

中国刑事诉讼运行机制 实证研究

Empirical Study on the Operation Mechanism of Criminal Procedure in China

左卫民等 著

D925.21/3

2007

国家“九八五工程”
四川大学宗教与社会研究创新基地
宗教与社会研究丛书

中国刑事诉讼运行机制 实证研究

左卫民等 著

Empirical Study on the Operation Mechanism of Criminal Procedure in China

撰稿人

左卫民 马静华 刘方权 郭松

唐雪莲 赵开年 胡建萍



法律出版社
LAW PRESS · CHINA

图书在版编目(CIP)数据

中国刑事诉讼运行机制实证研究/左卫民等著. —北京:

法律出版社, 2007. 7

ISBN 978 - 7 - 5036 - 7456 - 3

I. 中… II. 左… III. 刑事诉讼—司法制度—研究—

中国 IV. D925. 210. 4

中国版本图书馆CIP数据核字(2007)第084379号

© 法律出版社·中国

**中国刑事诉讼运行机制
实证研究**

左卫民 等著

责任编辑 高山
装帧设计 乔智炜

开本 787 × 960 毫米 1/16

版本 2007 年 7 月第 1 版

出版 法律出版社

总发行 中国法律图书有限公司

印刷 北京北苑印刷有限责任公司

印张 24.5 字数 325 千

印次 2007 年 7 月第 1 次印刷

编辑统筹 法学学术出版社

经销 新华书店

责任印制 陶松

法律出版社/北京市丰台区莲花池西里 7 号(100073)

电子邮件/info@lawpress.com.cn

网址/www.lawpress.com.cn

销售热线/010-63939792/9779

咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里 7 号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782

重庆公司/023-65382816/2908

北京分公司/010-62534456

苏州公司/0512-65193110

西安分公司/029-85388843

上海公司/021-62071010/1636

深圳公司/0755-83072995

书号:ISBN 978 - 7 - 5036 - 7456 - 3

定价:45.00 元

(如有缺页或倒装,中国法律图书有限公司负责退换)

序

本书是试图运用实证研究方法来探讨中国刑事诉讼制度的一次努力的结晶。迄今为止的二十年左右,中国刑事诉讼制度研究得到快速发展,尤其对中国刑事诉讼立法变革推动的成就是有目共睹。然而,我们也不得不承认,改革的努力在立法层面并未全面展开,在实践中更是举步维艰。对此,我曾在《中外法学》2002年第4期撰文阐释。随着时间的推移,我越来越认识到改革的挫败与理论研究的盲区相关联,尤其与对中国刑事诉讼运行机制的把握不够紧密相关。因应于此,近二三年来,我开始调整研究的思路与方式,在继续坚持多元理论视角研究的同时,也开始更多关注以实证方式把握与研究中国刑事诉讼制度的运行状况。可以说,这两年来,的努力很大程度上集中于此。本书便是我及我所带领的科研团队在此方面努力的集中展现。当然,由于人力、经费等因素,本书并未全面展开对一切重要问题的实证调研,而主要侧重于一些过去研究较少的问题,如侦查中的一些问题。

毫无疑问,从事实证研究的酸、辣、苦、甜百般

于心。无论资料收集的困难、数据分析的艰辛,还是从数据到结论的理论推导的踌躇,乃至统计、图表运用等尝试的笨拙,对我们而言,均是相当之挑战。因为,对长期习惯于理论化研究范式的学者而言,这无疑是一次范式转换。尽管如此,我们还是坚持了下去。当然,其成效如何,还有待读者诸君审视与批评。无论如何,我们认知自己研究的初步性,并将在未来的研究中沿此路径不断改进与完善。

作为司法的实证研究,本书的研究是在我主持下进行的。对研究主题、基本思路乃至重要观点的提出与论证,我应负主要文责,因为本书每篇文章都由我进行过少则五六次,多达十多次,平均七八次的全面修改。作为拟定并亲历亲为地实施调查方案的主持人,对实证调研的质量也责无旁贷。但是,对于参与本项研究的主要研究人员,包括马静华、刘方权、郭松、赵开年、唐雪莲的投入与热情,我要表示感谢。对参与调研或协助整理书稿的同学,包括兰荣杰、林喜芬、冯露、贺夏熙、白冰、刘明忠、程金存、李刚、尚继刚、王晓莉、吕珊、张慧敏、陈源、徐彦哲、彭美、姚剑等,以及支持和帮助过我们的有关部门同志,我也要致以深深的谢意。

与本书相关的大部分研究,得到了福特基金会及其项目官员刘晓堤女士的支持,对此,我们要致以特别的谢意。同时,相关研究被中国法学会列为2005年度部级项目(项目编号:CLS(2006)WT06),我们也要表示感谢。另外,由于论题的相关性,本书收录了两篇论文《侦查中的律师:以律师会见制度为重点》与《侦查监督制度的考察与反思》,前者得到中美法律合作基金及美国天普大学法学院桑国亚博士(John Smagula)的支持,后者得到最高人民检察院以重点课题立项方式给予的支持,在此,我们一并表示感谢。当然,作为国家“九八五工程”四川大学宗教与社会研究创新基地的学术带头人,我还要对基地的首席科学家、德高望重的卿希泰教授致以深深的谢意,因为他大力支持了本人的研究与本书的出版。

左卫民

2007年1月26日

于阳光明媚的川大校园

Foreword

This book project demonstrates our efforts in empirical studies on China's criminal procedure system. In the past two decades, China witnessed rapid academic progress in the study on the criminal procedure system, with outstanding reform results for China's criminal procedure legislation. However, we have to recognize that the full-fledged progress has not yet been on the way in the legislative side, causing countless problems in practice. For this, I offered my view on the *Domestic and Overseas Law Studies* 2002 (4). As time passed by, I developed an increasing awareness of the relation of reform failures and theoretical areas not yet being studied, particularly in my understanding of China's criminal procedure operation mechanism. Due to this reason, I began in the past 2 - 3 years to readjust my ways and methods of research, and to, while continuing my pluralistic research, focus more on empirical side on China's operation context of the criminal procedure system-my

primary efforts in the past few years. This book offers a picture of practical efforts of the research team under my leadership. However, due to shortage of hands and funds, this book, incapable of an empirical study on all significant issues, has to concentrate on those issues that have not been studied fully or considerably, such as criminal investigation. It is without question that we experienced all sorts of difficulties and challenges in our practical study, such as in collecting evidences, evidence analysis, and inference from evidences to theory, statistics, and graphic uses. It is indeed a new research mode for scholars like us who are accustomed to theoretical models. In spite of this, we persevered with outcomes that are subject to review and criticism of our readers. At all events, we understand the initial nature of our study, and will sure improve ourselves in our future research. As an empirical study on law, this book is completed under my full charge. I am responsible for quality of the research concerning the ways and methods of research, proposal of important concepts and argumentation, etc. I reviewed and revised all papers at least 5 to 6 times, at most a dozen times, and averagely 7 to 8 times. There is no shirking of my duties to personally interview writers of field investigations to ensure the quality of their reports. I would like extend my warm gratitude to dedication and enthusiasm of major research members (MA Jinghua, LIU Fangquan, GUO Song, ZHAO Kainian, TANG Xuelian), investigators and my students who help to clear up the book draft (LAN Rongjie, LIN Xifen, FENG Lu, HE Xiayi, BAI Bing, LIU Mingzhong, CHENG Jincun, LI Gang, SHANG Jigang, WANG Xiaoli, LU Shan, ZHANG Huimin, CHEN Yuan, XU Yanzhe, PENG Mei, YAO Jian), as well as people of authority organs who help us a great deal. Most of our research is generously supported by Madam LIU Xiaodi and officials of the Ford Foundation, to whom I would like to extend my special thanks. Furthermore, China Law Society listed this project in the 2005 Ministerial Project (CLS (2006) WT06). And, for relativity of the book's

thesis, we collected two academic papers: 1) Lawyers in Investigation: Focus on Lawyer's Interview; 2) Examination and Reconsideration of Investigation Supervision System. The former is supported by the Sino-US Law Cooperation Fund and Dr. John Smagula with the School of Law, Temple University, USA. The latter is supported by the Chinese Supreme Court as its key research project. I would like to express my special thanks to all of them. Of course, as the academic leader of the Sichuan University Innovation Base for Religious and Social Research, which is listed in the National "985 Project", I would like to express my sincere gratitude to eminent professor Qing Xitai, who is a chief scientist of the Base, for his great support in my research as well as the publication of this book.

ZUO Weimin,

January 26, 2007

At sunny campus, Sichuan University

目 录

第一章 侦查到案制度：从现实到理想 / 1

- 一、导论：一个初步的概念性框架 / 1
- 二、侦查到案措施：适用状况与问题之揭示 / 4
- 三、适用错位的原因解读 / 9
- 四、实践中的侦查到案措施体系：一个整体性的
分析与评价 / 19
- 五、结论：法定到案措施体系的重新配置 / 23

第二章 认真对待侦查讯问 / 38

- 一、导言：问题、材料与方法 / 38
- 二、讯问中的高认罪率 / 41
- 三、高认罪率是如何实现的 / 46
- 四、为什么追求高认罪率 / 52
- 五、功能与规范：双重挤压下的讯问改革 / 57

第三章 被规避与替代了的搜查程序 / 65

- 一、导言：问题的引出 / 65

二、文书内外：过程与结果的反差 / 68

三、应然与实然：对原因的追寻 / 76

四、问题解决的可能进路 / 80

第四章 侦查羁押制度：问题与出路

——从查证保障功能角度的分析 / 86

一、引言 / 86

二、实践中证明量差之比较 / 93

三、实践中查证负担之比较 / 99

四、期间耗费之比较 / 109

五、问题与进路 / 116

第五章 侦查中的取保候审：从功能背离 到制度改革 / 128

一、问题的提出与分析范式之设定 / 128

二、话语功能：从适用理由角度的分析 / 132

三、实践功能：从取保候审处理结果的角度的
分析 / 135

四、功能背离的双重解释 / 138

五、改革进路 / 144

第六章 监视居住：功能与适用 / 151

一、导论：论题与方法 / 151

二、功能分析：替代羁押与限制权利 / 153

三、适用率分析：问题与原因 / 156

四、一个可能的改革进路 / 159

第七章 侦查中的律师

——以律师会见制度为重点 / 164

一、引言 / 164

二、现状考察 / 166

三、问题与出路 / 178

第八章 侦查监督制度的考察与反思 / 187

一、若干基于数据的分析 / 188

二、侦查监督制度运行：一种定性分析 / 195

三、侦查监督不力的深层原因 / 200

四、侦查监督制度的立法完善：权威重建与职能
简化 / 202

第九章 实践中的退回补充侦查制度 / 210

一、问题的缘起：基于对现象的观察 / 210

二、退回补充侦查制度的实践功能 / 214

三、问题之揭示：退回补充侦查制度的“另一种
功能” / 219

四、进一步的追问：检察机关何以可能如此 / 226

五、简短的结论与未尽的问题 / 229

第十章 实践中的公诉裁量 / 232

一、问题与方法：必要的交代 / 232

二、公诉裁量的具体状况：以案件处理结果为
视角 / 236

三、分析与讨论：公诉裁量状况的初步结论与
具体评价 / 242

四、结论与意义：公诉裁量完善的方向 / 249

第十一章 刑事审限问题:历史与现状 / 253

- 一、地方性知识:我国刑事审限制度的语境考察 / 255
- 二、超审限问题的治理 / 262
- 三、审限压力中的制度性因素:以三个基层法院为例的分析 / 274
- 四、一个可能的改革进路:从“超限”治理到制度完善 / 279

第十二章 中国简易程序改革:一个初步的考察与反思

——以 S 省 S 县法院为主要样板 / 282

- 一、如何兴起:我国简易程序的一个简短回顾 / 283
- 二、效果如何:简易程序适用的初步实证分析 / 287
- 三、问题解析:从权利与权力角度展开的讨论 / 290
- 四、进路:从单一型效率结构迈向平衡型效率结构 / 294

第十三章 刑事证人出庭作证试点调研报告 / 301

- 一、导言 / 301
- 二、S 省 C 市刑事证人出庭情况 / 304
- 三、证人出庭率分析 / 306
- 四、证人作证程序研究 / 327

参考文献 / 355

Contents

Chapter One Investigation-to-Case System ; From Reality to Ideal / 1

1. Introduction ; An Initial Framework of Concepts / 1
2. Investigation-to-Case Measures ; Applicable
Context and Problems Revealed / 4
3. Interpretation of Reasons for Applicable
Misplacement / 9
4. Investigation-to-Case Measure System in Practice ;
An Integral Analysis and Comment / 19
5. Conclusion ; Redistribution of the Legal Investigation-
to-Case Measure System / 23

Chapter Two Precautions for Investigation Interrogation / 38

1. Introduction : Problems , Evidences and Methods / 38
2. High Rate of Confession in Interrogation / 41
3. How Comes the High Rate of Confession / 46
4. Why to Pursuit the High Rate of Confession / 52
5. Reform in Interrogation under Double Pressures of
Functionality and Regulation / 57

Chapter Three Search Procedures Eluded and Substituted / 65

1. Introduction ; Problems / 65
2. In and out of Documents ; Contrast of Process and Result / 68
3. Inevitability and Fact ; Pursuit of Causes / 76
4. Possible Solutions against Problems / 80

Chapter Four Operation Mechanism for Investigation Detention Problem and Solution ; Analysis on Investigation Guarantee Functionality / 86

1. Introduction / 86
2. Practical Comparison of Volumes of Evidences / 93
3. Practical Comparison of Investigation Burdens / 99
4. Comparison of Time Consumption / 109
5. Problems and Solutions / 116

Chapter Five Bail System in Investigation ; From Functional Departure to System Reform / 128

1. Problems and Presumption of Analysis Models / 128
2. Discourse Function ; Analysis on Applicable Causes / 132
3. Practical Function ; Analysis on Results of Post-pending Bail Handling / 135
4. Double Interpretation of Functional Departure / 138
5. Reform Measures Suggested / 144

**Chapter Six Under Surveillance : Function
and Applicability / 151**

1. Introduction : Theme and Method / 151
2. Functional Analysis : Substitute Detention and
Restricted Rights / 153
3. Analysis on Rate of Applicability : Problems and
Causes / 156
4. A Possible Reform Measure / 159

**Chapter Seven Lawyer in Investigation : Focus
on the Lawyer Interview System / 164**

1. Introduction / 164
2. Examination of Actualities / 166
3. Problems and Solutions / 178

**Chapter Eight Examination and Reconsideration of
the Investigation Supervision
System / 187**

1. Analysis Based on A Number of Data / 188
2. Operation of the Investigation Supervision System ;
A Qualitative Analysis / 195
3. Fundamental Reasons for Deficiency in Investigation
Supervision / 200
4. Legislative Improvement on Investigation Supervision
System ; Reconstruction of Authority and Function
Simplification / 202

Chapter Nine The System of Returning for Supplemental Investigation in Practice / 210

1. Cause of the Problem; Observation on Actualities / 210
2. Practical Function of the System of Returning for Supplemental Investigation / 214
3. Problem Revealed: "Another Function" in the System of Returning for Supplemental Investigation / 219
4. Further Pursuit; How Could the Procuratorate Organ Act So / 226
5. Brief Conclusion and Pending Problems / 229

Chapter Ten Public Prosecution Judgment in Practice / 232

1. Problems and Method; Necessary Account / 232
2. Actuality of Public Prosecution Judgment;
A Perspective on Results of Case Handled / 236
3. Analysis and Discussion; Initial Conclusion of and Specific Comment on Public Prosecution Judgment / 242
4. Conclusion and Significance; Orientation to Improve Public Prosecution Judgment / 249

Chapter Eleven Issue of Trial Time Limit: A Diachronic and Synchronic View / 253

1. Localized Knowledge; Contextual Examination of the System of Trial Time Limit of China / 255
2. Handling the Exceeding the Trial Time Limit / 262
3. System Factors of Time Limit Pressures; Analysis on

Three Grass-root Courts / 274

4. A Possible Reform Measure: From Radical Cure
against "Exceeding the Trial Time Limit" to System
Improvement / 279

**Chapter Twelve Reform in China's Simplified Criminal
Procedures: An Initial Examination
and Reconsideration-Sample in the S-
county Court in S Province / 282**

1. Rising: A Brief Review of China's Simplified
Criminal Procedure / 283
2. Effects: Initial Empirical Analysis on Application of
Simplified Criminal Procedure / 287
3. Interpretation of Problems: Discussion on Rights and
Power / 290
4. Reform: From Single-effect to Balanced-effect
Structure / 294

**Chapter Thirteen Investigation Report on Pilot
Court Appearance of Criminal
Witness / 301**

1. Introduction / 301
2. Court Appearance of Criminal Witnesses at C City
in S Province / 304
3. Analysis on the Rate of Witness Court Appearance / 306
4. Study on Procedures of Witness Court Appearance / 327

Bibliography / 355