

学校编码：10384

分类号_____ 密级_____

学号：12920071150360

UDC _____

厦 门 大 学

硕 士 学 位 论 文

犯罪构成限制解释论证

——何以限缩犯罪构成的适用范围

Argumentation of Limited Explanation of Constitution of Crime
——Narrowing Down Applicable Scope of Criminal Constitution

翟 伟 坤

指导教师姓名：邱兴隆教授

专业名称：刑法学

论文提交日期：2010年 月

论文答辩时间：2010年 月

学位授予日期：2010年 月

答辩委员会主席：_____

评 阅 人：_____

2010年4月

厦门大学博硕士学位论文摘要库

厦门大学学位论文原创性声明

本人呈交的学位论文是本人在导师指导下,独立完成的研究成果。本人在论文写作中参考其他个人或集体已经发表的研究成果,均在文中以适当方式明确标明,并符合法律规范和《厦门大学研究生学术活动规范(试行)》。

另外,该学位论文为()课题(组)的研究成果,获得()课题(组)经费或实验室的资助,在()实验室完成。(请在以上括号内填写课题或课题组负责人或实验室名称,未有此项声明内容的,可以不作特别声明。)

声明人(签名):

年 月 日

厦门大学博硕士学位论文摘要库

厦门大学学位论文著作权使用声明

本人同意厦门大学根据《中华人民共和国学位条例暂行实施办法》等规定保留和使用此学位论文，并向主管部门或其指定机构送交学位论文（包括纸质版和电子版），允许学位论文进入厦门大学图书馆及其数据库被查阅、借阅。本人同意厦门大学将学位论文加入全国博士、硕士学位论文共建单位数据库进行检索，将学位论文的标题和摘要汇编出版，采用影印、缩印或者其它方式合理复制学位论文。

本学位论文属于：

1. 经厦门大学保密委员会审查核定的保密学位论文，于 年 月 日解密，解密后适用上述授权。

2. 不保密，适用上述授权。

（请在以上相应括号内打“√”或填上相应内容。保密学位论文应是已经厦门大学保密委员会审定过的学位论文，未经厦门大学保密委员会审定的学位论文均为公开学位论文。此声明栏不填写的，默认为公开学位论文，均适用上述授权。）

声明人（签名）：

年 月 日

厦门大学博硕士学位论文摘要库

内容摘要

本文的论证目的是证立犯罪构成限制解释的内涵、类型和正当性根据，旨在促成司法官通过限制解释限缩犯罪构成的适用范围，排除司法实践中不应或不宜适用犯罪构成而适用犯罪构成的情形，从而从实质上限定刑罚权的边界，确保人权不受刑罚权的侵犯，从而彰显刑法的理性本源、价值实质和人文品格。

犯罪构成限制解释在构成要件体系上的内涵和路径。司法官对犯罪构成适用作限制解释时所依据和使用的犯罪构成理论和构成要件体系，应充实为“五要件”体系，即在主体、客观方面、主观方面、客体之外，增加一项实质要件：不具有严重的危害性、实质的刑事违法性、受刑罚惩罚的必要性的行为，不是符合犯罪构成的行为。以此实质要件统摄前四要件，对四要件做限制性的实质解释，使前四要件实质化，又在四要件之外和之上，对整个犯罪构成进行实质性、限制性的价值考量，从实质、价值两个逻辑关口将那些不应或不需刑事归责的行为彻底排除在犯罪构成适用之外。

犯罪构成限制解释的类型化内涵。犯罪构成限制解释的三种类型：文义内的限制解释；超文义的限制解释；刑事政策上的限制解释。

本文从三个维度对犯罪构成限制解释进行了价值论证：犯罪构成限制解释有利于罪刑法定主义的实现；犯罪构成限制解释有利于刑法解释目标的达至；犯罪构成限制解释的价值原则和价值根据。

关键词：犯罪构成；限制解释；价值根据

厦门大学博硕士学位论文摘要库

ABSTRACT

The purpose for argumentation of this essay is to proof the essence, types and due foundation of application of limited explanation of constitution of crime, to help the legal secretary narrow it down where the principle of criminal constitution can be used according to the limited explanation and exclude the situation where it is not supposed or not appropriate to apply in judicial practice. What's more, it also contributes to limit the definition of criminal penalty power, ensuring human rights from violation, illuminating the rational source of rationality, essence of value and sense of civilization of criminal code.

The systematic essence and approaches of constituent elements on limited explanation of criminal constitution. The theory and system of constituent elements based on and applied by legal secretary when he makes a limited explanation to application of constitution of crime should be enriched into "five-element" system, that is, to add one more substantial element besides subject, objective aspects, subjective aspects and object. The behavior doesn't satisfy the requirements of criminal constitution without severe harmfulness, substantial illegality of crime, necessity of criminal penalty. This substantial element is used to govern and make a substantial and limited explanation the first four elements, making them substantial's. It's such an element that weighs in value on the whole system of constitution of crime substantially and limiting, excluding drastically the behavior which should not or ought not to be penalized criminally in both logical thresholds of substance and value.

The essence of deification of limited explanation of criminal constitution. Three types of limited explanation of criminal constitution: literally limited explanation, out-of-line explanation, and situation-and-policy explanation.

This essay focus on demonstrating in value the limited explanation of criminal constitution in three dimensions: the limited explanation of criminal constitution

contributes to implement the principle of conviction and penalty according to law, accomplish the target of explaining criminal laws and conform to the standard and basis of value of limited explanation of criminal constitution.

Key Words: Constitution of crime; Limited explanation; Foundation of value

厦门大学博硕士论文摘要库

目 录

引 言.....	1
第一章 犯罪构成限制解释的类型化内涵.....	2
第一节 犯罪构成限制解释的涵义.....	2
一、基本定义.....	2
二、犯罪构成限制解释的构成要件体系内涵.....	2
第二节 犯罪构成限制解释的类型结构.....	6
一、文义内的限制解释.....	6
二、超文义的限制解释.....	7
三、刑事政策上的限制解释.....	9
第二章 犯罪构成限制解释与罪刑法定主义的实现.....	11
第一节 犯罪构成限制解释与罪刑法定主义的实质契合.....	11
一、罪刑法定主义的完整内涵.....	11
二、罪刑法定主义的实现需要犯罪构成的限制解释.....	12
第二节 相关驳议之辨正.....	14
一、是否会导致司法权侵涉立法权.....	14
二、是否会导致司法官的恣意与擅权.....	16
三、是否会导致法律防卫功能的弱化.....	16
四、是否会导致法律适用的不统一.....	17
第三章 犯罪构成限制解释与刑法解释目标的达至.....	18
第一节 刑法解释目标理论评价.....	18
一、主观说：立法者意思说.....	18
二、客观说：法律客观意思说.....	18
三、两种学说的同一性.....	19
第二节 犯罪构成限制解释的目的诉求.....	20
第四章 犯罪构成限制解释的价值根据.....	22

第一节 刑罚权止于人权：刑法的至上价值	22
一、刑罚权和人权的性质.....	22
二、人权的绝对性和刑罚权的相对性.....	22
三、犯罪构成限制解释旨在彻底实现刑罚权止于人权.....	25
第二节 正义在于报应的合理性	25
一、法律正义服从于实质正义，个体正义优于一般正义.....	25
二、不合理的法律报应不是正义，也不是真正的报应.....	26
第三节 刑法的节俭性和必要性	27
一、刑法的节俭性.....	27
二、刑法的预防功利.....	28
三、刑法的利益和不利益.....	29
第四节 刑法的人格化与人性化	30
一、理性.....	30
二、慈悲心.....	31
三、开明.....	32
四、顺人心.....	33
第五节 真正违法性与真正合法性	34
一、合宪与合自然法.....	34
二、行为的真正违法性和适用的真正合法性.....	35
结 语	38
参考文献	39

CONTENTS

Introduction	1
Chapter 1 Essence of Deification of Limited Explanation of Criminal Constitution	2
Subchapter 1 The Definition of Limited Explanation of Criminal Constitution	2
Section 1 Elementary Definition	2
Section 2 Essence of Limited Explanation of Criminal Constitution in System of Constituent Elements	2
Subchapter 2 Typed Structure of Limited Explanation of Criminal Constitution	6
Section 1 Literally Limited Explanation	6
Section 2 Out-of-line Explanation	7
Section 3 Situation-and-policy Explanation	9
Chapter 2 Put into Practice the Theory of Limited Explanation of Criminal Constitution and Implement the Principle of Conviction and Penalty According to Law	11
Subchapter 1 Substantial Coincidence between the Principle of Limited Explanation of Criminal Constitution and Counterpart of Conviction and Penalty According to Law	11
Section 1 The Complete Essence of Principle of Conviction and Penalty According to Law	11
Section 2 The Realization of the Principle of Conviction and Penalty According to Law Needs the Principle of Limited Explanation of Criminal Constitution	12

Subchapter 2	Identification of Relevant Argument	14
Section 1	Whether to Result Judicial Authority Intervenes Legislative Authority	14
Section 2	Whether to Result Arbitrariness and Autocracy of Legal Secretary	16
Section 3	Whether to Lead to Weaken the Function of Legal Protection	16
Section 4	Whether to Result in Inconformity of Legal Application	17
Chapter 3	Accomplishment the Target of Criminal Explanation and Limited Explanation of Criminal Constitution	18
Subchapter 1	Remark on the Theory of Target of Criminal Explanation	18
Section 1	Subjective Doctrine: the Doctrine of Opinions of Law Makers	18
Section 2	Objective Doctrine: the Doctrine of Objective Opinion of Law	18
Section 3	The Identity of These Two Doctrines	19
Subchapter 2	The Pursued Purpose of Limited Explanation of Criminal Constitution	20
Chapter 4	Grounds in Value of Limited Explanation of Criminal Constitution	22
Subchapter 1	Protection of Human Rights: the Supreme Value of Criminal Law	22
Section 1	The Character of Criminal Penalty Power and Human Rights	22
Section 2	Absoluteness of Human Rights and Relativity of Criminal Penalty Power	22
Section 3	Limited Explanation of Criminal Constitution Aims at Protection of Human Rights	25
Subchapter 2	Justice on Account of the Rationality of Retribution	25
Section 1	Legal Justice Is Object to Substantial Justice, Individual Justice Is Superior to General Justice	25
Section 2	Unreasonable Retribution of Law Is Neither Justice nor the	

Real Retribution	26
Subchapter 3 Frugality and Necessity of Criminal Law	27
Section 1 Frugality of Criminal Law	27
Section 2 Precautionary Utility of Criminal Law	28
Section 3 Advantage and Disadvantage of Criminal Law	29
Subchapter 4 Personification and Humanity of Criminal Law	30
Section 1 Rationality	30
Section 2 Compassion	31
Section 3 Open-mindedness	32
Section 4 Submission to Public Conscience	33
Subchapter 5 Real Illegality and Real Legality	34
Section 1 Conformity to Constitution and natural law	34
Section 2 Real illegality of Conduct and Real Legality of Application	35
Conclusion	38
Bibliography	39

厦门大学博硕士学位论文摘要库

Degree papers are in the "[Xiamen University Electronic Theses and Dissertations Database](#)". Full texts are available in the following ways:

1. If your library is a CALIS member libraries, please log on <http://etd.calis.edu.cn/> and submit requests online, or consult the interlibrary loan department in your library.
2. For users of non-CALIS member libraries, please mail to etd@xmu.edu.cn for delivery details.

厦门大学博硕士学位论文摘要库