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风险社会语境中的经济法责任研究

A Study on Liability in Economic Law
in the Context of Risk Society

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内容摘要

风险社会对传统法律制度提出了全面的挑战。传统部门法为了应对风险社会的挑战都在试图拓展其责任制度；经济法责任制度是经济法学者为了应对风险社会挑战，满足风险社会的责任制度需求的另一种路径选择。从风险社会的语境研究经济法责任问题有助于突破以往经济法责任研究的困境，促进经济法理论走向成熟，更好地满足经济法实践的客观需要。

本文正是以经济法责任制度应对风险社会的挑战为主线，运用风险社会理论和语义分析方法、经济分析方法等研究方法，阐释了经济法责任产生与发展的社会基础，辨析了经济法责任的独立性之争，分析了市场主体责任与政府责任的特征及其风险根源，探讨了经济法责任实现的诉讼机制选择与创新，并对现实中的新问题进行了个案分析。

首先从分析经济法责任研究中定义式思维方式的缺陷入手，提出经济法责任研究要进行语言学转向，分析了经济法责任研究的特定语境，阐述了风险社会理论及其法律风险的控制功能，为从风险社会语境研究经济法责任进行了必要的理论铺垫。

继而针对经济法责任的独立性之争，从民法现代化语境与经济法语境的冲突、多重行政法语境之冲突、统一经济法语境的缺失以及风险社会中法律责任制度变革的不同路径等视角对这些争议进行了辨析，剖析了争议产生的原因，提出了本文对经济法责任独立性的基本判断。

接着从“政府——市场”的二元经济法框架及经济法责任的二元结构出发，运用风险社会理论重点分析了市场主体的风险地位与市场主体之经济法责任之间的风险逻辑关系，揭示了市场主体责任的社会性、身份性的风险根源；以宏观调控为重点探讨了政府的责任两难及其风险根源，评析了克服两难的三种进路，重点探讨了宏观调控的软法规制，指出政府在宏观调控中的责任两难只是硬法上的责任两难，而硬法在规制宏观调控裁量时存在失灵，故宏观调控权需要硬法与软法的混合控制。

最后，以风险社会中的诉讼机制变革为背景，辨析了经济法责任实现的诉讼模式之争，从风险社会中诉讼机制变革的一般规律出发，提出了经济法责任实现的诉讼机制选择与创新。

此外，选取了风险社会中两个比较典型的个案——美国次贷危机之后提出的金融危机责任费和我国风险社会中的节能减排问责制，分别从市场主体责任和政府责任的视角对其进行了剖析；提出了金融危机责任费对完善我国问题金融机构救助机制的启示及完善节能减排问责制的社会团体进路。这也是对前述研究所得出的理论观点进行的现实运用与验证。

关键词： 经济法责任；经济法；风险社会

ABSTRACT

There are comprehensive challenges for traditional liability system. The traditional laws try to develop their own liability system while liability in economic law is another choice of economic law scholars to deal with the challenges and to meet needs of responsibility system in risk society. Therefore, to study the problem of liability in economic law from the context of risk society is helpful to break through the dilemma in the research about liability in economic law, to promote the mature of economic law theory, and to better meet the objective needs of economic law practice.

Focusing on the responses to the challenges for liability in economic law, taking the means of combining risk society theory, method of semantic analysis and method of economic analysis, the author probes into the social root of liability in economic law, discriminates the disputes about its independence, analyzes the characteristics of the liability of subjects of market and government's liability and their roots of risk, finally discusses the choice of litigation system to realize liability in economic law and its renovation. In addition the author makes case study on new problems in reality.

Firstly, the author starts with the analysis of the defects of the thinking pattern of definition in the research about liability in economic law, advises that the research should be in linguistic turn, analyzes the particular context of the study on it, reviews risk society theory and the function of liability for risk control, which provides necessary foundation in theory for the research about it in the context of risk society.

Secondly, from the standpoint of the clash between the context of civil law modernization and the context of economic law, multiple administrative law contexts, the lack of uniform economic law context and different paths of changing traditional liability system, the author discriminates the disputes about independency of liability in economic law, analyzes the reasons for the disputes and puts forward the fundamental judgment for the independency of liability in economic law.

Then, according to the binary framework of "government and market" in the researches about economic law and binary structure of liability in economic law, through the use of risk society theory, the author analyzes selectively the logic relationship between the status of subjects of market and its liability and reveals the

risk roots of liability of subjects of market. The author probes into the dilemma of government's liability and its risk roots focusing on macroeconomic control, discusses three paths to overcome the dilemma focusing on the regulation of macroeconomic control by soft law, and comes to the conclusion that the dilemma in macroeconomic control is only the responsibility of dilemma in hard law while the power of macroeconomic control should be controlled by hard law and soft law because of the failure of regulation of discretion in macroeconomic control by hard law.

At last, from the standpoint of the renovation of litigation system in risk society, the author differentiates and analyzes disputes about litigation system to realize liability in economic law, and gives advice about the choice of litigation system to realize liability in economic law and its renovation on the basis of general rule of litigation system renovation in risk society.

In addition the author chooses two typical cases in risk society: financial crisis responsibility fee resulted from sub-prime lending crisis and the accountability of energy conservation and emission reduction in Chinese risk society, makes respective study from the standpoint of the liability of subjects of market and government's liability, and proposes how to improve the system of financial institution relief in our country from the standpoint of financial crisis responsibility fee and how to improve the accountability of energy conservation and emission reduction by social group. The analyses are also the use of the viewpoints presented in the above researches and the test for them.

Key Words: Liability in Economic Law; Economic Law; Risk Society

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