THE RIGHT TO SAFETY: SOME JURISPRUDENTIAL REFLECTIONS*

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Abstract

In the recent legal literature there is certainly no lack of studies concerning the increasing risks to which all individuals and society as a whole are exposed. However, the legal framework within which such risks ought to be considered and dealt with is much less clearly specified. This article makes an attempt in this direction. It argues that, from a jurisprudential perspective, a right to safety exists. It then points out that such a right to safety has obtained international recognition in the last years. As a next step, the article considers how this right can result in practical remedies. The conclusion is that, in order to ensure the respect of the right to safety, private action or private enforcement is inadequate. Public law tools are necessary, particularly in the field of criminal law.

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1. Modernity, Risk, Safety

According to a well known sociological doctrine one of the peculiar features of post modern society, so-called, is the emergence of situations of general risk which to a large extent cannot be minimised or controlled.

This phenomenon weighs heavily on the collective psyche

*By courtesy of *Journal of European Criminal Law*

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and so affects today's population that they have been defined by way of blithe slogan as "risk societies". Given, however, the scale of the phenomenon and the global spread of risks produced by modernity it would be more appropriate to talk of risk society in the singular.

As always happens, the slogan ends up combining and confusing phenomena which are not only somewhat diverse but at times wholly contradictory.

In the minds of those who coined the phrase the image of the risk society immediately evokes the failure of modernity because the risks in question are essentially man-made in the sense that they derive from human conduct – environmental risks, technological risks, product risks. These risks are at best difficult to control. The metaphor that springs to mind is that of the Sorcerer's Apprentice.

It is pretty obvious, however, that the growing collective attention being paid to risk situation in reality from the basic success of modernity, which has, even if only in a small corner of the globe, made our individual and collective lives much safer than they were previously (and much safer than they are in a large part of the planet).

Collective attention turns not only towards the risks created by human activity but also towards natural risks, which were once regarded as inevitable parts of life, if not even as manifestations of divine wrath, in the face of which all that was possible was acceptance or, as the case may be, collective expiation.

Even these phenomena – or rather the risks attached to their happening – are conceived of being basically manageable, to such a point indeed that the damage they occasion is one way or another attributed to human conduct, mainly in the form of some act of omission, such as neglecting to take the precautions necessary to reduce their destructive power. A good example are the accusations laid at the countries hit by the tsunami on 26 December 2004 to the effect that appropriate warning systems did not exist or if they did not work.

The common factor in the perception of risk situations in post modern societies, far from being man's inability to control them, is essentially the exact opposite i.e. they are potentially controllable by some person or persons. Such persons (who they are is discussed below) are considered liable for the damage

caused by a disaster (man made or natural) by reason of their having failed to take the precautions which would have averted the disaster or reduced the extent of the damage.

2. The Right to Safety

The widespread perception of the relative manageability of calamitous events goes hand in hand with the notion that they are not inevitable or that their effects can be limited. This naturally gives rise to the expectation that those who can intervene actually take the steps necessary to avert or contain the disaster.

There is therefore a collective expectation of safety. This increasingly manifests itself as a true and proper right with corresponding legal obligations for certain persons.

The notion of a "right to safety" found its first significant, if necessarily generic, expression in the Montreal Declaration of May 2002 adopted at the 6th Word Conference on Injury Prevention and Control.

Starting from the need to prevent damage caused by human behaviour the Declaration addresses the whole range of risks to which communities are exposed and advances a right to safety, both individual and collective which it defines as a fundamental right, essential for the attainment of heat, peace, justice and well-being (Article 1).

Article 2 defines the right as follows:

"Safety is a state in which hazards and condition leading to physical, psychological or material harm are controlled in order to preserve the health and well being of individuals in the community.

Safety is the result of a complex process where humans interact with their environment, including the physical, social, cultural, technological, political, economic and organizational environments.

Safety is, however, not defined as a total absence of hazards. The object of this Declaration is not to eliminate all risks but rather to control them in order to protect the health and well being of individuals and the community".

The Declaration enumerates a series of principles and standards deemed necessary to give meaning and shape to the right in question and concludes in Article 11 by providing for State responsibility for the development of mechanisms to protect collective safety against of human and natural origin.

Given that every legal order has and always has had the fundamental task of protecting the community (the notion that this protection cannot be distinguished from upholding individual rights is rather recent), and for this purpose possesses legal mechanisms to guarantee the life and the safety of individuals and of the group, one may ask whether the "right to safety" describes anything really new on the legal landscape of the Western World or whether it amounts to a formula devoid of normative significance, a verbal synthesis covering in reality various rights already recognised by the Constitutions of Western countries. As these existing rights protect the individual they also protect the group collectively. Above all they are the right to life and the right to health but include also the right to property, at least to the extent that property is indispensable to guarantee the life and the physical and mental health of persons.

If it is correct that the right to safety does not protect fundamental values different than those already contemplated by various human rights charters, there is nonetheless no doubt that it guarantees them in a new way, i.e. by means of what we might call ex-ante protection.

Generally speaking the legal protection of these values is traditionally provided in the form of a reaction to a violation of the rights in question, which become actionable only once they have been compromised.

Rights protected in this manner are essentially of a compensatory or restorative nature and operate in favour of those who have been injured.

The recognition of a specific right to safety has on the other hand the purpose of preventing any violation or compromising of these rights and permits the legal system to intervene at the prospect of infringement.

In this regard the specific matter under protection in the sense of collective insecurity caused by the perception of the risk situation. The term risk perception implies a built-in and irremovable uncertainty as regards the effective quantification of a risk of harm to life or to collective well being that might materialise at some unknown time in the future.

In this sense the right to safety is nothing other than the jurisprudential response to the demand of modern society for ever greater individual and collective security.

According to the Montreal Declaration the holders of the right to safety are both the individuals and the communities or the groups to which they belong. However, it is clear enough that individuals are not considered in their own right but only as a part of the aggregate community. Individual safety is thus not the object of the right to safety except to the extent that the individual is indistinguishable from the group or the community.

The collective dimension of risk is therefore a fundamental element of the right to safety.

What is much more complex is the discussion both of the identification of the obligations on those responsible legally to provide the level of safety claimed and the identity of these persons themselves.

It would seem to be an essential task of State, international and supranational institutions to develop, in the first instance, a coherent legal theory out of the heterogeneity of the risks in question, the collective dimension of the risks themselves and the need to eliminate or limit them.

3. Right to Safety and Liability in Tort

Generally speaking, the law's response to cases where interests of apparently collective importance are damaged – as in the case of the right to safety – is to leave it to individuals (or to more or less organised groups of individuals) to react (private action) or to entrust organs of an institutional kind to react (public action). Public action may be either an alternative to private action or be taken cumulatively with private action.

The classical solution of the first type (private action) is based on the civil liability of the offender. The solutions pertaining to the second type resort to liability in public law (criminal or administrative), but in this regard the distinction, as will be seen below, is not always possible and in any event is never entirely clear.

Leaving aside for the moment any consideration of what many (the author included) regard as the residual and subsidiary nature of public sanctions regimes, private action is historically speaking the law's reflex.

The private action/civil law approach has, notoriously, been tested in North American law in regard to the liability in tort of companies which place dangerous products on the market.

Here the experiment has not yet been concluded and the law is still evolving so that it would be premature to express any definitive views.

As we see it, however, the system of civil liability has certain defects and at the very least is not up to the task either of dealing fully with all the risk situations that may arise of guaranteeing the citizens' right to safety.

Some of these defects can perhaps be corrected but others seem to be structural and thus difficult to remove, notwithstanding the natural flexibility of civil liability regimes, which unlike many others are capable of rapidly evolving in new directions.

A first defect is the incalculability of the sanction, the prime example being the quantum of damages awarded in product liability cases, where the sanction is often out of all proportion to the infringement in any given case.

In regard to disproportionate sanctions the obvious culprit is without question the institution of "punitive damages", which, not without good reason, is coming under increasing scrutiny.

It would be wrong, however, to attribute this sort of disproportionate result to punitive damages alone, or for that matter to any system of "private sanctions".

Whatever way one looks at it, any system which creates liability for infringements of the right to safety under civil law has to contend with the fact that the damages in question in any given case will be incalculable an often disproportionate with the consequence that the offender will be punished to excess. And this conundrum obtains whether the quantification of the damages is left to a jury as in North America or is incumbent on professional judges elsewhere.

There are two reasons for this and the law has no complete solution.

The first and principal reasons is the fact that the number of injured persons is impossible to tell with any precision. Given the scale of the phenomena in question an the uncertainty as to their effects the number of persons entering the frame can only be guessed at. Event then any estimate is subject to uncontrollable

increases by reason of the individualization of the damage caused –this being an essentially elastic concept and as such difficult to encapsulate in normative terms.

In the case of a risk pertaining to the population of a given territory it is not difficult to imagine that every individual resident on that territory is a potential protagonist. But even that gives no precise figure because it cannot be excluded that other actors may emerge who do not belong to that category of persons.

The second but no less important reason is the not infrequent slenderness of the causal link between the unlawful conduct and the event causing the damage in respect of which reparation is demanded. The courts of course tend to translate the nexus into more or less accurate statistical probabilities, as a substitute for the stricter relationship of causal efficiency and sufficiency.

This it seems is a structural issue.

To adopt more stringent causal criteria would, in this context of irremovable uncertainty, almost inevitably lead to the creation of an excessive burden of proof for the plaintiff and thus to the virtual absence of any liability on the part of the defendant. It is for this reason that risk society theories recognise the term "organised irresponsibility".

In other words, any regime placing the burden on the individual harmed is bound to waver between excessive punishment for the guilty on the one hand and insufficient protection for the victim on the other.

In the first case the dangers is above all that there will be no incentive to take (court) action which by extension would be beneficial for the generality. In the second case the danger is that there will be an almost total lack of any deterrent against unlawful conduct, not to speak of the absence of any reparation in favour of the victim.

In these circumstances the main defect of any regime of civil liability is the imprecise definition of what is unlawful and the uncertain causal link between the unlawful and the damage caused.

An efficient and correct deterrent requires an ex ante determination of the unlawful conduct which is to be prevented. This conduct must be recognizable as such as soon as the person responsible begins to act (or fails to act where action is required).

Finally it must be possible to isolate the conduct in question from the general field of activity in which it takes place.

These requirements are hard to meet in a regime of civil liability because the uncertainty over the nexus between the conduct on the one hand and the undesired event on the other is such that the unlawful nature of the first cannot be determined unless the second actually materialises.

Last but not least, the very fact that under a regime of civil liability no action is likely until the calamitous event occurs speaks eloquently against leaving it all up to the individual.

Indeed if a specific right to safety has any sense at all it resides in the ex ante nature of the protection or in an approach which seeks to avert the disaster. The law must thus act before the disaster occurs.

This is beyond the scope of private action or private enforcement, not only for the reason already mentioned but also because in an ex post and private regime there will always be great difficulty of proof and because the potential victims will often not even be aware that they are exposed to a significant risk or that their situation is insecure.

4. The Right to Safety and Criminal Law

There is no doubt that empowering institutional organs to uphold the right to safety by means of criminal or administrative sanctions against persons who endanger collective safety would at once remove many of the difficulties redolent of enforcement by private action.

To be absolutely clear, there is no question of excluding private action (i.e. actions in damages) and substituting it by system of a purely public law nature. It is, however, necessary to understand that recourse to instruments of public law may effectively avoid or rather prevent as well as suppress behaviour injurious to public safety.

A system imposing sanctions of a public law nature would in general make it possible:

a) to quantify liability because the scale of sanctions would be determined in advance and range between a minimum and a maximum, thus avoiding cases of over-punishment;

b) to attach liability to defined types of behaviour, thus avoiding uncertainty between lawful and unlawful conduct and above all ensuring that this distinction is not made after the event or more precisely after the apprehended risk has materialized;

c) to initiate action without regard to considerations of economic convenience which the individual inevitably has to bear in mind;

d) to reduce substantially, if not to eliminate altogether the information deficit regarding the lack of collective safety, with which the individual has to contend.

In summary entrusting the repression of risk begetting conduct to an institutional organ meets the requirements of certainty and sufficiency and is thus preferable, in terms of efficiency, to relying exclusively on private action.

This conclusion does not mean of course that the public law solution comes without problems of its own.

The very contours of a general hypothesis of "risk crime" have still to be drawn: "risk crime" exists already in the positive laws of the western world, but so exists in the form of indictment provisions of a precise and specific nature which are not transposable to other situations.

The number of risks that come within the scope of the right to safety is potentially unlimited and the right may be infringed both by act of commission and act of omission. In addition risk situations in the post modern sense are generally conceived as falling under the responsibility of organizations, public or private (States; public administrations; corporations), and not of individuals.

These factors do not facilitate the criminalization of the right to safety especially in legal systems where the personal element of crime is essential, or constitutionally entrenched, so that the criminal law is addressed to individuals and not to collective structures (*societas delinquere non potest*).

In this context there is thus a further difficulty: if the criminal law is to be applied to collective structures the subjective element of crime, the *mens rea*, is hard to define, and thus has to be defined objectively. Just as strict responsibility has come to form part of the law delict, so too would strict liability have to form part of the law criminal.

These difficulties are certainly not insurmountable but are likely nonetheless to impede general acceptance of obligatory and particularly of criminal law norms such as to give the safety practical form, be that acceptance at State or EU level.

BIBLIOGRAPHY

M. Mitka, *Who declares the individual's right to be safe*, JAMA (2002).

A. M. Miller, *Why declaring safety a right might not (and should not) make it a right*, in *Health and Human Rights*, vol. 6, Harvard School of Public Health (2003).

G. Stevens, *Advancing safety as a fundamental human right*, in *Health and Human Rights*, vol. 6, Harvard School of Public Health (2003).