

On the Establishment of Civil Emergency Avoidance under the Risk of Self Recruitment

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ABSTRACT. *As a legitimate reason, whether the civil emergency avoidance can be established under the premise of self recruitment risk is not consistent with the provisions of various countries and academic views. Self recruitment risk is also called self trapping risk, which means that the actor has intention to avoid the risk in the emergency. As for the risk of self recruitment, the research focuses on the field of criminal emergency avoidance. Starting from the system of civil emergency avoidance, this paper analyzes the feasibility of the establishment of civil emergency avoidance under the risk of self recruitment.*

KEYWORDS: *Self recruitment risk; Intention; Civil emergency risk avoidance*

1. Question raising

Whether the self recruitment risk can be set up as an emergency risk aversion is a question. Looking at the legislation of the emergency risk aversion system in various countries, the attitude towards this issue is quite different, mainly summarized as follows: (1) in the negative mode, the legislation clearly denies the establishment of emergency risk avoidance. For example, article 228 of the German civil code clearly stipulates that if the danger is caused by the fault of the actor, the actor is obliged to compensate for the damage[1]. (2) affirmative mode: it is recognized in legislation that the risk of self recruitment should be established as an emergency avoidance, and it is regarded as the circumstance of lenient punishment for the actor. Such as the criminal code of the Republic of Montenegro and the criminal code of the Republic of Serbia. (3) the mode of differentiation system, according to the different subjects of interest protection, strictly distinguishes whether the self recruitment risk can be established as an emergency hedge. In order to protect the legitimate rights and interests of the third party, there is a space to identify the emergency avoidance; if it is only for its own interests, the identification of the emergency avoidance is excluded. (4) in the open mode of legislation, there are no special provisions on whether the risk of self recruitment can constitute the emergency avoidance, only the general elements of the emergency avoidance system. At present, most countries or regions adopt this legislative model, China's "general principles of civil law" and "tort liability law" all adopt the open legislation mode. Since China has not explicitly denied the establishment of emergency avoidance under the risk of self recruitment, there is still room for analysis and Discussion on this issue.

2. Feasibility Analysis of Establishing Emergency Avoidance under the Risk of Self Recruitment

Based on the open legislation mode adopted by China, the author believes that after excluding the risk aversion, other types of risk can be identified as emergency risk aversion, for the following reasons:

First, it is in line with the original intention of legislation to establish an emergency hedge under the risk of self recruitment. The open legislation mode of our country makes it possible to discuss the problem of emergency risk avoidance. When the danger has happened, the law should pay attention to how to minimize the loss of the whole social interest and how to limit the threat of interest brought by the danger to the minimum. Instead of following the public's indignant and cathartic condemnation of the perpetrator. Otherwise, it will become the theory of legal moralism, which may aggravate the responsibility of the actor.

Secondly, the establishment of emergency risk aversion under the risk of self recruitment fully conforms to the evaluation of the elements of emergency risk aversion. The dangerous sources of emergency haven do not exclude the urgent and realistic dangerous situation caused by the actor's intention or negligence. Moreover, in the intention of risk avoidance, the self-employed risk actors are often unwilling to do harm to society, and hope to protect greater social interests through risk avoidance.

Thirdly, the establishment of emergency avoidance under the risk of self recruitment embodies the character

of tolerance and modesty of law, humanity and humanity, and the important thought of legal interest protection. In the final analysis, modern rule of law is the rule of human nature and conscience, rather than the rule of mechanical rules.[2]

Fourth, the establishment of emergency Hedging under the risk of self recruitment does not violate the principle of liability under emergency hedging. In the emergency avoidance under the risk of self recruitment, the person who caused the danger also became the risk averse actor, and the dual identities were overlapped, which made the opposition scholars think that if the emergency avoidance was established, the punishment could be reduced according to the exemption clause. In fact, it is not so. Since it has the subject status of causing the dangerous lover, under the premise of constituting the emergency avoidance, according to the provisions of the emergency avoidance system of our country, the person causing the dangerous situation should bear the risk avoidance damage. Therefore, it will not result in the phenomenon of escaping from responsibility punishment. As Mr. Shi Shangkuan said in his book, “where there is responsibility for the occurrence of danger, the civil law clearly stipulates that it shall be liable for compensation. At this time, although the act of asylum of the perpetrator is not illegal, the person who is still responsible is not based on the tort, but on the special provisions of Article 150, paragraph 2 of the civil law.” [3]

3. Conclusion

The author holds a positive attitude on the establishment of emergency avoidance under the risk of self recruitment. In the field of civil and criminal law, emergency avoidance belongs to the same reason of illegal obstruction. Its illegal nature will not change because the risk averse actor is responsible for the danger.

⁴However, the application of law is not a simple formal logic reasoning process, it must always pay attention to the concept of social equity in real life, and take into account the interests of many parties. But from the perspective of the victim, it is obviously unfair for an innocent third party to bear the loss caused by the danger caused by the risk averse actor, therefore, it is necessary to set up an independent right of civil claim to let the risk averse actor bear the appropriate civil liability. Since then, it can not only protect the rights and interests of the first actor, but also protect the rights and interests of the victims to be compensated. Therefore, the provision of emergency avoidance in the “general principles of civil law” is actually a special provision for the balance of rights and interests between the risk averse actor and the victim.

References

- [1] Zhang Bao, Hou Huasheng (2013). On the judgment path of emergency avoidance of self recruitment danger. *China Journal of criminal law*, no.9, pp. 30-37
- [2] Chen Zhonglin (2007). Common sense, common sense and common sense: a view of rule of law and legal education. *Journal of the Pacific*, no.6, pp.16-19
- [3] Shi Shangkuan (2000), *General theory of civil law*, China University of political science and Law Press, pp.755
- [4] Chen Xuan (2007). Study on the problem of emergency avoidance under the situation of self recruitment. *Journal of Jiangxi Public Security College*, no.1, pp. 71-76