

# IRK FERENC: THE RELATIONSHIP BETWEEN SOCIAL AND ECONOMIC CHANGES AND CRIME. THE CRIMINAL POLICY OF RISK SOCIETY

We are living at the time of a long period of radical social and economic transformation. Mankind is beginning to realize that *increasing performance* is only one aspect of sustainable development. The other important task is *controlling the risks* that go together with increased performance. (Besides these, there is a third, very important factor involved: *diminishing the inequalities* that are present in the world. This factor, however, concerns our topic only indirectly.) It seems that the initial period of this process – a short process viewed from a historical perspective although it seems a long one for those who live through it – dates back to the time of the cold war after World War II. It was at that time that mankind (even if not the whole of it but at least the best of it) realized how vulnerable the population of the world as a whole and the individuals in it are. Nuclear explosions also raised the awareness concerning how easy it is to start these irreversible or hardly reversible changes. Sometimes the harmful effects of these processes are manifest only with a time delay and they can be hardly forecast, if at all.<sup>1</sup> The nuclear disaster in Chernobyl as well as the terrorist attack on the World Trade Center in 2001 also raised awareness of the implications of the possibility of irresponsible and undependable persons taking possession of technological instruments developed in the second half of the 20th century.<sup>2</sup>

## 1. The new risk concept of risk society

Most sociologists describe the end of the 20th century as the beginning of a new form of society: the term “post-modern” was created and several attempts have been made to define the essential characteristics of this type of social order.<sup>3</sup> The most significant summary of the past two decades was written by Ulrich Beck, whose work entitled “Risikogesellschaft”, which has been translated into several languages, is among the foundational works about the essence of new society.<sup>4</sup> One of the starting points of his argument is that the period of *class societies*, which lasted for thousands of years, came to an end in developed societies at the end of the 20th century. At the same time *risk societies* started to be formed, which

<sup>1</sup> The scientists of the Club of Rome were the first to call public attention to the realistic dangers of this trend on the one hand and the possibility of preventing these dangers on the other. For further information, see the following sites: <http://www.kornyezetunk.hu/belső/090.html> ; <http://www.inco.hu/inco0401/infotars/cikk2h.htm> ; <http://www.clubofrome.org/docs/limits.rf> ; <http://www.clubofrome.org/> ; <http://dieoff.org/page25.htm>.

<sup>2</sup> The suicide attacks in 2004 and 2005 brought about the realization for the public (and the governments) in Europe that no one can feel safe any more and that it is possible to kill innocent people without traditional weapons or a declaration of war.

<sup>3</sup> See about it F. Sack: Társadalmi átalakulás és kriminalitás – társadalmi átalakulás, mint kriminalitás. (Social transformation and criminality – Social transformation as criminality.) In: F. Irk (ed.): *Social transformation and crime*. Hungarian-German Criminological Symposium Budapest, 1995. 20-25 August. OKKri Budapest 1997. pp. 95-132.

<sup>4</sup> Beck, U.: *Risikogesellschaft. Auf dem Weg in eine andere Moderne*. Suhrkamp 1986. The quotations and references are partly from the German edition of 2003 and the Hungarian edition of the same year. (Beck, U.: *A kockázat-társadalom. Út egy másik modernitáshoz*. Andorka Rudolf Társadalomtudományi Társaság és Századvég Kiadó, Budapest, 2003.) ; see also: *Risk Society Towards a New Modernity* (1992) ; *La société du risque. Sur la voie d'une autre modernité*, Paris, Aubier, 2001

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were gradually replacing the industrial societies of the 19th and 20th centuries and were radically different from them. The difference between the two kinds of societies – if we look at them only from a scientific point of view – is huge and they represent different qualities. While science attacked *outside dangers* and arranged protection against them until the last century, risk society has to fight against *the dangers created by risk society itself*.<sup>5</sup> In this world order – which started before the fall of the Berlin Wall, as Beck also expounded his views, which are far from being conformist, before this event – it is not governments and especially not parties that tell what the image of our future should be like. Everyday reality, *the changes themselves* dictate, while science and political institutions only react to these – these reactions are better or worse (but mostly they are bad and delayed). Changes take place partly automatically and are hardly noticeable, especially in the initial period and partly because of this, they are not controlled. During these transformations it is the more favourable case if there are responses to the challenges of the environment, which are manifested in different initiatives, and not only passivity, a mere going along with the course of events. It can also be regarded as a fortunate development if among the initiators we find economic pressure groups that clearly articulate different interests and different lobby groups that are markedly different from each other (NGOs among them). The traditional relationship between science and institutions, however, is a thing of the past. There are no unquestionable taboos and the statements of sciences that often became rigid dogmas in the past are debated by professionals and the public now.

*Risk society*,<sup>6</sup> which replaced class society unnoticed, as if by stealth, operates *on principles that are basically different* from the principles we used to have. Society does *not* make efforts in order to *protect* or to create certain values (e.g. justice, equality) any more but increasingly often it tries to take action against *the destruction of certain values*. The economic and social “development” of the last few centuries and especially of the last few decades has finally and irreversibly taken a course in which *an increasingly greater role is taken by risks that admittedly can only be managed to a limited extent*. Taking risks that involve the possibility of serious consequences has become tolerated in several fields of life by now.

The citizens and the leaders of countries that are in the most advantageous economic position are planning to take steps in response. The essence of these steps is to attempt to *take enhanced security measures* against the increased risks. The literature concerning the practical treatment of security, and public security as part of it, is almost inexhaustible. It can be summarised in the system of *risk management*. The parts of this system are the *attacker*, the *valuables* that are to be protected and the *situation*.<sup>7</sup> The experts who deal with risk management highlight the fact that besides the risks themselves, the new system of risk management also poses dangers for society. For instance, when we examine the ideas aimed at increasing security, we must take into consideration that the new opportunities that serve the purpose of protection often involve the limitation of *rights of freedom*, and in many cases their clear infringement. In democratic countries one of the major dilemmas of

<sup>5</sup> See: M. Aladási: *Dangerous modernity*. Népszabadság 10 July 2003

<sup>6</sup> See: Beck *ibid.* p. 65.

<sup>7</sup> In detail, see: Manócsa, G.: *Security: an Introduction*. Cranfield University 1998., also Finszter, G.: *Rendvédelem és kriminológia* (Law enforcement and criminal policy) Manuscript 2001.; Izk, P.: *Globális kockázatok – diszfunkcionális kriminológia*. (Global risks – dysfunctional criminal policy) In: Állam- és Jogtudomány XLII/3-4 (2001) pp. 191-224.

thinkers and politicians who are committed to rights of freedom is how to harmonize these two fundamental rights and the expectations of the public optimally.<sup>1</sup>

## 2. Does the changing concept of risk affect criminal policy?

We stated earlier that – at least from the point of view of security – that the main characteristic feature of the new risks is the mutual influence several *unknown* factors of risk-taking and its consequences exert on each other, which consequently leads to events and results with *uncertain* outcomes.

As we examine the unknown relationships, the deeper we dig, the more *questions* are raised and more of them remain unanswered. Here are just a few examples:

- ◆ Surely, there must be suitable – practical – grounds for asking the question whether in a society that is going through radical transformation *criminal law can be called the “ultima ratio” (ultimate solution)?*
- ◆ And if we say “yes” to this question, this will raise another question: for whom is it “yes” and for whom is it “no”?
- ◆ Do we admit that increasingly often punishment does not follow a crime or only follows it with a delay?
- ◆ Do we admit that there are such serious crimes for which the instruments of the law cannot provide adequate retribution, proportional to the punishments of that go with other crimes?

In stable societies the norms are stable, too. For a long time we believed that in countries operating under a constitutional legal framework this is mainly due to the fact the *most of the people* follow the norms voluntarily. Nowadays, however, we hear it said more and more often that in several walks of life this rule is a thing of the past. As a consequence, in most parts of the world one of the main guarantees for enforcing norms of criminal law ceased to exist. When ignoring the legal norms becomes general and following the norms becomes the exception, *what used to be deviance becomes the norm* because it is something that people do on a mass scale. This raises further questions:

- ◆ What will traditional criminal law do with the perpetrators and victims of traditional crimes when it has to face the damage done to future generations by persons that cannot be identified?
- ◆ What will happen to the taboo-role of criminal law if the perpetrators (and the victims) of environmental pollution and destruction (both real and virtual) that is done on an international scale have not got anything adequate to say? Because it is a plain fact that behind these crimes there are “spirits” that cannot be identified, parliaments and governments invested with legislative and punitive powers. The explanations for these facts are diverse.
- ◆ And if these crimes go unpunished, how can parliaments and governments have the moral right to deprive those people of their freedom who commit incomparably smaller crimes and to destroy their livelihood and the livelihood of their families? Added to it, indirectly, there is the damage in the magnitude

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<sup>1</sup> See: Glaeßner, G.-J.: *Sicherheit und Freiheit*. (Security and Freedom) In: [http://www.das-parlament.de/2002/10\\_11/Beilage/001.html](http://www.das-parlament.de/2002/10_11/Beilage/001.html), továbbá Bendrath, R.: *Von „Freiheit stirbt mit Sicherheit“ zu „Keine Freiheit ohne Sicherheit“?* (From “Freedom dies with Security” to “No Freedom without Security”?) In: <http://tor.at/resources/politics/infowar/userpage.fu-berlin.de/%257Ebendrath/sicher.pdf>

of billions of euros or dollars suffered by the public as a consequence of the punishments.

*Only global punishments can be the answers to global crimes.* Here we talk about punishments that have nothing to do with the average man, for whom criminal law has to (should) set an example. Or is it possible that decision-makers invent local punishments against global crimes? In the past quarter of a century we have observed a continuous change in the way risks are viewed and in connection with it in the priority of phenomena that are dangerous to society. Criminal policy, however, has been unaffected by this although there is a tradition of the successful harmonization of theoretical principles and practical demands in Hungarian law going back to one and a half centuries.

### 3. The danger posed to society in relation to criminal policy

The answer to the question why we impose punishments was already the starting point of the great codification trend of the 19th century. As the justification given by the minister for Csemegi Code summarized: the right solution here is provided by the *harmony* of the requirements of two principles, *moral truth and usefulness*.

The exclusive use of the *theory of absolute justice* would open the gates for the threat of criminal law: "According to this system ... the state has the right to punish any violation of morality even if it does not concern the order of the state and it would have the right to investigate and punish private immorality and even the errors of thoughts. This is tantamount to inquisitions and slavery."<sup>9</sup>

The exclusive rule of the *relative usefulness theory* on the other hand can result in the disappearance of moral responsibility with the size of objective danger taking its place: "Whether a crime is serious or not is not to be assessed from the point of view of moral corruption manifested in the crime but from the point of view of the danger that it causes."<sup>10</sup>

After expounding the two extremes, the justification given by the minister finds the fundament for the criminal legislation of 1878 to be built on in the unity of the absolute and relative approaches:

"The relative goals can be related to the goal of truth and besides that, to the extent the truth makes it possible, must be enforced together with it. But they are not principles of criminal law. Not accepting either the absolute or the relative theory as the basic principle of the present bill, its basic principle is the united theory, on which the bill of 1843 is founded and which permeates the whole system of that bill."<sup>11</sup>

*I think that the Beck-type risk paradigm can take criminal law in the direction of the utilitarian theory, taking the limits off its responsibility theory, which is based on the idea of crimes being attributable. (This meant a problem already in the case of crimes committed out of negligence but the legal responsibility of legal entities loosens the coherence of criminal law to an even greater extent. It is by no accident therefore that Hungarian law allows sanctions against legal entities only if there is individual behaviour that is attributable.)*

<sup>9</sup> The Hungarian Criminal Law and its complete material. First volume, Budapest, 1880., pp. 28-29. (Emphasis: F.L.)

<sup>10</sup> *ibid.*: the same pages. (Emphasis: F.L.)

<sup>11</sup> *ibid.*: the same pages

The way risk society assesses crime has special legal relevance in two areas:

- ◆ First, when we label some act as deviant and to an extent that by committing the act the perpetrator breaks a written norm of criminal law.
- ◆ Second, when we form an opinion of the gravity of the act that broke a norm of criminal law.

We can take it as a natural phenomenon that in a society undergoing a relatively fast transformation both the public and its representatives label new trends and acts that were accepted in the past as dangerous to society. Most of the new facts of codification in criminal law come from among these acts. (Criminalization) At the same time, in the case of several other acts, a change in the opposite direction can be observed compared to the approval these acts used to have. In this way, the acts against which the legislators of an earlier generation imposed sanctions of criminal law are not considered crimes any more by a community that forms opinion on it at a later time. (Decriminalization) The media take a significant part in it with their specific preferences and their ability to change the value judgements of the public themselves alone. The final word is pronounced by the political elite, sometimes relying on the opinions of experts in its wider circle.

Research carried out in Hungary in 1980s pointed out that – under the same legislative framework and legal practice – in many cases *there is a narrow dividing line separating the forms of behaviour that do not break specific legal regulations* (behaviour that is encouraged or tolerated) *and the ones that are illegal* (behaviour that is forbidden). Although since the change in the regime there has not been coordinated research concerning people who have difficulties fitting in society, it is obvious that the situation has not become any clearer or easier to judge in the past one and a half decades. The scope of acts that are not illegal (although cannot be called legal either, that is, they are not encouraged but tolerated) was extended together with the changes in the economy and the society and the focus points were also shifted. The moral background guaranteeing a firm choice of values was eroded in a short time. One of the consequences of this was that the fact that an act is *dangerous to society* as well as the extent of this danger became involved in political conflicts in many cases. The public either joins these debates – representing the set of values it already possesses – or watches these uncompromising fights as an outside onlooker. There is also a third possibility (which is better than the other two): the citizens try to appease their conscience saying that although what they do is against their taste (that is, their better self, their conscience, the set of values they possess), they do not need to worry about it since even the opinions of “the important people” are divided on the specific kind of acts that these average people committed. (Let us just think of the often changing “official” opinions of the political elites in different election periods on privatization, “black” and “grey” labour and drug abuse.) The official organs that apply the law also give support to the insecurity of the public on these issues when they pronounce statements and judgements that sometimes contradict each other and sometimes flatly contradict the earlier guidelines (and in many cases even their own statements made earlier).

This legal practice, which is becoming increasingly natural, is not only harmful but – indirectly – is *unconstitutional* as well. This may be due to the fact that the law in itself is not suitable for providing clear, unambiguous requirements for the specific area of life that is the target of the regulations. Among such circumstances security of law cannot prevail. A resolution of the Constitutional Court from more than ten years ago states the following:

“An essential element of the rule of law is security of law. Security of law makes it the responsibility of the state – and first of all, the legislator – to ensure the clarity,

unambiguously reliability and predictability of the law as a whole, as well as the different parts of the law and its specific regulations for all those who these norms concern. It means that security of law does not only require the clarity of specific norms but the reliability of the operation in the different legal institutions."<sup>12</sup>

Now the snake has managed to bite its own tail. It is not (or not only) those who break the norms who ignore the principle of the security of law but those who are supposed to supervise that the law is adhered to.

A precondition of the right balance in criminal policy is *determining the extent of the danger posed to society*.

In our present circumstances it is a serious problem that *there is an increasing number of phenomena for the judgement of which there is no firm basis*, no system of guidelines, through the help of which we could form an opinion on the positive or negative role of a specific act and on the extent to which the acts that are condemned are found worthy of condemnation. Although it is true that the Hungarian system of criminal law (still) contains an element, which could solve several dilemmas we face at present if it was filled with content. My opinion can in no way be regarded as new.<sup>13</sup> I think the actual starting point should be *the relationship between the acts dangerous to society and the harm they have caused*.

The other question is the interpretation of the *danger posed to society and/or illegality*. It is especially important to have the right approach towards the so-called material illegality:

"What the abstract idea of objective justice means for the philosophy of law *proportional and effective protection of legal objects* means for criminal law. The requirement of the necessity test is that criminal law should provide effective protection for legal objects in a manner that the sanctions of criminal law, as the necessary limitation of otherwise protected human rights, should be proportional to the infringement of interests protected by law ... The application of law cannot stop at stating the fact of formal illegality. An essential condition of legal punishment is to consider only those acts as crimes that harm or endanger some legal object. This is one of the functions of material illegality."<sup>14</sup>

The quotation goes on to say that a negative condition of material illegality is that the practice of judges should work out those circumstances that can exclude responsibility before the law besides those that are laid down in the law. One such condition excluding material illegality is taking risks.<sup>15</sup>

It is no doubt that even if it was not the case that some criminal lawyers, specialized in legal dogmas, worked for years on finding a way to expel this concept (risk posed to society), which they brand as a relic of communist (Soviet) times and therefore fit to be destroyed only, from the process of legislation and the application of the law as soon as

<sup>12</sup> 9/1992. (L. 30.) Constitutional Court Resolution

<sup>13</sup> Compare: Irk, F.: *Társadalomra veszélyesség - rendszerváltáson innen és túl*. (Danger to society – before and after the change in the regime) In: Farkas, Á. – Görgényi, I. – Lévai, M. (ed.): *Ünnepi tanulmányok II. Horváth Tibor 70. születésnapja tiszteletére*. (Studies in honour of the 70th birthday of Tibor Horváth II.) Bibo Kiadó Miskolc 1997. pp. 54-75.; Irk, F.: *Büntetőnorma-alkotás rizikótársadalomban. Kriminál-filozófiai alapvetés*. (The creation of the norms of criminal law in the risk society. Criminal-philosophical foundation) In: Ligeti, K. (ed.): *Wiener A. Imre ünnepi kötet*. (Imre A. Wiener Festschrift.) KJK-Kerszöv, Budapest, 2005. pp. 495-506.

<sup>14</sup> Bárd, Gellér, Ligeti, Margitán, Wiener A.: *Büntetőjog, általános rész*. (Criminal Law, general part), KJK KERSZÖV, Budapest, 2002., p. 60.

<sup>15</sup> *ibid.*: p. 139.

possible, it would still not be simple to find good answers to the challenges posed against criminal law by risk society. Without the overall renewal of material criminal law as well as procedural law, we cannot give the right answer to the new questions that arise in post-modern societies in these days.

It would be beyond the scope of this paper to prove that punishment that is proportional to the act (which, in my opinion, is the only acceptable moral principle for meting out punishment – as a means and not as an objective!) is a suitable *instrument* against the perpetrators of *traditional crimes* but the “new crimes” can only partly be fitted into this system, if at all. While the criminal procedure attempts to take part in the preparation of just decisions, it generates injustice itself. Why? Because – it seems – it is unable to adjust its own system to the changed pace of the world. We have the kind of rules that are like as if they were intended to contribute to the normal operation of the real world of the 19th century or the first two thirds of the 20th century. Ignoring the changes that have taken place in society in the past quarter of a century and the accelerated speed of life in society, they follow complicated and time-consuming procedural rules and often help the offender instead of the victim. (We are offered diverse explanations to this slow speed from guaranteeing security of law to the work overload of the law enforcement authorities.) It is *in the interest of the victim* (and besides in the interest of society) that not only just but fast punishments should be meted out in proportion to the act and that the victims should be freed from the consequences of the harm they suffered fast and completely, to the extent it is possible at all. It is *in the interest of the offender*, in contrast to the other parties involved in the procedure, to keep justice from prevailing and taking legal force, to maintain insecurity of law as long as possible and to prevent or at least delay their suffering the legal consequences of their breach of law. Nowadays time usually works for the offender ...

The work of legislators and the other parties involved in criminal policy is not made any easier by the fact that increasingly often they have no idea of the frequency of the concrete case (insecurity about the number) and the extent of the damage caused (insecurity about the quality). Different *traditional statistics* aimed at measuring crime *fail increasingly often*. These indicators provide increasingly less and insecure information on the phenomena we intend to measure.

Even a beginner detective knows that petty thefts involving only a small amount make up the overwhelming majority of crimes. When we measure the dynamics of crime as a whole, what we do is simply to register the changes that have taken place in crimes against property. An even more serious problem is that we neither notice nor measure the really big crimes discussed above, the ones that shatter the whole society. Partly because latency is high and partly because of several other reasons that we have briefly touched on above. It is true that *the new crimes* (which, incidentally, totally escape the attention of the majority of experts and institutions dealing with crime prevention) *make the measuring structures based on traditional thinking useless and of no value*. It is because there are crimes that

- ◆ we know and talk about,
- ◆ we know and do not talk about,
- ◆ we do not know and do not talk about,
- ◆ we do not know and still talk about.

In the same way as in several other kinds of statistics, the criminological database provided by different state institutions has another important role besides giving information: proving the importance of the institution that maintains the department that

performs the measurement.<sup>16</sup> Maybe it is not by chance that the regularly performed victim surveys that are supposed to make up for the lack of earlier data collection are becoming accepted only slowly. If it was not so, several relationships and explanations that seem clear now would become insecure.<sup>17</sup>

All these negative facts cannot lead us to the conclusion that we should give up all hope to prevent the acts of our age that seriously endanger society. On the contrary: within the framework of constitutional rule of law *we should aim at preventing the intentions of offenders and if we fail to do so, at giving retribution that is proportional to the act.* This goal can be achieved in two ways. *One option* is to use the set of instruments within the scope of criminal law and outside it (but still mainly legal instruments). *The other option* is to use other instruments, mainly legal instruments and other instruments that do not endanger the rule of law as well instead of the instruments of criminal law. Now in several areas of life *economic interests can exceed the results that can be achieved through the set of legal instruments and technical instruments serve security more efficiently than any threat by the state.* The time has come to declare that the usual symbiosis of institutions that give justice and exact retribution on crimes is not necessarily a natural and desirable relationship either among our present conditions or in the future. *There is a need for a change of paradigms in criminal policy.* The longer this change is delayed the more and greater damage is done to society.

The forms of control that serve crime prevention and retribution must serve the interests of the public and the individual and not the interests of the establishment. The instruments of control that are used now in many areas are outdated. There is an increasing number of new kinds of challenges that we cannot find an answer to through the set of instruments available for crime control at present.

*We cannot postpone the rewriting of the whole system of crime control any longer.*

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<sup>16</sup> An example of this is the so-called UPPCS (Unified Police and Prosecution Crime Statistics), which deals with the act and its perpetrator in great detail as well as with the steps taken by the authorities concerning the crime and the perpetrator but we know hardly anything about the person who initiated the process or about the aggrieved party.

<sup>17</sup> Is it in the interest of law enforcement organs – at least in the short term – that it should turn out regularly what the connection is between the number of the crimes registered by them and their so-called successful detection indicator on the one hand and the number of the crimes that actually took place but were not reported by the citizens (latent crimes) on the other?