論犯罪利得沒收「濫用或失權理論」 之應用與限制

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關鍵詞:犯罪利得沒收、第三人沒收、濫用或失權理論、善意第三人、財產權保障 Keywords: Criminal Confiscation, Third Party Confiscation, Abuse (or Forfeiture) Theory, Bona Fide Third Party, Property Rights Protection

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摘 要

我國就刑法第38條之1犯罪利得沒收法理基礎之問題,主要援引德國主流 學說見解之「濫用或失權理論」,且將該理論一體適用於所有沒收主體。惟就 現行規範而言,我國引介「濫用或失權理論」之內容,卻無法直接解釋刑法第 38條之1第2項「善意第三人沒收」之正當基礎,亦無法以具有體系之方式辨 別何種財產利益(例如善意第三人因沒收所生之賠償利益)是否為刑法第38條 之1第4項犯罪利得沒收之範圍,而存有論理補足空間。

本文參酌德國文獻紀錄,追溯至 Eser 創設「濫用或失權理論」之核心論 述,並察覺系爭理論於提倡初期、利得沒收施行時期,與2017年4月德國刑 法沒收修正等三個階段,都有其特殊意義,而得回應問題意識。本文並於確證 善意第三人利得沒收之正當基礎後,分別依循「濫用或失權理論」與「利得沒 收目的 | 檢驗刑法第38條之1沒收處分之適當範圍,嘗試釐清相關爭議。

Research on the Application and restrictions of "Theory of Abuse or Abridgment" in Criminal Proceeds Confiscation

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Abstract

In order to explain the jurisprudence of article 38-1 of the criminal law, also known as criminal confiscation, the academic discussion took into account important German insights and introduced the abuse (or forfeiture) theory. The doctrine also believes that this theory can be applied to all the subjects of criminal confiscation. However, when we refer to the current legal provisions, the "abuse (or forfeiture) theory" introduced by the academic discussion can neither directly explain the legal basis of the "bona fide third confiscation" of article 38-1 of the criminal law, nor can it discern what kind of property interest (such as the bona fide third party compensation for the benefits arising from the confiscation) is the scope of criminal confiscation of the article 38-1(4) of the criminal law. In short, there is room for discussion to make up.