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内容摘要

随着我国市场经济体制的建立和不断完善，金融在国家经济社会发展和人们生活中所起的作用越来越突出，金融活动已成为整个经济活动的中心。金融活动的快速发展需要一个稳定的金融秩序，而稳定金融秩序，需要法律的维护和调节，刑法作为保障法应当在这一过程中发挥重要作用。纵观我国金融犯罪的立法进程，1979 年刑法只有关于伪造货币罪、伪造有价证券罪和贩运假币罪的规定。1997 年刑法在承袭以往立法规定的基础上，进行了金融犯罪入罪上的扩张，在刑法典第三章的第四节和第五节对其进行了系统规定。从 1997 年至今陆续出台了八个刑法修正案及一个单行刑法，在八个刑法修正案中只有修正案二和修正案四没有对金融犯罪进行修订。特别是《刑法修正案八》废除了票据诈骗罪、金融凭证诈骗罪、信用证诈骗罪、虚开增值税专用发票用于骗取出口退税和抵扣税款发票罪、伪造和出售伪造的增值税专用发票罪的死刑配置，应当说是我国刑法在死刑改革上的一个巨大进步。

金融领域大规模入罪的初衷固然值得赞赏，但是从入罪的效果考察，并未达至预期成效——金融违法犯罪行为依然层出不穷；同时，大规模入罪也造成刑法典频繁修改，严重损害了国民的预测可能性。对此，理论界出现了对刑法干预金融领域过多的批判，而对于批判的回应，有学者主张应改变当前我国金融犯罪的立法模式，直接移植德日“双轨制”的立法模式，即将金融犯

罪的相关罪名归入到单行刑法和附属刑法中，并规定相应的罪名和法定刑。这种观点固然可取，但其仍仅属应然层面的构想。在我国当前的立法模式下，从实际出发对问题加以解决或许才应成为思考的良策。基于此，建立科学的金融违法行为入罪理论即成为本书的写作初衷和最终落脚点。

本书在充分参考国内外文献的基础上，遵循提出问题——解决问题——验证理论的基本思路，围绕金融违法行为入罪的刑法学基础——入罪依据进行主线研究，层层递进地展开论述。首先从孙大午案中出现的民众、舆论、学者反对刑法相关条文切入，论述当前金融刑法的立法现状，指出存在的问题，说明研究的现实意义；其次，为说明金融违法行为入罪的特殊性，奠定研究的刑法学基础，具体分析了自然犯与法定犯入罪的区别；再次，根据入罪的刑法学基础，论证金融违法行为入罪的依据；又次，根据入罪依据得出金融违法行为入罪的标准；最后，对所提的理论进行立法检校。在研究中采用逻辑分析法、比较分析法和实证分析法，对金融违法行为入罪的理论进行了系统的阐述，以期对相关研究有所深入和推进。具体章节的内容安排如下：

第 1 章：导论。本章主要介绍了问题的提出和研究的概况以及国内外文献综述。在问题提出环节指出了金融犯罪立法中存在立罪过多的问题；同时，在借鉴大量国内外研究成果基础上，对国内外的研究进行了述评，指出研究中存在的忽视金融违法行为入罪研究的问题，并对论文的主要内容、基本思路、研究方法等进行了阐述。

第 2 章：金融违法行为入罪的刑法学基础。本章主要分析自然犯与法定犯入罪之区别，为金融违法行为入罪奠定刑法学基础。首先简述了国内外自然犯与法定犯的区别理论，并对其进行了简要的分析，揭示了日本自然犯与法定犯区别的理论是立足于解释论的，是为了说明行政刑法是否可以不必完全适用普通刑法

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总则的问题；而揭示德国自然犯与法定犯区别的理论在于从立法上说明行政不法与刑事不法的区别。因此，不能将德日刑法关于自然犯与法定犯的区分理论直接加以移植。文章提出，自然犯与法定犯的真正区别在于立法上的差异且主要是入罪上的不同，在此基础上引出法定犯的超常性概念，并对其生成机理进行了分析与论证，指出自然犯与法定犯入罪的差异在于法定犯的超常性。由于金融犯罪属于法定犯的范畴，因而法定犯的超常性理论对金融违法行为入罪具有重要的指导意义；同时，借助金融学知识，从货币市场、信贷市场以及两者的关联中，指出金融犯罪可能发生的环节，对其超常性作进一步的论证。

第 3 章：根据法定犯的超常性理论，系统阐述了金融违法行为入罪的依据。首先，在入罪依据的论域选择上，指出入罪依据为价值事实的范畴，不同主体对入罪依据具有不同的评价，论域概念可以合理解读入罪依据的多元性。进而将入罪依据分为两个方面：一是犯罪学论域内的入罪依据，二是刑法学论域内的入罪依据。犯罪学论域内的入罪依据主要体现为对社会越轨行为的阐述，而刑法学论域内的入罪依据主要体现为对犯罪本质的理解。其次，对入罪依据进行了厘定，指出入罪依据应从社会危害性与应受惩罚性两方面考虑，刑事违法性不是入罪依据的范畴。进而对金融违法行为入罪依据进行了解读，指出在社会危害性层面，由于金融行为的复杂性，民众易于被相关的金融团体俘获，使部门利益全局化，出现入罪上不断扩张的情景；根据法定犯的超常性理论，金融违法行为的入罪理应有应受惩罚性的考量，进行限缩性的厘定。

第 4 章：根据入罪的依据，提出了金融违法行为入罪的标准。本章共分四部分。第一部分，指出当前标准与依据存在混同使用的现状，并对其进行了辨析，指出标准和依据是不可混同使用的。第二部分，首先对当前的入罪标准进行了观点汇总与简要

评析，指出存在的问题：一方面是所提标准的理论依托并不明显；另一方面多是未对所提标准展开系统的论证。第三部分，根据金融违法行为的入罪依据，从必要性与可行性切入，提出了其入罪的五个标准：保护必要性、损害产生可能性、行为的可处理性、行为处罚效率性、证明可能性，并对其含义进行了解释。第四部分，对所提的标准进行了系统的阐述，指出其合理性。

第5章：本章以前文提出的金融违法行为入罪的五个标准为分析工具，对现行刑法中相关金融犯罪罪名设置存在的弊病进行分析。笔者认为，就骗取票据承兑、金融票证罪而言，其堵漏之立法技术不能逾越金融违法行为入罪之保护必要性标准；就证券、期货犯罪而言，其入罪存在行为处罚效率性与证明可能性方面之不足；就洗钱罪而言，其扩容上存在与行为可处理性标准背离之弊。

第6章：结语。本章作为全文的结束语，是在对全文进行总结归纳的基础上，指出本书的主要创新点和存在的不足，以及后续的研究方向。

本书的创新之处可以归纳为以下几点：

第一，研究视角上的创新。通过对国内外犯罪化理论的综述，发现国内外多数学者对犯罪化的讨论没有注意到自然犯与法定犯的应有区别，进而对于特定类型的法定犯入罪缺乏研究。本书结合中国的立法现状，提出应从立法上对金融违法行为入罪进行深入研究。

第二，刑法学基础上的创新。为给金融违法行为入罪提供刑法学基础，并将其与自然犯入罪相区别，本书提出了法定犯的超常性理论。笔者认为，法定犯的超常性建立在自然犯的常性基础上。自然犯的常性指的是普通民众的常识、常理、常情。对于自然犯，根据普通民众的常识、常理、常情即可对入罪有一清晰的判定。对法定犯而言，则需要有超常性的理解，即法定犯不可通

过常性的判断而入罪，需要有超然于常性的理性思考。对此，文章从两个方面进行了论证：首先，法定犯将市民社会里较高层面的道德纳入其中，这无形中超出了最低限度道德的底线；其次，法定犯除体现市民社会愿望道德的诉求外，更多体现了政治社会超过通常要求的要求。法定犯的超常性给金融违法行为入罪提供了新的刑法学基础，因此，对金融违法行为的入罪不能完全套用自然犯的入罪理论。

第三，标准论证上的创新。当前的研究存在将入罪依据与入罪标准混用的情形，本书指出应当界分入罪依据与入罪标准。入罪依据乃将某一行为进行刑罚处罚进而归入刑法的宏观依托，但仅从入罪依据判断缺乏可操作性；而入罪标准的提出则有助于入罪依据的践行，以使依据具体化。在系统归结前人提出的入罪标准基础上，本书提出金融违法行为的入罪标准应从必要性与可行性两方面探寻。据此本书结合金融违法行为的特点提出了其入罪的五个标准：保护必要性、损害产生可能性、行为的可处理性、行为处罚效率性和证明可能性，并对五个标准进行了系统论证；应当强调的是，本书提出的金融犯罪入罪的五项标准，其他学者也提出过相似的标准，但是，对于这些标准应当成为金融违法行为入罪的考量依据，及对这些标准的内涵进行较为详细的论证却是本书的创新之处。

Abstract

With our country market economy system's establishment and continuous improvement, the role that the finance plays in national socio-economic development and people's life is more and more prominent. Finance activities have become the center of the entire economic activities. The fast development of the financial activities needs a stable financial order. To maintain the stability of the financial order, legal maintenance and adjustment is necessary. As a safeguard, criminal law should play an important role. Throughout the legislative process of our financial crime, the Criminal Code of *1979* only includes the crime of counterfeiting currency, counterfeit securities crimes and the crime of trafficking in counterfeit currency requirements. On the basis of inheriting the formerly stipulation of the legislation, 1997 criminal law has carried on the expansion of the financial crimes to conviction. And in the Penal Code , sections IV and V of Chapter III, it has been systematic stipulated. From 1997 until now, seven Criminal Law Amendments and a single have been released. Among seven amendments to the Criminal Law , only Amendment 2 and Amendment 4 did not revise the financial crime. Among other five amendments, 22 clauses are in involved in financial crime revision, accounting for nearly half of the 57

provisions in all.

The original intention of financial crime to conviction is good, but from the effect point of view, it is not to the expected results. Financial crimes and criminal acts are still emerging. At the same time, frequent changes of the Penal Code also caused serious damage to the possibility of national forecast. Theorists also critiques that the penalty is involved in the financial field excessively. Regarding the critical response, some scholars advocate changing the current legislative pattern of financial crime, transplanting "dual track" legislative model ofGermany and Japan, falling to a single criminal law and subsidiary criminal law, and providing the corresponding charges and the legal punishment. It is certainly desirable, but it is still merely an idea. In our current legislation model, from reality to be addressed should be thinking of a good policy. Based on this, the establishment of a scientific theory of financial offenses conviction becomes the task of this article.

With various literatures at the author's disposal, the present paper follows the conventional pattern that a doctorial dissertation should bring up the question first, and then finds a way to solve it, and finally verify the solution offered by the author. Centering on the theoretic basis of financial crimes, the foundation of incrimination and concrete criteria, the author deepens his research progressively.

Firstly, by reviewing people involved in the Sun Dawu's case, the public opinion, and some scholar's opposition of related articles in the criminal law, the present paper cuts into the present law-making situation, points out the defects and states clear-

ly the significance of the research. Then, the paper goes on to designate the distinctiveness between the incrimination of natural crimes and statutory offense so as to state clearly the peculiarity of the incrimination of financial crimes and build up the criminal law basis for this study.

Moreover, with the criminal law of constituting crimes in mind, the thesis further studies the proofs of constituting the crime of financial illegal activities. In addition, the author establishes the criteria of the incrimination of illegal financial activities based on the proofs of constituting crimes. Finally, the thesis examines the theory suggested by the author. Through employing logic analysis, comparative analytic approach and demonstration study, the present thesis conducts a systematic research of the theory of constituting crimes, expecting to push the relevant study to a new stage. The structure of this paper is as follows:

Chapter 1: Introduction. This chapter introduces the issues raised and research profile, and domestic and international literature review. The issues exist in financial crime legislation over the issue of stand sin; at the same time, the paper will draw on the research results based on the research at home and abroad to do a survey of existing studies that neglect of financial violations convicted of the problem; the main content of paper, the basic ideas, research methods are described.

Chapter 2: Financial illegal basis for the crime of criminal law. This chapter analyzes the natural guilty and convicted of committing a statutory distinction between convicted of financial offenses laid the basis of criminal law. First of all, naturally

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committed abroad briefly the difference between theory and statutory offense, and a brief analysis was carried out, revealing the nature of Japan committed and the statutory distinction between committing to explain the theory is founded on theory, is to illustrate the possibility of administrative criminal law need not fully applicable to the problems of ordinary criminal law General; Germany Natural Crime and Legal Crime is the difference between the theory of the executive from the legislative note the distinction between criminal and criminal wrongfulness. Therefore, the theory can not be transplanted directly to natural and legal offenders committing real difference is that the differences in legislation and the main differences is convicted. This leads to the Extraordinary Official guilty of the concept and conduct a comparative analysis and argument, that the statutory nature committed with the difference between the crime committed into the extraordinary nature of the statutory offense. Financial crime is committed because the scope of the statutory and therefore guilty of the extraordinary legal theory convicted of financial offenses have important guiding significance, at the same time, with knowledge of finance, from the money market, credit market and the association between that financial crime possible link to its extraordinary nature of further evaluation.

Chapter 3: According to the theory of Extraordinary Official guilty, the system described the basis for conviction of financial violations. First, in the conviction based on the domain of choice, that conviction based on the fact that the scope of value, based on those convicted of different subjects have different evaluation, a reasonable interpretation of the domain concept can be

convicted based on diversity. Thus can be convicted based on two aspects: First, Criminology conviction based on the domain, the second is the criminal law to convict based on the domain. Criminology conviction based on the domain is mainly embodied in the elaboration of social deviance, and criminal law to convict based on the domain is mainly embodied in the understanding of the nature of the crime. Secondly, were determined to convict based on that conviction should be based on harm to society and should be considered both in terms of punishment, criminal law is not a conviction based on sex category. As on the financial basis for the conviction offense interpretation, pointed out that levels of social harm, due to financial behavior complexity, people easily captured by the related financial organizations, departments interests of the whole, appearing to incriminate the continued view; According to the Extraordinary Official guilty of the theory of financial offenses should have the conviction shall be subject to punitive reasons, to limit shrinkage of determining.

Chapter 4: According to the basis for conviction, presented the financial violations of specific standards for conviction. This chapter consists of three parts. The first part, the basis for the current existence of a mixture of standards and status, and analysis was carried out, that can not be confused with the standard and applied basis. The second part, first, the current standard of the doctrine of conviction and a brief summary, points out the problems: one is the theory relies on the proposed standard is not obvious; the other hand, many proposed standards did not start the system argument. Accordingly, under the financial basis for the conviction offense, cut from the necessity and feasibil-

ity of proposed his conviction of five specific criteria: the need for protection, the possibility of damage to produce, act to deal with nature of the punishment efficiency to prove the possibility, and its meaning is explained. The third part, on the proposed standards were described, that its reasonable.

Chapter 5: Employing the five criteria that helps constitute financial crimes, the author analyzes the defects in defining various financial illegal activities. With regard to defrauding fund and altering financial bills, the legislation should not transgress the necessity of protection of constituting financial crimes. In terms of financial crimes related to securities and futures, the efficiency of punishment and possibility of proving of constituting crimes are not effective enough. Speaking of money laundering, the content of this crime contradicts the maintainability.

Chapter 6: Conclusion. As the concluding part of this paper, this chapter summarizes the whole dissertation, points out the innovations and the defects and the direction of the follow—up study.

The innovation of this paper can be summarized as follows:

The first innovation of this paper is its research perspective. After a literature review of the relevant research home and abroad, the author notices that the majority of scholars did not make a clear distinction of natural crimes and statutory offense, as a result, the research on featured statutory offenses is a void. In accordance with the present law-making situation, this paper suggests that study on constituting the crime of financial illegal activities should be approached from the angle of legislation.

Second, the theoretical basis of this research is new. In or-

der to find the criminal law basis of constituting the financial crimes and differentiate it from natural crimes, the present thesis invents the theory of over constancy of statutory offenses. According to this thesis, over constancy of the statutory offenses is based on the constancy of natural crimes. The constancy of natural crimes refers to the general knowledge, logical thinking and natural explanation. It is easy to constitute natural crimes just by referring to the citizen's common sense. To the statutory offenses, however, we need to have extraordinary knowledge to constitute them. In other words, the incrimination of statutory offenses is not based on people's common sense but extraordinary reasoning. Therefore, the paper clarifies its argumentation through two stratification planes. First, when constituting the statutory offenses, we need to take the higher-level of civilian ethics into consideration, which undoubtedly transcends people's baseline of morality. Second, the constituting of statutory offenses reflects the civilian's moral appeals, and more importantly, it exemplifies the wish that the pursuit of political society should exceed the citizens' common desire. The over constancy of statutory offenses adds a new dimension to the constituting of financial illegal activities from the angle of criminal laws. Consequently, the incrimination of financial violation should not copy the practice of constituting natural crimes.

Third, the practice method of argumentation is without precedent. The old study tends to confuse the proofs of incrimination and the criteria of incrimination; the present thesis points out that we should distinguish the former from the latter. The proof of incrimination is to regard an action as the basis of crimi-

nal punishment, but this is not sufficient and lacking in the operability. The appearance of the criteria of incrimination, however, is helpful to make the best of the proofs of constituting crimes, and makes the macroscopic proofs concrete. By incorporating the research result of the forerunners into this paper, the author suggests that the criteria of incrimination should include two aspects, the necessity and operability. Taking the characteristic of financial illegal activities in account, the author comes up with five concrete criteria to constitute crimes: the necessity of protection, the possibility of damage, the maintainability of behaviors, the efficiency of punishment and the probability of testifying. Besides, the systematic argumentation is also included in this thesis. It is necessary to state clearly that former researchers also had the similar criteria, but this is the first time to dig up their connotations, make careful reasoning and consider them as the proofs of constituting financial crimes.

Key words: financial offenses; statutory criminal; incrimination ground; incrimination standards

序

2010年7月博士毕业至今已经过去三年的时间，三年间我由原来的学生转换成现在的老师，这是一个不小的跨越，也是人生中一个必经阶段。新的岗位有新的要求，人生免不了要“入俗”。从2010年12月进入四川省委党校从事教研工作开始，我的研究方向也在逐渐的转型，省委党校作为培养党、政领导干部的学府，带有培训模式，对老师的要求更严格、苛刻，而在内容上需要从具体的理论转化成理论和实践相结合的专题形式。尤其是在党的十八大之后，法治精神的宣讲成为党校、行政学院法学的主阵地，因此，我的研究方向也逐渐朝行政法方向转型，转型的过程是痛苦的，意味着对新知识的学习和接受。在这个阶段我又给在职研究生主讲宪法学的课程，虽然这些新的知识激发了我学习的动力，但回头想想毕竟进行了接近五年的刑法学的训练和学习，还是难以割舍对于刑法学的热爱。恰逢党的十八大之后我们国家开始了轰轰烈烈的惩治腐败行动，紧扣这一“需求”，我重新回过头来研究职务犯罪的预防，又想起了自己放置多年的博士论文。

博士论文开题前夕，导师胡启忠老师建议我从立法的角度来分析当前我国金融违法行为的入罪问题，主要针对的是当前我国金融犯罪立法不科学的现状。从1979年的刑法到现今，我国已经出了八个刑法修正案，这其中针对经济犯罪尤其是金融犯罪的条款特别多。修改的目的是为了更好地惩罚敢于违反金融秩序行

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