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内容摘要

洗钱是源于国外的一种犯罪行为，最初出现于20世纪30年代，并在20世纪70年代被立法予以禁止，不久即被认定为犯罪。洗钱行为被犯罪化不久就因为其具有明显的跨国性而成为一种国际性犯罪，在多个国际公约中得到规定，并且迅速成为最受关注的国际问题之一；在这一过程中，国际社会反洗钱立法不断发展。

受国际形势的影响，洗钱在我国也成为越来越受关注的一个焦点问题。从1990年我国首次开始反洗钱立法，到1997年后我国开始初步构筑反洗钱法律体系，再到2003年之后我国反洗钱法律体系的不断完善，我国反洗钱立法不断演变。在这十多年中我国反洗钱立法如何受到国际影响，为何频频修订，还存在哪些问题，又该如何进一步完善，这些问题都需要总结并值得深入研究。

为此，本书通过考证国际反洗钱立法的起源、发展情况，剖析了反洗钱立法的原因与发展趋势，阐述了国际反洗钱立法对我国的影响，并由此分析了我国反洗钱立法发展的进程与原因，还指出了当前我国反洗钱法律体系存在的问题并提出了完善立法的相应建议。全书共分五章对这些内容作出论述：

第一章，“反洗钱立法演变的背景”。首先，考证了“洗钱”一词的起源与反洗钱立法的启动，这引出了洗钱行为与反洗钱立法的渊源。从语言的起源与传播来看，洗钱行为最先发生于美国，此后才被流传至包括中国在内的其他国家；并且，“洗钱”最先只是一个通俗用语，在洗钱行为被立法禁止之后才逐渐成为一个法律专有术语。从立法的启动与推广来看，最先由美国等发达国家开始反洗钱立法，此后通过国际公约将这种立法在全球推广，进而我国开始了反洗钱立法。其次，阐述了洗钱行为的社会危害性，这说明了反洗钱立法的基本原因，也反映了反洗钱立法演变的进程。洗钱行为最初的社会危害性在于恣纵特定的犯罪行为，故而洗钱只是被当作毒品犯罪等特定犯罪的附属行为而被立法所禁止；此后，洗钱规模的扩大，其严重扰乱了稳定的金融秩序，故而被认定为是一种独立的金融犯罪；洗钱行为跨国性的特征，使得其危害性不局限于一国，还严重破坏了整个和谐的国际社会秩序，故而其被认定为一种国际

性犯罪而予以在全球预防与打击。最后，分析了洗钱行为的发展趋势，这点明了反洗钱立法演变的原因。国际化程度的提高，使得反洗钱立法日趋全球统一；危害性的日益严重，使得反洗钱立法日趋严厉；实施领域日益多元化，使得反洗钱立法日趋扩大适用范围；实施主体日益专业化，使得反洗钱立法日趋提高监管手段。

第二章，“国际反洗钱立法的发展及其对我国反洗钱立法的影响”。联合国的反洗钱公约、相关法律文本以及金融行动特别工作组的反洗钱立法建议，代表了国际反洗钱立法的状况与标准，对这两个组织反洗钱立法发展的考察，可以分析出国际反洗钱立法的发展及其对我国的影响。联合国所通过的反洗钱公约与法律文本反映了国际社会对反洗钱所达成的共识，《联合国禁毒公约》、《联合国禁止洗钱法律范本》、《与犯罪收益有关的洗钱、没收和国际合作示范法》、《制止向恐怖主义提供资助的国际公约》、《联合国打击跨国有组织犯罪公约》、《联合国反腐败公约》等公约与法律文本代表了联合国各个时期对反洗钱的立法认识；由于我国是联合国重要成员，也是相关反洗钱公约的缔约国，上述这种反洗钱立法内容在各个时期不同程度上推动了我国反洗钱立法的发展。作为反洗钱专门组织的金融行动特别工作组，它的成立与壮大本身就反映出了国际社会反洗钱的决心与共识；由该组织所制定和不断修订的反洗钱建议，吸收了不同时期反洗钱国际公约的内容，从而使得该建议日渐成为反洗钱立法的国际标准。通过对该组织1990年和1996年以及2003年三个时期反洗钱建议的分析，剖析了国际反洗钱立法标准的发展。由于早期我国并不关注金融行动特别工作组，更不是其成员，因此该组织前两个版本的反洗钱建议对我国影响不大，这也是我国早期反洗钱立法落后的一个重要原因；本世纪初我国开始关注金融行动特别工作组的活动并于2007年正式加入该组织，由此该组织的反洗钱建议对我国产生直接约束力，客观上推动了我国反洗钱立法的发展与国际化。

第三章，“我国反洗钱理论研究的演进”。我国不同时期反洗钱理论研究的水平，代表了这些阶段反洗钱立法的状况，也反映出反洗钱立法演变的原因。在1988—1996年，我国理论研究处于初步介绍国外洗钱概念的早期阶段，反映出我国反洗钱立法的薄弱、不受关注；此时我国的反洗钱立法处于初创时期，而理论研究成果也无法为我国的反洗钱立法提供更多的理论支持。在1997—2002年，理论研究深化了对洗钱行为的认识，并由此针对我国反洗钱立法状况提出了一系列的立法建议，这反映了我国反洗钱立法还不完善；这

些理论研究成果为我国反洗钱立法的发展提供了资料甚至直接的立法内容，由此，在这一时期我国的反洗钱法律体系开始初步构建。2003 年至今，此时理论研究针对我国反洗钱法律体系的各个问题展开调查、分析，并由此提出了完善立法的具体建议，这反映出我国反洗钱法律体系还存在着漏洞；这些理论研究成果成为推动我国反洗钱立法发展的直接动因，对完善我国反洗钱法律体系提供重要内容。

第四章，“我国反洗钱法律的发展”。从立法内容上看，我国反洗钱法律的发展可以分为三个阶段，1990—1996 年是我国反洗钱立法的初创时期，1996—2002 年是我国反洗钱法律体系的初步构建时期，2003 年至今是我国反洗钱法律体系的完善时期。第一阶段，称得上我国反洗钱立法的只有 1990 年《关于禁毒的决定》的一个简单条款，此时我国的立法不自主，仅仅是为履行相关国际公约的义务而规定了反洗钱的相关条款。这一时期的立法对于预防、打击洗钱犯罪十分有限，几乎仅仅是一种摆设作用。第二阶段，我国在刑法中明确而详细地规定了“洗钱罪”，并且不断修订得以完善；而在金融行政管理法中也开始出现预防洗钱的内容，特别是由中国人民银行制定了专门的反洗钱规章。由此，我国的反洗钱法律体系得以成形；但一方面此时我国的反洗钱立法重视刑事打击而忽视预防，另一方面我国的反洗钱法律总体效力层次不高。第三阶段，不论是刑事法律还是行政管理法都不断完善反洗钱内容，表现为刑法的修订、《中华人民共和国反洗钱法》以及配套法规的制定。这些立法内容在各个层次、从不同角度对我国预防、打击洗钱犯罪作出了详细而又明确的规定，并且总体上反映了国际反洗钱的最新标准。

第五章，“我国反洗钱法律体系存在的问题及其立法完善的建议”。虽然 2006 年通过的《刑法修正案(六)》进一步促进了我国反洗钱刑事立法的完善，但依然存在着一些问题，其表现为：洗钱犯罪尚未完全独立化，三个打击洗钱犯罪的条文分散于刑法的不同章节；洗钱行为并未完全犯罪化，洗钱的第三阶段即融合阶段的行为并没有被规定为犯罪；对洗钱上游犯罪的规定不合理，一方面由于要求主观是明知，使之难以认定，另一方面，由于上游犯罪过窄，无法达到维护金融秩序的目的；洗钱犯罪的主体也过窄，一方面单位只对个别洗钱犯罪行为负责，另一方面自我洗钱者并不构成洗钱犯罪；洗钱犯罪的刑事责任也过于轻微，无论通过对比中外洗钱犯罪的刑事责任，还是对比中国洗钱犯罪与其他金融犯罪的刑事责任，都显示我国的洗钱犯罪被轻刑化了。对于我国刑事立法的这些问题，应该通过增设罪名，并将相应罪名设置于同一个条文

下，使之独立化；同时，通过扩大犯罪构成要件，在主体、客观行为、犯罪对象等方面予以扩充，并加重刑事责任，由此达到完善洗钱犯罪刑事立法的目的。在行政管理法方面，虽然一系列专门反洗钱的法律、法规完善了预防洗钱的行政立法，但依然存在一些漏洞，主要包括：预防洗钱的领域过窄，没有将所有阶段的洗钱行为都予以包容，也没有详细规定特定非金融机构的反洗钱义务；反洗钱内控制度不具可操作性，既过于抽象，也没有相应保障措施；客户身份识别制度还存在漏洞，没有针对不同风险程度的客户规定不同的识别制度；交易报告与记录保存制度也有待完善，没有详细区分既遂与未遂的交易以及可疑交易的依据等；对法人的监控手段过弱，无法有效预防利用法人洗钱的行为；相关主体的法律责任偏轻，无论是与国外立法相比，还是从洗钱行为的危害性来看，都应该加重相关主体的法律责任。对于这些存在的立法问题，应该通过修订法律以及制定相应的实施细则，有针对性地予以补充、完善。

［关键词］ 反洗钱　立法　演变

Abstract

Money laundering is a crime from abroad and it firstly appeared in the 1930s. It was forbidden by the legislation in the 1970s and it was identified as crime lately. The acts of money laundering became an international crime because of its obvious transnational nature after it was criminated. Then it got the provision in a number of international conventions and quickly became one of the most international concerned. In this process, the anti-money laundering legislation developed in the international community.

The money laundering has become a focus attention problem in China now under the impact of the international background. From the Chinese first anti-money laundering legislation in the beginning of 1990, China started to build a preliminary anti-money laundering legal system after 1997, and to Chinese anti-money laundering in 2003 after the constant improvement in the legal system, Chinese anti-money laundering legislation is constantly evolving. It needs to be summarized and be worthy depth study for some questions: how the anti-money laundering legislation is impacted in the 10 years, why they are frequently emended, which still exist and how we solve the problems and so on.

This paper analysis the reasons and the development trend of the international anti-money laundering legislation and expounds the impact of the international anti-money laundering on our country according to the research of the origin and the development institution of the international anti-money laundering. Then this paper analysis the process and reasons of Chinese anti-money laundering legislation and pointed out the problems of the Chinese anti-money laundering legal system and put forward the methods to solve them. The full paper is divided into five chapters of these elements to make expositions:

The first chapter is "the background of the anti-money laundering legislation evolution". Firstly, the "money laundering" and the origin of the start-up money-laundering legislation are certificated, which led to the origin of the money-laundering and anti-money laundering legislation. From the origin and communication of the language, the act money-laundering firstly occurred in the United States, and then spread to other countries including China. What's more, the "money-laundering" is an exoteric diction. It became a legal proprietary terminology gradually after legislation against. From the start and promotion of the legislation, the United States and other developed countries began with the anti-money-laundering legislation. Then our country had the anti-money laundering legislation according to the promotion of the international common divisor. Secondly, it expatiates the disserve of the money laundering, which explains the basic reason of anti-money laundering legislation and also reflects the evolvement process of the anti-money laundering legislation. The initiate disserve of the money laundering is to indulge specific criminal acts, so money laundering is forbid by the legislation as an accessorial specific criminal act just as drug-related; since then, the enlargement of the scale of money-laundering seriously disrupts the stability of the financial order, and therefore it is identified as an independent financial crimes, its transnational characteristics makes the disserve not only impacts just one country but also damage the whole harmony international social order, so money laundering is prevented and forbid globally recognized as an international crime. Finally, this paper analysis the development trend of money-laundering, which points out the reason for the evolution of anti-money laundering legislation. A rising degree of international makes the gradual globalization uniform of anti-money laundering. The increasingly serious harm makes the gradually stringent anti-money laundering legislation. The implementation diversification of the field makes that anti-money laundering legislation has been expanding the scope of application; the main increasingly specialized implementation makes anti-money laundering legislation means more rigorously.

The second chapter is "the development of international anti-money

laundering legislation and the impact of Chinese anti-money laundering legislation". United Nations convention against money-laundering and related legal texts and the Financial Action Task Force against money-laundering legislative proposals, representatives the status and standards of the international anti-money laundering legislation. The research of the two organizations' anti-money laundering legislation development reflect that the development situation of the international anti-money laundering and the impacts on China. Adopted by the United Nations convention against money laundering and the text of the law reflects the international community's anti-money laundering by the consensus reached, *the United Nations Drug Conventional* and *the United Nations Model Law against Money-laundering*, *with the Proceeds of Crime*, *Money Laundering*, *Confiscation and International Cooperation in the Model Law*, *Suppression of the Financing of Terrorism*, *the International Convention*, *United Nations Convention against Transnational Organized Crime*, *United Nations Convention against Corruption* and the text of the law, such as the Convention on behalf of the United Nations during the period of awareness of anti-money laundering legislation. As China are an important member of the United Nations and the relevant party of the Convention on Money Laundering, the contents of this anti-money laundering legislation in the various periods varying degrees is promoting the development of Chinese anti-money laundering legislation. As a specialized organization of anti-money laundering Financial Action Task Force, it sets up with its own growth which reflects the international community's determination and consensus of the Anti-Money Laundering; From the organization established by the Anti-Money Laundering and the proposed amendment, it draws a different periods of the International convention on anti-money laundering, thus enabling the proposed legislation against money-laundering is becoming the international standard. By the analysis of anti-money laundering advices of the organizations in 3 periods during 1990 and 1996, it anatomies the development of the international anti-money laundering legislation standards. In early times, China doesn't concern the Financial Action Task Force, and certainly not its members, so the first two versions of the pro-

posed anti-money laundering of the organization effects little on China, which is an important reason for the trail of Chinese anti-money laundering legislation. China begins to pay attention to the Financial Action Task Force's activities in 2007 and formally joined the organization in the beginning of this century, which restricts China directly with the advices of anti-money laundering legislation and objectively promoted the development of Chinese anti-money laundering legislation and internationalism.

The third chapter is "the evolution of the Anti-Money Laundering theory study". The level of Chinese anti-money laundering theory in different times represents the state of anti-money laundering legislation and reflects the evolution of the reasons for anti-money laundering legislation. From 1988 to 1996, Chinese study of theory is to introduce the concept of money-laundering in the early stages during the preliminary period, which can reflect the weakness of Chinese anti-money laundering legislation without concern. What's more, the results of the theory study can not provide more support for the theory. From 1997 to 2002, the theory study deepened the cognition of the money laundering act, and then proposed a series of legislation advices to the situation of Chinese anti-money laundering. This reflects the system of Chinese anti-money laundering is not perfect; these theory study results provide data and direct contents of legislation for the development of Chinese anti-money laundering legislation, and therefore it began to build the system of Chinese anti-money laundering legislation. From 2003 till now, this theoretical study began to investigate and analysis various issues which exists in Chinese anti-money laundering legal system, and then they proposed specific advice to promote the legislation, which shows that there are some leaks in Chinese anti-money laundering legal system; these theoretical study results became the direct reason for the development of Chinese anti-money laundering and provide important contents for our country's anti-money laundering legal system.

The fourth chapter is "the development of Chinese anti-money laundering legislation". The development of Chinese anti-money laundering legislation can be divided into three periods according to the contents of legislation.

It is the maiden creative period of Chinese anti-money laundering legislation from 1990 to 1996. It is the prime building period for that from 1996 to 2002 and from 2003 till now it is the promotion period. In the first stage, there is only one simple item that can be called as the Chinese anti-money laundering legislation. At this time our country's legislation is not freedom and only to carry out some obligation of international conventions and regulate the relevant provisions of the Anti-Money Laundering Terms. During this period the offences of the legislation is very limited for the prevention and fight against money-laundering. In the second stage, our country regulated the criminal law of money laundering clearly and specifically and constantly revised to be perfect; in the financial administration law it also began to prevent the money-laundering, particularly by the People's Bank of China formulated special anti-money laundering regulations. Thus, Chinese anti-money laundering legal system is formed, but on the one hand, Chinese anti-money laundering legislation neglects prevention, on the other hand, Chinese anti-money laundering laws have not very high level on the overall effectiveness. In the third stage, whether administrative or criminal law are constantly to improve the anti-money laundering act, amendments to the Penal Code for the performance, *People's Republic of China Anti-Money Laundering Act*, as well as supporting the enactment of laws and regulations. These legislative at all levels, from different angles on China's prevention, the fight against money-laundering offences made a detailed and explicit requirements, and reflect on the whole of the latest international anti-money laundering standards.

The fifth chapter is "the existing problems in Chinese anti-money laundering legal system and the proposals on how to improve the legislation". Although the *Criminal Law Amendment* further promotes Chinese anti-money laundering legislation criminal to be perfect in 2006, but there are still some problems and their performances are: money-laundering offences have not been completely independent of the three anti-money laundering provisions scattered crime in different sections of the criminal code; not entirely criminal money-laundering, it's the third phase of the integration

phase behavior and had not been provided for the offence of money-laundering predicate offences provisions unreasonable. On the one hand it is very difficult to be identified because of the subjective knowing requirements; on the other hand, we can't achieve the purpose of safeguarding the financial order because the predicate offence is too narrow. On the one hand the offices are only responsible for the individual units on money-laundering offences, on the other hand, self-money-laundering is not recognized as money-laundering criminal and the criminal responsibility for crimes is too light, whether by comparing the criminal liability of foreign money-laundering offences, compared China or other financial crime and money-laundering laundering crimes of criminal responsibility, it shows that Chinese money-laundering crime is of the lightest punishment. For these issues of Chinese criminal legislation, we should add more charges and set up on the same charges under a provision so that they are independent. At the same time, it should be expanded in the objective, target crime areas according to the expansion of the criminal element. What's more, it should increase the criminal liability, thus improve the crime of money-laundering for the purpose of criminal legislation. For the aspect of the administrative law, although there are a series of specialized anti-money laundering laws and regulations to prevent the money-laundering to improve the executive and the legislation, there are still some loopholes, including: reducing the size of the area to prevent money-laundering, not all stages of the money laundering act to be inclusive, there are no details of specific non-financial institutions to combat money-laundering obligations; internal control system is not a money-laundering operation, too abstract nor corresponding security measures; identification system, there are still loopholes, and has not addressed the risks of the different customers identification systems; transaction reports and record-keeping system to be perfect and no detailed distinction completion of the transactions, as well as attempted the basis of suspicious transactions; the means of corporate control is also too weak and unable to effectively prevent the use of corporate money-laundering acts; related to the legal responsibility are too light, whether it is compared with the foreign legislation or from the dangers

of money laundering, should be the main related to increase legal responsibility. For this existing legislation should be enacted to amend the law, and the corresponding implementation details to be added to address.

[**Key words**] anti-money laundering, legislation, evolution

目　录