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赵金成／著

洗钱犯罪研究

XIQIAN
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序

吴振兴[①]

赵金成同志的博士论文《洗钱犯罪研究》作为专著即将付梓出版，作为导师我为其感到由衷的高兴。现应其之邀，欣然提笔，略缀数语，权且为序。

随着国际交流活动的日益发展和贩毒、走私、贪污受贿、金融诈骗等违法犯罪活动的大量发生，洗钱在世界范围内日益猖獗，严重破坏了金融秩序和社会信用基础，我国亦未能幸免。这一点从自1997年《刑法》增设洗钱罪填补刑法空白以来，转眼不到十年，《反洗钱法》又即将出台就可见一斑。毋庸讳言，面对日趋严重的洗钱犯罪，我国刑法中单独洗钱罪的规定已无法承载并实现应有的功能。中国需要一部《反洗钱法》，并适时对《刑法》进行修订，两者充分协调呼应，从而真正有效地遏制洗钱犯罪，防范金融风险，保障社会经济安全运行。

《洗钱犯罪研究》正是在上述大背景下应运而生的。作者创新性地将立论基点置于整个反洗钱法律体系的构建之中，对关涉洗钱犯罪的诸种问题给以稳静而循序之梳理，具有全面的理论和实践意义。从宏观层面看，作者以侧重从犯罪学和比较

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①吴振兴，中国法学会刑法学研究会副会长，吉林大学法学院教授、博士生导师。

刑法学意义考察的基础论部分开始，在本体论部分以规范刑法为视角对洗钱犯罪的罪名体系，犯罪形态等问题分别加以阐释，最后以洗钱犯罪的规控体系构建结束。前后密切衔接，形成严谨体系，各章节之间的节、目安排合理，阅后给人以清晰的印象。从微观层面看，书中很多观点颇富启迪性。如在本体论部分，作者在对洗钱犯罪侵害法益进行厘清和对现行刑法洗钱罪构成要件解构的基础上，以立法论为视角对洗钱犯罪的刑法规范从个罪走向类罪作了充分的论证，并在此基础上建构了洗钱犯罪的罪名体系—以实行行为为中心重构了洗钱罪的罪状，创设了放纵洗钱罪和金融监管人员重大失职罪两个罪名。值得一提的是，作者在细微之处也未人云亦云。如在何种犯罪应当纳入洗钱犯罪的原生犯罪的问题上，作者对贪污贿赂犯罪不应整体纳入，而应将挪用公款罪、巨额财产来源不明罪予以排除等情况给予了证成，言之成理，持之有故，充分显示了作者扎实的刑法理论功底。

作者并没有就此止步，而是以此为基点，运用刑法理论就洗钱犯罪的诸种犯罪形态问题，特别是其中的疑难问题作出有力的回应。作者在这些问题上都不是泛泛而谈，而是旁征博引，条分缕析，每种犯罪形态的论述都洋洋洒洒近万言，阐述深入，观点也具有开创性。在规控论部分，作者运用系统论的思想，着力构建了以时空模式为架构的洗钱犯罪规控体系，这也是其凭借丰富的司法实务经验所作的原创性贡献。此外，作者还对洗钱犯罪的国际与区际合作、《反洗钱法》的制定以及《反洗钱法》与《刑法》如何协调适用等亟待解决的问题进行了较为详尽的阐述。

可以说，《洗钱犯罪研究》是一篇凝聚着赵金成同志的学识、智慧与汗水的倾心之作。答辩委员会认为："该文观点鲜

明，内容丰富，结构合理，资料详实，文字流畅，对洗钱犯罪作了深入系统且有开拓创新性的研究。该文具有较高的理论价值和实践意义。”我认为这种评价是中肯的。作者的确将洗钱犯罪的研究无论从理论层还是实务层面在深度和广度上都推进了一大步。

赵金成同志虽投身司法实务工作，却具有坚实厚重的学术背景，特别难能可贵的是他对刑法学的热爱之情。如今，博士论文的出版为其数年的刑法研习画上了一个完满的句号。我坚信，他所受到的学术熏陶使其在更好地从事司法实务的同时，也必将使其承担更大的学术使命。我期待着他在理论与实务的道路上不断前进并获得更大的成功。

是为序。

吴振兴

二〇〇六年五月五日

内容摘要

晚近以来，在世界范围内随着毒品、走私等犯罪的日益猖獗，后续的洗钱犯罪数量也呈不断扩大趋势。与此相对应，有关洗钱犯罪的国际与各国刑法规范的迅速变化与发展便成为近20多年来刑法领域一个独特的法律现象，并对各国刑事立法、司法与刑法理论的发展与趋同起到了积极的推动作用。面对日益严重的洗钱犯罪及其引发的各种社会问题，我国《反洗钱法》的出台也已经初现曙光，随之而来的便是刑事立法作出相应的修订，以便更富有成效地惩治洗钱犯罪。自1997年刑法增设洗钱罪以来，学界虽然对关涉洗钱罪的诸问题进行了一定的理论探讨，但大多学者囿于各种原因与条件的限制，未能站在更为广阔的视角探讨洗钱犯罪关涉的诸种问题，这不仅严重影响了对洗钱犯罪相关立法、司法与理论的深入研究，而且必然影响到司法实践对洗钱犯罪的惩处，使司法实务中最终以洗钱罪定罪处罚的刑事案例少之又少。为此，本书试图以整个反洗钱法律体系为背景，以反洗钱国际合作的需要为目标，以刑事法学特别是以规范刑法学为视角，对洗钱犯罪进行深入的理论研究，希冀为指导司法实践对洗钱犯罪的正确处理及完善洗钱犯罪的相关刑事立法作出点滴贡献。

本书由基础论、本体论和规控论三篇，共十三章内容组成。

在基础论中，本书在洗钱犯罪概说部分，首先对洗钱犯罪

的起因与特征、现状与发展趋势进行了考察，揭示了洗钱犯罪活动的源起、历史发展和严重的社会危害。洗钱犯罪的立法肇始于国外，因而有必要对世界范围内洗钱犯罪的立法发展状况作以宏观的了解，本书就欧洲、美洲、亚洲等典型国家和地区的洗钱犯罪的刑事立法进行了剖析，论证了它们的优劣与异同。通过比较研究，指出了我国在预防与惩治洗钱犯罪上存在的不足，尤其是现行刑法对洗钱罪的规定不能适应遏制洗钱犯罪的需要和违背立法初衷的实情。国际和各国刑事立法关于洗钱罪的规定伴随洗钱犯罪的严重亦步亦趋的迅速变化已经表明我国单独洗钱罪的规定根本无法承载并实现刑法所应有的功能。中国需要一部《反洗钱法》，而后适时对《刑法》进行修订，从而使两者充分协调呼应才能真正有效地遏制洗钱犯罪，保障司法机关的正常活动和经济秩序的安全运行。

在本体论部分，本书以规范刑法学为视角对洗钱犯罪所关涉的诸种问题进行了微观的澄清。在对洗钱罪、洗钱犯罪侵害的法益进行厘清和对现行刑法洗钱罪构成要件进行解构的基础上，以立法论为视角对洗钱犯罪的刑法规范从个罪走向类罪作了较为充分的论证，并在此基础上作为立法建议，建构了洗钱犯罪的罪名体系。本书鉴于《反洗钱法》的即将出台，以实行行为为中心较有新意地重构了洗钱罪的罪状；对何种犯罪应当纳入洗钱罪原生犯罪作出了回应，并对贪污贿赂犯罪不应整体纳入原生犯罪，而应将挪用公款、巨额财产来源不明罪予以排除等情况进行了较好的诠释。此外，为实现对洗钱犯罪侵害法益的更切实保护，本书创设了放纵洗钱罪和金融监管人员重大失职罪两个罪名，并对上述罪状的表述作了必要的说明，在立法技术和理论自足层面较好地解决了以往理论和实务中遇到的种种尴尬、难题。

在本体论部分，本书还对洗钱犯罪的诸种犯罪形态分专章进行了探讨。鉴于在司法实践中可能发生认定疑难的主要是洗钱罪，所以在犯罪形态的探讨中主要以洗钱罪为模版，只有在相关犯罪形态中其他罪名也可能发生认定困难的场合，才对放纵洗钱罪等罪的犯罪形态问题加以研讨。具体而言，在共犯形态中，考虑到洗钱罪的行为特征和该罪与原生犯罪的特殊关系，对洗钱罪的复杂共犯、原生共犯、过限共犯和疑难共犯等问题进行了全方位的阐释；在停止形态中，在厘清犯罪着手和既遂标准问题后，对洗钱罪和放任洗钱罪的着手和既遂的判断进行了探讨，并对洗钱预备行为的可罚性、中止犯的成立空间和认识错误对既遂、未遂的影响提出了自己的看法；在罪数形态中，文章在厘清罪数形态判断基点的基础上，对洗钱犯罪罪数形态的具体认定进行了考量，并对洗钱罪与相关易混罪名的区分给予了充分的说明。此外，本书有感于洗钱犯罪犯罪形态的特殊性，增设洗钱犯罪的交叉形态一章，对洗钱犯罪中可能出现的共犯与停止形态、罪数与停止形态和共犯与罪数形态交叉等问题进行了专门的研究，以期有助于司法实践对洗钱犯罪的准确有效认定。

在本体论的最后，本书把视角置于洗钱犯罪的刑事责任问题，着重从洗钱犯罪的刑罚设置和刑罚适用方面进行了诠释，详细论述了洗钱犯罪刑种、刑度和加重情节等内容，特别对数额对洗钱犯罪刑事责任的承担的影响作了说明。作为立法建议，论证了在洗钱罪中创设减轻情节的必要性。

在规控论部分，本书将目光聚焦于洗钱犯罪规控体系的建立，运用系统论的基本思想，对洗钱犯罪的规控体系进行了研讨。认为洗钱犯罪的规控是一个系统工程，为此，构建了洗钱犯罪规控体系的时间模式和空间模式，并对两者予以整合，以

此为基点，详细阐释了该体系的制度建设与基本运行。鉴于国际合作与《反洗钱法》在规控体系中的特殊性与重要性，分专章论述了我国国际合作和区际合作所要遵循的原则和基本路径，强调了区际合作在我国控制洗钱犯罪中所具有的特殊意义，并初步架构了区际合作的理论体系。基于对我国反洗钱工作现状的考察与反思，通过贯穿犯罪预防和综合运用多重手段控制洗钱犯罪的基本理念形成了《反洗钱法》的主体框架，并在理论上设定了《反洗钱法》的应然内容和《反洗钱法》与《刑法》的协调运行机理。

ABSTRACT

In recent years, with the increasing of the drug – related crimes and the crimes committed by smugglers, the crime of money laundering also show a tendency of expansion. Correspondingly, the prompt progress of the international criminal regulations of the crime of money laundering has become attractive within the international society, and it has also played an important role to push the development of the legislation, justice and theories of criminal law. As a result of the serious affect of the crime of money laundering on our society, the legislation of anti – money laundering has already on its way. Regulations of the Crime of Money Laundering have been added into Criminal Law of People's Republic of China, and some discussion has also been carried. However, due to the restriction of different conditions, it is still in need to do some studies on questions and issues relating to the crime of money laundering in a broader and deeper point of view. Without this, it will bring many difficulties and problems in punishing and frustrating the crime of money laundering in practice, and making progress in theories. And one of the consequences is that defendants are seldom convicted as the crime of money laundering. Therefore, this paper will try to make a comprehensive study on c the crime of money laundering from the angle of view of normal criminal law, aiming at the need of

international cooperation to tackle with such crimes and give some suggestions to the legislation of such crimes.

There are three parts in this paper including 13 sectors. In Part I it is introduced some basic information about such crimes including the causes, characteristics, present status and their recent development. Since China is not one of first countries that made such legislation, it is necessary for us to understand the history of the progress of such legislation macroscopically in the world. So the legislation of the crime of money laundering in some typical countries has been demonstrated to help us to make a comparative study. Through this work it will be easier for us to find out the deficiencies and limitations of the legislation of the crime of money laundering in our country, and especially our actual legislation of the crime of money laundering cannot meet our need of tackling with such crimes effectively. On the other hand, to stipulate the crime of money laundering with a single provision in China's Criminal Law cannot carry out the function of tackling with such crimes thoroughly. The best way to be suggested in this paper is to draw Anti – Money Laundering Law separately, and harmonized it with the regulation of amended Criminal Law of People's Republic of China.

Problems related to crimes of laundering money will be expatiated from the angle of normal criminal law in Part II. Based on the analysis of the behalf infringed by such crimes and the components of the regulation of such crimes in China's criminal law, criminal regulations of such crimes have been demonstrated both the accused to be sentenced and such crimes classified to stipulate the advisable system of such crimes. According to the imminent coming of Anti –

Money laundering Law, it is considered as an innovative structure which is constructed surrounding the action of committing such crimes. In this frame, it is clear to classify different action of committing the crime of money laundering, and correspondingly, it will be reasonable to explain that crimes of embezzlement and bribes shall be sorted out of the original crimes in some forms, and crime of misappropriating public funds and possession of substantive property from unexplainable source shall be treated distinguished. Besides, in order to protect the behalf infringed by the crime of money laundering more powerfully, two new accused of crime of pampering money laundering and the crime of breach – of – duty – in – financial – regulation have been founded here with relative statements of them. Hopefully these ideas can be helpful to resolve problems and embarrassments in the application of theories into practice from the level of legislation.

Furthermore, aspects of forms related to crimes of laundering money have been explored as well in Part II. Considering main difficulties in justice practice to ascertain the crime of money laundering, crime of pampering laundering money and other relative forms of crimes will not occupy much paper to be explained unless in the circumstance of confusion. In a way more concrete, as to the form of co – committing a crime, a comprehensive expatiation of complicated accomplice, original accomplice, heritage accomplice of the crime of money laundering can be found in this paper. As to the form of ceasing committing termination, according to the standards to determine the commencement of committing and accomplishment, the commencement of committing and the accomplishment of

the crime of money laundering and pampering laundering money can be can be determined. Consequently, there have been made some discussions on the punishment of the preparation to laundering money, constitution of ceasing committing, and the influence of improper cognition on determining the accomplishment. As to the numbers of the crimes, how to determine the crime numbers of the crime of money laundering will be stated together with a statement of how to distinguish crimes of laundering money and other relative crimes. Moreover, considering the particular form of such crimes, an extra sector comes into forth to indicate the forms of such crimes in order to investigate potential possibility of co – committing a crime and ceasing committing, crimes numbers and the terminations of the ceasing committing, and co – committing a crime and terminations of ceasing committing.

At the end of this part, it comes to the review of criminal liability, which focuses on the annotation of the setup and application of penalty. Such a review covers varieties, grades and conditions of aggravation of penalty to the crime of money laundering, especially the influence of amount on the determination of liability. As a suggestion for our legislation, it is necessary to add provisions stipulating conditions of alleviation as a whole.

When it comes to the last part, main attention is paid to the constitution of regulatory frame. Considering making effective regulation of the crime of money laundering as a systemic project, such a regulatory frame shall be made up of temporal mode and special mode. How this regulatory frame runs has been explained at the same time. On the other hand, due to the importance and particu-

larity of international cooperation and the legislation of anti – money laundering in such regulatory frame, there has been a detailed statement of principals and routes that shall be observed in international and inter zone cooperation. Generally, through the studies and discussions on the present status of anti – money laundering in our country, a regulatory frame of anti – money laundering has been formed based on thoughts of prevention of crimes and tackling crimes of laundering money with diverse means, and moreover, contents that should been involved in anti – money laundering law have been illuminated together with the harmonization of Anti – Money Laundering law and Criminal Law.

目　录

中篇　本体论