

# On the Legal Philosophical Foundation and Legal Nature of Emergency Hedging

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**Abstract:** The criminalization of emergency hedging has been going on for a long time. As early as in the Tang law of concentrated Chinese law system, there was the emergence of emergency hedging system. With the development of economy and society, more attention is paid to the protection of people's "freedom" and rights, and the process of criminalization of emergency hedging continues to mature, and the system positioning and legal nature of emergency hedging system have become the subject that the interpretation of criminal law must respond positively. This paper first analyzes the relevant concepts of the legal nature of emergency hedging, and introduces the research object of this paper. The author believes that the investigation of the legal nature of emergency hedging cannot be separated from the ethical basis and value basis of criminal law, so it first discusses the legal philosophy basis of emergency hedging system, and then summarizes and examines the system positioning of the current emergency hedging system, and evaluates the relevant theories respectively to explain the legal nature of emergency hedging.

**Keywords:** Emergency Hedging; Legal Nature; Legal Philosophy; Legal Interest Measurement.

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## 1. The Legal Philosophy Foundation of Emergency Hedging

The criminal law circle analyzes the basis of emergency avoidance from the Angle of legal philosophy mainly has the following viewpoints:

One is the priority value request theory. This view holds that when different value conflicts occur, it can be directly, practically and most appropriately used as the solution of value conflicts, that is, the priority value request. This view seems to be very practical, simple and easy to operate, and obviously bears the imprint of the idea of interest measurement in "utilitarianism". But it does not reveal the essential connotation of priority value claim, and its judgment standard in specific cases is also vague.

The second is the theory of social beneficence. Most supporters of this view argue that in the act of emergency avoidance, the victim's sacrifice is for the overall interests of the society, so it caters to the intrinsic value orientation of the legal order and has legitimacy. This view uses the social benefit of an act as the criterion for judging the legality of an act, which is influenced by the thought of public interest in utilitarianism, that is, as long as the risk aversion behavior reduces the damage to the overall social interests, it can prevent the violation of the law.

The third is the theory of social solidarity. This view holds that citizens exist not as individuals, but as people in society and have joint obligations to live with society. Therefore, citizens have a joint obligation to tolerate their own little interests being infringed in order to save others in danger. That is, the legitimacy of hedging behavior comes from the mutual assistance needs of human society that are inseparable and universally connected.

Throughout the above views, it can be found that although the views on the legal philosophical basis of emergency hedging are different, most criminal law scholars always discuss the legitimacy basis of emergency hedging with the two main positions of "social solidarity" and "utilitarianism", so it is an unavoidable issue in the study of the legal nature of

emergency hedging.

### 1.1. Social Solidarity

Léon Duguit believes that people must live in society and must have social solidarity, that is, solidarity is the "gift" of human beings. This kind of social solidarity is manifested in two aspects: first, according to the collective life, to meet the common needs. The second is that people give full play to their talents and meet different needs in society through "division of labor". Based on this, he believes that the foundation of all social norms is composed and determined by social solidarity, which on the one hand restricts the content of social norms, on the other hand also restricts the function of social norms. Therefore, some scholars argue that legal norms, as one of the three norms, are inevitably affected by social solidarity, which can be used to explain law and emergency avoidance system. According to this, some scholars believe that the reason why the emergency avoidance in criminal law can prevent the violation of law is the social joint obligation between members of society to participate in the common life of society. Therefore, in order to preserve the interests of oneself or the third party, the avoidance behavior that has to be taken against the interests of others is an infringement permitted by the legal order, and the infringed others must also tolerate such avoidance behavior. To some extent, the author agrees with this view, thinking that it is a direction to explain the theoretical basis of the emergency hedging system, but it is too idealistic and ignores the selfishness of human beings. The above interpretation is in effect a tacit acknowledgment that all citizens support the rule that "in emergency situations, the minor rights of innocent third parties can be sacrificed in exchange for their own major rights." It also requires all citizens to consciously accept the probability of becoming an innocent third party in an emergency, and then tolerate the harm caused to them by other citizens' risk-averse behavior. Obviously, it overemphasizes deontology, imposes the duty of tolerance and the duty of solidarity on the injured third party, and weakens the concept of rights. It strengthens the constraint of norms, weakens the

guarantee of individual freedom, and violates the rights-based criminal law view. Therefore, there are still major defects in social solidarism.

## 1.2. Utilitarianism

Bentham believes that utility is a tendency that can bring benefits or reduce pain to stakeholders, and his principle of utility is an important part of his philosophy of law. The utilitarian principle holds that when something can increase a person's total happiness or reduce a person's total suffering, it can be regarded as contributing to or for the benefit of the person; When this behavior contributes more to the tendency of community happiness than reduces the tendency of community happiness, the requirements of the utilitarian principle are satisfied. Obviously, the principle of utility is to understand whether human behavior is correct or not based on whether it promotes happiness. For individuals, the pursuit of their own greatest happiness is utility, and people's behavior will also be driven by utility. For the government, "the greatest happiness of the greatest number is the criterion of right and wrong." Accordingly, the principle of utilitarianism requires that legislation should seek to be "the greatest happiness of the greatest number of people, which is a public happiness interest." That is exactly what the law expects of an emergency hedging regime. On the basis of individualism, the law should tolerate the instinct of human beings to seek advantages and avoid disadvantages in a special state of emergency. First, it is difficult for the doer to keep a sober legal cognition in the face of sudden danger. Secondly, even if the perpetrator is still conscious of the constraints of the law, two protected interests are not allowed to coexist at the same time, and the abstract danger of breaking the law is insignificant in the face of the actual and immediate danger, and the relatively distant danger of punishment is insignificant in the face of the fear of imminent possible harm. Therefore, it is not in line with reality and reason to ask citizens to bear and bear the occurrence of the crisis, nor is it in line with the legal principle of "law does not force others to do what is difficult", so the behavior of hedging cannot be the basis for condemning the perpetrator. However, law is a universally binding norm, not a single norm aimed at an individual. Its audience is all citizens, and the interests to be considered are global. Therefore, in order to protect the greater rights and interests of oneself or others from infringement, others may save others in danger at the cost of a little of their own interests, which is not only the requirement of social public interests, but also the requirement of legal utilitarianism, reflecting the consistency of the purpose of the establishment of the emergency avoidance system and the purpose of utilitarian legislation. It can also be considered that the emergency hedging system is the embodiment of the principle of utilitarianism, and utilitarianism provides ethical and moral justification for the emergency hedging system.

However, some scholars criticize utilitarianism for taking the interests of society as the most important criterion, which will lead to disregard of individual dignity and rights, and affect fairness and justice. For example, in order to save the lives of others, in the case of urgent need for organ transplantation, the organ of a third party is forcibly used to complete the transplant operation without the consent of the third party. At this time, the behavior of exchanging the health of the third person for the life of the person in danger is generally in line with the requirements of improving social

public interests. Therefore, if the utilitarian standard is adopted to provide a theoretical basis for emergency avoidance, the behavior of forcibly using the organs of the third person should be affirmed and tolerated. But in fact, this so-called risk-aversion behavior obviously cannot constitute an emergency risk-aversion, otherwise the basic health of any citizen can not be guaranteed. The author thinks that this kind of critical point of view is essentially to change the concept, to elaborate the problem of philosophy with specific means and tools, which do not belong to the same legal category. In fact, it is a question of the modalities and limits of emergency hedging.

Many scholars hold a unique choice between the above two positions, but the author believes that the interpretation of law is not a question of right and wrong positions, and the more reasonable viewpoints, the closer the interpretation can be to the truth. Therefore, the viewpoint of "social solidarity" and "utilitarianism" can form the theoretical basis of emergency hedging. At the same time, the Marxist philosophy of law which ADAPTS to our ideology, especially the cooperative thought and the right conflict theory, can also constitute the theoretical basis of the emergency hedging system.

## 1.3. Dialectical Materialism and Historical Materialism

Marx's dialectical materialism believes that the conflict of interest comes from the contradiction of rights, the universal connection and the unbalance of the unity of rights and obligations, and essentially comes from individualism, emphasizing that the interest subject cannot blindly maintain private rights. Historical materialism emphasizes that the happiness of human society must be created and realized by cooperative societies, "frictional relations will accelerate conflicts, and the breakdown of the relationship chain will cause pressure on other relations." Therefore, from the moral and economic point of view, Marx believes that individual interests cannot always take precedence, because the essence of man is not an inherent abstraction of a single person, and in the investigation of reality, the sum of all social relations constitutes man. The law, as the norm to reconcile the conflict of interest, cannot keep the "reciprocity logic" at all times, so the confrontation of rights is inevitable. Therefore, in an emergency, the heterogeneity and independence of the individual's own rights sometimes require independent compromise, with an attitude of tolerance and cooperation, subordinated to the general interests of the society. It is not difficult to see that there are some similarities between Marxism and utilitarianism in the view of social interests. His view that "those who bring happiness to the many are the happiest" is similar to the utilitarian view that "the greatest happiness to the greatest number" is also fundamentally different: First, Marx paid more attention to multiple values rather than utilitarian values. He paid more attention to people's self-realization and activities conducive to human dignity. From the perspective of self-satisfaction, Marx's view was more able to rationalize the third party's tolerance and surrender in emergency avoidance from the perspective of self-dedication and realization of their own social value. Second, Marx believes that utilitarianism is irreducible, which makes the total amount of interests considered by utilitarianism impossible to calculate and compare.

The above three philosophical viewpoints of law have their own special backgrounds, which can provide support for the

theoretical basis of emergency avoidance, but they are more explained from the legal theory. As an important system of criminal law, emergency avoidance studied in this paper should be considered from the standpoint of criminal law, criminal law thinking and criminal law characteristics. Therefore, the particularity of criminal law is different from any other law. The author thinks that the theoretical basis of emergency avoidance should be found in the category of criminal law philosophy.

#### **1.4. The Doctrine of Modesty in Criminal Law**

The doctrine of modesty in criminal law requires the minimum expenditure (that is, less use, no penalty, the maximum use of penalty substitution measures) to win the greatest social benefits, that is, effectively prevent and resist crime. Penalty, as the last defense line of protection law, is the most severe in use, and we must maintain a modest and restrained attitude. Therefore, when we discuss the emergency hedging system, we should also consider whether the emergency hedging behavior has a very serious social danger and whether it meets the minimum requirement of punishment. In fact, regardless of the result of hedging behavior to all parties, the hedging behavior should be beneficial to society in essence, without greater social harm, and without subjective crime. In short, the establishment of the emergency hedging system is also the requirement of implementing "crime modesty" and "penalty modesty" to a certain extent.

## **2. Doctrinal Disputes on the Legal Nature of Emergency Avoidance**

The basic positioning of emergency hedging in different criminal systems determines the different conclusions on its legal nature, which is the primary logic to analyze the legal nature of emergency hedging.

In the civil law countries represented by Germany and Japan, the determination of whether an act constitutes a crime should go through three levels, that is, the evaluation of the conformity of constituent elements, illegality and accountability. The act only satisfies the conformity of the constitutive elements of the crime, but can not establish a crime. Some behaviors have some special justification reasons, for example, the emergency hedging behavior discussed here may conform to the constitutive requirements of crime in form, but the social risk of the emergency hedging behavior is denied, so it can only be prevented in the evaluation process of illegality or responsibility. From the criminal law theory of the civil law system, we can at least conclude that the emergency avoidance is the lower class of preventing illegality or preventing liability.

In common law countries represented by the United Kingdom and the United States, the evaluation system of crime is "double level", that is, the elements of crime and the grounds of defense. The determination of the criminal act must be evaluated by the elements of intention, action, consistency and causality in the substantive sense, and the possibility of legal defense must also be excluded. This kind of combination of positive and negative elements, entity and litigation significance has the advantage of simple operation, and attaches great importance to the form of crime. In this criminal constitution system, emergency avoidance belongs to the legitimate cause of legal defense, that is, in the common law system, emergency avoidance is the reason for the

defense of crime.

Different legal cultures, values and criminal constitution have contributed to different understanding of the legal nature of emergency avoidance in various countries. The author tries to analyze the different theories about the legal nature of emergency hedging in the world, and then discusses the legal nature of emergency hedging in our country.

### **2.1. Analysis of Relevant Theories in Civil Law Countries**

#### **2.1.1. Illegal Dissuasion**

Also known as illegal block but yuan said. It should be said that the reason why emergency avoidance cannot be established as a crime is that it prevents illegality. On the basis of affirming the responsibility of preventing violations, some scholars believe that "from recognizing the legal interests of others and the need to balance legal interests, it will not only prevent the responsibility, but also prevent the illegality of the act itself." Differences in the understanding of substantive illegality have led to different opinions on the reasons for preventing illegal actions:

One is the *laissez-faire* theory. In the case that both parties are legitimate rights and interests, one party will be harmed, which is natural and inevitable, so it is said that the hedging behavior is "right to right", the law can not make a choice, should be allowed to produce the natural result. Japanese scholar Yoshiki Kureda argues that, in his view, the understanding of the nature of emergency hedging behavior should first not be judged from the law, that is, there is a field of freedom above the law, but from the behavior itself after being separated from the elements of legal evaluation. Therefore, they conclude that all emergency hedging behavior is neither illegal nor lawful, but a natural act of indulgence. German scholar Bellinger and Japanese scholar Miyamoto argued that the occasion of the same value of legal interests is *laissez-faire* behavior, and in this occasion there is no tolerance obligation, so you can take risk-aversion behavior. The author believes that the theory emphasizes the value concept of returning to freedom in the way of thinking, which has positive significance, but the understanding of "*laissez-faire*" is too absolute and extensive, and the environment in which it is established can only be the ideal space of value balance, and can not adapt to the real judicial practice. In addition, law has the value measure function of right and wrong and the effect of resolving actual disputes. For the consideration of legal guidance function, in the process of analyzing the legal nature of "emergency hedging", it is too imprudent to give it the evaluation of illegal or appropriate law, but choose to define another "*laissez-faire*", which also deviates from the ultimate purpose of studying the legal nature of emergency hedging. Because there is no difference in the degree of illegality, there is only a difference in whether there is such a nature. Therefore, "breaking the law" and "conforming to the law" must be the opposite relationship of "choosing one and abandoning the other", and there is no other possibility of compromise or compromise. The author thinks that emergency hedging should not fall into the logic trap of "neither right nor wrong", and should adhere to the basic category of illegal or appropriate law.

The second is the theory of legal interest measurement, also known as the theory of superior interest. This theory takes the comparison of superior interests as the starting point, and holds that when two legitimate interests conflict, in order to preserve the larger interests, the smaller interests are

sacrificed, which is generally beneficial to society and meets the need of preserving legal order. It should be said that Japan's general theory, representative scholars have Ono Kiichiro and so on. This theory takes a comparative position to consider the balance of the overall interests of society, and believes that "greater than" is reasonable, because it has produced beneficial social consequences. In essence, it should be said that the principle of complementarity and balance should be adhered to, and the hedging behavior of protecting superior interests should be affirmed.

The author believes that this argument conforms to people's simple concept of fairness, and is easy to convince the public by means of comparison and weighing. It is in line with national ethical concepts and has good operability in most cases. At the same time, this theory is consistent with the intrinsic value of "result without value theory" and has theoretical rationality. However, in judicial practice, the theory of legal interest measurement may often face the situation of failure. On the one hand, not any interest can be quantified, and some interests cannot be compared or are not suitable for comparison. On the other hand, if the opposing interests are equal, it is difficult to make a reasonable explanation for the theory of legal interest measurement, and the superior interests will no longer exist. For the author's second concern, some scholars' views can be explained, such as Italian scholar Durio Padovani believes that when the value of saving interests and sacrificing interests is equal, the interests will inevitably face losses, and at this time, the interests of one of them can only be retained, which should not be considered "negative", at least it can be the legal "balance of payments". Since "balance" is achieved, it means that no harm is done to the result, and according to the position that the result has no value, illegality should be prevented. The author believes that this view can not make up for the inherent defects of the theory of measuring legal interests, because the premise of this view is the conflict of two kinds of interests, but whether the emergency hedging is based on the conflict of interests is worth discussing according to specific circumstances. In addition, it is doubtful whether this view can be understood and recognized by the public, because its essence is to explain the "luck factor" for the risk-averse actor, who believes that the sacrifice of interests is uncertain, so in the case of sacrificing interests and saving interests, the sacrifice of interests should tolerate this uncertainty, which is obviously not in line with the instinctive cognition of human nature to seek benefits and avoid harm.

All in all, this theory is undoubtedly in line with the requirements in the sense of legal philosophy, but it is also difficult to explain when the superior interest is not obvious and the conflict of legal interests cannot be compared.

### **2.1.2. The Theory of the Illegality of Obstruction But Punishment**

Some scholars believe that this theory is developed from the illegal obstruction theory, so it is classified as the lower class of illegal obstruction theory. The author does not agree with this classification, so it is listed separately. Because under a unified legal system, the concept of illegality should try to achieve consistency, can not simply separate the department of law, and think that the illegal act in civil law is legal in criminal law. This argument argues that the hedging behavior meets the requirements of the conformity of the constituent elements, but considering the weakness of human feelings, it can be paid without asking, preventing the behavior from being punished. Here, "punishable illegality"

is obviously a different concept from "illegality" in the above laissez-faire theory and the theory of legal interest measurement. In fact, emergency avoidance can only deter criminally punishable illegality, but whether general illegality can be prevented needs further discussion. Because the correct understanding of this theory should think that the concept of illegality does not only exist in the field of criminal law, but also includes "other legally punishable illegality". It should be said that it abandoned the "thorough adaptation of the law" advocated by the law to prevent the violation of the law and acknowledged a certain degree of relaxation. In essence, it is not the same theory as the illegal obstruction theory, so the author thinks that it belongs to two different categories of concepts. The author thinks that "the theory of the illegality of preventing but punishable" sets up a concept of "great illegality" when analyzing the emergency hedging behavior, and can explain the problem of "from punishment to the people" in some emergency hedging behavior.

Some scholars criticize that this is essentially a simplistic position of behavioral analysis, which I also find inappropriate. This is because we do not want to simplify the issue of the punishment of emergency hedging behavior, but to promote its refinement on the basis of insisting on the modesty of criminal law. This statement emphasizes that the concept of illegality exists under different legal horizons, but the criminal law is of a restrained nature. Therefore, the exclusion of the penalability of the emergency hedging behavior will first exclude the penalability of the penalty, but it does not mean the loss of civil illegality, that is, it can be investigated for civil liability such as compensation: The orderly connection between criminal law and civil law in this case can be well explained by using the viewpoint of this theory. The exclusion of criminal illegality does not mean the exclusion of civil illegality, which is conducive to maintaining the unified legal order.

### **2.1.3. Responsibility Prevents Saying**

Also known as the responsibility to block but one yuan said. This theory holds that the emergency hedging behavior is illegal in essence, because the hedging behavior infringes the legal interests of the third party, the victim cannot bear the harm result without reason, and the reason why the hedging behavior can not be punished is that it prevents the liability. Kant once thought about emergency avoidance from the perspective of rights, and argued that violent aggression for self-preservation cannot be considered as completely uncondemnable, but it can be exempted from punishment. The supporters of the theory of preventing liability believe that the person who is in an emergency must be clear that he cannot shirk and pass on the risk to others at will when he is opposed to the protection law interests, and this behavior and the result of the behavior that causes the risk of others to increase without reason should be evaluated as illegal. However, according to the principle of expected possibility, the expected possibility theory aims to provide legal relief for the human weakness of the actor, so it is necessary to judge whether the actor can be expected to carry out legal acts by combining the physical and psychological conditions of the actor at that time and the accompanying circumstances. People in a state of emergency may not have the possibility to carry out lawful acts or have no time to react to prevent their own wrongful acts, which is obviously in line with "human weakness", and thus the responsibility is prevented.

There are two main points of view in this argument:

One is the theory of no responsibility. This doctrine holds

that the perpetrator's spirit in the face of extreme danger and imminent emergency

The state is far beyond the normal state of fear and anxiety, and the huge mental pressure is enough to destroy the actor's independent will, so that it completely loses the ability to free meaning. When the actor has no cognitive ability and control ability, the behavior of infringing on the interests of the third party out of physiological instinct does not reflect the domination of his free will, which is an unconscious activity, naturally cannot be attributed to the actor, so it will not be punished. This view respects human nature as much as possible, but it fails to explain intentional risk aversion. Although we cannot rule out that in the act of emergency risk aversion, there is indeed a state of near-unconsciousness under great mental pressure, we also cannot rule out the state that the actor has a clear understanding of risk aversion and the purpose of risk aversion, that is, in the act of risk aversion, the actor is aware of the existence of danger, and then independently avoids the danger by infringing on the legal interests of the third party. If it is explained by the theory of "no responsibility capacity", its behavior cannot constitute an emergency hedge.

Second, there is no possibility of expectation. This statement takes into account that the act of infringing legal interests in an emergency hedge is one in which the perpetrator is in imminent danger

Therefore, the perpetrator can not be expected to make other lawful acts, so it can only be exempted from the criminal responsibility that the person should bear. The author thinks that this view is more in line with the simple moral sense of citizens than the theory of no responsibility, but it is not in line with the legislation and judicial practice of various countries. First of all, according to this view, the balance of legal interests is not considered in the identification of emergency hedging, and most of the existing laws of various countries have the limitation of damage, that is, the criminal law norms of emergency hedging hope to guide and restrict the actor to achieve the general balance of protection interests and sacrifice legal interests in emergency hedging, so the possibility of no expectation is incompatible with the actual legal norms. Secondly, in judicial practice, not all hedging actions are for the protection of their own interests.

#### **2.1.4. Dichotomism**

Also known as dualism theory and distinction theory, it holds that in emergency situations, legal interests protected by law have different meanings

And the nature, should distinguish in the specific situation is to prevent the violation of the law or prevent the responsibility. This dichotomism can be specifically divided into two categories:

The first is the dichotomy theory based on preventing but breaking the law. This is the general theory of Germany, which is divided into two mainstream views. One is to recognize

In order to protect the greater legal interest at the expense of the lesser legal interest, the hedging behavior should be regarded as the cause of preventing the violation of the law; When the size of legal interests is difficult to compare or even impossible to compare or the two legal interests are equal, the actor has no legitimate reason to indicate that his own interests are superior to others, so the hedging behavior has no responsibility but cannot be the cause of preventing the violation of the law. Secondly, from the standpoint of the stability of human ethics and legal order, life and body are the

foundation of human social life and the most direct and essential elements for survival. The emergency avoidance involving the major interests of life and body should be the cause of obstruction responsibility, while the avoidance behavior causing other conflicts of legal interests should be the cause of obstruction illegal. Compared with the former, the latter will put more emphasis on the particularity of the right to life, but whether life or physical interests can be measured is questionable. From a philosophical point of view, killing innocent people in order to save more people may not be just, because the nature of life cannot be measured in any form. However, in terms of legal thinking, many scholars believe that although life cannot be compared in terms of "quality", it can be compared in terms of "quantity", and it is necessary to measure it. For example, Professor Zhang Mingkai believes that if the risk-averse behavior of sacrificing one life to protect the lives of more people is not allowed to occur, it will lead to more people dying in order to comply with the law. Nor the concept and practice of sacrificing a person's life, which is unacceptable to the general concept of the public, does not conform to the justice of the legal order, and of course does not conform to the social utilitarian nature of emergency hedging. Therefore, the act of sacrificing the life of one person in order to protect the lives of many others should generally be excluded as a crime. In addition, in addition to the right to life, the body can also distinguish between light injuries and serious injuries when it is injured, and in practice, the public security organs have a set of standardized criteria for injury detection, so some emergency avoidance involving life and physical interests is still in line with the principle of superior interests, and should be considered to prevent but illegal.

The second is the dichotomy theory based on the responsibility of resisting. This theory holds that the act of emergency hedging is mainly illegal in principle, while preventing the violation of the law is a supplementary principle as an exception. It maintains that the act of hedging is prevented from liability because the actor does not have the possibility of expectation, but when there is a huge difference between conflicting legal interests, that is, when one legal interest is significantly superior to another, the act of hedging will become the cause of preventing the violation of the law. Some scholars believe that the rationality of this view is that the appropriateness of superior interests is affirmed by the national concept.

## **2.2. Analysis of Relevant Theories of Common Law Countries**

In the criminal law system of the common law system, emergency avoidance, as a defense to exclude criminal responsibility, has no effect on its legal nature

There are also differences of interpretation.

### **2.2.1. The Choice of Two Evils**

"a choice of two evils" literally means "a choice of two evils," according to the say-so view

In this case, there are only two choices, one is to violate the criminal law and cause less damage; The second is to abide by the norms of criminal law but cause greater damage to oneself or others. From the perspective of the overall interests of society, the former is more appropriate.

### **2.2.2. Theory of Necessary Behavior**

It is said that people in an emergency when their legal interests are at risk, do harm to others, if necessary

If so, the law should acquiesce. Under section 27 of the 1992 Draft Penal Code, "It is a defence if the perpetrator is necessary to do an act in order to save himself or another from imminent danger of death or serious injury, and could not reasonably be expected to do anything other than that". It embodies the point of view of this. The author thinks that the disadvantage of this theory is that the definition of "necessary act" is not clear, and there is a large space for interpretation. But at the same time, the author thinks that this theory is indeed suitable under the legal environment of the traditional case law of the United Kingdom and the United States. In order to apply the theory of necessary acts to the interpretation of emergency risk aversion, the abstract path is not an appropriate choice, and the more abstract the interpretation of necessary acts, the more likely it is to lead to the anomy of discretion. On the contrary, in the case law environment, the necessary acts formed by the specific confirmation and guidance of each case are more conducive to the scientific identification and interpretation of emergency risk aversion behaviors.

### 2.2.3. Specific Environment

Or the environmental stress theory. In the 1980s, Britain gradually developed a specific defense in a series of traffic accident cases, called Duress by circumstance. On the relationship between environmental stress and emergency avoidance, British scholars have different views. However, quite a number of scholars believe that environmental coercion is a special kind of emergency hedging, and this paper does not explore the differentiation or special relationship between the two concepts, but mainly introduces the idea of environmental coercion in the Anglo-American law system to consider the impact of environmental coercion when explaining the emergency hedging behavior. This view mainly holds that it is difficult or impossible to define emergency risk aversion in a fixed way. Therefore, the understanding of emergency risk aversion behavior should start from the specific and actual environment, pay attention to various elements of the environment in which the risk aversion behavior is located, and use professional knowledge and means such as logic and statistics to objectively and rationally analyze whether the actor should carry out risk aversion behavior. In other words, Is it because of the environment in which it is forced to implement risk-averse behavior. Obviously, the point of view puts emphasis on the proof and assurance of facts and the environment in analyzing the nature of emergency risk-aversion behavior. The author believes that its point of view does not focus on the comparison of social interests, but pays more attention to the behavior process, and can consider the situation of the risk-aversion actor more truly, which is of positive significance.

### 2.2.4. Damage Reduction Theory

This theory is similar to the theory of legal interest measurement in the context of civil law system. "The reason why an emergency is a defence is that the harm caused by the act is less than the harm avoided and that the harm could not have been avoided by less damaging means." This theory is called the comparison of considering damages, which is actually the comparison of the conflict of legal interests. According to this theory, reducing damages is the basis for the doer not to bear criminal responsibility, which in essence reduces the scope of application of emergency hedging, simplifies the problem, and fails to consider the complexity of hedging behavior. At the same time, it also has similar defects to the theory of measuring legal interests. Such as

ignoring the situation of equal conflict of interest.

## 3. Conclusion: Examine the Legal Nature of Emergency Avoidance in the Criminal Constitution System

Scholars have different opinions on the nature of emergency hedging, and most of the explanations are reasonable. However, the author believes that all the discussions on the legal nature of emergency hedging have the position and viewpoint of the crime constitution system in the final analysis, so it is necessary to discuss the legal nature of emergency hedging under the background of two different crime constitution systems.

In the traditional four-element crime constitution system, we should first clarify whether the emergency avoidance is a part of the crime constitution, and in which crime constitution we should evaluate it. Regarding the first controversy, there are two viewpoints: "positive theory" and "negative theory". The difference between the two lies in whether the emergency avoidance should be regarded as the evaluation factor of influencing crime outside of crime composition. The negation theory holds that the discussion category of emergency avoidance is the theory of social harm, which cannot be confused with the theory of crime constitution. Specifically, the act conforms to the constitution of the crime, indicating that the act has social harm, so as to make criminal treatment; However, the behavior of excluding social harm indicates that it does not have social harm, so as to make a crime treatment, in other words, the two are opposites in the function of criminal law. This point of view is conducive to the independent and complete consideration of emergency avoidance, which will not affect the existing crime constitution system, and is convenient to reveal the cause of emergency avoidance crime more objectively and independently. However, the author agrees with the affirmative theory, and believes that we should insist on incorporating the emergency avoidance into the crime constitution system, because under the four-element theoretical system, the crime constitution is a complete system, which has complete form and substantive elements, and the problems of conviction and sentencing under this system should be completed through the evaluation of the four elements, and it is a crime that meets the constitutive elements. Non-compliance does not constitute a crime. As Professor Li Hong believes, before reaching the conclusion that an act does not constitute a crime, a judgment has already been made that the act does not constitute an emergency hedge. On the premise of making it clear that emergency avoidance is in the internal evaluation of crime constitution system, the author thinks that it should be included in the objective aspect of investigation. On the one hand, emergency avoidance itself is a kind of behavior, which has a natural connection with the criminal behavior as an objective aspect of crime. On the other hand, it is precisely because the objective aspect of emergency avoidance is similar to some crimes, which leads to disputes on the boundary between crime and non-crime. Therefore, the key to explain that emergency avoidance does not constitute a crime should be to explain that it does not conform to the objective elements of crime. At this time, the act of emergency avoidance should "exclude the cause of the crime".

In the three-stratum crime constitution system of Germany and Japan, there are mainly three viewpoints which have been

pointed out above. The author thinks that the legal nature of emergency hedging can not be "completely to either side", that is, it is unreasonable to define the nature of emergency hedging as either "the cause of illegal obstruction" or "the cause of responsibility obstruction". First of all, "illegality" and "accountability" are not mutually exclusive two levels of logical relations, but after the first exclusion of illegal in the three-level criminal constitution system, there is no need to study in the following accountability, logically since the two are not mutually exclusive, it is not appropriate to absolutely bias to a certain side. Moreover, through the previous analysis, whether it is illegal to prevent or responsibility to prevent, there are obvious defects, which will not be repeated here. The author thinks that under the Chinese criminal law environment and ethical tradition, the viewpoint of "dichotomy" is the most appropriate, but there is no need to worry about whether the dichotomy with illegal obstruction is the principle or the dichotomy with responsibility obstruction is the principle. The author thinks that these two are abstract dichotomy, which can not solve the urgent problem of our criminal law, and regards any kind of illegal obstruction and responsibility obstruction as the basic principle. The other is regarded as a supplementary principle, which is more just a little concession made in legal discourse and legal logic for self-consistency, and concretely substituted into judicial practice. Obviously, it is impossible to choose a certain priority between the two, because the case is not abstract.

Different from the connotation of "dichotomy" from the perspective of the civil law system, Chinese scholars put forward other viewpoints of "dichotomy", one is the dichotomy between beneficial behavior and laissez-faire behavior, and beneficial behavior is similar to the "legal interest measurement theory", based on the utilitarian standpoint, considering the overall interests of the society, the emergency hedging to safeguard superior interests is a beneficial hedging behavior. However, in the case of a forced emergency, there is no increase in the overall social interests of sacrificing the legal interest and the protection law interest, but the criminal law has a laissez-faire attitude towards this kind of hedging behavior, so it is called laissez-faire hedging behavior. This view has many points worth discussing. First, some scholars refute that although emergency avoidance does not have the social harm of crime, it can not be said to be beneficial to society because it has caused a disastrous result to the legitimate interests of society. Second, the nature of the two is very vague, and the specific defects can be reflected in the classic mountaineer case.

Case (Climber case) : A and B two people together to climb the mountain, two people will be connected with each other with ropes, because the mountain is steep, the mountain suddenly slipped in the process of climbing, A accidentally stepped on the edge of the cliff and suspended in the air, because two people hang together with the rope, resulting in B because of gravity continues to slide, at this time B has been unable to pull back, and do not take measures in time, will slide together with a cliff. Therefore, in order to protect his own life, B cuts the rope, thereby saving his own life, but causing A to eventually fall off the cliff, resulting in his death.

In this case, sacrifice legal interests and protection interests are equal, belong to "one life for one life", according to the above view, the form meets the requirements of laissez-faire behavior. However, in essence, if B does not cut the rope, there is a high probability that both A and B will die together. Therefore, in the measurement of legal interests, it can be

considered that the harmful result of "causing two deaths" to the final harmful result of "only one death" is an act conducive to the overall interests of the society, so in essence it conforms to the beneficial behavior. A single case may involve two concepts under two points, and it is obvious that this classification pattern is difficult to make scientific explanations for specific cases.

Another dichotic theory proposed by Chinese scholars is to divide emergency risk aversion into two kinds: emergency risk aversion of right behavior and emergency risk aversion of laissez-faire behavior. Among them, "right behavior" is because in order to protect the overall interests of the society, the risk-averse person objectively protects greater interests with smaller legal interests, which is beneficial to social development in nature and conforms to the requirements of legal order, so it should be regarded as right behavior. "Laissez-faire behavior" is a hedging behavior to protect one's own interests or other interests that one is obligated to protect, that is, to transfer the damage that one is obligated to bear to an innocent third party. Compared with the classification of beneficial behavior and laissez-faire behavior, this classification is obviously progressive. Because the classification of beneficial behavior and laissez-faire behavior is more based on the simple measurement of results, while the classification of right behavior and laissez-faire behavior highlights the key role of objects in the nature of emergency risk-averse behavior. Meanwhile, rights and obligations are accompanied by each other, which is more in line with the inner ethics of citizens. In other words, the relationship between the "rights act of the risk-averse person" and the "tolerance obligation of the infringed person" cannot be reasonably explained. According to this view, when the risk-averse behavior protects other rights and interests that it does not have the obligation to protect itself, including the interests of others, social interests, etc., as long as it is greater than the interests of the infringed person, the risk-averse behavior is an emergency risk-averse behavior of the rights act. The victim must endure the abuse. Infringing upon the legitimate rights and interests of innocent third parties, but its behavior is evaluated as "right" is not reasonable, and even because of the consistency of rights and obligations, some scholars argue that emergency hedging can not be given the label of rights at all, because no one has unwarranted infringement, the obligation to tolerate infringement, not only does not conform to the legal value, but also violates human rights. In addition, laissez-faire behavior also has the logic trap mentioned above, which is neither legal nor illegal.

Through the above analysis, it can be found that there are always various interpretation problems in the view of two-point theory. The author believes that the root cause is that these theories are from abstract to concrete two-point theory, that is, they try to restrict and explain the emergency hedging in judicial practice through a "principled spirit", so they can never include all the emergency hedging behaviors in specific cases in the explanation and response.

All in all, this paper evaluates and analyzes the various interpretations of the legal nature of emergency hedging. These viewpoints are essentially different in terms of the focus and position of the problem. In the process of combing and analyzing them, the author believes that in the case of many advantages and disadvantages co-existing, it should not completely fall to a certain position, but should be combined with the investigation of the criminal system. Efforts should be made to explore and improve the interpretation of the legal

nature of emergency hedging, because at least in the short term, the four-element crime constitution theory is still the dominant crime constitution system in our country, and there is no need to be completely replaced. The interpretation of the legal nature of emergency hedging should adapt to the current legal system, and the improvement on this basis is also the requirement of maintaining the stability and order of criminal law. At the same time, the function of the legal nature of emergency avoidance is to reveal "what is the reason why criminal responsibility can not be borne", rather than to give it a special name. Focusing on this issue, Chinese scholars generally understand that emergency hedging objectively causes damage to certain legitimate interests but prevents greater legitimate interests from being damaged, so it is beneficial to society. From the subjective point of view, the actor is out of necessity, in order to protect the greater legitimate interests, there is no intention to harm the society, that is, from the subjective and objective investigation to determine that the emergency avoidance does not have social harm. Although this analysis method seems simple and straightforward, subjectively, it does not take into account the possibility of expectation, and it cannot investigate whether the actor has the intention of harming society. Objectively, it only considers the situation of "protecting greater interests at the expense of smaller interests", and the basis of judgment is not clear. From the perspective of practicality and utility, the effect is far worse than the measurement of legal interests. The specific viewpoints and advantages of the theory of legal interest measurement have been mentioned above, and in addition to these inherent advantages, the more important thing is that it can also fit in with China's criminal law system and ethical tradition. The theory of legal interest measurement is not a unique product of the theory of "preventing illegal causes", and we can use it as a tool and means, so that we can start from the standpoint of "superior interest theory". It is more clearly explained that emergency avoidance is an act that does not produce the effect of legal interest infringement worthy of punishment, and does not have the "social harm of crime" in essence. Therefore, the author proposes to define the legal nature of emergency hedging from the cognitive logic of "conflict of legal interests - judgment of social harm". That is, the first step is to carry out legal interest measurement on the basis of specific case facts, the second step is to determine whether the behavior excludes social harm, and finally the author's view is that the legal nature of emergency hedging is the behavior of excluding social harm on the basis of legal interest measurement.

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