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厦门大学

博 士 学 位 论 文

金融隐私权法律问题研究
——以银行业个人客户金融隐私权保护为中心

Legal Approach of the Right to Financial Privacy
——on the Protection of Individual Bank Customers' Right to Financial Privacy

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内 容 摘 要

随着社会的发展和人们观念的更新，传统隐私权的内涵开始发生变化，外延也不断扩张，出现了一种新型隐私权，即金融隐私权。在保护客户金融隐私权的过程中，公权力与金融隐私权、金融隐私权与其他私权利之间存在很多矛盾与冲突之处。欧盟模式和美国模式是金融隐私权保护的典型代表，本文在比较分析两种模式的基础之上，结合我国实际，以银行业个人客户金融隐私保护为中心，构建我国金融隐私保护法律体系。

本文除导言和结束语之外，共分为五章。

第一章从分析隐私、隐私权和金融隐私权的发展历程入手，指出金融隐私权是一种新型的隐私权。金融隐私权赋予权利主体享有一定的控制支配权，从而使消极的被动的隐私权变成了积极的主动的金融隐私权。该权利具有防御权能、支配权能、救济权能。由于多种因素的影响，金融隐私权极易受到侵犯，侵犯的后果十分严重，因此保护客户的金融隐私权具有重要意义。

第二章通过对侵权行为法的梳理，明确了过错责任原则、严格责任原则、公平责任原则是认定银行承担法律责任的基本原则，主张以四要件说作为银行的一般侵权行为构成要件，仅在一些特定情况下，成立特殊侵权行为，适用严格责任原则和公平责任原则。在构建侵犯金融隐私权类型的过程中，我国应当采取侵权行为一般化与类型化的方法，明确作为和不作为两种侵权类型。

第三章分析了金融隐私权与社会公共利益、金融隐私权与银行利益、银行个人客户之间的利益冲突，认为权利本位当然不否认公共权力的存在，所否认、否定的是权力的“任性”，应当以权利来限制权力。利益衡平、权利均衡作为解决权利冲突的重要方式，银行应当尊重客户的金融隐私权，设置严格的信息隔离机制解决信息冲突问题，妥善处理不同客户之间的利益冲突。

第四章认为银行保密义务和银行保密义务的例外原则是银行法中两大并行不悖的法律制度，确立了金融隐私权法律保护的基本原则。欧盟的统一保护、注重政府监管的模式则代表了世界最高水平，美国的分业保护、注重行业自律的模式具有很强的实用性，两种模式各具特色。通过对比分析，文章指出两种模式相

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互借鉴，对金融隐私权的保护水平逐渐趋同。

第五章立足于隐私权制度在我国建立的背景，指出我国金融隐私权保护现状堪忧，尚未形成比较完备的法律保护体系，反洗钱体系建设滞后，征信法律制度不健全。基于公共利益，在反洗钱和征信过程中，我们必须对公民的金融隐私权进行必要的限制。但是，缺乏有效的法律规制，有关机构极易侵犯公民的金融隐私权。为此，论文有针对性地提出完善措施，既确保有关机构顺利开展工作，又保护公民的金融隐私权，力图构建一个比较完备的金融隐私权法律保护体系。

关 键 词：金融隐私权；银行个人客户；法律保护

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ABSTRACT

The connotation and denotation of the right to privacy changes or expands with the development of society and the advancement of people' cognition. A case in point is the generation of a new type of right to privacy—the right to financial privacy. In the protection of the right to financial privacy, there exist lots of conflicts between the public power and the right to privacy as well as between the right to financial privacy and other types of right to privacy. The EU pattern and the U.S. pattern are two typical patterns for the protection of the right to financial privacy. This thesis puts forward some suggestions on the construction of China's legal system on the right to financial privacy with individual bank customers' right to financial privacy as the core on grounds of a detailed analysis of above-mentioned two types of the right to privacy protection.

Besides the preamble and conclusion, the dissertation consists of five chapters.

In Chapter one, the author discusses the theoretical basis of the right to financial privacy. After analyzing the concept of privacy, the right to privacy and the right to financial privacy, the author argues that the right to financial privacy is a new type of right to privacy. The right to financial privacy grants the subject the right of control in certain situations, which changes the positive right to financial privacy into a negative right to financial privacy. The right to financial privacy is featured by the abilitiy of defense, theabilitiy of control, and the ability of relief. For a varieties of reasons, the right to financial privacy is always easily infringed, which makes it significant for us to put it under more strict protection.

In Chapter two, the author introduces the theoretical basis of the tort law. The author maintains that the principle of fault liability, the principle of strict liability, and the principle of equitable liability constitute the basic principles for the liability of the bank, and the author insists that the four elements of tort are the elements of the bank's tort. The principle of strict liability and the principle of equitable liability are used only in case of special tort in certain circumstances. China should adapt the methods of infringement act generalisation and categorization in the construction of the infringement types of the right to financial privacy and categorize the infringing

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act into action and inaction.

In Chapter three, the author analyzes the interest conflicts, including the conflict between the right to financial privacy and the social public intrest, the conflict between the right to financial privacy and the bank's interest, and the conflict between the banks and the individual customers. This thesis points out that the right-based system does not exclude the public power, what it excludes is the arbitrary performance of the public power. The latter should be restricted by the former. The right to privacy and the public power should be well balanced. Banks should respect and protect individual bank customer's right to financial privacy and balance the interest conflicts of different types of customers by setting up strict information isolation mechanism.

In Chapter four, the author holds discussion on the two main parallel legal systems of the banking law—bank security obligation and exception principle of bank security obligation, which is also the general principle for the protection of the right to financial privacy. The EU's unified protection mode, emphasizing government supervision, provides the most sufficient protection for the right to financial privacy in the worldwide. USA specialized protection, which stresses on industry self-regulation, is a pretty practical mode for the protection of the right to financial privacy. Each mode has its merits and demerits and complements each other.

In Chapter five, the author probes into the current situation of the right to financial privacy protection in China and analyzes the defects in anti-money laundering legal system and that in the credit reporting system. The author believes that it is necessary for China to strengthen the right to financial privacy protection in anti-money laundering and in credit reporting for the purpose of protecting public interests. The author puts forward tailor-made suggestions for constructing Chinese-styled protection system for right to financial privacy in line with the current situation in China with the purpose of enhancing the protection of the right to financial privacy and improving the efficiency of the bank.

Keywords：the right to financial privacy；individual bank customer；legal protection

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