The Inspection and Correction of "Reification" Criminal Law— A Case Analysis Based on Tobacco-Involved Crimes

Chen Cheng, Master

Chen Cheng, MasterinPublic Procurator, Criminal Law and Criminal Policy, Criminal Jurisprudence and Internet Crime, Hangzhou people's Procuratorate, Hangzhou, Zhejiang, China. Correspondenceauthor:Chen Cheng; cc1123172624@126.com

Abstract: Superficially, the control of trafficking of counterfeit cigarettes in the name of illegal business operation goes against the spirit of modest and restraint, as well as the doctrine, of the Criminal Law; substantially, however, it is the realistic portrayal of the cross-border governing of market misconduct with "reification" criminal law. In recent years, modern criminal law has opened the way to a transformation of functionalism upon the demand for security governance derived from risks to society. It has gone from being a passive night watchman to being a positive leader and pusher, highlighting the trend of "reification" of functionalism-oriented criminal law. The reification not only weakens the contractual value of crime and punishment but also causes dysfunction of the integral legal order. In this regard, while affirming the legitimacy of the functionalism transformation of criminal law, this paper corrects the trend of "reification" of functionalism-oriented criminal law by declaring the modest value of classical humanity-oriented criminal law, and promotes its return to the modest value of "humanity-oriented" criminal law. Based on the principle of unity of legal order, this paper proposes to build a two-tier judgment model consisting of "general violation" and "punishable violation" in an attempt to provide intellectual support for the processing of criminal cases involving tobacco.

key words: rationalism; risk society; active general prevention; tobacco

Tob Regul Sci.™ 2021;7(6): 5541-5553
DOI: doi.org/10.18001/TRS.7.6.43

INTRODUCTION

As stated in Article 2 of The Law of the People's Republic of China on Tobacco Monopoly, "The tobacco monopoly commodities mentioned in the Law refer to cigarettes, cigars, cut tobacco, re-dried leaf tobacco, leaf tobacco, cigarette paper, filter rods, cigarette tow and cigarette manufacturing equipment. Cigarettes, cigars, cut tobacco and re-dried leaf tobacco are generally referred to as tobacco products"; and in Article 3, "The State shall, according to law, exercise monopoly administration over the production, sale, import and export of tobacco monopoly commodities, and production sale, import and export of tobacco monopoly commodities, and practice a tobacco monopoly license system." If any actor buys and sells

counterfeit cigarettes without a license, and makes a large amount of profit, it may be deemed as the crime of illegal business operation. However, there is a doubt in deeming as unlicensed buying and selling of counterfeit tobacco as the crime of illegal business operation based on unlicensed business activities.

Through retrieving "https://wenshu.court.gov.cn/", the author finds that the cases of unlicensed buying and selling counterfeit tobacco are quite common; the judiciary authorities generally deem them as illegal business operations. In addition, such cases are directly regulated by criminal law without being evaluated by other laws such as Civil Law and Administrative Law. Taking the case of illegal business operation by Fang and Cai, et al. as an example, the court believed that "the defendants Fang, Cai, Zhang, and Zhang illegally sell counterfeit cigarettes without the permission of the tobacco monopoly administrative department and without the tobacco monopoly license", forming the crime of illegal business operation. The judgment actually expands the scope of "tobacco" in Article 2 of The Law of the People's Republic of China on Tobacco Monopoly to "counterfeit tobacco". However, there is a logical paradox, namely, is a tobacco monopoly license required for the selling of counterfeit tobacco? This obviously violates the empirical law. In addition, any kind-hearted person may ask "Since unlicensed selling of counterfeit tobacco being far less harmful to society than the crimes of infringing on citizens' personal and property rights, why should it be governed by criminal law?"

The author believes that the control of tobacco-related crimes represented by trafficking of counterfeit cigarettes in the name of illegal business operation superficially goes against the spirit of modest and restraint, as well as the doctrine, of the Criminal Law; substantially, however, it is the realistic portrayal of the cross-border governing of market misconduct with "reification" criminal law.

The trend of "reification" of criminal law is a negative effect of modern criminal law in the process of functionalist transformation in response to the safety governance of risks to society. Therefore, this paper systematically interprets the legitimacy of functionalism-oriented criminal law through reviewing the evolution history of modern criminal law, reflects on its risks based on rationalism, and scientifically outlines the tobacco-involved crime treatment plan of "general violation" + "punishable violation".

THE HISTORICAL NARRATION OF HUMAN NATURE IN CRIMINAL LAW

The Darkness before the Dawn: the Negation of Imperial Tools

As is well known, feudal criminal law's main values were interference, arbitrariness, identity, and cruelty. The law penetrated every aspect of people's private and public lives. This is because, in feudal society, a very small number of people monopolized state power. They relied on violence through the use of "guns" and "knives" to rule over the vast majority of people in society and to ensure that power was inherited through "hereditary insufficiency". This system of rule and its source of power had no legitimacy. To maintain autocratic rule, terror was required. As Montesquieu argued, the principle of despotism is terror, and criminal law is a means of legitimizing terror. In these times, the state's power to penalize was unlimited, and criminal law was inevitably used to tyrannize people. In response, the classical school of criminal law declared that feudalism's penalties were harsh and indefinite. Moreover, crimes were temporary and decided upon by the monarch.[1] Thus, the individual had very few rights, and the person was the instrument and the object.

If it is true that "the feudal emperors regarded punishment as a tool of physical nature," then modern criminal justice opened the glorious recognition of human nature.[2] The idea of criminal justice based on human nature originated from the rise of the modern natural sciences. It was based on the awakening of human reason and was supported by the spirit of the contractualism.

The Light of Human Reason: the Enlightenment and Criminal Law Based on Human Nature

The rapid progress of the natural sciences (such as mathematics, physics and chemistry) improved human beings' ability to recognize and transform the world. It also helped to stimulate the rise of the Enlightenment. This led to a release of the potential contained within human rationality. Descartes described nature as a machine and man as a rational person who could control that machine. It is this kind of rational power that manifests during the Enlightenment.[3] With the discovery of Newton's three laws of motion in the seventeenth century, the public felt that human beings had discovered the key to the mysteries of nature, thereby gaining control over the natural world. They further believed that such ideas and methods could be transplanted into the social sphere. The governance of society was treated in a similar way to the natural world. It was thought that, as long as it was possible to discover objective laws about society, it would be possible to shape them and govern ourselves.[4] The rise of many social sciences during this period, including sociology, was a result of these ideas, to a certain extent. People thought that, by observing and analysing social phenomena and identifying objective laws, man would be able to control society as if it were a machine.[4]

Alongside the Enlightenment, the industrial revolution also fundamentally changed the traditional social structure. At the same time, it altered people's understanding of reason and themselves. "The most important impact of machine production on people's imaginary worlds is that it increased their sense of power a hundredfold".[5]In this regard, Kant emphasizes: "For man, generally speaking, every rational thing exists freely as a purpose. Man is not simply a tool used by this or that will".[6] Concomitant with the development of modern natural science, constructional rationalism sublimates human rationality in a new way. It presumes that every individual is predisposed to act rationally and that every human being is born with knowledge and goodness.[7] Through human reason, the world is knowable, and human beings can obtain sufficient knowledge and information about the real world to grasp the laws of nature and society. Through reason, human beings can construct their future by synthesizing all the details of their own situation.[8]

Furthermore, following Nietzsche's claim that "God is dead," human reason also dismissed the supreme authority of God and placed human beings as the masters of the new world. Thus, the recognition of the human as rational is perhaps the greatest intellectual fruit of the "forest of wisdom" that comes down from modern humanism. This is representative of a move towards value being placed on human dignity and independence. It also emphasizes self-confidence and subjectivity. Nietzsche's claim suggested that God was no longer the ruler of mankind. From then on, anthropocentric values and social practices have been at the centre of the development of many societies. In this development, humans draw inspiration from natural science and set up nature as an authority in opposition to religious ignorance. This leads to the promotion of human rights. This provides a strong ideological weapon as well as the theoretical basis for the development of a new social and political system. This has gone on to shape modern criminal law through a focus on humanitarian values.

The Principle of Crimes According to the Law: Criminal Law Based on Human Nature

The sacredness of human reason does not formally admit that humans have the subjective initiative for self-renewal and evolution. It is based on respect for people's free will, which affirms that everyone is the author of his or her own life. It also guarantees that individuals are not manipulated by others or by external things. In other words, the emphasis on human reason guarantees that individuals are free from external pressure by other people, institutions, or norms. Samuel Pufendorf argues that people can understand the complex objects they encounter in life and are capable of planning their future behaviour. This makes them conform to specific patterns to deduce the expected results of their behaviours. What distinguishes man from animals is his will.[9] Accordingly, one may, according to the provisions of the law, predict future behaviours and situations.

People have the right to determine their actions in accordance with the clear provisions of criminal law and thereby avoid punishment.[10] This is how the principle of crimes according to the law is revealed.

The principle of crimes according to the law can be traced back to article 39 of the Magna Carta from 1215. However, it was seventeenth- and eighteenth-century Enlightenment thinkers such as Beccaria and Feuerbach in Europe who put forward the principle of legality. They proposed the idea of crimes according to law and denied the feudal criminal system in which crimes were the result of evil forces and therefore in the purview of religious institutions. They criticized the arbitrariness of the feudal legal system. For example, Beccaria's famous book on Crimes and Punishments was based on the principle of crimes according to law: "Only the law can prescribe penalties for crimes. Punishment beyond the limits of the law is no longer a just punishment." Also, Beccaria designed "the ladder of punishment for crimes based on the limitation of punishment demanded by humanity." He also "discussed the origin of punishment and its limits from the perspective of social contract theory".[11]

Based on Beccaria's theory of psychological coercion, Feuerbach developed the legal doctrine of crime and punishment further. In his opinion, humans are self-interested and computational beings. He believed that it was human nature to seek advantages and avoid harm. After a reasonable calculation of the pain caused by punishment and the pleasure caused by crime, a person will not commit a crime if they feel that the pain will be more severe. He further claimed that any punishment that exceeds the general requirements for preventing crime through psychological coercion is unjustifiable. In Feuerbach's opinion, therefore, the most effective way to prevent crime is to intimidate citizens legally by providing a price list of crimes in advance and then doling out punishments that sufficiently offset the rewards that the crimes would provide.

This principle of crimes according to law real ized a qualitative change from thought to reality. The French Penal Code, issued in 1810, became the first penal code based on the principle of crimes according to law. Article 4 of the French Penal Code stipulates: "There is no law expressly providing for the punishment of offences committed, and no offence of police, misdemeanour, or felony may be imposed on any person."

Since then, the principle of crimes according to the law has gradually become established as a worldwide judicial code. This means that the norms of criminal law are based primarily on contracts. The law is not just a tool for cracking down on crimes; it is also a legal weapon that restricts the state's right to punish people, protecting individual freedoms. In this sense, the principle of crimes according to the law is an imperial principle of modern criminal law based on human nature.

In short, criminal law after the Enlightenment moved away from an emphasis on "physicality" and focused more on "human dignity." Criminal law became based on ideas of "humanity." It was no longer a tool that powerful people could use against less powerful people. Rather, the purpose of humane criminal was to "defend the weak".[12]

THE JUSTIFICATION CONFIRMATION AND THE REFLECTION OF RISK IN FUNCTIONALIST CRIMINAL LAW

The Social Mechanism for the Formation of Functionalist Criminal Law

The function evolution, legislative output and judicial supply of criminal law are always closely connected with social changes. Since the Enlightenment, classical and humanist criminal law has been based on the idea of contracts. In this model, the state is a passive observer that supports the mechanisms of social governance. This model has modesty and formal interpretation at its core. It prohibits infringement of property ownership and has other rights as its centre Its main focus is on crimes related to property, which are more often committed by people of lower classes. Therefore, the criminal law "Leviathan" cancer cells have been effectively controlled without the occurrence of disease spread.

However, the modernization of society not only increases certain risks but also introduces a

qualitative change in the nature of risk, according to the following pattern: "linear increment → geometric magnitude multiplication → exponential dispersion." Risks increase exponentially rather than arithmetically. They are no longer simply a product of causal relationships; they demonstrate clear social characteristics. When a person takes risks, they do not consider how much they contribute to creating the risks themselves. Individuals are fearful of society which is an uncontrollable black box. People typically think about what will happen in the near future. They do not focus on the unimaginable realm of the distant future, even though a lack of attention in this regard can lead to a significant loss.

For example, the current era has seen the development of new technologies such as biometric identification, voice recognition, drone warfare, satellite positioning, big data, and cloud computing. Thus, the protection of personal data has become an important social governance issue. There is now a general risk that people's personal data will be leaked or abused. This threatens citizens' personal safety, property rights, and interests. Thus, modernization has created new risks in society. The advent of these new risks means that individuals face greater threats than they have before and that human beings are forced to share a common destiny. These risks also increase anxieties about public safety, meaning that data security is a top priority. At a national level and an individual level, risk management and security are of paramount importance. According to Beck, the question of how to limit risks and redirect threats is one that has developed systematically with the modernization of society. Responding to this question requires ensuring that no harm is done either ecologically, medically, psychologically, or socially. It also requires making sure that the level of harm done to people is tolerable.[13] In other words, as nations move from being free states to being safe states, the evolution of the social structural evolution forces the classical model of criminal law (based around humanity) to transform into a functional and normative model. In this model, consideration is given not only to traditional guarantees of freedom but also to new regulations on security, leading to a functionalist form of criminal law.

The Normative Construction of Functionalist Criminal Law

The theoretical carrier of functionalism criminal law is "roxin connection"

In the traditional humanist model of criminal law, the legal system always steers clear of penetrating of criminal policy, keeping its operations closed and independent. Criminal policy is only used to guide criminal legislation and judicial sentencing activities. Its practical purpose is to combat crime. Therefore, criminal policy is not the academic standard used to develop the criminal system, nor is it the normative basis by which the boundary between crimes and non-crimes are judged. The German scholar Claus Roxin used the term "LisztscheTrennung" to describe this separation between criminal law and criminal policy. CaiGuisheng, a Chinese scholar, translates this term as "Liszt chasm".[14] In this sense, the application of criminal law is often regarded as a process of reasoning by syllogism and formal logic. Although this criminal law system can faithfully defend the basic values of the formal rule of law (such as predictable legal judgments and stable and consistent judicial application), it is nevertheless fixed and static; it cannot effectively respond to a society's need to govern risk. Moreover, it struggles to handle the systematization of criminal law, the individual nature of criminal policy, the dogmatism of criminal law, the flexibility of criminal policy, and the tendency of technical logic to alienate individuals. The social life of criminal law becomes more prominent as it requires deduction and demands value in criminal policy. In other words, the system of criminal laws lags behind real changes in society, making it difficult for the legislator to account for illegal activities and respond to the relevant facts. This means that criminal law may become divorced from reality and become overly formalist.

Roxin has stated that "criminal law should not ignore the changes in the world but should integrate these changes and the ideas behind them".[15]

Functionalist criminal law is the theoretical result of emerging requirements for governance during the transition from an industrial society to a risk society. From the perspective of systems theory, given the rapid development of science and technology and its efficient transformation of the forces of social production, there has been an increasingly well-defined social division of labour in modern society. This has resulted in an increasingly complicated social structure. As a result, modern society has gradually become functionally divided in terms of politics, economics, the law, religion, education, and science. This is also the case for many other subsystems, all of which have their social functions.

Although the legal system has the status of an independent subsystem, any attempt to turn the law into a political tool or an economic vassal will inevitably affect its ability to realize its function. The destruction of the basic ecology within the whole social system may lead to a major crisis or the collapse of the whole social system.[16] To ensure that the social system can evolve with times, each subsystem has an independent identity and way of operating. Each subsystem must operate autonomously in accordance with reason and logic, conforming to the social division of labour. As for the legal system, it uses a binary system (legal vs illegal) to regulate behaviour in the social system. It endeavours to ensure normative behaviour in a highly mobile society of strangers, thereby establishing order within modern society.[17] At the same time, the system must remain cognitively open to information from the external environment. It must be able to solve problems by adapting and adjusting.16 This means that the legal system should have the capacity to evolve since it is only by evolving that it can cope with the complexities of the external environment.

If the legal system cannot respond to changes in the external environment, it will be unable to evolve synchronization with that environment. This will make it difficult for it to implement law s that are people-centred and that allow for good governance. Accordingly, functionalist criminal law means that criminal legislation should respond to social changes. Its normative model should meet the rigid functional expectations of the legal system that are affected by changes in the real world. Criminal justice should be based on the social function of criminal law, and criminal law should be related to reality. Its purpose should be regulating society in whichever way is most suitable to achieve the corresponding effect. This forms the following path: "social function of the norms of criminal law → specification protection purpose → normative limit."

In the theoretical interpretation of criminal law, there are two ways of dealing with the relationship between criminal law and criminal policy. The first is separation (the "Liszt chasm" mentioned above). In this model of separation, the legality of crime and punishment is an insurmountable barrier for criminal policy.[18] In the sense of methodology, the two are independent. This model also emphasizes effective communication between criminal policy and criminal law; criminal policy's focus on prevention is combined with the normative focus of criminal law (the "Roxin connection"). If the separation model is intended to maintain the autonomy of the criminal law system, then the Roxin connection views the legal system as the dialectical unity of autonomy and flexibility. Therefore, to develop a functionalist form of criminal law, it is necessary to redefine the relationship between criminal law and criminal policy using the Roxin model of interpretation. On the academic spectrum, the fundamental mark of criminal policy entering the criminal law system is the birth of the rational theory of justice, whose ultimate goal (according to CaiGuisheng) is the "Roxin connection".

In evaluating the proposition that the "Roxin connection" aims at eliminating the "chasm" between criminal law and criminal policy, Feng Jun argues: "Today, the dominant approach in German criminal jurisprudence is to construct a doctrinal system of criminal law that is not only guided by the existence of facts (e.g., by causality or teleological behaviour) but by the objectives and purposes of criminal law".[19]He continues to argue the following:

There are many differences between Roxin's criminal doctrinarism, which is oriented towards the

protection of legal interests, and Jacobs' criminal doctrinarism, which is oriented towards the maintenance of legal norms. Nevertheless, they both overcome the 'Liszt chasm'. They both see the rationalism of criminal law as the basis for the construction of a doctrinal system and they try to make the content of criminal law conform to the requirements of criminal policy. Finally, they both strive to realize the social function of criminal law within a strict system of doctrinal theory regarding criminal law.[19]

In this paper, the significance of the "Roxin connection" is that it maintains the three-stratum structure of the classical "Belling-Liszt" system, while also internalizing the value system of the general prevention of criminal policy into the aims of each stratum in the criminal law system. Furthermore, it forms a rational criminal theory system based on the ontology of the "reification of constituent elements," the "value of violation" and the "functionalization of guilt." In this way, it unifies criminal policy and criminal law. In other words, the entity of the crime is lawlessness and guilt. The evidence of illegality is no longer simply deduced by the public, which would mean that there was a trade-off between the prevention of crime and the teleological orientation. Illegality is reduced to device for distributing and protecting profits, allowing the judiciary to make substantive value judgments in their application of the law.[20] The category of guilt is derived from the need to punish individuals. It is focused on individuals rather than on the needs of society. It is combined with the theory of prevention.

As a consequence, guilt is transformed into a conceptual system that accommodates both retribution and prevention. Furthermore, in the normative evaluation of retribution and prevention, retribution is ranked higher than prevention. Accordingly, the protection of legal interests and the mechanisms of condemnation through the law are realized through punishment, and the state's right of punishment is only activated if it is necessary for prevention. Thus, the application of criminal law is no longer a mere exercise in linguistic competence, con ceptual analysis, and logical deduction. On the contrary, those who apply the law are required to regard criminal law as an open evaluation system based on the purposeful order. They must take criminal policy as the basis for their value judgments and interpret criminal law according to certain standards. They must consider whether their interpretations are in line with the purposes of criminal law and whether they enable the prevention of crime as mandated by criminal policy.

The practical paradigm of functionalist criminal law is "active general prevention"

The transformation of classical humanist criminal law into functional criminal law shows that "the modern concept of the law has also come down from the metaphysical value system of the Enlightenment era; it is a tool of social governance".[21] The "autonomous law" advocated by the rule of the formal law has also transformed into a "responsive law." The law has become a tool for solving social problems.[22] This has led to the instrumentalization of criminal law. As a result of this trend, preventative forms of legislation have emerged, and judicial restraint has given way to judicial activism.

The classical humanist model of criminal law deprives citizens of basic rights (such as life, freedom, and property) to protect the necessity of life. The penalty imposed on the perpetrator is equivalent (harmful) to the abuse of his free will to the realization of the danger prohibited by law. This kind of response is based on the affirmation of the freedom and rationality of individual actors. It accords respect to these actors as rational subjects. It allows them the freedom to yield to the inducement of a crime, creating a form of illegality that conforms to the constitutive requirements and the equal retribution imposed on him by force. It does not use people for any kind of utilitarian purpose. Kant argues as follows: "Whatever innocent evil you inflict on another person, you inflict on yourself. When you insult him, you insult yourself. When you steal from him, you steal from yourself. When you hit him, you hit yourself. When you kill him, you kill yourself".[23] Thus, it can be seen that, in the traditional humanist approach to criminal law, the state is not primarily interested in prevention. This is the refraction effect of depriving defendants of their

basic rights by introducing a guilty verdict. This verdict is a warning to those who are free to make their own decisions and who are ready to act. This is a kind of negative system of prevention based on psychological deterrence. It uses legislative intimidation to offset the criminal's motives for committing a crime by highlighting the foreseeable pain that would be caused by the penalty for that crime.

From the perspective of functionalism, it is difficult to satisfy the requirement for criminal law to participate actively in social governance, and the negative intimidation by example goes through the process of disenchantment. Active general prevention has gradually become the practical paradigm for functionalist criminal law. There are three aspects to positive general prevention: a call for "learning legal loyalty" among the people through the mechanisms of criminal justice; an effect of national loyalty when laws are enforced; a soothing of the general public about their feelings about the law, particularly as far as punishment is concerned.[24]GüntherJakobs, proposed the idea of active prevention by building on the work of Welzel and NiklasLuhmann. Jakobs argues that "the function of a penalty is not to deter potential criminals or make those who have committed crimes better but to maintain the public's trust in legal norms".[25]

In other words, although the essence of crime is the infringement of legal interests, and the legitimate basis of criminal law is undoubtedly the protection of legal interests, the goal of criminal law to maintain the security of legal interests should not override the efforts to stop legal interests being infringed, which is already assured through positive general prevention. Criminal law can't protect legal interests that have already been damaged and restore them to their original state. Instead, criminal law should focus on prevention in the future. Convicting and sentencing highlight the necessity for and the value of both the norms of criminal law and the judicial system. This instils loyalty and trust in the legal system among citizens. Thus, it can be seen that the rationality of active general prevention lies in treating criminal law as a subsystem of the social system. A final negative assessment of a wrongful act is made through criminal proceedings, and a warning is given to potential offenders not to repeat the same mistakes. At the same time, this makes law-abiding citizens more likely to conform to the required ways of acting. People thus internalize (in their mind) and externalize (in their action) a normalized form of identity. Through the repetition of this process, the public's trust in the existence and the implementation of the legal system increases, thereby stabilizing the operation of various social systems.

It should be clarified here that the effectiveness of norms is not the same as the actual effect of norms. Theories of criminal law often confuse these when interpreting the value of positive general prevention. For example, some argue that "the task of positive general prevention theory for punishment is to confirm the public's recognition of the effectiveness of norms so that it pays attention to the damage inflicted by crime on social psychology and responds to it".[26] In fact, the actual effects of norms refer to their practical application. And the effectiveness of norms, according to Alexi, refers to how legal rules are issued by the relevant authority, as well as their ability to create obligations among people. The object of application of norms refers to the compulsory obligations of citizens whom the state expects to comply with the legal norms and obey the legal order. As norms are formed, their validity comes from the logical relationship between a particular legal norm and its superior norm in the legal order. In other words, the validity of legal norms must be examined to see whether they conform to the standards set by higher-level norms.

"When a legal norm with a hierarchical structure is formed into a system it is generally called a 'legal order".[27] The effectiveness of norms has nothing to do with whether they are recognized and obeyed by people:

Active general prevention emphasizes that every member of society has an active obligation to learn lawful behaviour. It is not about enforcing obligations through criminal nets but trying to make members of the community aware of the boundaries between what is legal and illegal. This encourages people to be aware of their legal interests and the

advantages of social stability. They should then voluntarily and actively cooperate to understand their obligations and to comply with them.

The fundamental mission of active general prevention is to spare no effort in encouraging citizens to internalize legal norms into basic doctrines. Thus, normative effectiveness is not the final, anticipated goal.

The Hidden Worries of Functional Criminal Law

As the ideas of a risk society interact with the concept of positive general prevention, the modest image of classical criminal law based on human nature undergoes a structural shift. Criminal legislation and the normative interpretation of criminal law gradually become tools for resisting various social risks. Furthermore, the tendency of functionalist criminal law towards reification becomes increasingly apparent. As a result, individuals are regarded as the means of social stability.

As functional criminal law is formed within a risk society, the legislature "obviously turns to prevention and safety. The state starts to intervene before crimes occur and before there is concrete suspicion of a specific crime committed against a certain actor".[28]Most typically, in the setting of constitutive elements, the concept of causation is replaced by the concept of correlation. In industrial society, the focus of criminal law is generally placed on the last moments before a specific threat is realized. Usually, criminal law begins to intervene only at the point when an act will imminently infringe on a person's legal interests. In a risk society, as the actor separated from knowledge and practice becomes the responsibility of functionalist criminal law, the legislator criminalizes risky behaviours that, from experience, are only weakly correlated (or even uncorrelated) with the occurrence of harm. This is based on the needs of secure governance.

Moreover, this process of criminalization via correlation leads to the following legislative phenomena: the implementation of preparatory behaviours (where the act of preparing to commit a crime is identified as a crime itself, as in the act of preparing to commit terrorist activities); the criminalization of aiding or assisting (the act of aiding a crime is directly identified as a crime itself, as in the crime of helping to commit information internet crimes); and the prepositioning of the accomplished form of the crime (where abstract dangerous offences are added, as in the crime of dangerous driving, or where consequential offences are amended to specific dangerous offences and specific dangerous offences are amended to abstract dangerous offences). Crimes are changed from consequential crimes to specific dangerous crimes. For example, "Criminal Law Amendment (8)" adjusted the "crime of producing and selling poisonous and harmful food" to an abstract dangerous crime. In the last 20 years, the legislative response to terrorism, cybercrimes, food and drug crimes and crimes of environmental pollution shows a move towards active criminalization and heavy punishments. Moreover, pre-punishment has become the "new normal" in Chinese criminal law. The general features of current criminal law legislation have been summarized as follows: "The depth, breadth and intensity of the regulations imposed on social life by the criminal justice system have increased. The law not only 'governs extensively', but also 'governs strictly".[29]

If judicial restraint is the essence of the classical humanist model of criminal law, then judicial activism is the "original ecology" of the functionalism of modern criminal law. Judicial activism emphasizes the positive and effective application of the law to social reality; it advocates for increased discretion in legal judgments.[30] This view is understandable. However, judicial activism often deviates from the legal track of criminal law while representing the strong impulse of criminal law to participate in social governance. On the one hand, the formal interpretation of criminal law retreats from the background and substantive interpretation prevails. It openly advocates for criminal law and the judicial organs to change from doling out "a limited amount of punishment" to doling out "punishment" properly. This can pass for the substance judgment and will essentially be inflicted upon punishment worth but lacks rules into sin a positive attitude, and in effect to punish necessity may be the culvert

perturbation range semantics and digestion of a legally prescribed punishment of human values. On the other hand, criminal policy provides objective guidance for the normative interpretation of criminal law through the specific methodology of objective interpretation. The "penetrating mode" helps ensure an exact match between the judicial and the normative purposes of criminal law. However, "prevention is always associated with a lack of restrictions and with an inherent logic of 'sooner rather than later".[31] Criminal policy is always primarily organized around efficiency. In the process of forming and implementing criminal policy, policymakers focus on achieving their desired effect of preventing and limiting crimes while also allocating the fewest number of resources possible.[32] Due to its political nature and its emphasis on timeliness, it is easy to induce people to get rid of all kinds of restrictions in the name of national or social interests, thereby leaving criminal policy unbridled and above the law.[31]

The basic position, legislative dynamics, and judicial orientation of functionalist criminal law indicate that criminal law (which was originally a passive element in the toolbox of social governance) is now endowed with the responsibility of actively preventing and mitigating risks. Thus, the legislature does not carry out in-depth empirical research into certain risks, nor does it make rational value judgments. It engages in policy trade-offs without giving trial systems enough opportunity and time to develop. It does this simply to reassure the public about their fear regarding particular crimes. As a result, criminal law no longer strictly observes the boundary between laws and social norms. It extends beyond its reasonable function to erode the regulatory territory that originally belonged to civil law, commercial law, economic law, administrative law, and other legal departments. Thus, social governance becomes gradually more dependent on criminal law. This suggests that criminal law will eventually become a domineering monopoly, leading to an improper derogation of the rights and freedoms of citizens and causing the overall legal order to become dysfunctional. The priority of criminal trials in cases of "execution concord" and "civil punishment cross" is the most obvious manifestation of the disorder of the legal system. Prioritizing criminal law not only covers up the weaknesses of the administration and the loopholes in the system but also "separates incidental civil action from the general principle of imputation behind civil tort law, thereby causing general civil injustice".[33]

THE REIFICATION AND CORRECTION OF FUNCTIONALIST CRIMINAL LAW AND THE RETURN TO A BASIS OF HUMANITY

Correcting the Value Basis of the Reification of Functionalism

Criminal law and civil law have different social divisions of labour. There are also other obvious differences between them in their nature, purpose, function, and more. Nevertheless, criminal law and civil law are consistent in their desire to protect the legitimate rights and interests of citizens. Criminal law and civil law, which are derived from the law in general, show a considerable degree of similarity in terms of their legislative provisions, theoretical structures, and basic principles. Civil law intends to ensure equality and autonomy within the social body through empowered institutional arrangements and open financial compensation. It guarantees the status of the civil body in private law, encouraging subjects to operate and develop in private law. It specifies personal and property relationships between equal civil subjects. The normative structure of criminal law is prohibitive. It aims to protect legal interests by regulating and punishing illegal actions. It manages the relationship between the state and criminals. Therefore, the task of civil law is to promote national core interests and values, whereas the task of criminal law is to prevent the loss of national core interests and values.

Both civil law and criminal law regard humans as subjects with free will and equal status. They guarantee human subjectivity through a series of rules and procedures. Civil law is like a kind mother who insists on "the rights of the people". To provide citizens with economic and social autonomy, the Civil Code guarantees all kinds of human rights. It aims to protect people throughout their lives,

ensuring that each person is supported by the law.[34]Criminal law, on the other hand, is a necessary evil. It states and deals with the causes of evil in the language of evil. As a national concept, criminal law is like a strict father. The subjects of criminal law are like naughty children. Criminal law designs a set of punishments to chastise these children.

However, "criminal law has changed its image: it is no longer like a strict father. It lets people make their own decisions but still punishes a few serious crimes severely. It is more like a kind mother, a constant companion".[35]

The Return of Humanity to the Functional Approach

The risk society forces criminal law to change from being a form of civil defence to being a form of social defence focused on national security. It thus becomes a form of state control. As a result, the judicial status of criminal law is seriously weakened. Purposiveness replaces stability as the most important guiding principle for the application of criminal law, and criminal law plays an increasingly important role in guiding social life. However, as Lister argues, "the best social policy is the best criminal policy." The idea of "repressive criminal governance", which hopes to suppress crimes using state power, fundamentally undermines the inherent principles of criminal governance. This is because, with the development of criminology, the causes of crime are gradually revealed. Crimes are shown not to be simply the actions of individuals but rather a product of society as a whole; they are no longer a result of actors' free will.[36] In this sense, while short and fast criminal law is the country's main means of punishing crimes, it is only a subset of the overall social system. It cannot eliminate on its own the root causes that give rise to crimes. This makes it difficult to treat the root causes of crimes. In general, while criminal law can reduce the number of crimes, social policy can curb the increase in crime. Therefore, to punish and prevent crimes, criminal law is indeed indispensable, but it must also be supplemented by effective policies regarding education and public protection. The good intention of tracing the source of governance may not be able to be realized.

Criminal law does not have a positive effect. It gives rise to the negative energy of "Reification." Thus, the modest spirit of abiding by the classical and humanist approach to criminal law can be regarded as the best way of ensuring that functionalist criminal law retains its humanity. After all, criminal law should not be like the sword of Damocles hanging over the heads of its citizens. It should be a shield that protects citizens' legal interests. It should be the last resort of social governance:

The austerity of criminal law is the core of basis for the limit of the effectiveness of punishment and criminal law and emphasized by careful and legitimacy of the power of penalty, not just against the necessary crime and punishment, also does not exclude criminal law essentially to participate in social governance, of course, also don't deny 'tools from social changes and development of the legal system of criminal law' role. Merely or unilaterally advocating prudent punishment based on the spirit of modesty makes criminal law incapable of action (or entirely negative in its responses), which is essentially contrary to the functional nature of criminal law as a social system.

In view of this, we should affirm the principle of a unified legal order in the handling of cases where there is "civil punishment concurred." We should then regulate the "proactive adjustment of civil law and the complementary protection of criminal law." We should build a two-level model of judgment based on the ideas of "general violation" and "punishable violation". That is to say, breaking the law should first be treated as an act that undermines the expectations of compliance within the overall legal system. Different fields of law should be united in judging whether actions are illegal or not. The different understandings of illegality in each field of law are only the result of illegal acts. This is true, for example, when it comes to compensation for damages in civil law, administrative penalties in administrative law, criminal penalties, and security penalties.[37] Since the definition of illegality is different in different fields of law, we should

recognize the relative ways in which different fields of law judge illegality. Illegal acts in criminal law are those that are worthy of punishment, that which is worthy of punishment for a crime, that which is worthy of punishment for a crime, that which must have a certain degree in quantity, and that which is worthy of punishment in quality.

The tobacco-involved crimes represented by trafficking of tobacco products involve important propositions of criminal law doctrine such as criminal and civil law crossover, and competition and cooperation between administrative punishment and criminal punishment. In other words, tobacco-involved crimes generally have dual wrongfulness: Firstly, such crimes violate civil law, administrative law and other antecedent laws, and when the wrongfulness reaches or exceeds the upper limit of legal liability of the antecedent laws, criminal law sanctions would be applied. Therefore, the criminal management of tobacco-involved crimes must follow the rule of shared governance by civil law, administrative law and criminal law. Before exhausting the methods stated in antecedent laws, criminal law should not forcefully intervene in the handling of tobacco-involved cases as the social management law. Taking the trafficking of counterfeit cigarettes as an example, it first goes against the principle of honesty and credibility in the Civil Code; therefore, the harmed private rights can be remedied by infringement suits. In terms of administrative management, the market supervision and management department can impose fines and confiscate illegal income according to administrative laws and regulations such as The Law of the People's Republic of China on Tobacco Monopoly. If the antecedent civil law and administrative law cannot fully regulate such misconducts, the criminal law may be applied.

CONCLUSION

Tobacco-involved crimes often have the dual attributes of civil and criminal violation. However, the civil or administrative violations do not necessarily ignite the "fire" of criminal offense. In practice, due to the naturally expansive nature of functionalism-oriented criminal law, civil and administrative violations are often treated as criminal crimes, which go against the human rights protection function of criminal law. By reviewing the value rationality of classical humanity-oriented criminal law and systematically depicting the original face of functionalism-oriented criminal law, this paper builds a two-tier judgment model consisting of "general violation" and "punishable violation" based on the principle of unity of the legal order, and proposes the preliminary solution in regard to criminal-civil cross cases. However, the solution has not yet been examined by enough criminal cases involving tobacco, and its practicality and effectiveness still need to be further evaluated by judicial practice. In view of the limitation of space, this paper suggests that criminal law is the last resort, and that the use of criminal law for the regulation of trafficking of tobacco products (including counterfeit cigarettes) by criminal law should face up to the impact of social change on the evolution of crime, adhere to the status of criminal law as a safeguard law, and further clarify the relationship between criminal law and antecedent law.

Conflicts of Interest Disclosure Statement

The authors declare this research is not funded by any organization related to tobacco production.

References

1. Jiang M. The Impacts of Preventive Legislation of Criminal Law on Criminology: Predicaments and Solutions. *Political Science and Law*. 2020;1:86.
2. Chen ZL. Introduction to Human Dignity and Criminal Law System. 418.
3. Roland N. Stromberg. A history of modern Western thought. Translated by Liu Beicheng and Zhao Guoxin. *Gold Wall Press*. 2012;52.
4. Lao DY. The functionalization trend of criminal law system in network era. *China Law Review*. 2020;2:105.
5. Bertrand R. History of Western Philosophy (vol.1), translated by He Zhaowu. Commercial Press. 2015;274.
6. Immanuel K. Principles of moral metaphysics, translated by Miao Litian. Shanghai People's Publishing House. 1986;80.
7. Lao DY. Behind the social harm standard-Questioning the epistemological thinking of "seeking truth from Facts" in criminal field. *China Law Review*.2020;2:199.

8. BermanML. Risk Assessment for Tobacco Regulation. *Tobacco Regulatory Science*.2019;5:36.
9. Samuel VP. Natural law obligations of man and citizen, translated by JuChengwe. Commercial Press. 2010;60-63.
10. Helmut C.International criminal Law and European Criminal law, translated by Wang shifan. Peking University Press. 2017;141.
11. Beka L. On Crime and Punishment, translated by Huangfeng. Commercial Press. 2017;72-73.
12. Chen XL. Introduction to Human Dignity and Criminal Law System. 186.
13. Ulrich B. The risk society, translated by He B*owen. Yilin Press. 2004;15-16.*
14. Claus R. Criminal Policy and Criminal Law System (second Edition), translated by CaiGuisheng. China Renmin University Press. 2011;14.
15. Claus R. New developments in the discussion of legal interests, translated by Xu Sijie. *Journal of Lunar Law*. 2012;211.
16. Lao DY. The functionalization trend of criminal law system in network era. *China Law Review*. 2020;2:109.
17. Jia J. The Predicament and Way out of axiology of New Behavior-also discuss with Professor Zhou Guangquan. *Modern Law Science*. 2018;6:119.
18. Chen XL. The Relationship between criminal doctrine and Criminal Policy: from The Liszt gap to Roxinconnection. *Peking University Law Journal*. 2013;5:975.
19. Feng J. The position and method of criminal law doctrine. *Peking University Law Journal*. 2014;1:180.
20. Wu CZ. Concept law, benefit law and value law. China Legal System Publishing House. 2011;432.
21. FrechtlingJA. Establishing a Research Base to Inform Tobacco Regulation: Overview. *Tobacco Regulatory Science*. 2021;7:144.
22. Qiang SG. From governing the country by administrative Law to Governing the country by government and Party Law-Juristical thinking on the relationship between Party Law and National Law. *China Law Review*. 2016;3:36.
23. Guo Y. Reflections on the Internal Grounds of Immanuel Kant's view of punishment. *Research on modernization of rule of Law*. 2020;1:141.
24. Claus R. General theory of German criminal law, translated by Wang Shizhou. Law Press. 2005;43.
25. Gruente J. Behavior liability criminal law - functional description, translated by Feng Jun. China University of Political Science and Law Press. 1997;37-39.
26. Chen JL. The crisis of the justification of penalty and the active general prevention. *Law Review*. 2014;4:162.
27. Takehiko S. Fundamentals of Criminal Law, translated by Li Hong. Law Press. 2005;212.
28. Erich Z. Criminal Law in the global risk society and information society, translated by Zhou Zunyou and Jiang Su. China legal publishing house. 2012;167-168.
29. Zhou GQ. The establishment of positive legislative concept of Criminal law in China. *law research*. 2016;4:24.
30. Nonet S.Law and society in transition, translated by Zhang Zhiming. China University of Political Science and Law Press. 1994;81-128.
31. Lao DY. Investigation of the relationship between criminal policy and criminal law system. *Journal of Comparative Law*. 2012;2:92.
32. Liang GL. Criminal policy: Position and scope. Law Press. 2005;21-22.
33. Chen RH. Problems and Doctrines in criminal proceedings. *China Renmin University Press*. 2013;236.
34. Wang LM. Review and Prospect: Forty years of Civil law legislation in China. *Law*. 2018;6:36.
35. Zhang ZG. On the legal principle of cumulative crime-Taking the crime of environmental pollution as the center. *Global Law Review*. 2017;2;173.
36. Enrico F. The positive school of criminology, translated by GuoJianan. China University of Political Science and Law Press. 1987;43.
37. Hans HJ and Thomas W. Lehrbuch des deutschenStrafrechts, translated by Xu Jiusheng. China legal publishing house.