BOSHI WENKU
〔法学·刑法学〕

渎职罪构成研究

DUZHIZUI GOUCHENG YANJIU

贾济东 著

（修订版）

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内容提要

本书在介绍渎职罪国外立法特点和国内立法发展的基础上，对我国刑法中渎职罪的概念、构成和司法认定等问题进行了深入分析，并提出了完善立法的建议。

本书可供法学研究者和司法实践者参考使用。

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摘　要

渎职罪的基础理论既是刑法理论的重要组成部分，也是司法实践中争论颇多的问题。本书在介绍渎职罪国外立法特点和国内立法历程的基础上，对我国刑法中渎职罪的概念、构成和司法认定等问题进行了深入分析，并提出了完善立法的建议。全书除引言外，共分为七章。

引言部分对我国渎职犯罪的刑事立法、司法实践和理论研究的现状进行了分析，从提高思想认识、改善执法环境、指导司法实践、推动立法完善、探索刑法理论和贯彻刑事政策诸方面揭示了对渎职罪构成的若干问题进行研究的理论意义和实践价值。

第一章介绍外国刑法关于渎职罪的含义与范围、罪名、主体、刑罚种类等的一般规定，描述了我国渎职犯罪的立法轨迹，回顾了1979年《刑法》关于渎职罪的规定以及其后社会的发展与渎职罪立法的完善，分析了1997年《刑法》对渎职罪章的修改，阐述了渎职罪的概念和法律特征，并从罪过形式、行为表现、主体要求、犯罪客体、立法形式和既遂形态等方面对渎职罪进行了不同的分类。

第二章对渎职罪的主体进行了考察，在回顾渎职罪主体立法演进历程的基础上，指出我国渎职罪的主体范围在立法上和解释中一直是变动不居的：新中国成立初期至1997年《刑法》，其演进的轨迹是由大到小、由宽变窄、从抽象到具体；1997年《刑法》实施以来，立法解释和司法解释又不断扩大渎职罪主体的适用范围，呈现出从1997年《刑法》复归的态势。该章对有关渎职罪主体的司法解释和立法解释进行分析，并对渎职罪主体的范围与本质进行深入探讨。认为1997年《刑法》第93条中所称的

国家机关，是指从事国家管理和行使国家权力，以国家预算拨款作为独立活动经费的中央和地方各级组织，具体包括权力机关、行政机关、检察机关、审判机关以及军队系统的各级机构。国家机关工作人员不仅包括国家机关中从事公务的人员，还包括依照法律、法规规定行使国家行政管理职权的组织中从事公务的人员，在受国家机关委托代表国家机关行使职权的组织中从事公务的人员，以及虽未列入国家机关人员编制但在国家机关中从事公务的人员。关于渎职罪主体的内涵即“国家机关工作人员”的本质，应坚持以具备资格为前提、以拥有职责和职权为基础、以职务名义从事国家管理、公共管理和社会管理等公务为核心的三位一体的“新公务论”。

第三章在评述渎职罪罪过形式的各种学说的基础上，主张刑法分则渎职罪章所规定的个罪的罪过形式是单一的，要么是故意，要么是过失；且多数为故意，少数为过失；其中，滥用职权型（包括徇私舞弊型）渎职犯罪是故意犯罪，玩忽职守型渎职犯罪是过失犯罪。并重点对滥用职权罪和玩忽职守罪罪过形式的各种学说和司法认定的立场进行了探究。

第四章在概述渎职犯罪行为基本特征、基本形式和主要类型的基础上，对玩忽职守行为、滥用职权行为和徇私舞弊行为的表现与认定进行分析。玩忽职守行为包括作为和不作为两种基本形式以及擅离职守、疏忽职守和未尽职守三种类型，司法认定中应注意：不能将玩忽职守行为等同于不作为；不能忽视职务的关联性。关于滥用职权行为，本章分析了其内涵、成立范围、概念和特征，认为其包括作为和不作为两种基本形式以及故意超越职权、故意不正确履行职责和故意放弃职守三种类型。司法认定中应注意：不能将不作为排除在滥用职权行为之外；不能脱离职责考察滥用职权行为；故意不正确履行职责既包括实体上的职务权限，也包括程序上的职权；滥用职权的成立不以对方能够认识到是行使职权为条件，也就是说，只要实施滥用职权行为，无论是

公开实施的，还是秘密进行的，也不管对方是认识到了，还是毫不知情，均不影响认定。本章还对徇私舞弊行为中“徇私”的地位与内涵，“前案”的内涵、称谓、范围、性质和确定标准等问题进行了较为深入的研究。认为对“徇私”应作广义的理解，即“徇私”不仅包括徇个人私情、私利，在特定情况下，还应包括徇单位和小团体之私。同时认为，“前案”的性质既非罪案或罪犯，亦非一般行为或人员，也不能简单地等同于涉嫌犯罪的行为或犯罪嫌疑人，而是作为渎职行为成立犯罪的前提条件的行为或人员。其中，认定涉嫌犯罪的“前案”的正确标准应当是：有证据证明有犯罪事实，而且需要追究刑事责任；其依据则是刑法和刑事诉讼法的相关规定。

第五章分析渎职结果的概念、特征与分类，并对渎职罪重大损失结果的认定标准、原则和范围、“遭受重大损失”的计算时间，以及关于债权损失、利息损失和挽回经济损失的认定等问题进行深入研究。本章所研究的渎职结果，即渎职罪的危害结果，是指渎职行为对国家机关的正常管理活动以及公共的或公民的合法权益所造成的具体侵害事实。其特征有四：（1）渎职结果是由渎职行为引起的；（2）渎职结果是对犯罪客体造成的实际损害；（3）渎职结果是成立某一具体渎职犯罪所必须具备的危害结果，如果渎职行为没有造成这一特定结果，就不构成犯罪；（4）渎职结果具有多样性。根据渎职结果的特征和表现形式，可以将其分为物质性结果与非物质性结果、直接结果和间接结果等几类。关于渎职罪重大损失的认定标准，本书采取“三元标准说”，即综合运用质的标准、量的标准以及质与量相结合的标准对渎职罪的损失进行理论上的分析。关于重大损失的认定原则，主张在确定损失的数额时，要注意一定量的损失数额与社会危害性的关系问题；同时，要认识到损失数额是渎职犯罪定罪量刑的重要依据，但并不是惟一的依据。关于“遭受重大损失”的认定时间，主张以检察机关依法立案的时间为准。

第六章研究渎职罪因果关系的概念、特征、性质与形式，提出渎职罪因果关系的判断方法。认为渎职罪的因果关系是指渎职行为与渎职结果之间引起与被引起的联系。它具有客观性、相对性、顺序性或同时性、复杂性和多样性以及特殊性等特征。其性质是必然性与偶然性的统一，即渎职行为与渎职结果之间的因果关系，从一个角度看具有必然性，从另一个角度看则可能具有偶然性。但这种必然性与偶然性的统一并不排斥从形式上将渎职罪的因果关系区分为必然因果关系和偶然因果关系。从因果关系的性质的角度，可将其分为必然因果关系和偶然因果关系；从因果联系程度的角度，可将其分为直接因果关系和间接因果关系；从原因行为的单复或在因果发展过程中介入新的原因的角度，又可将其分为简单的因果关系、复杂的因果关系和中断的因果关系。本章剖析大陆法系和英美法系关于刑法因果关系的学说及其判断方法，在批判借鉴的基础上，指出判断渎职罪的因果关系应注意：（1）确定考察的顺序，查找原因现象或者结果现象；（2）根据不同层级，分步进行考察；（3）把握间接因果关系的程度；（4）甄别刑法因果关系与病理因果关系；（5）玩忽职守犯罪的因果关系必须联系“职守”予以认定。

第七章探讨渎职罪的立法完善问题。在主体方面，建议将渎职罪的主体修改为“公务人员”，即从事国家事务、公共事务和社会事务等公务管理的人员。在罪过方面，主张明文规定且分别规定故意与过失。在罪状方面，建议对“徇私舞弊”、“情节严重”和危害后果在罪状中的地位作适度修改。在既遂形态方面，建议对《刑法》第397条第1款进行修改，将滥用职权罪由结果犯修改为行为犯，并将滥用职权造成危险状态或严重后果的情形作为加重处罚的情节予以规定；将涉及公共安全和公害犯罪的玩忽职守罪由结果犯修改为危险犯，并将玩忽职守造成严重后果的情形作为加重处罚的情节予以规定。同时，在总结司法实践经验的基础上，对渎职罪章的其他条款进行相应的修改。在法定刑方

面，对故意犯罪与过失犯罪法定刑的失衡与完善、一般条款与特殊条款法定刑的协调、一般主体与特殊主体犯罪的刑罚平衡、社会危害性程度与刑罚轻重的调适以及增加规定财产刑和资格刑等问题进行充分论述。

ABSTRACT

The basic theory of crimes of dereliction of duty is not only an important part of the criminal theory, but also a very controversial question in juridical practice. The book makes a deep research on the definition, features, judicial determination of crimes of dereliction of duty, and presents legislative suggestions to improve our criminal law. Excluding the preface, the whole book is divided into 7 chapters.

In the preface, the author makes an analysis of the present situation of the criminal legislation, judicial practice, and theoretical research on malfeasance in our country, showing the theoretical and practical value of the research on the constitution of crimes of dereliction of duty, thus helping enhance our understanding, improve the executing conditions and legislation ability, instruct the judicial practices properly, and carry out the criminal policy precisely.

The first chapter introduces the general knowledge of the definition and scope, subject, penalty etc in the foreign criminal law at first and then reviews the legislative history of crimes of dereliction of duty in our country, analyzing the provisions and legislative improvements of the crimes due to social development in the criminal law (1979) and the amendments of the crimes in the criminal law (1997). Lastly, the author presents his own fresh ideas about the definition and legal features of crimes of dereliction of duty, and makes classifications about crimes of dereliction of duty on the basis of guilty mind, act forms, subject, object, legislative forms and the accomplishment of the offence.

In the second chapter, the author studies the subject of crimes and on the basis of analyzing the legislative history of our criminal law, points out that the scope of the subject in the legal interpretation and legislation is changeable. As a matter of fact, the scope of the subject has been narrowed down since the foundation of our country up to the year 1997. Since the enforcement of the 1997 criminal law, the judicial and legislative interpretations are actually enlarging and developing the applying scope of the subject in a contrary direction. Meanwhile, after pointing out the drawbacks of legislation about the subject of such crimes in the 1997 criminal law and the defects of judicial interpretation and legislative interpretation, the author discusses the scope of the subject with details, holding that the national mechanisms in Article 93 of 1997 criminal law means organs of all levels from the central to the local including legislative organizations, administrative organs, procuratorial organizations, judicial organizations and the agencies in the army system, which are in charge of national administration, perform national power and utilize national budget as an independent activity expenditure. In a word, the clerks in the national mechanisms not only include members engaged in civil service in the state agencies, but also ones in the organizations with national administrative power stipulated by the law and rules, in the organizations authorized by national organs acting in the name of national power and ones who are not enlisted in the national personnel but engaged in the civil service. Then, the author presents "new civil service" theory—considering competence as the precondition, viewing authorized power as the basis and considering the management of national, public and social affairs as the core.

In the third chapter, after commenting on all kinds of theories on guilty mind of crimes of dereliction of duty, the author holds that the

form of guilty mind is sole—deliberation or negligence, but most are deliberation. Among those offences, the guilty mind of the type of power—abusing offence including practice favoritism and commit irregularities is deliberation, and that of dereliction of duty offence is negligence. And then key attention is paid to the research on the theories and the judicial determination about guilty mind of abusing offence and dereliction offence.

In the fourth chapter, the author makes a further research on forms and determination on conduct of favoritism and malpractice, abuse of powers and neglect of duties after summing up the basic features and key forms of crimes of dereliction of duty. In the author's opinion, the conduct of dereliction can be divided into 3 types—unauthorized departure from official duty, negligence of duty and duty unaccomplished, including two forms of conduct—commission and omission. But some points we should pay attention to in the judicial practices are that we should not consider the conduct of dereliction as omission and ignore the duty relevance. The offence of abusing office can be divided into 3 types—stretch of authority, nonperformance of duty, renouncing the responsibility with deliberation, including two basic conduct forms—commission and omission after the research on the definition, scope and features of the offence of abusing office. In the judicial determination, we should pay attention to the notion that omission should not be excluded from the duty. The scope of duty unperformed deliberately includes not only substantive power, but procedural power as well. Understanding the performance of duty is not the precondition of the establishment of such a crime which means that the crime can be established only by the act of abusing office without considering how the act is performed—openly or secretly, knowingly or unknowingly? Besides that, in this chapter, the author makes further

research on the status and connotation of the conduct by favoritism and the connotation scope, nature of the pre-case. The author concludes that we should understand the conduct by favoritism in a broad sense, which includes not only private benefits but also the interests of some units and small organizations. The determination of the pre-case should comply with the following conditions: criminal facts proved by evidence and deserving criminal responsibility, and stipulations in the criminal law and criminal procedural law.

The fifth chapter includes the definition, features, classification of the consequence caused by crimes of dereliction of duty. The author makes a deep research on the determining standards, rules, scope of the serious harmful consequence, and expiration date of the losses—measuring, the losses of the creditor's right, loss of interest and retrieval of economic losses. The harmful consequence researched in this chapter refers to those caused by the offence of malfeasance to the proper administration of the national mechanism and the public and personal legal rights. The features of the harmful consequence are as follows: (1) the consequence is caused by the conduct of malfeasance; (2) the consequence of the crime is a kind of material effect caused to the criminal object; (3) the consequence is the necessary element of the legislation of such a crime, otherwise the crime of the malfeasance is not established; (4) diversification of the consequence. The consequence caused by crimes of dereliction of duty should be divided into material and spiritual ones, direct and indirect forms on the features of the consequence. In the book, "three—aspect" standard is adopted to measure the serious harmful consequence. The relationship between some amount of losses and social harmfulness should be considered and the amount of losses is a very important but not the only one factor in the establishment and punish-

ment of such a crime. The author also points out time of placing a case on file by the prosecutor is the proper time to direct economic losses.

In the sixth chapter, the author presents a new method of judgment about the causation of such a crime after the research on the definition feature, form and nature of the causation in crimes of dereliction of duty. To the author, the causation is the relationship between the conduct of malfeasance and the consequence, which is characteristic of objectivity, relativity, sequence, simultaneity, complexity, diversity and speciality. The nature of such causation is combination of certainty and contingency. It means that the causation has certain aspect on one side and fortuitous aspect on the other. By the nature of contingency and certainty, the causation can be divided into positive causal relationship and fortuitous causal relationship. According to the extent of causation, it can be divided into direct and indirect causal relationship. According to the point of new intervening cause, it can be divided into simple, complex and interrupting causal relationship. According to the comments and analysis of the theories and methods of judgment in the causation of continental law system and Anglo—American law system, such rules following should be paid attention to: (1) the determination order of the causal; (2) the procedures of causation determination ; (3) the degree or extent of causation; (4) the difference between criminal causation and pathological causal relationship; (5) the causation determination in the offence of dereliction should be in connection with the "duty".

The seventh chapter is concerned about the legislative perfection of crimes of dereliction of duty. Suggestions are as the following: the subject of crimes should be changed into "public functionary" which is engaged in national, public and social affairs. The guilty mind in-

cluding deliberation and negligence should be explicitly and separately stipulated in the criminal law. As for the fact about a crime, the status of "favoritism and malpractice", "serious nature" and harmful consequence should be properly amended. As for the accomplishment of such a crime, it is stated in Article 397 in the 1997 criminal law that some of the consequence offense should be changed into potential damage offense or behavioral offense. At the same time, on the basis of summing up the judicial practices, potential damage offense should be added when amending some other clauses in the criminal law. The author also makes further research on statutory penalty balance between intentional offense and negligent offenses, the harmony between general clause and special clause, the statutory penalty balance between general subject and special subject, the unanimity between the degree of social harmfulness and penalty and the supplement of property oriented penalties and punishment against qualification in the criminal law.

序

马克昌*

渎职犯罪是一种社会危害性非常严重的腐败行为。它既是近年来我国司法实践中常见多发的一类犯罪，也是当代国际刑法理论关注的热点犯罪类型之一。我国已签署的《联合国打击跨国有组织犯罪公约》和《联合国反腐败公约》均对此给予严重关注。同时，我国刑法理论界、立法机关和司法实务部门也在致力于探寻良策以遏制愈演愈烈的渎职行为。在这种特殊的背景下，我校刑法学博士贾济东在校期间，以“渎职罪构成研究”为题撰写博士学位论文。毕业后，他根据答辩委员会提出的意见并结合司法实践，对论文作了适当修改，随后由知识产权出版社于2005年出版成书。由于该书很快销售一空，遂根据新的情况对原书加以修订。现修订工作已经结束，修订版即将付梓。翻阅之余，认为本书有如下特色：

一、体系严谨，重点突出。以往我国关于渎职罪的研究，大多着重于具体犯罪罪刑问题的探讨，而对其基本理论问题则关注甚少，从而导致诸多问题困扰司法实践。本书是我国第一部从刑法基本理论的角度对分则渎职罪的若干共性问题进行全面研究的专著。全书分为七章，依次为：概论、主体论、罪过论、行为论、结果论、因果关系论和立法完善论。概论述之于前，为全书论述做好铺垫。渎职犯罪为特殊主体，故概论之后，即继之以主体论，由主体产生行为，由行为产生结果以及因果关系，而以完善立法建议作结。结构严谨，于此可见。同时，一部学术专著，不仅要统摄全局，更要善于取舍，突出重点。对此，本书的尝试

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较为成功，例如：在介绍渎职罪国外立法特点、回顾国内立法历程时，可谓惜墨如金；而对于渎职罪的主体、罪过、行为、结果以及因果关系等与刑法理论和司法实践休戚相关的部分，则不惜浓墨重彩，表现了作者善于分清主次、妥当驾驭资料的能力。

二、资料翔实，重在实践。刑法学作为一门应用法学，决定了刑法理论研究离不开司法实践。研究渎职罪的构成，同样离不开对刑法理论知识和司法实践经验的长期积累，厚积方能薄发。正如庄子所言："且夫水之积也不厚，则其负大舟也无力。"本书既兼顾了理论，又注重了经验，较好地把握了理论与实践的结合点。作者通过深入调研、参与办理案件等多种途径，搜集了大量的案例，掌握了宝贵的第一手资料，并认真加以总结、归纳，同时，针对立法上的问题和司法实践中的困惑，进行理论思考，进而运用研究结论来指导司法实践，在服务实践的过程中检验和发展研究结论。这种立足于生动的司法实践、立足于鲜活的案例基础上的思维过程和结论，对于刑法理论的研究，颇有裨益。

三、理念明确，富于创新。我国一贯奉行"从严治吏"的政策，党的十六届六中全会又强调要贯彻执行"宽严相济"的刑事司法政策，为构建社会主义和谐社会夯实法治基础。这些政策，对于研究如何惩治和预防渎职犯罪，无疑具有重要的指导意义。本书在修订时注意贯彻上述政策精神，坚持政策与法律的辩证关系，体现了服务和谐社会的法治理念。围绕这一指导思想，该书对渎职罪中的若干争议问题发表了自己的看法，提出并论述了一系列具有创新性、独到性的见解。例如：科学界定了我国刑法中渎职罪的主体（国家机关工作人员）的范围和内涵，首次提出了以具备资格为前提、以拥有职责和职权为基础、以职务名义从事国家管理、公共管理和社会管理等公务为核心的三位一体的"新公务论"，为司法实践中准确认定渎职罪的主体提供了理论标准；分析了玩忽职守行为、滥用职权行为、徇私舞弊行为的表现形式与认定原则，提出了渎职犯罪所涉"前案"的标准，

对“徇私”作了广义解释；从渎职结果的概念入手，通过对渎职结果特征的分析，提出了较有说服力的渎职结果认定的“三元标准说”，对渎职罪重大损失结果的司法认定进行了深入剖析，等等。更值得肯定的是，该书还对我国刑法中渎职罪的立法完善提出了可行性建议，如将渎职罪主体直接修改为“公务人员”以及关于渎职罪罪状描述、法定刑的进一步平衡等建议，均属创新，值得称道。

四、立足前沿，着眼发展。《周易》推崇“与时偕行”的思想，时今我们也倡导“与时俱进”。法学研究必须关注理论前沿，根据立法活动和司法实践的最新动态，不断调整研究方向，完善研究内容，发展研究结论。本书的修订再版，正是坚持发展观念的结果。本书的修订内容，不仅体现了有关国际公约的立法思想，还根据《刑法修正案（六）》和《最高人民检察院关于渎职侵权犯罪案件立案标准的规定》，对有关操作规范的完善问题进行了新的探索。应用法学的实践性，决定了这种发展性必然贯穿法学研究的始终。

总之，《渎职罪构成研究》一书，坚持理论与实践的有机结合，结构严密，资料翔实，见解新颖，应用性强，是一部值得阅读的好作品。尽管书中的观点未必尽善，错漏碍难避免，却瑕不掩瑜。本书的出版和再版，对于深入研究渎职犯罪、系统探索刑法理论乃至完善立法和指导司法实践，都有参考价值。本书再版付梓之际，作者邀我作序。我与作者既有师生之谊，复感其盛情难却，遂欣然命笔，概述本书的由来与特点，意在向读者推荐，是为序。

马克昌

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