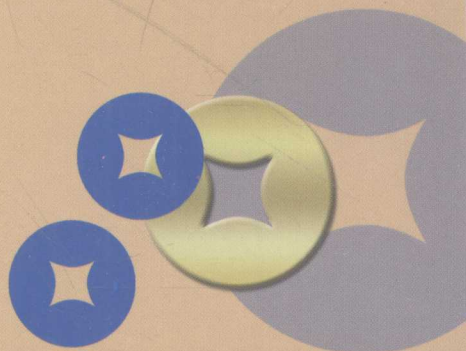


庄少绒 著

# 中西方金融 法治演进研究



The Study on Evolution of Chinese and  
Western of Rule of Law in Finance

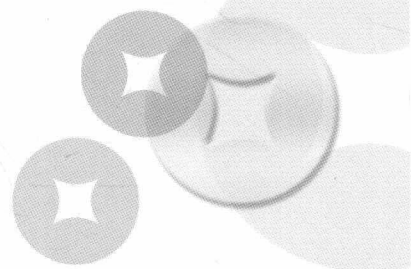
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## 内容摘要

法治是一个国家或一个社会在政治和法制建设中一种综合性的关于社会秩序的价值目标,以及由此产生的一系列基本的行动原则及其实现过程和结果。相对于人治,法治意味着在国家中法律具有最高的权威,相对于法制,它是一种良法之治,使权利和自由得到保障和实现、权力受到约束,是法律统一并得到普遍遵守的社会状态。金融法治是法治在金融领域的具体化,善法之治、法律至上、平等适用、制约权力、权利本位的法治精神在金融领域表现为,确实地平等地保护存款人和投资人的利益,强调金融机构在安全基础上得以平等地最大自由地竞争,确立并强调金融领域里“法的统治”,一切皆在法律下运行,并把金融制度、金融活动的内容和要求直接规定为法律,使金融经济运行法律化,不仅金融市场参与者应守法,金融市场监管者的政府也应依法行权,维护金融市场的公平竞争秩序。总之,金融法治是要用法治原则来指导金融的运行和发展。金融法治对我国当下的市场化改革、国有金融业占主导的金融市场的规范和金融全球化下市场的开放具有重要意义。

所处的经济发展环境,对法律和法律相关的、有关秩序安排的内在价值系统和思维模式会造成影响。金融法制随着金融的发展历史走来,不可能不带有历史的痕迹。而不同国家的传统及观念会影响并体现在法律制度中。在此经济环境和历史传统影响下形成的某种法律观念和法律理论,又是法律制度产生和制定的依据,中外法律史上任何一种法律制度的建立都先行地有着一种法律观念的产生和指导,对法律制度的制定和实行产生影响,法律制度只有在相协调的法律观念和思想理论影响下才能够产生和得到执行,一个有效实行的法律制度后面必定存在与之相协调的法律观念和理论。因此,一定的法律观念和思想理论影响法制,而法治依赖于法





制，因此这些法律观念和思想理论影响法治，也就影响了金融法治。

从主要代表不同法系又具有不同金融制度且金融水平发达的美、英、德三个西方代表国家的金融法律制度（主要是证券法律和银行法律）的演进研究中发现，西方国家金融法治的发展是在传统社会内部因素的推动下，经过漫长的演化过程逐步发展的，与西方发达国家市场经济制度的发展过程一样，是自然演进、同步演进的。西方国家金融法治的演进各具特点，美国金融法治演进中颁布了大量的成文法律，对金融机构的影响也从早期金融业的自由经营到1933年后的全面管制，再从20世纪80年代以后从管制走向自由；英国金融法治的演进经历了自律管理到法制化的过程；德国金融法治演进中形成了独立性很强的中央银行和全能银行制度。但这些不同演进现象的背后，却都体现出注重对投资者和债权人权益的保护、立法朝着提供更为自由平等的竞争方向发展、尊重依赖法律管理金融市场、对日益强大的政府监管权力存在制约机制的特点。在寻求对这些存在于西方金融法治演进中的共同特点进行合理有效地解释和说明时发现，这些共同特点正是西方社会极为久远的传统而稳定发展的权利、自由、平等、法治等思想理论、民主政治实践以及体现这些的一系列政治法律制度等影响的结果。从而说明西方金融法治的演进主要是在相协调的法律文化中进行的。

中国金融法治的演进经历了近代和现代两个阶段。中国近代的历史普遍认为从1840年鸦片战后至1949年国民党政府垮台期间。从清末政府开始意识到办银行兴国、出现了官办银行，加之民间金融机构的发展，以及随着外国势力而进入中国的外资银行，使得近代金融参与者性质和形式多样，金融立法也由针对一个银行的单一立法发展到国民党统治时期的完善立法，但金融机构独立自由空间却越来越小，债权人和投资人的权益难以保障。随着国民党对金融垄断的加强，最终导致金融体系的崩溃。立法的完善并不能带来金融活动的良好发展，这除了限于当时的社会经济环境、政府性质外，传统法律观念和思想未能适应金融活动的要求密切相关。近代中国的历届政府仍然实施传统的中央集权的专制政治，在“家国一体”、以国家为本位传统法律文化影响下，近代金融立法主要是维护统治者的利益、忽视私人或个体利益，法律是权力的附庸而不是权力的约束的

中国传统法律文化观念的影响使政府的权力不受约束并凌驾于私人金融财产权之上,强权政治和金融垄断造成金融机构间不平等竞争并丧失自由独立经营的地位和权利。传统社会中的权力、权利及法律意识还没有随着传统的君主专制转变到宪政民主的意识中来,深受传统专制文化影响的金融法律制度虽然逐渐完备,但与银行等金融业所需要的自由、独立、平等、对私人财产权的尊重要求相去甚远,最终使金融体系走向崩溃。可见,完备的金融法制并不一定就是金融法治,还要看其是否是良法,是否符合金融活动的规律,这种符合金融活动客观规律的良法的制定与施行需要有相应法律文化的存在和发展,关键是政治经济制度以及思想意识文化领域中适合金融活动规律的制度和意识的生成,而这又不是中国近代政府所能做到的。这决定了近代金融法治演进的命运只能是无果而终。中国现代金融法治是随着计划经济向市场经济的转变而获得发展空间,并逐渐明确了法治金融的方向。中国现代金融法治演进经历了建国初期和计划经济时期、由计划经济向市场经济转变时期、市场经济逐渐形成时期,中国社会的法律观念随之也呈现出多元化,既有传统的、计划经济时代的,更有市场经济的并逐渐占据支配地位的法律文化。这些经济模式和法律文化的发展变化使得中国现代金融法治的演进体现了:由传统及计划经济观念对国有财产保护的优先考虑,发展到市场经济及权利观念对各种性质的财产权一体保护,金融市场主体从政府附属机构到成为日益独立的市场主体并逐渐公平地竞争,法律对金融市场的管理作用逐渐增大且立法质量也不断提高,金融监管机构日益独立、监管权力日益增大且受到约束等演进特点,显示出金融法律的发展逐渐符合市场经济发展的需要,表明与市场经济相协调的法律文化逐渐支配影响着金融立法的发展。

今天,随着经济全球化的深化,金融全球化成为历史发展的必然,出现各国或地区在金融业务、金融市场、金融政策与法律等方面跨越国界而相互依赖、相互影响、逐步融合的趋势,表现为货币体系、资本流动、金融市场、金融信息流动、金融机构等要素的全球化以及金融政策与法律制度的全球化等。随着中国成为世界贸易组织的成员国,中国金融市场既要更加开放以符合世贸组织的要求、与国际接轨,同时更要维护金融的稳定、安全,唯一的办法只有实行金融法治,在借鉴西方国家的经验和做法



的基础上,在开放国内市场的同时,要营造内外资公平竞争的市场环境,平等保护金融市场中各主体权利,为了适应全球对金融的放松管制、鼓励竞争,应扩大我国金融机构的自由经营权利,对金融市场的管理,要依靠法律法规,需要建立完善的金融法律框架,为了确保金融安全,需要健全金融监管体制,赋予金融监管机构更大权力的同时又要使权力受到制约,提高监管水平,加强国际金融监管的合作与协调、建立国际合作的有效调整规范体系,充分发挥独立司法作用,加快推动中国金融法治的发展。

## Abstract

Rule of law is of comprehensive value concerning social order in policy and legality construction in a country or a society. Compared to rule of person, rule of law means the law has utmost authority in the Country. Compared to legality, rule of law is good governance by law, which protects rights and freedom, restricts powers, and the laws are well observed in a society. Rule of law in finance refers to specific rule of law in financial areas. The spirit of governance by good law, supremacy of law, equal application, restricting power, and of right-orientation is reflected as protecting interests of deposits and investors equally, ensuring free competition of financial institutions on the basis of safety, establishing and emphasizing rule of law in financial areas, incorporating financial rules and financial activities into laws so as to legitimize the running of financial economy, requiring both participants and regulators of the financial market to observe the laws, and maintaining fair competition order of the financial market. To sum up, rule of law in finance is to direct the running and development of finance by using rule of law principle. Rule of law in finance is of great importance in china's market reform with the background of financial globalization, as the financial market is mainly dominated by the state-owned financial enterprises.

Legal culture is an integral part of human culture. It is a stable element in variable legal phenomenon and a common element of the inner value system and thinking modes in the whole culture related to laws and orders. Conceptions of legal culture are restricted by the conditions of economic development. And conceptions formed in certain environment are the basis of regulations, influencing the formation and application of legal rules. In other words, legal rules can be



formed and executed in a well-balanced legal culture. Behind an effectively executed legal rule, there must be a concord legal culture. Therefore, as legality is affected by legal culture, upon which relies rule of law, rule of law in finance is influenced by legal culture.

The development of western system of law in finance in countries such as Britain, Germany and U.S. (whose system of law is well-developed but different from one another, focused mainly on the law of the stock market and banking) shows that each country has its own characteristics in such development. For example, the development of American financial system is related to the various effects upon the financial institutions with the enactment of the rule of law, it is thus marked by several phrases: the period from the early free financial management to the post-1933 overly regulation, from regulation to free management starting from the 1980s, and the period of regulation based on freedom and self-discipline. As the British rule of law in finance witnessed a process from self-disciplined management to legal regulation, its development is divided into the following stages: the self-disciplined management, the co-existence of self-discipline and legal regulation; and the legal regulation as the main means. With the formation of independent central bank, omnipotent banking system, the development of German rule of law in finance consists of three phases: administration by central bank, administration by the omnipotent bank, and the regulation of the stock market and banks. Although the process of development in these western countries is marked with difference, they all emphasize protecting property rights of investors and right holders, providing a freer and fairer competition environment while financial institutions continually chase for operation freedom and fair competition, regulating financial market according to law, and restricting the increasing regulating powers of the government. All these are reflections of the western culture in finance, which points to freedom and rights but rejects interference from state power.

A reasonable description and explanation of the characteristics common to the rule of law in finance in these western countries could not be given from the perspective of law but from an alternative, as Lawrence M. Friedman, the American

jurist suggests, behind the statute book there lie powerful thoughts. In spite of the different processes of evolution, the conceptions of freedom, individual right, rejection of interference from the state power are all stressed in their development. In other words, western legal culture is basically the thoughts, consciousness and the theories in western convention, developed with the continuous orientation on conceptions of right, freedom, equality and rule by law, as well as the a series of political, legal system which embodies these ideas. The evolution of rule of law in western financial areas proceeds from a concord culture, with the sophisticated commodity economy and market economy as the prerequisite.

The evolution of Chinese rule of law in finance experiences two stages: the modern era and the contemporary era. The modern era starts from 1840s (post-Opium-War) to 1949 with the collapse of Kuomintang government. The state-held bank first appeared as the Qing Government attempted to develop its economy. With the setting up of private financial institutions and the banks of foreign investment, Chinese financial market in this period is made up of diverse participants working in different forms. Financial law evolved from a law for the regulation of one bank to the relatively integrated legislation. But as the financial institutions had less and less freedom, creditors and investors could not have their profit guaranteed. And the increasing monopoly by Kuomintang led to collapse of this financial system in the end. It means that an intact legislation only cannot ensure positive development of financial activities. The collapse was related not only to the social-economic environment in China and the work of the government, but it was also related to legal culture and convention which did not meet the need of financial activities. All these took place with the background that all Chinese governments in modern China maintained traditional central-local relationship while facing both domestic turbulence and foreign threats, and were influenced by the conceptions of Chinese traditional state-oriented culture in which family and state are considered as a whole, and law as the tributary of the power. The modern financial legislation is to ensure the governor's interests. The government's power is free from restriction and prior to the individual's property right.



Power politics and financial monopoly create unfair competition among financial institutions, making them lose their status and rights for free and independent operation. All these elements form an environment which is away from the demand of the banks and other financial institutions: freedom, independence, equality, and respect of the private property. Although, during this period, the financial rules are gradually set up and great changes take place in the whole legal system, the legal culture transforms very slowly from constitutional monarchy to constitutional democracy. The contemporary Chinese financial law developed from the process of transformation from a planned economy to the market economy, going gradually towards rule of law in finance. As it has gone through several periods of development, namely, the planned economy when the republic was established, the transformational period from a planned economy to the market economy, and the formation of a market economy, legal culture in China is plural with both the conventional, planned element and the market element which has gradually become dominant. These modes of economy and the changes in legal culture show that with the development and reinforcement of relevant legal culture, certain changes has taken place in accordance with the market economy and a picture similar to western financial evolution appears: the prior consideration of protecting state-owned property under traditional planned economy is replaced by protecting all types of property rights under market economy; the subject of the financial market refers to the market entities rather than the government affiliates; and the laws enjoy stronger regulating capacity on the financial market with better quality regulations. Financial authorities are more independent, and regulating power is increasing but with restriction. These changes comply to the need of a law-ruled economy and a law-ruled country.

Today, with the deepening of economic globalization, there will certainly be a financial globalization, with the presence of transnational circuit of financial business, financial market, financial policy and financial law of different countries and regions together with their mutual influence and mutual integration. The financial globalization will principally occur in the globalization of monetary

system, capital flow, financial market, the flow of financial information, financial institutions and other major elements as well as the globalization of financial policy and system of law. With China entering WTO, on the one hand, Chinese financial market should be more opened to the world to meet the demand of WTO; on the other hand, rule of law should be adopted in the financial market in order to maintain its security and its stable development. While learning the experiences and practices from western countries, the financial market should be administrated on the basis of the rule of law. An intact framework of financial law should be established, and system of discipline and restriction in finance should be perfected to ensure financial security. While it is subjected to proper restriction, more power should be granted to the regulating and administrating financial institutions for quality regulation. At the same time, international cooperation and coordination in financial regulation should be strengthened, and an effective standard and system of adjustment based on international cooperation should be established. An independent judicature should also be fully brought into play. All these measures should be taken in order to facilitate the development of rule of law in finance in China.

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## 绪 论

金融是现代经济的核心。在资金融通过程中,涉及到投资者、存款人(银行的债权人)及金融机构等。金融机构与其他类别的企业相比,自有资本与其运作的资产之比,明显较其他企业要低,也就是说,金融机构更多地是利用“别人的钱在经营”。投资者和存款人的信任,是金融业生存和发展的前提。一旦他们的权益得不到保障,对金融机构产生不信任,极易导致发生银行业的挤兑和资本市场投资的抽回并造成金融恐慌,从而危及国民经济。所以金融是一个特别需要法律规范和调控的经济领域,也是一个本身即体现和反映着法治运作的经济领域,很少有经济部门是这样受到法律的重大影响的。金融的历史实际上也就是法律演变的历史。

### 1.1 问题的提出和意义

由于金融发展的历史也就是法律演变的历史,相关法律的观念、思想理论在金融法治演进中起着重要的影响。这些既是人类文化整体中的一部分,也是变动着的法律现象中的稳定性因素,实质上是人们有关秩序安排的价值认识和思维模式。在一定经济环境下形成的某种法律观念和思想理论,是法律制度产生和制定的依据,对法律制度的制定和实行产生影响,即法律制度只有在相协调的法律观念和思想理论影响下才能够产生和得到执行,一个有效实行的法律制度后面必定存在与之相协调的法律观念和思想理论。因此,法律观念和思想理论影响法制,而法治依赖于法制,因此法律观念和思想理论影响法治。

金融法治是法治原则在金融领域的指导和运用,体现为金融市场有完善的法律法规,对投资者和存款人利益加以保护、对市场主体的自由和平等地位及公平竞争进行维护,政府对金融领域的监管权力依法取得并依法



行使等。这涉及到法律观念中的权利观念以及由此对权利人权利的保护和尊重的状况,自由、平等、正义的法律观念以及对金融机构经营自由、平等竞争的影响,权力的观念以及对金融监管的影响等。这些因素影响着金融的立法、执法和当事人的守法,是导致各国金融法治状况不同的深层原因。可见,法律观念、法律思想理论通过法制和市场参与者的意识同样影响着金融法治。金融法治对我国市场经济要求的法治经济、金融市场参与者的权益保护和市场规范管理以及在金融全球化的进程中与国际的接轨、金融竞争力的提高等都具有及其重要的意义。对金融法治演进进行研究,找出其特点及影响因素,不仅是法律文化理论、法治原则在金融领域的运用,具有理论意义,而且对于我国市场经济体制下实现金融法治具有现实的指导启发意义。

## 1.2 研究现状

目前理论界在金融领域里的法律研究更多地关注金融活动对金融制度创新的影响,如陆泽峰《金融创新与法律变革》和陶广峰、张宇润所著的《金融创新与制度创新》、刘锐、阎晓田、赵连杰所著《东西方的金融改革与创新》等书,关心和研究的是我国金融法律制度的建立、完善问题,忽视对法律制度背后的法律文化的研究。而法律文化学者主要从理论上整体上研究法律文化的概念、法律文化结构分析、法律文化内在矛盾、社会基础、与现代社会和现代政治的关系,如刘进军、李少伟的《法律文化导论》、刘作翔的《法律文化理论》,或者只是按照法系对各国的法律文化作些介绍,如德国K·茨威格特H·克茨著的《比较法总论》,还有就是对中西方的法律文化进行比较,如范忠信的《中西法文化的暗合与差异》、张中秋的《中西法律文化比较研究》,将法律文化与具体经济领域尤其是金融领域结合起来的研究不多见;而对法治进行研究的学者和研究成果很多,但多是在宪法框架下或针对政府权力进行的,将法治原则运用到金融领域的学者不多,主要有高晋康、谢垚、刘强所写的论文《金融法治与我国金融安全》,阐述金融法治的含义及其与我国金融安全的关系,其他学者也谈金融法治,但只是强调金融法治的意义和金融制度的完善、金融机构的守法经营等,没有从金融法治演进的角度涉及相关法律文化研

究。

从收集和阅览到的材料看,中国学者对国外金融法律的研究现状:大量的对金融法律和实务的研究,有徐冬根、陈慧谷、潘杰的《美国证券法律与实务》,万猛、刘毅的《英美证券法律制度比较研究》,张智勇的《欧盟货币金融法律制度研究》,盛学军主编的《欧盟证券法研究》,李仁真主编的《欧盟银行法研究》,还有外国学者研究金融法律对金融机构的影响,如美国学者威廉姆·A·拉维特、约瑟夫·琼斯著,刘李胜、安静翻译的《银行与金融机构法概要》,Benston, G.J.,《The Separation of Commercial and Investment Banking: the Class-Steagall Act Revisited and Reconsidered》(Macmillan Press, 1990)一书论述美国一部金融法律对商业银行和投资银行的影响;Jonathan R.Macey and Geoffrey P. Miller: Banking Law and Regulation.Little; (Brown and Company, 1992)论述银行法与对金融机构的管制之间的关系;对国内学者西方各国法律发展的研究主要是何勤华主编的各国法律发达史如《德国法律发达史》《美国法律发达史》《英国法律发达史》,没有专门从法治角度研究金融法律演进;《美国金融体制》《英国金融体制》《德国金融体制》等书只是从金融体制的角度介绍各国金融机构、金融市场,没有从西方各国金融法治演进的角度,研究其演进特点和影响的因素。

本文从法治的角度既研究西方金融法律制度的变迁又研究中国近现代金融法律制度的发展变化,并从法治角度分析其演进的特点及其影响因素,是弥补这些方面研究空白的一种尝试。

### 1.3 研究对象的选取、研究框架安排及研究方法

由于篇幅资料所限,本文对研究对象的选取:西方国家主要是代表不同法系、金融制度又各具特色且金融水平发达的英、美、德三国,中国金融法治演进又分为近代和现代两个部分。

研究框架及思路:以金融法律制度演进在先(主要是金融法律中的证券法律制度和银行法律制度);其次是分析演进中体现的特点,然后结合相关法律观念和思想理论说明的分析研究顺序。对各国金融法律制度演进论述又根据各国特点进行分阶段或部分进行研究论述,如,美国金融法治