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摘　要

犯罪与刑罚作为刑法的一对基本范畴，两者共同构成了刑法学的研究对象。但是，在我国刑法学界，这对“孪生兄弟”并未得到一视同仁的待遇：犯罪研究备受青睐，而刑罚研究则颇受冷落。关于犯罪构成或刑事责任的长篇大论的专著、浩如烟海的论文让人眼花缭乱，与少量有关刑罚方面的论著形成了鲜明的对比，从而使刑罚在刑法学理论体系中的地位一落千丈。就附加刑而言，因其在地位与性质上，与主刑相比处于从属地位，在惩罚的严厉程度上，显然属于一种轻刑罚。因此，无论是在理论研究上，还是在司法实践中，无论是从立法者、司法者、学者，还是从社会公众，甚至受刑人本人的角度，附加刑并没有得到应有的重视。近年来，虽然有关附加刑研究的著作有所增多，司法实务部门也开始关注附加刑，特别是罚金刑的适用与执行，但相关著作的注释法学色彩非常浓厚，在一定程度上阻碍了理论研究的深度；刑罚改革的司法实践也是停留在地方司法机关的层面，不具有普遍性和权威性，有关附加刑的改革更是处于探索阶段。

针对附加刑研究和司法实务的现状，笔者结合自己在工作实践中积累的点点滴滴看似细微又少有定论的争议问题，坚持理论联系实际的学风，利用撰写博士论文的机会，试图在附加刑研究领域作一探索，并为我国刑罚，特别是附加刑的理论发展和司法实践作出自己的努力。

本书共有“绪论”和正文八章。

“绪论”一方面从刑罚理论的历史发展轨迹，强调了刑罚学在整

个刑法理论体系中具有与犯罪和刑事责任同等的重要性；另一方面又结合新中国建立以来刑罚理论研究现状，指出了附加刑在理论和实践方面的落后局面，据此表达了笔者启动附加刑研究的原因、目的及研究方法。

正文总体上分三部分。

第一部分是介绍附加刑的基本情况，包括第一章“附加刑概述”和第二章“附加刑的历史沿革及各国立法比较”。通过对附加刑的概念、功能、地位及种类的研究，笔者认为，我国的附加刑并不是像诸多著作中所讲的，以刑罚能否独立适用为标准划分的，而是以刑罚能否附加适用为标准所作的刑罚分类。通过剖析刑法学界对附加刑的“偏见”，笔者强调附加刑在功能和地位上不是一味地依附于主刑，而是独立于主刑，具有与主刑平等的刑法地位，并能起到弥补主刑不足、防止刑罚过剩等作用，借此呼吁刑法学界对附加刑加以重视。通过阐述附加刑的起源、发展并对各国立法在附加刑体系、适用对象、方式、执行制度等方面的比较，使人们对古今中外的附加刑有一个初步的感性认识。通过论证主刑、附加刑之分的刑罚意义，对我国附加刑体系的利弊作了较为深入的剖析。

第二部分是有关财产刑的问题，包括第三章“财产刑的司法适用”、第四章“财产刑的执行”和第五章“财产刑的立法完善”，从司法适用、执行、立法完善三个角度对财产刑作一全面论述。第三、四章立足于立法现状，对司法实践中遇到的诸多争议问题提出解决对策：如针对司法实践中罚金刑的广泛运用及产生的量刑失衡问题，笔者主张根据不同种类的罚金刑，建立相应的罚金刑刑格，或者通过研究立法有关罚金刑与主刑并处的不同模式，或者参照同类违法行为所处行政罚款的上限作为无限额罚金数额的下限等，借此限制法官的自由裁量权，相对统一罚金额度，并对特殊的犯罪对象，如单位、未成年人的罚金适用提出了量刑平衡的独到见解。针对没收财产刑司法适用中的混乱局面，笔者主张要避免“滥用”与“不用”两个极端，对没

收全部财产的适用加以限制并规范没收的范围。针对财产刑执行立法的缺失，笔者特别强调了执行的规范与公正，一方面提出了在现有法律框架下的执行对策——特别是建立有关判前财产审查和线索移送等机制；另一方面又对尚未引起关注的，财产刑执行侵犯第三人及被执行人合法权益的问题作了预判。前者具有现实的可操作性并在实践中取得了一定的效果，后者则具有一定的前瞻性。在第五章有关财产刑立法完善的探讨中，笔者主张将罚金刑上升为主刑的同时可以与其他主刑并科适用，以顺应我国不断扩大的罚金刑适用需求；针对日益猖獗的有组织犯罪，强调坚持保留没收财产刑这一发达国家已经不大运用的刑罚手段。在财产刑适用范围和方式的具体立法完善上，根据不同财产刑的特点，主张大幅度扩大罚金刑的适用——特别是对轻罪的适用要予以彻底体现，对没收财产刑则要加以限制，并在个罪的立法上要体现平等性和一致性。在有关财产刑执行制度的立法完善上，主张吸收有关国家的立法例，引进罚金刑的缓刑、减刑制度及易科制度，从制度上缓解财产刑执行难的世界性难题。

第三部分是有关资格刑的内容，包括第六章“资格刑的司法适用”、第七章“资格刑的执行”和第八章“资格刑的立法完善”分别从司法适用、执行、立法完善三个角度对资格刑问题作了全面论述。鉴于剥夺政治权利是我国资格刑中运用最为广泛、最具有代表性的刑种，笔者着重对这一附加刑的司法适用、执行等问题作了较为深入的分析研究。在相关司法适用的问题上，通过对剥夺政治权利的性质与内容的全面剖析，着重指出了该刑罚所包含的权利必须具有政治性，并与宪法意义上的相关权利区别开来，从而为准确适用该刑罚设置了前提条件。针对剥夺政治权利并罚的问题，笔者一改学术界主张的单一采用“并科加吸收说”、“限制加重加吸收说”等观点，主张根据主刑刑种的特点分别采用各种并罚原则，并提出相关立法建议。在涉及缓刑、假释的剥夺政治权利的复杂情形中，笔者也提出了具体的处置对策，并对最高法院相关批复意见作了法理检讨。针对资格刑

的立法现状，笔者对建立完善我国资格刑刑罚体系提出了大胆的设想：针对自然人与单位的不同特点，主张引进适用于单位的资格刑，在现有资格刑刑种的基础上进行细化、规范，最终形成一个由剥夺公权、剥夺从事特定职业资格、驱逐出境、剥夺军衔、停业整顿、限制从事业务活动与强制撤销组成的资格刑刑罚体系。鉴于这一设想之实现尚需时日，笔者又在现有法律框架下，对有关剥夺政治权利司法适用和执行中的立法矛盾进行了剖析，如剥夺政治权利在分则条文中的刑罚排列顺序、组合上的缺陷，死刑附加剥夺政治权利终身的立法科学性等问题，提出具体的立法完善对策。

Abstract

Crime and punishment, as a couple of a basic category in terms of the criminal law, have both constituted the object of study. However, in terms of the crime and punishment alone, this twin has not been treated equally without discrimination in the criminal law study circle in our country in that it is a self-evident fact that the study of crime has drawn wide attention while that of punishment left out in the cold. Whereas lengthy monographs and tremendous amount of papers on crime constitution and criminal liabilities dazzle the eyes, those on punishment forms a sharp contract, resulting in the fact that the status of punishment has gone down dramatically in the theory system of the criminal law. As for the accessory punishment, it occupies a subordinate position in comparison with the principal penalty in terms of status and nature. It is obvious that the accessory punishment falls into the category of light punishment in terms of the severity of penalty. Therefore, the accessory punishment has not drawn due attention in terms of theoretical study, judicial practice from the legislator, the judicial circle, scholars, and the public, or even from the perspective of the convicts. In recent years, although more works on the study of the accessory punishment have been published and the judicial administration has paid more attention to the accessory punishment, especially

to the application and execution of amercement, the annotation of corresponding works is full of strong colour of jurisprudence, which has hindered the depth of theoretical study to a certain extent. In addition, the judicial practice of the reform in punishment remains at the level of local judicial administrations, leading to no universality and authority. The reform in the accessory punishment is even in the stage of exploration.

In the light of the present situation of the study of the accessory punishment and judicial practice, the author incorporates the crumbs of disputed issues which seem minute and short of final conclusion in the course of his work and practice. Moreover, adhering to the style of uniting theory with practice, the author attempts to explore the area of the study of the accessory punishment by utilizing the opportunity of writing the dissertation with a view to contributing his own efforts to the criminal penalty, especially to the theoretical development and judicial practice of the accessory punishment in our country.

I. Characteristics of this dissertation

This dissertation is noted for four characteristics from the innovative point of view as follows:

1. Original theme. It is mentioned hereinbefore that the theoretical study of criminal penalty is comparatively weak, especially there are few monographs on the accessory punishment, among which Sun Li's *A Study of Amercement* (published in 1995), Shao Weiguo's *On Amercement* (published in 2004), and Wu Ping's *A Study of Capacity Penalty* (published in 2000) are quite recommendable. Nevertheless, these monographs normally only deal with one aspect of the accessory punishment, e. g. the amercement or

the capacity penalty. There are even fewer comprehensive and systematic monographs on the accessory punishment.

2. Good reference. Firstly, there is little theoretical research in the accessory punishment, leading to few reference materials, thus this dissertation is of certain perspective value. Secondly, in terms of the comparison of the legislation on the accessory punishment, the author especially quotes laws of countries to which few scholars pay attention in addition to the criminal legislation of countries adopting the continental law system. In addition, the author selects laws of several typical countries in all the continents for reference, e. g. Vietnam, Mongolia, Singapore, the Philippines, and India in Asia; Nigeria and Cameron in Africa; Finland in Europe; New Zealand in Oceania; Argentina and Brazil in South America. Through consulting the criminal legislation, especially some characteristic provisions in these countries, the author incorporates the national conditions to propose that the amercement be upgraded to the principal penalty, the capacity penalty system be established, and the type of the capacity penalty be subdivided, which can be used as a reference for scholars as well as for the legislator seeking to amend and perfect the accessory punishment to a certain extent.

3. Suitable for practice. The author has consciously accumulated quite a few disputed issues which seem minute and short of final conclusion thanks to the favourable condition of working in the forefront of judicial administration, e. g. the balance in the measurement of the amercement and the concurrent punishment of the deprival of political right. In terms of the judicial measurement of the amercement, the author suggests that the legislative defect i. e. there is no scope of the prescribed penalty for the amercement be

avoid and the range of the amercement similar to that of the prescribed penalty be established with a view to restricting the judges' right to free adjudgment as well as to seeking the relative unification in terms of the adjudgment of the amercement. As for the concurrent punishment of the deprival of political right, the author proposes that principles of absorption, merger, and confined aggravation be adopted according to the different kind of the penalty on which the deprival of political right is added with a view to achieving the rationality of the term of the deprival of political right. The in-depth and meticulous study of those practicable issues is of certain guiding significance for the judicial practice.

4. Unique View. In view of the defects in terms of the theoretical study of the accessory punishment in the scholastic circle as well as the fact that some debated issues have neither come to any final conclusion nor drawn any attention in the theoretical circle, the author is forced to look for issues or to put forward his views on relevant issues. For instance, in terms of the amercement in exchange for penalty, in addition to the system of the amercement in exchange for the penalty of deprival of freedom, for labour redemption, and for reprimand in foreign countries, the author also suggests a buffer in consideration of our national conditions, i. e. the amercement in exchange for the administrative detention. In terms of the exchange of the amercement and the detention whose natures are different, apart from the exception of similar legislation in France, i. e. the amercement in exchange for the civil detention, there are few suggestions either in terms of legislation in other countries or in theoretical study.

II. Structure and main content of the dissertation

This dissertation contains an introduction and the main body in eight chapters.

On one hand, the introduction section stresses that the criminal penalty is of the same importance as crime and criminal liabilities in the whole theoretical system of criminal law in the history of development in theories on the criminal penalty, one the other hand, it incorporates the present situation of the study of theories on the criminal penalty in our country since its foundation and points out the backward situation of the theory and practice of the accessory punishment to express the cause, objective, and method of the author's study of the accessory punishment.

The main body consists of three sections in general.

The first section introduces the basic circumstances of the accessory punishment, including Chapter One "Outlines of Accessory Punishment" and Chapter Two "Historical Evolution of Accessory Punishment and A Comparison of Legislation in Various Countries". The author thinks that through the study of the concept, function, status and type of the accessory punishment, the accessory punishment in our country is divided according to the criteria whether it can be added to the criminal penalty instead of being divided according to the criteria whether the criminal penalty can be applied independently as is described in many works. Through an analysis of the "prejudice" adopted by the legislator in our country, it is stressed that the accessory punishment is independent of the principal penalty instead of dependant on the latter in terms of function and status. Thus the accessory punishment shares an equal status as the principal penalty in terms of the criminal law and plays a role of covering the shortage of the principal penalty as well as pre-

venting redundancy of the criminal penalty. Thus the author calls on all circles to attach importance to the accessory punishment. Through elaborations on the origin and development of the accessory punishment and a comparison of legislation in various countries in terms of the accessory punishment system, applicable objects, methods, and the execution regime, the author enables others to have an initial perceptual understanding of the accessory punishment at all times and in all countries. Through an exposition on the significance in terms of separating the accessory punishment from the principal penalty, the author makes an in-depth analysis on the advantages and disadvantages of the accessory punishment system in our country with a view to providing materials for the elaboration on the legislative perfection of different varieties of the accessory punishment hereunder.

The second section concerns the property punishment, including Chapter Three "Judicial Application of Property Punishment", Chapter Four "Execution of Property Punishment", and Chapter Five "Legislative Perfection of Property Punishment", which is a comprehensive elaboration on the judicial application, execution, and legislative perfection of the property punishment. Chapter Three and Chapter Four analyzes the present situation of legislation and puts forward countermeasures to address the numerous problems occurring in the judicial practice. For example, as for the extensive application of the amercement as well as the imbalance in the measurement of penalty hereunto in judicial practice, the author suggests that a corresponding range of the amercement be established according to the different type of the amercement or the judge's right to free adjudgment be restricted and the amount of the

amercement be uniformed relatively through studying the different models of the concurrence of the amercement and the principal penalty in terms of legislation, or by consulting the maximum amount of the administrative fine against similar offences so that it can be used as the minimum amount of limitless amercement. In addition, the author also puts forward his unique opinion on the balance in the measurement of penalty in terms of the amercement against special crime perpetrators, e. g. units and juveniles. As for the chaotic situation in terms of the expropriation of property in judicial application, the author maintains that two extremes, i. e. "misuse" and "difference" be avoided so that the application of expropriation of all property can be restricted and its scope be standardized. As for the lack of legislation on the execution of the property punishment, the author especially lays emphasis on the standard and fairness in terms of execution. On one hand, the author proposes countermeasures against execution within the existing legal framework, especially the establishment of the system of pre-trial investigation on properties as well as that of clues transfer; on the other hand, the author makes a pre-judgment on the violation of legal interests of a third-person or those of a recovered which has not drawn any attention. The former is practicable and has already made certain effects in practice while the latter quite perspective. Chapter Five explores the legislative perfection of the property punishment. The author advocates that the amercement be upgraded to the principal penalty; meanwhile, it be applied with other principal penalties concurrently with a view to addressing the increasing need of expanding the application of the amercement in our country. As for the increasingly rampant organized crime, the author emphasizes that the expropria-

tion of property which is little used in developed countries be retained. In terms of the legislative perfection concerning the scope and method of the application of the property punishment, the author maintains that according to the features of different property punishments, the application of the amercement, especially that against petty crimes, be expanded to a great extent while the expropriation of property be restricted. In addition, equality and consistency should be reflected in terms of the legislation on individual crimes. As for the legislative perfection of the property punishment execution system, the author holds that guiding cases in terms of legislation in relevant foreign countries be absorbed and the probation system, reduction system, and exchange system in terms of the amercement be introduced with a view to alleviating the worldwide problem of the difficult execution of the property punishment.

The third section contains elaborations on the capacity penalty, including Chapter Six "Judicial Application of Capacity Penalty", Chapter Seven "Execution of Capacity Penalty", and Chapter Eight "Legislative perfection of Capacity Penalty". Similarly, the author again makes a comprehensive elaboration on the judicial application, execution, and legislative perfection of the capacity penalty to maintain the continuity of the dissertation as well as the consistency in terms of style. In view of the fact that the deprival of political rights is the most extensively used and the most representative penalty range in terms of the capacity penalty in our country, the author lays emphasis on the in-depth analysis and study of the judicial application and execution of this the accessory punishment. In terms of the relevant judicial application, the author points out that the rights provided by such penalty should be political, and should

be differentiated from the corresponding rights in terms of the constitution through a comprehensive analysis and study of the nature and content of the deprival of political rights, which has set up a prerequisite for the correct application of such penalty. As for the concurrent punishment of the deprival of political rights, contrary to the view of unitary adoption of "merger along with absorption" and "limited aggravation together with absorption" advocated by the scholastic circle, the author maintains that various principles of concurrent punishment be adopted according to the features of the range of the principal penalty. Moreover, the author proposes corresponding suggestions on legislation. In terms of the sophisticated situation concerning the probation and parole along with the deprival of political rights, the author also puts forward concrete countermeasures and makes a jurisprudent review of the official reply issued by the Supreme Court. As for the present situation of legislation on the capacity penalty, the author proposes a tentative idea in terms of the establishment and perfection of the capacity penalty system in our country, i. e. the introduction of the capacity penalty applicable to units. That means a capacity penalty system consisting of the deprival of public rights, the deprival of the qualification for a specific profession, deportation, the deprival of military rank, termination of business, restriction on business operation, and coercive abolishment should be established on the basis of the subdivision and standardization of the existing range of the capacity penalty. In view of the fact that it takes time to realize the tentative idea, the author again analyzes and studies the legislative conflicts in terms of the judicial application and the execution of the deprival of political rights within the existing legal framework, e. g. the ar-

rangement sequence of the deprival of political rights in the provisions in the criminal law, the defect in combination, and the scientificalness in terms of the legislation concerning the accessory deprival of political rights for life with the death penalty. In addition, the author puts forward concrete countermeasures in terms of legislative perfection.