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# Governance Logic and Basic Systems of the New “Food Safety Law of the People’s Republic of China”: a Focus on Social Co-Governance

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**Abstract:** To modernize food safety governance, we must carry out basic restructuring of its internal logic at the national level to reflect the features of contemporary Chinese society that shape food safety. This will entail establishing an overarching, macro-level conception of food safety that integrates “baseline safety”, “hub safety”, “co-constructed safety” and “endogenous safety”. These four dimensions of safety represent four fundamental requirements of food safety governance in modern Chinese society, which is a “risk society” (Beck 1992) and one that is also complex, open and pluralist. These requirements are: maximum legal liability, a unified, authoritative and efficient supervision system, a concept of social co-governance, and enterprises being the primary entities accountable for food safety. This article uses this analytical framework to interpret the basic contents of the newly revised Food Safety Law of the People’s Republic of China, and uses a focus on social co-governance to present the institutional highlights of this law and the transformation of the internal logic of food safety governance.

**Key words:** food safety governance; supervision system; whole process supervision; social co-governance; Food Safety Law of the PRC

The newly revised Food Safety Law of the People’s Republic of China (the Food Safety Law or the Law”) was adopted by the Standing Committee of the National People’s Congress of the People’s Republic of China on April 24, 2015. A result of changing social realities in China, the revisions and adjustments in the Law reflect the profound reorganization of the national governance system for food safety. This shift is crucial, because only if the new Law has a comprehensive command of the basic features of China’s social transformation and can establish an integrated and effective overall conception of food safety will China be able modernize its food safety governance system and improve governance capacity.

An examination of China’s food safety governance shows that this work is situated in the particular time and circumstances of this country. Contemporary Chinese society is a

“risk society” (Beck 1992), and it is a society that is complex, open and pluralistic. . The Food Safety Law responds to these four basic characteristics of contemporary society by constructing a macro-level, overarching conception of food safety governance, and it significantly transforms the internal logic of food safety governance through the establishment and systematic design of the concept of social co-governance (*shehui gongzhi*).

## 1 Top-level design of food safety governance: constructing an overarching, macro-level conception of food safety

Reform of the basic structure of food safety governance and appropriate revision of the Law is possible only if there is an overarching, macro-level conception of food safety based

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on an accurate understanding of the key features of modern societies. Only then can the governance system and governance capacity can be modernized.

### 1.1 Risk society and baseline safety

According to Ulrich Beck, Anthony Giddens and other contemporary scholars who research the sociology of risk, risks in the age of industrial civilization differ greatly from those in the age of traditional agricultural civilization. The risks we face now are technical risks with modern ideological, political and economic features rather than simple natural ones. First, these risks are characterized by their “democratic distribution”, and this breaks with the traditional situation in which different classes in society have different capacities to avoid risk. Today, there are some risks that no one, regardless of social class or status, can escape or remain free of; examples include environmental hazards, ecological pollution, and food safety incidents (Beck U, 1992). Second, these risks are themselves the products of the technology and innovations of industrial civilization and are, in some cases, even generated by efforts to regulate risk (for example, pollution of food sources which results from the use of pesticides to reduce plant diseases and insect pests).

Contemporary China is undergoing a historic transformation and becoming a modern “risk society”. Many scholars have pointed out that China, like the US and Europe, communication of food safety risks across locations and populations (Balzano, J. 2012). This is due to factors related to industrial development, such as the distribution of industry, the pollution of food during production and processing (through the use of chemical fertilizers, pesticides and food additives), and the extension of the food supply chain. At the same time, population migration and the social division of labor are isolating food producers and traders from food consumers; technological innovation is making the production, operations, storage and transport of food products more specialized; the industrial and commercial society makes it more likely that people receive food supply services in an anonymous environment; and the mechanisms that allow society to have confidence that food is safe are challenged. Collins, E. 1993; Zhang, L. *et al.*, 2015).

The emergence of the risk society has moved China’s food safety increasingly in the direction of the need for baseline safety. This means that because of technological innovation and social development, people have very high expectations for food safety assurances that are timely, adequate and high-priority. There are three reasons for this: first, as the daily demand for food products is more or less fixed, people require foods to be safe at all times; second, given that the level of fear in society is high and, as a result of social transformation, there is zero tolerance for unsafe food products, people have higher safety expectations of and

standards for food products than they do for other consumer goods and require food safety to be fully assured in terms of government supervision and market order; and third, the democratic distribution of risk means that food risks are something that no one can avoid, meaning food safety is a type of basic value, the realization of which is a high priority for citizens.

### 1.2 Complex society and hub safety

Chinese society is evolving from a simple society to a complex society. Generally, social complexity refers to “the scale of a society, the quantity and features of its components, the diversity of its integrated special social functions, the quantity and diversity of its unique social personalities, and the diversity of the overall cohesion mechanism of social functions” (J. Tainter, 1990). The complexity of a society is related to an increase in the amount of information that needs to be processed concurrently. The existence of a larger volume and more types of information also indicates that a society is more complex.

Food safety governance in China is now encountering this kind of complexity in several respects. First, multiple types of food safety problems exist that are associated with different links in the food chain: there is pollution from heavy metals and industrial chemicals found in the production environment; and from pesticide residues, and from additives and antibiotics used in the production process. Counterfeit goods turn up at points of sale; and there is pollution in storage and transport facilities. These various food safety links all involve interactions between multiple social organizations.

Second, the development of China’s food industry is extremely unbalanced, and there is great variation in risks across different food types and different food production regions. The intensity and level of industrialization of agricultural production and animal husbandry in various regions differs, as do food processing methods, and the dietary habits and preferences of people in different regions and in different urban and rural areas.

Patterns of economic development make China’s food industry landscape even more challenging (Chen Xiwen and Deng Nan, 2004): industries different in both level and scale intersect and coexist, and various producer and consumer groups need to be protected differently. For example, the focus today is on food safety for consumers, while workers in food industries, particularly those engaged in agriculture in rural areas, are often at high risk of occupational exposure to safety hazards; these workers are not effectively protected by existing laws. This complex situation results in high costs for unified governance based on the Food Safety Law<sup>1</sup> (Fang *et al.*, 2014). Lastly, the advent of China’s information highway has led to improvements in the commu-

<sup>1</sup>FANG Jing, WANG Yiyang, LUO Chunxia. 2014. Research on How Yunnan Provincial Rural Health System Copes with Health Problems Resulting from Environment, a draft not published. (in Chinese)

nication of information about food risks, but categories are complicated and there are massive quantities of information, meaning that effective risk assessment and risk management has higher social costs.

Under these conditions, China's food safety needs to become "hub safety" that can understand and manage the multiple "spokes" - overlapping organizations and safety fields - that characterize the landscape of food safety. Effective governance requires the consistent implementation of a "unified, authoritative and efficient supervision system" to prevent loopholes emerging as the result of the multiple actors involved and the complex industry chain. Governance needs to establish supervision and tracking that extends across all food industries and all links in the food chain, based on the principles that "local governments should assume primary liability" and "enterprises should be the primary accountable entities.

### 1.3 Open societies and the co-construction of food safety

An extremely heterogeneous, complex society is often built on the principle that government and society should adhere strictly to their own boundaries, and on the establishment of sound democratic rules and organizational forms. These developments are rooted in the fact that government in a complex society does not monopolize authority and professional advantage. Hence, enactment of social policies and laws inevitably shifts a situation in which the government and the state play a central role towards a social learning model in which the government respects and learns from society, and only those demands and information that are fully grounded in society can be transformed into national policies and laws (Peter A. Hall, 1993).

"Promoting the modernization of the national governance system and governance capacity", are among the general objectives of comprehensively deepening reform, as set forth at the Third Plenary Session of the 18th Central Committee of the CPC. They represent an accurate, historical judgment of China as it transforms itself into from an authoritarian state into a high-quality democratic state, and from a state with a vertical communication system generated by wartime conditions into a state with a lateral communication system. In this open society, food safety governance cannot be a project undertaken solely by the government, but must incorporate many aspects of democracy. Thus, food safety also entails the co-construction of safety on the basis of cooperative-regulation (Baldwin *et al.*, 2012).

There is another reason for taking a cooperative-regulation approach to food safety governance, and that is the Chinese government's general shortage of supervision capacity. A shortage of professional law enforcement personnel, testing and analysis equipment, etc. is a serious problem that hinders China's food supervision efforts. Addi-

tionally, the central government and local governments are highly mismatched with respect to finances, powers and responsibilities, making it still more difficult to supervise food safety at the community level. According to an assessment by the China Food and Drug Administration (CFDA) on 2012, for example, China should have at least 50,000 supervisors available to oversee the food industry, but only 10,000 were on the job (Zhang, 2013). A study conducted by the Global Food Safety Forum (GFSF, 2011) shows that China had only 70 vocational colleges providing training in food inspection and related fields on 2010. According to a study in 2013, only about 6,000 food inspection laboratories were operating in China, and many key testing devices such as rapid detection devices were unavailable in less developed regions because of insufficient funds (Jia C. and Jukes D., 2013). Because the food industry has developed in an uncoordinated manner, sensitive and effective supervision is possible only with cooperation between the government, society and enterprises. The recent incident involving the invent of Shanghai Huxi Food Company. offers a typical example of an undercover investigation by government and active information feedback from social media leading to administrative penalties being levied on the meat supplier.

Food safety in an open society can only be co-constructed safety, achieved through cooperative-regulation by government, society and the market. To accomplish this, "social co-governance" must be established as a fundamental concept.

### 1.4 The pluralist society and endogenous safety

With emergence of the risk society and the complex society, modern societies must become increasingly pluralist, or pursue multi-centric governance, before organizations or entities in different parts of society can be effectively coordinated. The development of Western modernity includes the call for a shift from control to governance. According to the French philosopher Michel Foucault, control over individuals in modern societies entails not direct control but self-control, self-regulation and self-discipline, which are achieved through training, and developing in subjects a sense of responsibility. In the face of risks like unemployment, accidents, and famine and disease, individuals, families and social organizations should assume greater responsibility, letting the state play a supporting role in the background. (M. Foucault, 1991).

Reflecting on modernity, British sociologist Anthony Giddens also suggests that a pluralist society is an inevitable extension of the risk society, and that modern technical and governance risks force individuals to brave dangers and exert themselves to prevent risks because traditional preventatives like national regulations and authoritative professional opinions are not enough to cope with such risks. Giddens (1991) says that in the face of risks in modern so-

ciety, everyone must take more “leadership responsibility” and have more “self-created life experiences”. Thus, we can also say that food safety in modern society is ultimately “endogenous safety” generated by members of society, particularly by food enterprises regulating themselves.

In light of this, to govern food safety, China must establish as a fundamental rule that “enterprises should be the primary entities held accountable”, and the government and the society must engage in cooperative-regulation. Moreover, a variety of social entities, including enterprises in particular, must build systems for self-regulation. These initiatives are not only key to easing problems caused by the poor governance capacity of the government, but also offer a fundamental solution to food safety problems.

To sum up, the establishment of effective food safety governance in contemporary China is taking place in the context of a society which is a “risk society” and which is complex, open and pluralist. Because of this, governing food safety requires the country to establish baseline safety supported by intensified, strict accountability; hub safety the object of which is whole process, multiple-actor supervision; co-constructed safety with social co-governance as the driving force; and endogenous safety with an emphasis on making enterprises the primary responsible entities. The four types of safety constitute an overarching macro level conception of safety running through the internal logic of national governance for food safety. They also provide the top-level design for revising the law and reviewing the effectiveness of regulatory measures.

## 2 New governance framework: basic systems and their weaknesses

### 2.1 A more rigorous responsibility system to ensure baseline safety

The experience of food safety governance in modern industrial countries invariably demonstrates that the key to ensuring baseline justice is to set up the most rigorous responsibility system possible. Therefore, the new Food Safety Law makes great efforts to perfect an accountability system. In the current situation, this system works to bring together three factors:

#### 2.1.1 Combining civil liability, criminal liability and administrative liability

With respect to civil liability, the Food Safety Law states that a system to determine primary responsibility shall be set up. This system will require any food producer or operator who has received a compensation claim from a consumer to compensate in advance, and not allow them to shirk responsibility. At the same time, the system that allows a consumer to demand punitive damages in statutory cases has been improved. With respect to administrative liability, the amounts of fines have been increased significantly, and incarceration for offenses is now a possibility. With respect

to criminal liability, alleged violators shall be prosecuted for criminal liability if any action of a producer or operator, supervisor, inspector or other subject is determined to constitute a crime. An effort has been made to establish a reciprocal relationship between administrative liability and criminal liability. For any person suspected of being involved in a crime, the food and drug department must make a judgment based on preliminary evidence, and if the evidence warrants, hand the person over to a public security agency to pursue criminal charges. If the public security agency determines the person’s behavior does not constitute a crime, the agency has an obligation to refer the case to the food supervision department for an investigation of the individual possible administrative liability.

#### 2.1.2 Combining property penalties, disqualification penalties and reputation penalties

Breaking with traditional enforcement patterns, in which being held accountable was equivalent to being fined, the Food Safety Law introduces a mechanism for multiple punishments including disqualification and reputation penalties. For example, if an employee of a food inspection body has been found guilty and subjected to criminal punishment for a food safety violation or has been dismissed because of his issuance of a false inspection report, this individual will, in accordance with regulations, never again be allowed to engage in food inspection work. Another example concerns the establishment of a unified blacklisting system for food enterprises. Any enterprise that has been found guilty of breaking the law, violating food safety regulation of food safety or being a party in a food safety incident will be exposed. A mechanism for multiple punishments will be developed in order to increase cost of illegal behavior.

#### 2.1.3 Combining corporate responsibility, government responsibility and third-party agent responsibility

The Food Safety Law particularly emphasizes the need for local governments to assume more leadership responsibility. For example, the Law improves basic procedures for handling food safety incidents, and sets out more cases in which any local government officials involved shall be required to resign from office; according to the supervisory provisions set by the Law, any person who performs three acts of concealment or false reporting of any serious food safety incident will be dismissed directly; any certification body, inspection body or identification body and their personnel will, according to the Law, be penalized and investigated to determine their responsibility for illegal activities.

It should be mentioned that the Law includes corresponding provisions to ensure baseline safety. To make sure that the Law has optimal effects, however, current institutional arrangements still need to overcome some theoretical and practical challenges. For example:

(1) A number of people, including some deputies to the

National People's Congress, involved in the public discussion of standards for punishments believe that current punishments are too light. Some people propose that penalties for illegal production or operations, punitive damages, and even the rescinding of qualifications be more severe (People's Court Daily, 2014). But how should punishment standards be set to ensure that punishments can achieve a governance effect while meeting the proportion principle set forth in the Constitution of the People's Republic of China and in administrative law. This requires more thought and discussion.

(2) Further thoughts about how local governments assume general responsibility.

The administrative efforts of governments to make public power accountable originated in the UK and the US. According to UK law, instead of simply investigating responsibility, applying a sanction accountability means that in a specified forum, holders of public power must interpret, describe and justify their actions, and accept specific results (M. Bovens, 2007; J. King, 2013). Generally speaking, the rules for accountability contain: the subject of accountability, which can be legal accountability, political accountability, administrative accountability, professional accountability, public accountability or some combination of these; the object of accountability, which can be collective accountability or individual accountability; the content of accountability, which can involve finance, procedures for handling affairs, or the results of this handling (J. King, 2013). Clearly, the accountability system allows for the all-round supervision of public behavior through an explanation of reasons.

At present, however, accountability as it is set out in the revised Food Safety Law exists only as punitive, administrative accountability and is short of procedural design; no specific system guarantees public accountability. Accountability must be based on consistent definitions of rights and responsibilities, and how we effectively ensure the ability of local governments to perform their responsibilities remains a matter in need of further consideration.

## 2.2 Rebuild government organizations to ensure baseline safety

The second governance item, which the Food Safety Law makes great efforts to improve, is the restructuring of government organizations. As a type of baseline safety, food safety requires the government to play the role of guarantor and supervisor. Under the constitutions of countries that have systems of civil law the individual and society are responsible to regulate themselves, with the proviso that the government must finally provide guarantees and support to prevent the failure of the market and society (M. Stolleis, 2014). The Law makes improvements in the following three areas:

### 2.2.1 Centralization of powers

Food and drug supervision departments generally rely on

the Food Safety Law and related laws to govern the production and sales of food products. The Law's provisions bring together supervision departments with administrative licensing. With the centralization of power, the licenses for original production and operational services have been combined into a single license. This measure makes the administrative licensing process more efficient and convenient while restricting administrative power. Additionally, where they are needed, robust measures must be in place and used as needed to ensure licenses operate as stipulated; otherwise, gaps in supervision can appear. For example, the newly revised Law significantly intensifies supervision of food additives, and adds a licensing requirement for production and operations.

### 2.2.2 Collaboration based on a division of labor

Collaboration based on a division of labor between health, agriculture, quality inspection, public security and other departments allows for the full supervision of the key areas for which the departments are responsible. This effort also involves the establishment of information sharing platforms to facilitate communication between the central government and local governments, and between supervisory departments.

### 2.2.3 Transferring more resources to local governments

Transferring more resources to local governments is the key to restructuring the system, and the process in terms of organization, personnel and guarantees is detailed in the legal documents. With respect to organization, the Food Safety Law calls for the establishment of grassroots and frontline food supervision agencies, and stipulates that tasks such as troubleshooting, information reporting, law enforcement assistance, etc. must be undertaken by township governments and sub-district offices. Transferring organizations to the local government is followed by the transfer of law enforcement capacity. To build a relatively complete guarantee system, the Law also requires implementation of regulations to develop supervision capacity, including the provision of working funds, law enforcement equipment and facilities, and law enforcement training to enhance the caliber of enforcement. According to current estimates, five food supervisors are needed, on average, for every grassroots area (communities and villages) in China, or a total of 35,970 food supervisors (National Bureau of Statistics of China ed., 2012). Ensuring the availability of personnel in sufficient numbers, and coordinating the responsibilities and relationships between the central government and local governments, particularly those in grassroots areas, are crucial to success or failure of grassroots food safety governance efforts.

Research suggests that the current Law has not completely achieved an optimal restructuring of government. Lines of authority are still not smooth in some areas. For example, the distinction between food products and edible

agricultural products needs to be defined more clearly by the food and drug department and the agriculture department. Giving the health management department the authority to both assess risks and develop standards can easily lead to conflicts of interest. Under circumstances where separate licenses for food production and for food sales have been combined into a single license, the respective rights and powers of the various agencies concerned are currently unclear. These issues need to be further studied at the level of scientific principle, particularly scientific principles for the construction of law.

### 2.3 Improved risk communication and standards to improve hub safety

Because hub safety is a requirement in a complex society, the Food Safety Law has provisions to improve risk communication and standards. The establishment of a comprehensive risk communication system, for example, has made the obligations of the government and the society more explicit. The government is obligated to disclose information from food producers, industry associations, technology bodies, consumer associations, and news media. Standardized risk monitoring and risk monitoring plans for food safety should be submitted to the health administrative department under the State Council for record keeping. The Law defines six conditions which are subject to risk assessment.

To improve related standards and systems, the Food Safety Law proposes that national standards be integrated, and that the opinions of the society concerning the development of standards be solicited. The Law considers local standards to be provisional; they are supplemental to cover circumstances not addressed by national standards. Such local standards must be reported to central government authorities for recording. Provisions for a system to assess the execution of standards are clearly set out in the Law.

However, the existence of the complex society raises requirements for risk communication to a higher level. The regulations currently set out in the Law are still rather simple and rough. According to the research findings of Jeanne X. Kasperson, public participation is a precondition of risk communication. However, various social organizations in a complex society have differing abilities to use and analyze information. In this situation, how should government departments effectively stimulate the participation of less capable social organizations? For example, the Law needs to include more detailed provisions for the implementation of risk communication in rural areas. At the same time, there should be a balance between risk communication and risk management. To ensure timely communication, avoid social panic, and protect the rights and interests of related enterprises, we must be particularly careful that the rules maintain a balance between the urgency of a problem and the need to advise the public immediately of a hazard, and the

time required to scientifically analyze the level of the risk in complex circumstances (J. Kasperson, R. Kasperson, 2005). This point deserves further consideration.

### 2.4 Whole process supervision to ensure hub safety

The Food Safety Law has designed new regulatory measures to ensure that whole process supervision does not leave any dead zones for food safety supervision in a complex society. For example, the Law responds to the need to improve emergency response capacity, and details requirements for plans to respond to food safety emergencies. Plans shall contain a classification of the type of food safety emergency, the deployment of a command system and responsibilities for accident cleanup, a prevention and early warning mechanism, disposal procedures, emergency safeguard measures, etc. Food and drug supervision and administration departments and quality supervision departments that are part of county level or higher governments will use food safety risk monitoring information, risk assessment results, and food safety conditions to carry out risk management based on classification. This approach is a significant change to traditionally passive risk monitoring approaches, and should boost linkages between risk assessment, risk management and risk communication.

As the Food Safety Law approaches it, whole process supervision can achieve the governance effect of public law by use of private law. This constitutes another feature of whole process supervision. That is, a regulatory effect can be achieved by means of definite private obligations in combination with supervision and guarantees based on public power (Gao, 2011). In the case of supervision of safety for food products sold online, for example, the Law stipulates an obligation to register, defines several types of liability that can serve as a basis for compensation, and requires compensation in advance of the online trade platform. This approach shifts the costs of government supervision to market entities, and gives play to the enthusiasm for private supervision.

Additionally, the Law develops new whole process supervision mechanisms for use by the government. The admonishment system provides an example. This system places producers and operators, special supervision departments and subordinate government departments within the purview of superior or special authorities for the purpose of admonishment, and then incorporates the results of admonishment in a food safety credit file or in review and appraisal reports. This serves to increase the actual effect of this system. The spot check system is another example. If there is evidence indicating that a crime may have been committed or a serious hidden food safety hazard may exist in the food production or operational system, a food and drug supervision and administration department at a higher level of government authority may conduct a sudden, on-site check on related food producers or operators.

## 2.5 Self-regulation and enterprise accountability to ensure endogenous safety

Enterprises are members of the pluralist society. Without self-regulation by enterprises themselves, food safety will finally not be transformed into the endogenous safety of a social organism. Therefore, the Food Safety Law includes many regulations requiring enterprises to control themselves:

### (1) Human resources optimization

According to the Law, enterprise managerial staff and technical personnel must be trained, appraised and supervised to ensure a combination of enterprise self-regulation and government regulation; health certificates for food producers and operators must be obtained and provided to government regulators during inspections.

### (2) Enterprise self-control

According to the Law, a food enterprise should set up a food safety assurance system and a whole process quality control system, which together cover acceptance of raw materials, production and processing, output, and storage. The current provisions of the Law are, however, general in nature.

### (3) Whole process tracking system

The Law stipulates that each food enterprise shall establish a food tracking system to ensure that its food products can be tracked. At the same time, each food production enterprise is encouraged to establish a network-based food tracking system to ensure food quality control from the farm to the dining table. Additionally, each food production enterprise shall set up a whole process record system that records the purchase of food materials, food additives and food-related products, and checks that finished products are inspected. Whole process tracking systems can help enterprises identify safety risks and limit their exposure to liability, but the development, purchase and use of tracking technologies results in higher costs for enterprises. Finally, such higher costs must be passed on to the market, giving enterprises an incentive to evade this regulation. Hence, the establishment of support systems, including government subsidies to help enterprises meet the costs of technology upgrades, are important considerations for further revisions of the Food Safety Law.

### (4) System for production, operation stoppage and recall

According to the Law, if any food product does not comply with food safety standards or there is compelling evidence a food product may harm human health, the producer of the food shall recall the product and take remedial measures like treatment to render the product harmless or destruction to prevent the product from reappearing in the market. Instead of focusing on who or what is responsible for the results of food safety hazards, the Law shifts the focus to who or what is responsible for creating the risk in the first place and, in doing so, puts the onus on enterprises to

self-regulate.

In short, the revised Food Safety Law adopts a governance logic built on an overarching, macro-level conception of food safety, and improves the internal structure of legal institutional arrangements. However, the design of several specific systems still needs to be refined and improved.

## 3 Transformation of governance logic: the rise of social co-governance

The preceding section described the basic framework of the new Food Safety Law. The key feature of this framework is the transformation of governance logic from state dominance to social co-governance. Article 3 in the Law clearly sets out the legal principle of social co-governance: "Food safety work shall follow the rules of prevention first, risk management, whole process control and social co-governance, and have a scientific, strict supervision and management system." In the next section I undertake an empirical analysis of the standard forms and specific patterns in the practice of social co-governance to show both its vitality and the challenges that must be addressed.

The establishment of the principle of social co-governance in the food safety field has some profound legal bases in the current society.

### 3.1 Reconstructing a regulatory state: from regulation to cooperative-regulation

The model of the regulatory state, which arose during the 20<sup>th</sup> century, stresses that while respecting the market, the government can intervene in the market to prevent negative externalities and overcome malfunctions of the market and society. Since the 1980s, the disadvantages of unilateral regulation by government, including excessively high costs, simplistic regulatory mechanisms, serious mismatches between regulation and social information, and lack of responsiveness, have become increasingly apparent. Against this backdrop, a cooperative-regulation model began to appear in the fields of public administration and administrative law (K. Yeung, 2012, p65). The cooperative-regulation model emphasizes that the government and the society should communicate and collaborate, adopting cooperative measures to achieve common regulatory objectives and overcome regulatory crises. In the food safety field, cooperative-regulation is important in many countries in Europe and the Americas; in these countries, governments make full use of effective incentive measures to allow the society to undertake a series of tasks, including reporting, disclosure, and contract-based punishments agreed to by private parties. The government and the society work together to accomplish supervision over food safety. With respect to risk communication in particular (R. Baldwin *et al.*, 2011, p137), cooperative-regulation plays a role that no unilateral food safety governance model can fill. The cooperative framework ensures that food safety risks are identified in a timely,

transparent manner, and assessed effectively.

### 3.2 Democratized administrative mode: from high-power administration to “private participation in administration”

Social co-governance requires a readjustment of the basis of administrative legitimacy. The legitimacy model of administrative action, which originated in the 19<sup>th</sup> century, is mainly described as a “conveyor belt” model (C. Coglianese, E. Mendelson. 2012, p.147). In other words, an administrative action is legitimate because it strictly conveys the will of the legislature, which has democratic legitimacy. Since the middle of the 20<sup>th</sup> century, however, when the revolution in conceptions of rights and due procedures in the UK and US led to legislation defining administrative procedures in civil law countries, more and more system design has emphasized that administrative legitimacy should be built around democratic, private participation in the administrative process. In this model, an administrative action cannot be deemed legitimate simply because legislators are democratically elected. If the supervisory activities of the government do not include any effective participation of citizens, and do not fully reflect the positions of the interested party to administrative decisions, a legitimacy crisis can result. Social co-governance in food safety supervision is partly a response to the transformation of the administrative legitimacy model, and reflects the trend of increased democratic participation in modern societies. Only by participating themselves can citizens acknowledge the legitimacy of administrative supervisory behavior (A. Hoflund, M. Pautz, 2010).

### 3.3 The China Context

Besides the contribution of basic legal principles, the establishment of the principle of social co-governance in China draws on the special context of the country’s actual social situation. The principle of social co-governance in China relies on more than isolated legal principles. It is also driven by a transformation in the internal logics of Chinese society and government, which are inevitably of great significance to governance practices.

#### 3.3.1 Co-governance contributes to re-establishing limited government

Social co-governance, in fact, allows for government boundaries to be designated and enhances the design of a system of limited government. Food safety supervision does not just entail the traditional supervisory power of government, but involves granting citizens and social organizations the right to know and the right to participate through legislation to restrict government powers. As a result, the process of social co-governance also means designating tasks and determining once again the scope of authority that resides with the government, and the scope of that which resides with

society and individuals. The list of government powers is defined, and this leaves other powers to society and individual citizens. We can also think of social co-governance as referring to “socialization of state powers”, and restriction of state powers self-imposed by the government.

#### 3.3.2 Co-governance contributes to rebuilding the guiding government

Another important factor, which is indispensable to the establishment of social co-governance in China, is that social co-governance can reduce the cost to the government of food safety governance. According to CFDA statistics in 2014, China had 0.27 million registered food production enterprises, 2.63 million registered food selling enterprises, 8.11 million catering service enterprises, and approximately 90,000 permanent staff engaged in food supervision law enforcement. China’s food supervision departments have millions of supervision targets and thus require plentiful human resources, financial resources and materials. If the government continues its traditional practice of undertaking all specific supervision tasks, the cost will be difficult to bear. Thus, the Chinese government must transform itself from one that performs all supervisory tasks to one that provides guidance, to one that combines macro management with micro law enforcement, fully develops the supervisory potential of the society itself, and works with the society to jointly formulate rules, prevent risks and implement sanctions (R. Baldwin *et al.*, 2011). Socialization of food inspection organizations, as stipulated in the new Food Safety Law, is one example of this. When the government hands over the administrative authority for inspections’ enforcement to civil society organizations, not only are government costs reduced, but the professional expertise of social organizations is also brought into play, killing two birds with one stone.

#### 3.3.3 Co-governance contributes to regulatory government

Social co-governance supports the efforts of the Chinese government to develop means for food safety regulation. For example, the Food Safety Law calls for industry associations to develop industry standards, mechanisms to reward compliance and punish non-compliance, and systems to report offenses. These standards, mechanisms and systems, in some sense, extend the regulatory capacity of the government, and assist the government in making correct regulatory decisions and in creating regulatory measures that that serve as alternatives to ex post facto punishment or sanctions. Social co-governance combines regulation with self-regulation and sanctions with incentives, and integrates multiple punishments such as property penalties and social credit penalties. Social co-governance thus strengthens the regulatory performance of the government.



### 3.3.4 Co-governance contributes to smart government

Today, social co-governance in Chinese society exists in an environment that includes businesses involved with information and technology and data platforms. Therefore, co-governance can facilitate the communication and exchange of information between the government and society, supporting standard formulation, risk prevention efforts, etc. With the emergence of social co-governance, the government must develop more sensible governance models, cooperate with the society, make wider use of big data and cloud computing, and learn to regulate the new types of businesses in the food industry to support smart government.

### 3.3.5 Co-governance contributes to cooperative government

The principle of social co-governance also contributes to cooperative government. Cooperative government refers to government efforts to cooperate with civil society actors to jointly supervise food safety and safeguard basic public order (Balzano, J., 2012). As stipulated in the new Food Safety Law, consolidated market traders and online food trading platforms shall use contracts as a basis for regulating food producers and operators. This constitutes typical cooperation between government supervision departments and platforms. In effect, a combination of administrative management and civil contracts is used to supervise food producers and operators.

### 3.3.6 Co-governance contributes to responsible government

Finally, social co-governance in China plays a role in forcing the government to improve its careless and negligent supervisory efforts. Since social co-governance gives more initiative to civil society actors, it will inevitably require the government to respond to these actors in a more proactive, cooperative manner. For example, in responding to public appeals or the specific requests of stakeholders and in fulfilling obligations to report offenses, communicate information, supervise the media, etc., as set out in the Food Safety Law, government supervision departments will be required to perform their supervisory role more proactively and become “responsive, responsible government” (R. Baldwin *et al.*, 2011).

## 3.4 Types of system

The preceding sections analyze the basic legal principles and the significance of social co-governance, as it is established in the Food Safety Law. Next, we will undertake an empirical analysis to classify the rules of social co-governance contained in the Law, classifying the norms scattered throughout the Law, and highlighting the legal norms of social co-governance. We divide the norms of social co-governance into six types.

### 3.4.1 Types of self-regulation

The essence of self-regulation can be understood from different perspectives. For example, in terms of the relationship between the state and the private sector, self-regulation refers to “a private actor operating independently according to set standards and beyond the supervision of the government” (K. Yeung, 2012). In terms of relationships between actors within the private sector, it refers to “private actors use of some means to control themselves or other actors” (K. Yeung, 2012). In such instances, regulation refers to “private sector actors working with one another to jointly develop and follow the industry codes” (R. Baldwin *et al.*, 2011). Generally, self-regulation is characterized by the following: First, it achieves self-restraint and self-supervision by means of standards, work processes, or procedures (including mechanisms for rewards and punishments) that are set independently by an enterprise or industry organization, not by direct order or intervention of the government. Second, the standards or work processes, despite being set by private sector actors, have a legal basis and their enforcement must be closely supervised by the government, with the government playing a supporting role (C. Coglianese, E. Mendelson, 2012).

There are two key factors that justify the wide application of self-regulation: professionalism and efficiency (R. Baldwin *et al.*, 2011). One notable feature of the risk society in the age of the industrial civilization and the information civilization is that risks themselves are a product of technology and innovative ideas generated by industrial civilization and can even be the product of efforts to mitigate risks. Regulation and prevention of risks must thus be based on the use of various professional skills and expertise. The government often lacks the capacity to cope with the complex, diverse technical requirements needed to regulate risks. From the perspective of efficiency, the public expenditures of modern governments, including outlays for personnel, are controlled by parliamentary processes. Self-regulation helps to reduce government spending, and is more flexible than traditional bureaucratic efforts because it is not subject to the parliamentary process.

Provisions for the self-regulation type of social co-governance involving the participation of social actors can be found in Article 9 of the Food Safety Law: Food industry associations shall reinforce industry self-discipline, establish sound industry standards, mechanisms for rewards and punishments mechanisms in accordance with charters, serve and guide food producers and traders to formulate their charters, draw up standards, and release information. Article 9 allows for industry associations to restrain members by establishing disciplinary regulations, thus taking on the role of the government at a lower level, albeit in a manner that is more flexible and professional than the government's.

### 3.4.2 Types of contract-based governance

#### (1) Cooperative regulation between industry associations and enterprises

Cooperative regulation is a special type of self-regulation that refers to cooperative governance between enterprises and government, including the joint development and execution of standards by enterprises and government, and also governance between industry organizations and enterprises. The Law designs some systems and provides that, for example, food industry associations shall play multiple roles, such as reinforcing industry self-discipline, establishing industry standards and mechanisms for rewards and punishments pursuant to the charters of the food industry associations, and provide food safety information and other services. Food production enterprises may inspect the food products they produce on their own, or entrust food inspection entities to do so.

#### (2) Contract-based self-regulation

Contract-based self-regulation can also be viewed as "governance by means of private law". That is, equal entities enter into a contractual arrangement to fulfill certain special obligations and responsibilities to ensure food safety, and such entities realize enterprise self-regulation by adhering to the contract and sanctioning any party that breaches the contract. This idea for self-regulation is worthy of considerable attention. Its strengths include: first, this approach reduces government's costs, and limits the need for it to intervene directly with market entities; and second, in addition to a focus on breach of contract and punishments for violations after the fact, this method also requires parties to the contract to assume a range of responsibilities for contract fulfillment, thus demanding a focus on the prevention of risks before the fact.

The Food Safety Law designs three representative types of contract-based self-regulation:

#### (1) Regulation of consolidated trading market operators, etc.

In accordance with the Law, consolidated trading market operators, stall leasers, and trade fair organizers shall review the licenses of the food traders that are admitted, define the food safety management responsibilities of such food traders, and regularly inspect their operating environment and conditions. Upon finding any activity in violation of the Law, they shall immediately stop the activity and report to the government food and drug supervision and administration department at the level where the market is located. Where consolidated trading market operators, stall leasers, and trade fair organizers fail to perform the obligations as set out above and a food safety incident occurs in this market, they shall bear joint and several liability with food traders.

#### (2) Regulation of online food trading platforms.

In accordance with the Law, platforms providers shall fulfill three contractual obligations. First, they shall require

real-name registration of the food traders that use their platforms, and elaborate the responsibilities of the traders; the platforms shall also examine the licenses to determine if the food producers or traders have obtained such licenses lawfully. Second, online food trading platform providers shall, upon discovering a trader in violation of the Law's provisions, stop the activity of the trader in a timely manner and immediately report the violation to the food and drug supervision and administration department of the government that has jurisdiction over the activities of the trading platform; and the platform shall immediately terminate the online trading service if it discovers any activity that seriously violates the Law. Third, compensation liability can be divided into joint and several liability and independent liability: if any consumer buys food products through any online food trading platform, and has legitimate rights and interests damaged, he or she may demand compensation from the related online food trader or food producer. Should the online food trading platform provider not supply the real name, address and current contact information of the online food trader, the platform provider shall pay the compensation.

#### (3) Regulation of food advertisers.

As set out in the Law, food advertisements shall provide true, legal information, and shall not contain any false information, or information about disease prevention or treatment. Food producers and traders shall be responsible for the authenticity and legality of the advertisements for their food products. In the event that any advertiser or publisher of advertisements designs, produces and issues any false food advertisement, thus damaging the legitimate rights and interests of consumers, they shall bear joint and several liability with the related food producer and trader.

### 3.4.3 Types of public sphere supervision

The public sphere, an important concept put forward by German philosopher Juergen Habermas, is defined as a third sphere between the state and the civil society, and consists mainly of social organizations and entities that pursue and affirm the public interest. In the new Food Safety Law, the public sphere is important with respect to social co-governance. Specifically, an empirical analysis of this sphere reveals the following:

#### (1) Media supervision

News media shall publicize laws, regulations, standards and other information about food safety, and facilitate the supervision by public opinion of illegal food safety activities. Publicity and reports on food safety shall be authentic and fair. Effective supervision of the media is the most important form of public sphere supervision and social participation in food safety governance.

#### (2) Reporting of offenses by citizens

Any organization or individual has the right to report any food safety offense, study food safety information from the related department, and put forward opinions and sugges-

tions on food safety supervision and administration. The food and drug supervision administration departments, quality supervision departments, etc. that are part of governments at or above the county level shall make known their email addresses or telephone numbers, and receive any consultations, complaints, or reports of offenses. If such matters fall within the purview of a department, the department shall accept them, and shall, within a statutory period, respond to, verify and handle them; if a matter is not within its purview, the department shall refer the matters to the appropriate department, and advise the inquirer, complainant or informant in writing. The department that has the responsibility to handle such matters shall do so within a statutory period, and shall not shirk its responsibilities. If an investigation verifies that an offense reported by an informant actually occurred, the informant shall be rewarded.

#### 3.4.4 Types of state-guided governance

##### (1) Administrative guidance

The state encourages basic research and applied research on food safety, and supports food producers and traders to adopt advanced technologies and management standards for improving food safety. This encouragement is based on a consideration of enterprise costs.

##### (2) Administrative rewards

Any organization or individual that has made a great contribution to food safety work will be commended and rewarded pursuant to national provisions. Rewards and commendations introduce an incentive mechanism into governance activities, a mechanism that encourages a move away from the dependence of administrative agencies on punishments alone as a supervisory tool, and facilitates the more active participation of more social actors in governance. A more comprehensive administrative reward system will be included in the revised Regulations on the Implementation of the Food Safety Law of the People's Republic of China in the future.

##### (3) Food safety liability insurance system

The state encourages enterprises engaged in food production to buy food safety liability insurance. Social co-governance is also embodied in the concept of modern tort liability law: all members of society share food safety incidents and other risks both jointly and fairly; remedy is defined as an important value objective of tort liability law. Only when a risk sharing mechanism is set up in society will each victim be remedied most effectively and most fully.

#### 3.4.5 Independent inspections by third parties

Food production enterprises may either inspect their own food products, or entrust food inspection entities under the Law to do so. Entrusting third parties to inspect food products is an important aspect of the initiative to resolve the crisis in public confidence with respect to food safety, and to improve the credibility of enterprises. It is also a reflection

of the socialization of state power.

#### 3.4.6 Types of interactions between the state and society

##### (1) Information interaction

The fully transparent and free flow of information is a premise of social co-governance. To promote this premise, the new Food Safety Law designs norms for information interactions, which fall into the following basic types:

##### (2) State-dominated release

China will establish a unified food safety information platform, and implement a unified disclosure system for food safety information. General information on national food safety, warnings of food safety risks, information about major food safety incidents and investigations, and other information subject to disclosure rules as determined by the State Council will be announced by the food and drug supervision and administration department under the State Council. Where the impact of warnings of food safety risks, or information about food safety incidents and investigations is limited to a specific region, the information may be released to the public by food and drug supervision and administration departments that are part of the government in the locale affected. Such information shall not be released without authorization. Food and drug supervision and administration departments, quality supervision departments and agricultural administrative departments under governments at or above the county level shall be responsible to make known daily supervisory and administrative information on food safety. The disclosure of food safety information shall be accurate and timely, and shall include any explanations necessary to avoid misleading consumers and public opinion.

##### (3) Information sharing

After releasing information to the public as specified by the Food Safety Law, food and drug supervision and administration departments, health administrative departments, quality supervision departments and agricultural administrative departments under local governments at or above the county level shall report to authorities at a higher level. These higher level authorities will immediately report to the food and drug supervision and administration department under the State Council. Local authorities may, if necessary, also report directly to the central government department. Food and drug supervision and administration departments, health administrative departments, quality supervision departments and agricultural administrative departments under local governments at or above the county level shall circulate notices of food safety information released to the public in their jurisdiction to other governments at the same level.

##### (4) Dealing with the release of misleading information

No organization or individual shall fabricate and disseminate false food safety information. If any food and drug supervision and administration department under govern-

ments at or above the county level finds any food safety information that might mislead consumers and public opinion, this department shall immediately organize related departments, professional organizations, food producers and traders, etc. to verify and analyze such information, and publicize the results of this analysis in a timely manner.

### 3.5 Brief review of social co-governance legislation

The preceding section divided norms of social co-governance in the new Food Safety Law into six types, and analyzed and described the contents of the norms. This section presents a brief review of the current legislation:

#### 3.5.1 Incomplete norm structure

Many of the norms as they exist in the current legislation are incomplete. According to legal theory, only when a norm is complete in structure can its function and effect be realized to the greatest extent possible. A complete norm should include behavior modes and legal consequences: the former stipulates how those subject to the law shall act, and the latter specifies the legal consequence that specific behaviors will produce. At present, however, many norms for social co-governance are incomplete structurally. In particular, many norms have few provisions setting out obligations and responsibilities or, in other words, they lack legal consequences. As a result, these norms are unable to play a guiding role.

#### 3.5.2 Lack of balance between rights, obligations and responsibilities

Many articles in the Law set out rights without addressing the matter of obligations and responsibilities. Some actors are endowed with many obligations and responsibilities, but are not guaranteed any rights. As specified in the Law, for example, online platform providers have multiple obligations to check, register, inspect, and penalize, and they bear joint and several civil liability, but the Law has no provisions concerning their rights.

#### 3.5.3 Lack of procedural and operational rules

Many articles set out principles of social co-governance, but do not contain any specific information concerning procedures or operational rules. This situation hinders enforcement efforts; lower level laws are required to provide more detailed provisions.

## 4 Law-based governance: objectives and limitations

### 4.1 Governance objectives

To meet the fundamental requirements of food safety governance, what values should the revised Law set out to achieve? An overall, macro-level theoretical framework of safety can be used to summarize the value objectives the Law pursues (R. Baldwin, *et al.*, 2011; Broughton and

Walker, 2010).

#### 4.1.1 Legitimate governance\authority

First, the provision of safety must be genuine, and must comply with requirements for "legal reservations" and the protection of human rights. Safety is the fundamental objective, and for this reason, macro-level safety must be guaranteed by the rule of law. The Law has provisions to ensure that adequate authority and definite legal procedures are available for the responsibility system of the government, the self-regulation of enterprises and social co-governance. Manpower, materials and financial resources in particular shall be sufficient, as explicitly stipulated by the Law, so that mismatches between rights and responsibilities and law enforcement actions that exceed authority can be prevented. "Integrated building of the country under the rule of law, government under law and society ruled by law", as presented at the Third Plenary Session of the 18th Central Committee of the CPC, emphasizes that behavior at any level must be clearly authorized by law, and must not exceed the boundaries set by the law.

#### 4.1.2 Transparent governance processes

Efforts to ensure food safety must always be transparent. Whether for government behavior or enterprise behavior, specific procedures that have sufficient detail should be established to ensure that law enforcement and enterprise behavior are subject to public supervision at all times. The recent incident at the Shanghai Hushi Food Co. resulted from a large mismatch between what enterprise management and staff knew and the information about the situation that was available to the public. The Law should make greater efforts to ensure that the work of enterprises to self-regulate is transparent. More open and transparent channels should be available for acquisition of raw materials, processing, manufacture, storage, transport and inspection to ensure that these processes are subject to inspection by the public and the market.

#### 4.1.3 Responsible governance results

To deal with violations of food safety, we must establish an effective accountability mechanism. The Law should provide a system that is moderately strict, comprehensive in coverage and diverse in means. This system should ensure that corporate responsibility, governmental responsibility and social responsibility are covered by law. Moreover, it should prevent imbalances due to excessive emphasis on the responsibility of a particular actor.

#### 4.1.4 Coherent governance structure

Safety requirements within the macro safety concept must be well coordinated by the Food Safety Law to ensure mutual cooperation and coherence. Good legal governance requires that the values and norms of the governance structure

are coherent. Given that food safety relates to complex interest relationships in complex societies, conflicts of interest between different safety concepts are likely to occur. For example, according to Article 106 of an early draft of the Law, before an organization or individual could release any food safety information that could impact society or the food industry, they would have to verify the accuracy of such information with food production and operation enterprises, industry associations, scientific research institutions, and food safety departments in advance; no organizations or individuals were to release food safety information that had not been verified. This article was based on values of statism and baseline safety that are relevant in the context of a simple society. Obviously, these values conflict with the concepts of social co-governance and the co-construction of safety required by the Food Safety Law, and this leads to incoherence in the entire system of legal norms. The final Law substantially revised this article, thus solving the tension between statism and social co-governance, and between baseline safety and the co-construction of safety. (Article 121 in the final revision of Food Safety Law stipulates that “No organization or individual shall fabricate and disseminate false food safety information”.)

#### 4.1.5 Diverse governance means

To meet different needs for safety, different governance means must be available. Hence, legal governance must always consider classification, and ensure the diversity of governance means, including incentives and punishments, prior permission and supervision after the fact. Governance should make comprehensive use of types of multiple punishment, and avoid treating everything in the same way and relying on simplistic solutions. The system designed by the Law should achieve the effect of combined measures.

## 4.2 Governance limitations

There are, however, certain limitations to law-based food safety governance built around the macro-level conception of safety. Governance can be effective only if governance actors adhere to the idea of cooperative governance through multiple means. In theory, there are three aspects to such limitations:

#### 4.2.1 Complex interest games

The decentralization and dispersion of power and influence is a defining characteristic of complex societies. The legislative process is subject to complex interest games, and in the worst case scenario, legislation can be captured by vested interests. The final provisions of the revised Food Safety Law will reflect interest games between different supervision departments, between the central government and local governments, and between different interest groups in society, all of which add an air of uncertainty to the revision of the Law. The use of dynamic mechanisms such as the full

supervision function of democratic politics in addition to the Law is essential to avoid capture of the legislature.

#### 4.2.2 Limited legislation techniques

Law-based governance often presupposes perfect legislative text, but legislation has technical limitations. These include: the impossibility for legal norms to be highly precise, leaving room for interpretation; the Food Safety Law has limited capacity to anticipate future developments or to generalize from particular cases in the context of the complex society. Such challenges were encountered when revising the Food Safety Law. To improve legal explanations and understanding, it is important to absorb information and experience from society, and pay close attention to social developments and changes.

#### 4.2.3 Combination of food safety problems

Moving beyond the traditional division between public and private laws (which apply, respectively, to the whole of society or to transactions between individual or group agents), food safety legislation is typically problem-oriented and concerned with a specific field. Hence, the Food Safety Law must effectively use, coordinate and handle many systems including systems of civil law, criminal law and administrative law, and must draw on a great deal of specialist knowledge of food science, environmental science, economics, etc. as preconditions for determining rights, responsibilities and obligations. This creates significant limitations in terms of the knowledge base for the Law itself.

## 5 Conclusions

Taking the theoretical framework of the sociology of law as a starting point, this paper analyzes various problems affecting food safety in China. It summarizes the key features of a macro-level conception of food safety embodied in the Law: baseline safety, hub safety, co-constructed safety and endogenous safety and uses these as a basic framework for reviewing the legal governance of China's food safety. The paper deals with the basic framework of the revised Food Safety Law, and focuses on the logic and system design of social co-governance.

The establishment of this macro-level conception of safety is a response to needs for restructuring of national governance in the food safety field. Modernization of the national governance system and governance capacity must respond effectively to the value objectives embodied in this macro-level conception of food safety, actively incorporate governance practices into the basic framework of the rule of law, and use legal thinking and means to regulate and guide governance behavior. Only in this way can China achieve coordination between safety, governance and the rule of law, and ensure food safety for the Chinese people, thus meeting a necessary requirement for the people's livelihood.

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## 《新食品安全法》的国家治理内在逻辑：社会共治

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**摘 要：**实现食品安全治理的现代化需要对食品安全的国家治理内在逻辑进行顶层设计。为此，本文从分析当前食品安全治理所处的中国社会特征出发，认为需要构建一个综合了“底线安全”、“枢纽安全”、“共建安全”和“内生安全”的食品大安全观。它们分别对应着“最严厉的法律责任”、“统一权威高效的监管体制”、“社会共治理念”和“企业作为第一责任人”四大治理根本要求。以此为分析框架，可以把握新食品安全法的基本内容，并以社会共治为重点来突出其制度亮点和治理逻辑的内在转变。

**关键词：**大安全观；食品安全；治理；监管体制；全程监管；社会共治