherewithal. This proposition is a manifestation of the instrumentalization and utilitarianism of criminal law. It has certain rationality, but it also has considerable limitations. The comprehensive promotion of this proposition may lead to serious systemic drawbacks.

First of all, a single pursuit of the criminal law of economy may lead to criminal legislation and criminal justice pursuit of justice value of the deviation. In terms of criminal law legislation, since criminal penalties can better prevent the occurrence of certain illegal acts, this proposition may tend to expand the criminal circle. This has led to some behaviors with less social harm being stipulated as criminal acts by the Criminal Law. In the field of criminal justice, this claim may lead to wrongful convictions due to the neglect of procedural justice for the sake of quick case closure. Meanwhile, in order to achieve effective prevention and control of crimes, based on the economic considerations of criminal law, it is easy to lead to the occurrence of "severe crackdown" in the application of criminal penalties.

Secondly, from the perspective of the long-term effects of crime control, the pursuit of the criminal law of economy may eventually lead to criminal law "not economy". The "maximization" of criminal law benefits often focuses on the short-term deterrent effect of criminal penalties on crimes, while neglecting the long-term governance of crimes. The causes of crime are diverse, including personal factors, social factors, environmental factors, as well as cultural factors and situational factors, etc. Punishment merely serves as a means of crime governance and cannot completely prevent the occurrence of crimes. In crime governance, considering only the economic factors of criminal law will lead to the neglect of the root causes of crimes. It seems that effective prevention of crimes has been achieved in the short term, but the causes and

conditions that trigger crimes have not been effectively ameliorated, and the crime rate will fluctuate repeatedly. In the long term, the penalty cost for crime prevention will rapidly soar instead of precipitously diminish.

3.2 Regarding the Claim of Tolerance in Criminal Law

The so-called tolerance of criminal law can be said to be respect for freedom. "Even if the freedom of citizens is infringed upon and other control measures cannot effectively exert their effects, it is not necessary for criminal law to punish all of them without any compromise."[20] "Even if the perpetrator has committed a crime, if it is not determined that it is out of necessity for the benefit of the law, criminal punishment should be avoided as much as possible based on the spirit of tolerance." [21] The proposition of tolerance in criminal law is a manifestation of the application of humanitarianism in the field of criminal law, expressing respect for human nature. However, this proposition also has the following biases.

First of all, there is a certain tension between the leniency proposition of criminal law and the principle of proportionality between crime, responsibility and punishment. The principle of proportionality between crime, responsibility and punishment holds that "the severity of the punishment should be commensurate with the crime committed by the criminal and the criminal responsibility they bear", emphasizing that serious crimes should be severely punished and minor crimes should be lightly punished, with the crime and punishment being commensurate and the punishment corresponding to the crime. The tolerance of criminal law emphasizes that even if the freedom of citizens is infringed upon, criminal penalties should be avoided as much as possible. From the comparison of the two, the former requires that acts that are equally harmful to society be treated equally in criminal law legislation and judiciary, while the latter fails to meet such a requirement. If applied simultaneously, there will obviously be a conflict between the two. The lenient application of criminal law may lead to an imbalance between criminalization and decriminalization, trigger the risk of different punishments for the same crime, undermine the uniformity of the application of criminal law, and fail to fully achieve the just outcome pursued by the principle of proportionality between crime, responsibility and punishment.

Secondly, the claim of tolerance in criminal law may lead to the weakening of the function of criminal penalties. The task of criminal law is to "punish crimes and protect the people". The leniency towards behaviors that seriously endanger society cannot fully exert the function of criminal law and cannot achieve the goal of protecting the people. The exertion of the function of criminal law is mainly reflected in the application of criminal penalties. From the perspective of criminal law legislation, the claim of tolerance in criminal law may lead to the situation where harmful social behaviors that should be criminalized cannot be criminalized, and acts that should be subject to severe penalties are subject to lenient penalties instead. This approach cannot fully exert the function of criminal penalties and cannot effectively prevent the occurrence of the above two types of behaviors through criminal penalties. It will weaken the functions of punishment, deterrence, education and reform of criminal penalties for those who carry out the above two types of acts. In a certain sense, this kind of tolerance is an indulgence of those who carry out the above two types of acts. For the victims who have been harmed by the above two types of behaviors, it is also difficult to achieve the soothing function of criminal penalties. From the perspective of criminal justice, the punishment of criminals should be carried out in accordance with the law. Exceeding the tolerance of the law will also weaken the functions of criminal punishment, deterrence and pacification. For criminals, tolerance beyond the law means indulgence and is difficult to exert the punitive and deterrent functions of criminal penalties. Criminals will thus reduce their awe of the law and increase the risk of reoffending. At the same time, such tolerance will reduce the deterrent effect on potential criminals to commit criminal acts. For the victims, since the criminals have not received the punishment they deserve, they do not feel judicial justice and it is difficult for them to be propitiated accordingly.

3.3 The Final Claim on Criminal Law

"Even in terms of the safety of citizens, criminal law can only be used when other means, such as customary moral sanctions, informal control in regional societies, or civil control, are insufficient." [22] This is the finality of criminal

law, which can also be called its complementarity. This view emphasizes that protective interests should be given priority to other means rather than directly applied to criminal law. It is conducive to preventing the "expansion of criminal law" caused by excessive criminalization, thereby overly restricting individuals' rights. This plays a positive role in restricting the abuse of the state's criminal penalty power. However, this view also has certain biases.

First of all, the finality claim of criminal law will weaken the independence of criminal law as a means of crime governance. As an independent legal department, criminal law has unique regulatory objects and methods in crime governance that are different from those of other departments of law. It should not be required to be unidirectionally coordinated and connected with other means of crime governance, and become a subordinate of other means of governance. For acts that endanger society, the finality of criminal law requires that other means be given priority. Criminal law can only be used when other means are insufficient to control them. This proposition expresses the position that criminal law is attached to the effect of other means in stopping behaviors harmful to society, which weakens the independence of criminal law as a means of stopping behaviors harmful to society. Acts that can be regulated by criminal law are usually based on the serious social harm they possess or on considerations of safety value. One of the basic characteristics of crime is its serious social harmfulness. In some cases, based on the pursuit of safety values, certain behaviors with a relatively low degree of harm may also be defined as crimes. For instance, "drunk driving" is criminalized. Whether other means can stop a certain type of behavior is not a sufficient condition for that behavior to be regulated by criminal law. For instance, prostitution cannot be completely prevented by other laws such as administrative law, but such acts are not regulated by criminal law as a result.

Secondly, the final assertion of criminal law is not conducive to the timely prevention of certain behaviors that seriously endanger society by criminal law. After entering the risk society, today's society is confronted with various known or unknown risks. In the face of various risks being transformed into actual hazards, adhering to the final stance of criminal law will lead to certain legal interests not being protected in a timely manner. Here, two typical situations are illustrated as examples.

One situation is that for certain reasons, other means have not regulated a certain type of behavior that endangers society for a long time, and such behavior that endangers society urgently needs to be stopped due to its severity. If, in accordance with the requirements of the finality of criminal law, one can only continue to wait, it is obvious that such legal interests will not be protected in a timely manner. The usual practice is to regulate it first with criminal law. For instance, the issue of criminal law regulation concerning acts that infringe upon citizens' personal information. The Criminal Law Amendment (VII) passed by the Standing Committee of the National People's Congress in 2009 added two new criminal charges related to the infringement of citizens' personal information: "the crime of selling or illegally providing citizens' personal information" and "the crime of illegally obtaining citizens' personal information". It imposes criminal penalties on serious violations of national regulations in selling or illegally providing citizens' personal information, as well as on the act of stealing or illegally obtaining citizens' personal information by other means. Before this, there were no relevant administrative laws or regulations stipulating how to punish the infringement of citizens' personal information, and even the scope of personal information was not clearly defined by administrative laws. The Personal Information Protection Law, which is related to the protection of personal information, was not introduced until 2021, lagging far behind the adjustment of criminal law to such behaviors.

Another situation is when a certain type of behavior that endangers society occurs suddenly, and other means cannot adjust in time, nor can the effect of the adjustment be determined. However, due to the urgency and reality of the serious harm caused by this behavior, it must be stopped in a timely manner. If the criminal law remains silent at this time, it will lead to the expansion of the harmful social consequences of such acts, and even cause incalculable losses or other extremely serious harmful consequences. For instance, after the "He Jiankui Gene-edited Baby Case" occurred in 2018, it posed a serious threat to the ethics of biological research and social order. However, even after the incident,

there was no basis for relevant administrative penalties, nor was there a specific criminal charge that could be properly evaluated under criminal law. Instead, only the related incidental actions could be defined and dealt with. [23] After the "He Jiankui Gene-Edited Baby Case" was convicted of the crime of illegal medical practice, it has sparked many controversies in the theoretical and practical fields of criminal law. In 2020, the Standing Committee of the National People's Congress passed the "Amendment (XI) to the Criminal Law", which added the crime of illegally implanting gene editing and cloning embryos to regulate criminal acts of illegally engaging in human gene editing and cloning embryos.

3.4 The Claim Regarding the Incompleteness of Criminal Law

"The regulations implemented through criminal law should not permeate every corner of life, but should only be controlled within the necessary and minimum limits for maintaining social order. This is called the incompleteness of criminal law."[24] This proposition is conducive to strengthening the synergy between criminal law and other laws, preventing excessive criminalization, and avoiding the omnipotence of criminal law. However, this view also has the following shortcomings.

First of all, the theoretical presupposition of this proposition is difficult to hold, and its positive effect is very limited. The claim of the incompleteness of criminal law actually contains a theoretical presupposition, namely the completeness of criminal law. That is to say, it is possible for criminal law to permeate every corner of life, or it can be proved theoretically. If it cannot be proved, it cannot be demonstrated that the incompleteness of criminal law can be established. However, scholars who advocate the incompleteness of criminal law have never described this state, and there is no fact in history that criminal law has completely permeated every aspect of life. When it is impossible to explain the specific appearance of criminal law in its complete state, and when the complete state and incomplete state of criminal law.

Secondly, this proposition is prone to conceal the legislative inertia of criminal law and weakening the protection of legal interests by criminal law. Using the incompleteness of criminal law as an excuse can easily lead to the lag of criminal law legislation, resulting in the inability to effectively protect the legal interests that should be protected in a timely manner. Here, the legislation of the crime of impersonation is taken as an example. Before the legislation on the crime of impersonation, incidents of impersonating others' school records occurred frequently. Due to the oversight in the regulation of such behavior in China's legal system at that time, the rights protection of those who were impersonated could usually only be carried out through civil or administrative means. Even if the existing crimes such as "the crime of forging official documents, certificates and seals of state organs" and "the crime of using false identity documents and stealing identity documents" are punished, it is still difficult to comprehensively evaluate the social harm of such acts. Such behavior began when the "Qi Yuling case" in Shandong Province in 2001 drew widespread media attention, and it took a full 19 years from the addition of the crime of impersonation in the Criminal Law Amendment (XI) in 2020. After the legislation of the crime of impersonation, such criminal acts have been prevented more effectively.

4. The Ambiguity of the Judgment Criteria for Criminal Law Restraint

There are more discussions in the academic circle on the grand narrative of criminal law restraint, but less research on how to practice criminal law restraint. Some people hold the view that "the overly grand narrative of criminal law's restraint hinders the functioning of its micro-adjustment function, resulting in its application in individual cases being only guiding at the conceptual level rather than operational in specific cases."[25] There is also the view that the theory of criminal law restraint, which originated from the good original intention of restricting crimes, is gradually being interpreted as an impractical "labeling theory". [26] These viewpoints all point to the operational issues of criminal law restraint at the levels of criminal law legislation and criminal justice. When conducting criminal law legislation and criminal justice operations based on the proposition of criminal law restraint, the specific judgment criteria should first be clarified. However, judging from the current expressions of criminal law restraint by scholars, its judgment criteria are rather vague and almost difficult to be specifically implemented in

practice. This is also an important manifestation of its limitations.

4.1 The Criterion for Judging Whether Criminal Law is Economic or Not is Ambiguous

According to the content of the economic proposition in criminal law, it can be seen that the criterion for judging whether criminal law is economic or not is whether the cost input is the smallest and whether the benefits of criminal law (effective prevention and control of crimes) are the greatest. This standard seems clear but is actually rather vague and difficult to be applied in practice.

First of all, from the perspective of the relationship between cost and criminal law benefits, cost input is not positively correlated with criminal law benefits. The amount of criminal law resources invested is only a variable that affects the outcome of the effectiveness of criminal law. There are multiple factors contributing to the occurrence of crimes, such as personal factors, environmental factors, social factors, economic factors, etc. The input of criminal law resources cannot completely determine whether a crime occurs or not. Whether the prevention and control of crime is effective or to what extent it is effective is not entirely determined by the cost.

Secondly, the criteria for judging both cost and criminal law benefit are unclear. From the perspective of cost, what is the scope of criminal law resources? Does it refer to the allocation of criminal penalties, the expenditure in the judicial process, or both? Is the investment in criminal law resources limited to the accused or does it include assistance to the victims? Does cost refer to short-term cost or long-term cost? If short-term cost decreases but long-term cost increases, is it considered low cost or high cost? From the perspective of criminal law effectiveness, for whom is effective prevention and control of crimes targeted? Is it for ordinary people or for convicted criminals? Is the calculation of this benefit long-term or short-term? If the short-term benefit is good but the long-term benefit is poor, how should it be calculated? Moreover, the effectiveness of crime prevention is also difficult to quantify. For instance, it is difficult to measure or calculate exactly how many people can be prevented from committing intentional homicide by imposing the death penalty on a criminal who has committed such an act.

Secondly, it is difficult to find corresponding references for the “minimum” of cost input and the “maximum” of criminal law benefits. The “minimum” of cost input and the “maximum” of criminal law benefits are the products of comparison. But in fact, it is difficult to find a reference point when the input is not “minimum” and the criminal law benefits are not “maximum”. For instance, when the cost input of criminal law is A, the benefit of criminal law is B. When the cost input is C (C is greater than A), the benefit of criminal law is D (D is greater than B). At this point, it cannot be concluded based on the above situation that the more the cost of criminal law is invested, the better the benefits of criminal law will be. When the cost input is C (C is greater than A), the criminal law benefit is D (B is greater than D). At this point, it cannot be concluded based on the above situation that the more criminal law costs are invested, the worse the benefits of criminal law will be. Because the cost of criminal law is not positively correlated with the benefits of criminal law.

4.2 The Criteria for Judging Whether Criminal Law is Lenient or Not are Ambiguous

From scholars’ descriptions of criminal law tolerance, the criteria for judging criminal law tolerance can be summarized as “out of necessity”. That is, “out of necessity to protect the interests of the law.” However, there is no clear standard for what conditions are considered “out of necessity”.

First of all, from the perspective of whether an act is criminalized or not, “out of necessity” cannot provide a clear standard for criminalization. Whether criminalization legislation is needed for an act that infringes upon the freedom of others. Some scholars emphasize that “everyone must have a certain degree of tolerance for harm from others”, [27] and other control measures cannot effectively exert their effects. However, criminal law does not necessarily impose penalties on all of them without compromise. Some scholars hold that “Criminal law should be lenient in its operation towards trivial matters and try not to set them as crimes.” [28] None of these elaborations can clearly define the specific application conditions of “out of necessity”. Because it is impossible to clarify the extent to which each person should tolerate the infringement of others’ freedom, the

"try as much as possible" here cannot clarify under what circumstances a certain behavior can be defined as a crime.

Secondly, from the perspective of the allocation of penalties for criminal acts, "out of necessity" cannot provide a clear standard for the allocation of penalties. Regarding "out of necessity", some scholars hold that "when allocating and applying criminal penalties, efforts should be made to reflect the tolerance of criminal law through fines and non-criminal penalty methods as much as possible." [29]This kind of "try as much as possible" is another uncertain term, and it is impossible to clearly define the specific standards for the allocation and application of penalties for a criminal act. For instance, in China's criminal law, the crime of dangerous driving is only subject to criminal detention. Whether this conforms to the tolerance standard of criminal law or does not can only be a matter of "different people have different opinions". Without clarifying the application conditions of "necessity", it is also impossible to define the judgment criteria for criminal law tolerance.

4.3 The Criterion for Judging Whether Criminal Law is Final or Not is Ambiguous

According to scholars' descriptions of the finality of criminal law, the criteria for judging the finality of criminal law can be summarized as the last means of protecting legal interests. That is, when other means can achieve the purpose of protecting legal interests, they should be given priority. Criminal law can only be used when the control of other means is insufficient. The ambiguity of this standard can be explained as follows.

Firstly, the criterion for determining "can" in "other means can achieve the purpose of protecting legal interests" is unclear. Whether other means can achieve the purpose of protecting legal interests is judged by the results of their application. This outcome is influenced by at least the following four aspects: First, whether all non-criminal law means have been exhausted; The second is whether various non-criminal law means are highly coordinated; The third point is whether various non-criminal law means have been fully utilized in practice; The fourth point is whether time is granted for non-criminal law means to fully exert the effectiveness of the protection law's interests. It is very difficult to make accurate judgments on these four aspects, especially the first and the fourth ones. Because various non-criminal law measures are a process that keeps pace with The Times and can be constantly innovated, it also takes some time for various non-criminal law measures to play their role in protecting legal interests. To what extent can the means of innovation be determined as non-exhaustion of criminal law means? How long should non-criminal law measures be applied before it can be determined whether they "can achieve the purpose of protecting legal interests"? There are no specific standards for these yet. Based on the above analysis, it is very difficult to clarify the criterion of this "ability".

Secondly, the criteria for determining "insufficiency" in "insufficient control by other means" are unclear. "Adequate" and "insufficient" are judgments on the degree of control by other means. To what extent other means of control are considered "adequate" is a reverse criterion for judging "insufficient". However, there is no clear quantitative standard for judging "sufficient", which makes it difficult to judge "insufficient" as well. Situations controlled by other means may present different results of legal interest protection due to multiple factors such as different regions, different periods, and the innovation or implementation of other means. Then, how to consider "sufficient" and "insufficient" here also needs to be further clarified.

4.4 The Criteria for Judging the Incompleteness of Criminal Law are Ambiguous

According to the description of the incompleteness of criminal law by the aforementioned scholars, it can be seen that the criterion for the incompleteness of criminal law is that it should be "controlled within the necessary and minimum limits for maintaining social order". The ambiguity of this standard can be expounded from the following two aspects.

First of all, the criterion for judging the "necessity" of "necessary for maintaining social order" is difficult to clarify and elucidate. The judgment of "necessity" should be the result of a comprehensive and holistic consideration of various factors. Some people hold the view that "the so-called necessity means that 'only by resorting to criminal law can a certain improper behavior be effectively regulated and subdued', that is, the initiation of criminal law is a necessary condition for effectively regulating

improper behavior." [30]The view that interprets "necessity" from the single perspective of the "effectiveness" of criminal law utilization is debatable. On the one hand, it fails to consider that criminal law legislation itself is influenced by multiple factors, and the intervention of criminal law is facilitated by multiple factors. On the other hand, it only considers the effectiveness of criminal law tools, but does not take into account the fairness of criminal law intervention.

"The extent to which a country's criminal law to intervene with the unlawful acts depends on the country's estimation and actual assessment of the harm caused by illegal acts within a certain historical period. It is restricted by the existing political organizational form, economic operation mode of the country, as well as the values of the majority of social members and their tolerance and tolerance for illegal acts. Therefore, it is inevitable that there will be national differences (horizontal differences). In different historical periods of the same country, as the above factors evolve and change, the quantitative standards for criminal acts will also show temporal differences (vertical differences). Especially, the harmful nature and constitutive forms of specific crimes are diverse. In fact, it is impossible to apply a unified quantitative standard to all crimes."[31] Therefore, it is also difficult to set a clear standard for the "necessity" of "what is necessary for maintaining social order".

Secondly, it is difficult to find a reference point for the "minimum" within the "minimum limit" of maintaining social order. Some people hold the view that the so-called "minimum" means that the criminal circle should be confined to the smallest extent. Even if it is necessary to apply criminal law to improper acts, they do not necessarily have to be defined as crimes. Economic, effective and humanitarian factors should also be comprehensively considered to further limit the scope of the criminal circle. [32] This view, from the perspective of criminalization, advocates that the "minimum" within the "minimum limit" of maintaining social order is the minimum of the criminal circle. It further elaborates on the connotation of the incompleteness of criminal law and puts forward the factors to be considered for the restrictions on the criminal circle. However, such incomplete considerations have not clearly established the standard for the minimum scope of the criminal circle.

Emphasizing that criminal law should be controlled within the "minimum limit" of maintaining social order is an analysis of the issue from a comparative perspective. "Minimum" is always relative to some non-"minimum" reference object. For the criminal law legislation of a country during a certain period, whether an act is criminalized or not, in fact, there is no corresponding reference object for comparison and measurement. For instance, regarding the issue of criminalizing acts that infringe upon the reputation and honor of heroes and martyrs, there is a view that when civil means are used and the infringement is serious, it is only necessary to impose penalties under the Public Security Administration Punishments Law. Another view holds that moral, civil, administrative means and general provisions in criminal law are insufficient to punish and prevent such behavior, and it is necessary to establish this crime in criminal law. [33] The Criminal Law Amendment (XI) criminalizes acts that infringe upon the reputation and honor of heroes and martyrs and adds the crime of infringing upon their reputation and honor. Is this evaluated as being in line with the criminal law's control within the "minimum limit" of maintaining social order, or is it the opposite? As there is no corresponding reference object for reference, it is difficult to make a persuasive judgment on whether the criminalization legislation falls within the "minimum limit".

5. Conclusion

Criminal law minimalism is a vague concept that blends various viewpoints. Although its theoretical propositions have received the approval of many scholars, after analyzing the contents of various propositions, it can be seen that these propositions all have certain limitations to a certain extent. Especially, the ambiguity of the judgment criteria for various propositions of criminal law restraint makes it difficult to provide relatively clear quantitative standards, and its guiding value for criminal law legislation and criminal justice is very limited. If the advocates of criminal law restraint in the future fail to clarify its substantive connotation, correct its biases, and on this basis provide operational guidance for criminal law legislation and criminal justice, this theory will eventually be difficult to avoid being abandoned.

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