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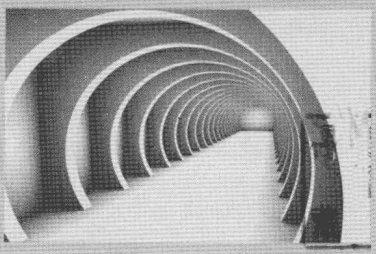

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摘　要

目前，我国正处于经济的高速发展期和市场的转型期，一些侵犯公私财产权和破坏市场有序发展的背信行为屡见不鲜。然而，我国现行刑事立法在规制这些背信行为上却存在一些缺陷和不足，常常会力不从心。另外，我国学者对背信犯罪概念的理解也不统一，对背信行为的认识仍存在偏差，对一些不是背信行为的违法行为却建议立法机关增设背信罪予以规制。这些现象反映了我国在背信犯罪理论研究上存在严重的不足，导致背信犯罪立法上的滞后。德国和日本是背信罪理论学说和立法经验较为丰富的国家，因此，研究德日典型背信罪的立法现状以及相关学说，分析我国背信犯罪的立法现状，深入比较我国背信犯罪与德日典型背信罪的异同，有助于我们正确理解背信罪和背信行为的内涵，寻求背信犯罪的本质，充分认识我国背信犯罪研究的不足，这对提高我国背信犯罪研究的理论水平和完善我国背信犯罪的立法都具有十分重要的意义。

本书共分导言、主体和结语三部分。导言部分重点阐述了本书的选题背景和研究意义、背信犯罪相关问题的研究现状和不足之处，以及本书的创新和不足。由于我国现有刑事立法规制背信行为的不足和少数学者对背信犯罪概念的理解偏差，使得当前进行我国背信犯罪与德日背信罪的比较研究具有十分重要的现实意义。然而，我国目前对背信犯罪的理论研究却主要局限于简单地介绍德日背信罪的立法现状和相关学说，没有对背信罪的内涵以及背信行为与其他债务不履行行为的区分做深入分析；对背信损害上市

公司利益罪和背信运用受托财产罪的研究也仅限于它们本身的犯罪构成要件分析和司法认定上，没有提出我国背信犯罪的本质学说，也缺乏对我国背信犯罪与德日背信罪的系统比较研究。因此，有必要通过对德日背信罪的立法背景、立法沿革和现行立法的研究来进一步阐述背信罪的内涵，合理区分背信行为与一般债务不履行行为的不同，正确理解背信罪的本质，并在此基础上，对比研究我国背信犯罪与德日背信罪的异同，以期对我国背信犯罪的立法完善提出相应的建议。

本书主体部分共分为五章。第一章“背信罪概论”，是对背信罪的整体介绍。首先对背信罪的基本结构、我国少数学者对背信罪的误解以及背信罪的罪名选择进行了详细分析，并在此基础上，从纵向的时间轴上，对背信罪的萌芽和形成进程及背信罪产生的原因和基础进行了完整的阐述，从而为正确理解背信罪的内涵奠定了基础；此外，从横向的空间轴上，对目前世界上没有规定背信罪以及规定了背信罪的其他国家和地区的立法进行了详细的介绍，为下文的比较研究铺垫。

第二章“德日典型背信罪之研究”，对德国和日本背信罪的现行立法进行了深入的分析和研究。“德国背信罪的现行立法研究”从德国刑法第266条的规定出发，将德国背信行为的犯罪构成要件分为两类：一是滥权构成要件；二是背托构成要件。根据德国学界的通说，符合滥权构成要件的犯罪行为是指行为人逾越内部信任关系的许可，而行使外部法律权限的行为，因此，权限滥用行为必须符合“对外性”和“法律行为”这两个条件。背托构成要件所规制的犯罪行为是指行为人违反财产管理义务的行为。这一范围相当宽泛，并不要求背信行为具有对外性，也不要求它是法律行为。然而，不管是滥权构成要件还是背托构成要件，都必须以造成本人财产损害作为背信罪成立的前提。“日本背信罪的现行立法研究”从日本刑法第247条的规定出发，对背信罪的犯罪成立条件中的主体、行为、主观目的、财

产损失的结果等要素进行分析。背信罪属于身份犯，其主体限于“为他人处理事务的人”。所谓为他人处理事务，是指为了他人处理他人的事务。所以，如果是自己的事务，即使是为了他人而处理，也不符合本罪的构成要件，这实际上也涉及到背信行为与一般债务不履行行为的区分。团藤重光博士在总结何谓他人的事务时，提出了“对内的关系”和“对向性关系”的概念，但却没有给出明确的定义和解释。此外，日本的背信罪还要求主体以为自己或第三人谋取利益为目的，或者出于对本人造成损害的目的实施违背任务的行为，给本人造成财产上的损失。

第三章“我国背信犯罪的立法现状”，则从我国刑事立法实际出发，分析和研究了我国背信犯罪的现状。我国 1979 年刑法和 1997 年刑法没有对普通的背信罪作出规定，直到 2006 年通过的《刑法修正案(六)》才规定了两个特殊的背信犯罪：一个是背信损害上市公司利益罪，另一个则是背信运用受托财产罪。故本章分为两节，第一节“背信损害上市公司利益罪”介绍了该罪的立法背景，研究和分析了有关该罪的罪名争议，从而得出笔者的观点：“背信损害上市公司利益罪”这一罪名不仅表达简洁、通俗、科学、合理，而且准确揭示了“背信”本质，并反映了“损害”这一核心要素，因而该罪名能全面反映本罪的外延和相关界限，有利于罪与非罪、此罪与彼罪的界定和区分。此外，本节还从主体要件、主观要件、客观要件以及犯罪客体等方面对背信损害上市公司利益罪进行分析研究，全面把握背信损害上市利益罪的犯罪构成要件。第二节“背信运用受托财产罪”介绍了该罪的立法背景，研究和分析了该罪的犯罪构成要件，从主体要件、主观要件、客观要件以及犯罪客体等方面整体把握背信损害上市公司利益罪的犯罪构成要件。

第四章“我国背信犯罪与德日典型背信罪的比较”，是全文的重点所在，在前文的论述基础上，分别从背信犯罪的本质和犯罪成立要件两个方面对两者进行对比研究。德国和日本学术界对于背信罪的

本质一直存在较大争议，比较有代表性的观点有滥用权限说、背信说、背信的滥用权限说、内部信任关系说，等等。而我国的两个背信犯罪将“背信”的意义限定在“违背忠实义务”和“违背受托义务”上面，这对认识背信犯罪的本质提供了立法依据和新的思路。笔者通过比较分析，认为背信说从违反信任关系造成财产的损害角度揭示了背信罪的本质，具有正确合理的内核，但如果无限定地理解作为背信行为前提的信任关系这一极为抽象的概念，将会使背信罪的界限变得模糊，不利于背信行为与一般债务不履行行为的区分。日本团藤重光博士曾提出“对内关系（内部关系）”与“对向性关系”的区分标准，但未能明确它们的内涵。笔者在综合比较研究的基础上，提出了自己的关于“对内的关系（内部关系）”和“对向性关系”的见解。对内的关系，是指行为人作为本人处理相关事务的延伸体，与本人之间形成内部的信任关系。两者在该事务的处理上，是作为同一当事方出现的。行为人的行为指向的是第三方，或者不特定的相对方，但绝对不能指向本人。而对向性关系，则是指双方互为行为相对人的关系，他们不是作为同一当事方，而是作为不同的相对方出现的，行为人的行为指向的是本人。以此种“内部关系”的见解为依托，笔者进一步提出了关于背信犯罪本质的新观点即“事务处理的内部信任关系说”：背信犯罪的本质是事务处理活动过程中的受托主体违背与本人之间的内部信任关系，未能从本人的最大利益出发为其处理事务，而导致本人财产损害的财产性犯罪行为。

另外，第四章也对我国背信犯罪与德日背信罪的犯罪成立要件进行了比较研究。通过对比，笔者发现它们既有相同之处，又各有自己的特色。首先，从主体上看，我国背信犯罪与德日典型背信罪都是身份犯，其主体都是特殊主体，都是“为他人处理事务之人”。但我国的两个背信犯罪中，背信损害上市公司利益罪既包括自然人犯罪，也包括单位犯罪；背信运用受托财产罪则只能是单位犯罪。而德国背信罪的主体只能是自然人犯罪，不能是单位或法人犯罪。并且，从

主体的涵盖范围看，我国两个背信犯罪的主体涵盖范围还不如德国背信罪主体的涵盖范围大。其次，从客观方面看，我国的背信犯罪与德日背信罪都是主体实施的违背信任的行为，都是财产性犯罪。但我国背信犯罪与德日背信罪所包含的“背信”的具体含义不同，行为的涵盖范围也不同。并且，德国和日本的背信罪都是结果犯，以造成本人的财产损失为必要。我国的背信损害上市公司利益罪也是结果犯，以造成上市公司重大损失为犯罪成立要件；但背信运用受托财产罪却是情节犯，以“情节严重”为要件。再次，从主观方面看，日本的背信罪，在主观上除了必须出自故意之外，还必须意图为自己或第三人谋取利益而给本人造成损害，即具有图利或加害目的，是目的犯。而德国背信罪与我国的两个特殊背信犯罪都没有此种目的上的特殊要求，不是目的犯。最后，从犯罪客体或保护的法益来看，背信损失上市公司利益罪侵犯的是双重客体，不仅妨碍了公司、企业的管理秩序，也同时侵犯了上市公司的财产权；背信运用受托财产罪侵犯的是简单客体，即破坏了金融管理秩序。而德国和日本的背信罪所保护的法益则是本人的财产权。

通过上述比较研究可以发现，我国的背信犯罪在主体、行为等方面比德日背信罪的范围规定得要窄，在规制一般的背信行为时，出现了一些力不从心的情况。基于上述结论，本书第五章提出了完善我国背信犯罪的立法建议。首先论证了我国增设普通背信罪的必要性和可行性，并提出了我国增设背信罪的模式及路径构想、背信罪犯罪构成要件以及背信罪刑事处罚的设置构想。同时，现有的两个背信犯罪由于其规制主体的特殊性，在实践中仍然有存在的必要，从而与新增设的背信罪形成特别法与普通法的法条竞合关系。当然，这两个特殊的背信犯罪在主体范围、行为方式以及情节结果等方面还存在一些不足之处，应当适当改进，予以完善。对于背信损害上市公司利益罪，笔者建议增加违法分红的行为样态，作为行为方式之六，即“违反公司法规定分配利润或股本金的”；对于背信运用受托财产罪，

笔者建议增设自然人犯罪主体，并取消背信运用受托财产罪的“情节严重”的情节要件，增加“致使客户遭受重大损失”的结果要件。

本书第三部分是结语。在对上文主体部分进行研究和分析的基础上，结语部分对笔者的主要观点和研究结论进行了集中的梳理。第一，笔者首次明确了作为区分“他人的事务”与“自己的事务”以及背信行为与一般债务不履行行为标准的“对内的关系（内部关系）”与“对向性关系”的具体内涵。这样就能通过判别行为人与本人之间的关系是属于“内部关系”还是“对向性关系”，来判断行为人的行为是否构成背信行为。换而言之，“对内的关系（内部关系）”与“对向性关系”的明确使得背信罪的内涵和范围变得清晰可见。第二，笔者通过比较研究德日背信罪的诸多本质学说以及我国背信犯罪中的背信本质，吸收背信说的合理内核，提出背信犯罪本质的新观点“事务处理的内部信任关系说”，即背信犯罪的本质是事务处理活动过程中的受托主体违背与本人之间的内部信任关系，未能从本人的最大利益出发为其处理事务，而导致本人财产损害的财产性犯罪行为。第三，笔者在比较分析我国背信犯罪与德日背信罪的犯罪构成要件的基础上，提出了我国背信犯罪立法的完善建议。笔者建议我国增设一个普通的背信罪，对严重的背信行为予以普遍性的规制；同时，现有的两个背信犯罪由于其规制主体的特殊性，在实践中仍然有存在的必要，从而与新增设的背信罪形成特别法与普通法的法条竞合关系。当然，这两个特殊的背信犯罪在主体范围、行为方式以及情节结果等方面还存在一些不足的地方，应当适当改进，予以完善。

Abstract

At present, our country is on the stage characterized by rapid development of economy and market transformation, and thus witnesses large numbers of behaviors that infringe right of public and private property and damage ordered development of market. However, there are certain flaws appearing in the process for present criminal legislation in our country to standardize such behaviors. In addition, scholars in our country also hold different view to understand crime and propose that legislation authority shall add crime to rectify and regulate law-breaking behaviors that do not belong to credibility, which leads to difference in getting acquainted with behaviors. Such phenomena reflect the lag of legislation, judicial and theoretic research on crime in our contry. Germany and Japan are two countries that boast most abundant practice experinece in the aspect of legislation and justice. Thereofre, to study present legislation of Criminal Breach of Trust in Germany and Japan as well as relevant theories, analyze current legislation of Criminal Breach of Trust in our country, and campare deeply the similarities and differences of Criminal Breach of Trust in our country and that in Germany and Japan will be conducive for our correct understanding of connotation of Criminal Breach of Trust and breach trust actions, pursue of nature of Criminal Breach

of Trust, and fully acquaintance with deficiency of Criminal Breach of Trust in our country, which will be extremely significant for improving legislatin of Criminal Breach of Trust.

This book consists of three parts, i. e. introduction part, main body, and conclusion part. The introduction part focuses on illustrating research background and significance, contemporary progress of questions related to breach trust both domestic and abroad, as well as innovations and limitations of this study. The current limitations of legislative regulation of criminal law in our country and a few scholars' deviation of understanding Criminal Breach of Trust grant extremely significant realistic meaning for conducting a comparative study of Criminal Breach of Trust in our country and that in Germany and Japan. At present, the study on Criminal Breach of Trust in our country mainly limits on simple introduction to present progress of legislation of German and Japan and relevant theories, failing to analyze in depth the connotation of Criminal Breach of Trust and distinguish breach trust behaviors from default behaviors. In addition, the studies on breach trust to harm the interests of the listed company and on the breach trust of entrusted property in our country all limit on analysis of elements in crimes and justice finds, and the essence theory on Criminal Breach of Trust in our country has not been proposed and in-depth comparative study on Criminal Breach of Trust and that in Germany and Japan is deficient. Therefore, there is need to further illustrate the connation of Criminal Breach of Trust, reasonably distinguish breach trust behaviors from general default behaviors, and properly understand the connotation of Criminal Breach of Trust by studying the legislation background, legislation evolution, and present study

on legislation of Criminal Breach of Trust in Germany and Japan, and to comparatively study the similarities and differences between Criminal Breach of Trust in our country and that in Germany and Japan on this basis with a view to proposing corresponding plans for the improvement of legislation of Criminal Breach of Trust in our country.

The main body of this book is divided into five chapters, in which Chapter One, i. e. Introduction to Criminal Breach of Trust, is a general introduction to Criminal Breach of Trust with three parts listed. The first part in Chapter One is entitled Concept and Name of Criminal Breach of Trust which gives a detailed introduction to basic structure of Criminal Breach of Trust, misunderstanding of a few scholars in our country on Criminal Breach of Trust, and name of Criminal Breach of Trust. The second part, i. e. Legislation Evolution of Criminal Breach of Trust, is devoted to complete representation of sprout and forming process, causation and basis of Criminal Breach of Trust by following time order, which lays a good foundation for properly understanding connotation of Criminal Breach of Trust. The third part, i. e. Legislation of Criminal Breach of Trust, gives a detailed analysis of legislation of foreign countries and other areas in which Criminal Breach of Trust has not been regulated and Criminal Breach of Trust has been standardized from the angle of space shaft, which hides the foreshadowing for the comparative study of next chapters.

The second chapter, i. e. Study on Typical Criminal Breach of Trust in Germany and Japan, respectively analyzes in-depth and studies present legislation of Criminal Breach of Trust in Germany

and Japan. The first part, i. e. Study on Present Legislation of Criminal Breach of Trust in German, starts from the stipulation of Article 266 of German legislation to categorize the elements in Criminal Breach of Trust in Germany into two kinds, elements in abuse power and elements in back support. According to general theory in academic circle of Germany, the crime behavior that meets the condition of abuse power refers to the action in which the actor oversteps the permission of internal trust relation to exercise external legal right. Thus, power abuse must meet such two conditions as being external and legal behavior. The crime behavior regulated by elements in back support refers to behavior that the actor engages in to violate the duty of property management, which gives an extreme extensive scope and imposes on no limitations on such breach trust such as being external and legal. However, both elements in abuse power and back support are based on the prerequisite of property damage to claim the Criminal Breach of Trust. The second part, i. e. Study on Present Legislation of Criminal Breach of Trust in Japan, starts from the regulation of Article 247 of Japanese criminal law and analyzes such elements of conditions of Criminal Breach of Trust as subject, behavior, subjective purpose, and result of property loss. The Criminal Breach of Trust is identity crime and its subject is limited to person who handles affaris for others, which refers to handling affairs of others for and on behalf of others. Thus, in case of handling affairs of oneself for other people, this element is not qualified for this Criminal Breach of Trust, which is a major point for distinguish breach trust from general default behavior. Doctor Tuanteng proposed concepts of internal relation and opposality relation yet

fails to give clear definition and interpretation when summarizing what are affairs of other people. Furthermore, Criminal Breach of Trust in Japan requires that the subject exercises behavior that is against task and causes loss in the aspect of property for seeking profits for himself or herself or for the third party or for causing damage to himself or herself.

Based on the reality of criminal legislation in China, Chapter Three analyzes and studies the present situation of Criminal Breach of Trust in our country. Criminal Laws passed in 1979 and 1997 by our country did not stipulate the general Criminal Breach of Trust until the Amendment 6 to Criminal Law passed in 2006 regulated two special crimes of breach trust, i. e. breach trust to harm the interests of the listed company and the breach trust of entrusted property This chapter is consisted of two parts, in which the first part, i. e. Breach Trust to Harm The Interests of The Listed Company, introduces legislation background of this crime, studies and analyzes crime dispute related to this aspect, and draws the conclusion that the breach trust to harm the interests of the listed company not only uncover the nature of breach trust but also reflects the core element of harm, successfully reflecting the extension of this crime and relevant boundary from all directions with concise, common, scientific, and reasonable expression. Furthermore, this part also analyzes and studies the breach trust to harm the interests of the listed company from such aspects of subject element, subjective element, objective element, and crime object. The second part, i. e. breach trust of entrusted property, also introduces the legislation background of this crime, studies and analyzes the element in this crime with a view to master the element

in Criminal Breach of Trust of entrusted property from aspects of object element, subjective element, objective element, and crime object.

As the substance of whole book, Chapter Four comparatively studies Criminal Breach of Trust in Germany and Japan and that in our country in the aspects of nature and element in Criminal Breach of Trust on the basis of research listed in Chapter Two and Chapter Three. There are always big disputes on nature of Criminal Breach of Trust in the academic circles of Germany and Japan, and representative viewpoints are theory on abuse power, theory on breach trust, theory on abuse power of breach trust, and theory on international trust relation etc. Two kinds of Criminal Breach of Trust in our country limit the meaning of breach trust on violating duties of being faithful and entrusted, which provides new idea and legislation foundation for understanding the nature of Criminal Breach of Trust. Through comparative analysis, the author holds the view that the theory on breach trust uncovers the nature of Criminal Breach of Trust with correct and reasonable core substance from the angle of property damage caused by violating trust relation, but unlimitedly understanding the very abstract value concept of trust relation as the prerequisite of breach trust will lead to vague boundary of breach trust and impossibility to distinguish breach trust and general default. Japanese Doctor Tuanteng once proposed the standard to distinguish internal relation and opposality relation, but failed to specify their connotation. On the basis of comprehensive and comparative study, the author proposes her own viewpoint on internal relation and opposoality relation. Internal relation refers to the internal trust relation between the actor and

the principal. The actor is the extensive subject of the principal who is engaged in economic activity. The two persons appear as the same party concerned when handling this affair. The action orientation of the actor is the third party or irregular counter party instead of the very person. And the opposality relation refers to the relation of both parties who are action objects who appear as different objects instead of the same party concerned. The action orientation of the actor is the very person. On the basis of understanding of such internal relation, the author further proposes the new point on nature of crime of breach trust, i. e. theory on internal trust relation in the process of handling economic affair, in which the nature of breach trust is the crime which causes the damage to the proper of the very person for the internal trust relation between the entrusted subject and the very person in economic activity fails to handle affair from the perspective of maximum profit of the very person.

In addition, Chapter Four in this book also comparatively studies the elements in Criminal Breach of Trust in our country and those in Germany and Japan. By comparison, the author finds out similarity and their unique characteristics. Firstly, from the aspect of subject, the Criminal Breach of Trust in our county and that in Germany and Japan are all identity crime with subjects of special ones i. e. person who handles affairs for others. However, the two kinds of crimes of breach trust are defined by our country as that breach trust to harm the interests of the listed company includes crime of natural person and that of unit and breach trust of entrusted property only limits on crime of unit. The subject of Criminal Breach of Trust in Germany can only be crime of natural

person instead of unit or legal person. Moreover, from the covering scope of subject, the combination of subjects of two kinds of crimes of breach trust is less than the scope regulated in Criminal Breach of Trust in Germany. In addition, from the perspective of objective aspect, crime of breach trust in our country and that in Germany and Japan are all trust-violating actions that subjects implement and belong to property crime, but the specific definition of breach trust included in Criminal Breach of Trust in our country and covering scope of action are different from that in Germany and Japan that are based necessarily on property loss and belong to result crime. Breach trust to harm the interests of the listed company in our country is also the result crime and the element in committed crime is based on significant loss caused to the listed company, while breach trust of entrusted property is the circumstance crime and the element in committed crime is based on significance of circumstance. Secondly, from the perspective of subjective aspect, Criminal Breach of Trust in Japan belongs to purpose crime in which the action is taken on purpose in the subjective aspect and for the purpose of gaining profits or imposing harm, i. e. obtaining interests for the actor or the third person and causing damage. Neither Criminal Breach of Trust in Germany nor two kinds of special crimes of breach trust in our country belong to purpose crime with such a special requirement in terms of this aspect. Finally, from the perspective of crime object or protected legal benefits, Breach trust to harm the interests of the listed company infringes dual objects, i. e. interfering management order of the company and enterprise as well as property right of listed company, and breach trust of entrusted property only infringes simple object,