



京师刑事法学博士文库 (7)

犯罪嫌疑人权利救济研究 ——以刑事侦查为中心

Research of Legal Remedy for Criminal Suspects
——Focus on Criminal Investigation Procedure

孟 军 著



中国人民公安大学出版社

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· 北 京 ·

图书在版编目 (CIP) 数据

犯罪嫌疑人权利救济研究/孟军著. —北京: 中国人民公安大学出版社, 2008. 3

(京师刑事法学博士文库 7)

ISBN 978 - 7 - 81139 - 052 - 0

I. 犯… II. 孟… III. 犯罪分子—人权—研究—中国

IV. D. 926. 7 D924. 114

中国版本图书馆 CIP 数据核字 (2008) 第 037613 号

京师刑事法学博士文库
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出版发行: 中国人民公安大学出版社

地 址: 北京市西城区木樨地南里

邮政编码: 100038

经 销: 新华书店

印 刷: 北京蓝空印刷厂

版 次: 2008 年 4 月第 1 版

印 次: 2008 年 4 月第 1 次

印 张: 9.625

开 本: 880 毫米 × 1230 毫米 1/32

字 数: 259 千字

印 数: 0001 ~ 3000 册

ISBN 978 - 7 - 81139 - 052 - 0/D · 049

定 价: 24.00 元

本社图书出现印装质量问题, 由发行部负责调换

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京师刑事法学博士文库

序 言

经过精心筹划,“京师刑事法学博士文库”在北京师范大学这所拥有百年历史的著名高等学府面世。该文库在今日之北师大创办,可谓生逢其时,躬逢其势,恰逢其地。

所谓生逢其时,乃指文库诞生于中国刑事法学理论研究进入精耕细作阶段。这是一个需要并且能够产生精深的刑事法学理论专著的时代,文库的内容恰好迎合了这种时代的需要。

所谓躬逢其势,乃指文库诞生之时,恰逢中国法律改革和法治现代化运动如火如荼地展开,方兴未艾,文库有幸见证并参与到这一国家与民族法治振兴的大业之中。

所谓恰逢其地,乃指北京师范大学为文库的茁壮成长提供了良好的环境和肥沃的土壤。众所周知,北京师范大学是我国极少数目前即拥有百余年历史的著名高校之一。她发端于1902年的京师大学堂师范馆。经过百余年的历史积淀,她不仅有着深厚的文化底蕴与优良的人文环境,而且在诸多人文社会学科领域达到了国内或者世界一流的水平,培养了大批国家栋梁之才。长期办学实践形成的厚重稳健的办学风格和“学为人师、行为世范”的办学理念,为法学这一逻辑严谨、内容深邃、价值超凡的社会科学在北师大的发展提供了得天独厚的条件。古人云:“源不深而望流之远,根不固而求木之长,德不厚而思国之安”,犹如“伐根以求木茂,塞源而欲流长”。没有深厚的人文底蕴与长期的学术积淀作为基础,要想在法学领域有所建树,即便费尽一时之心力,亦难免流于肤浅,不成大气。在北师大创办刑事法学博士文

库，自始避免了先天不足。

毋庸讳言，与众多成熟并稳步前进的学科相比较，北京师范大学的法学学科还是非常年轻的学科。由于种种原因，不管是学术人才的培养和引进，还是学术理论的创新和发展，法学学科都要比其他社会学科逊色。这不仅使得京师法学在20世纪90年代错失发展的良机，而且与北京师范大学闻名遐迩的国内与国际地位极不相称。令人欣慰的是，这种情况自2005年有了重大改观。在北京师范大学校领导的大力支持下，以著名中年法学家赵秉志教授为院长的北京师范大学刑事法律科学研究院于2005年8月18日在北京隆重成立，成为中国国内刑事法学领域中首家且目前唯一的、专门从事刑事法学研究与人才培养的独立性、综合性学术研究机构。2006年4月26日，在北京师范大学法律系的基础上，北京师范大学又正式成立了法学院。两院相继成立并得以迅速和良性的发展，标志着北京师范大学法学学科全面繁荣的新时代的到来。“人事有代谢，往来成古今。江山留胜迹，我辈复登临。”随着法学学科建设在北师大的全面展开，我们完全有信心经过若干年的努力，让北师大法学研究跻身于中国乃至世界法学强者之林。

“桃李不言，下自成蹊”。北京师范大学以其深厚的学术底蕴与宽松、自由的教育环境，吸引着国内外的青年学人慕名而来，追求精神的提升与文化的发展。“千里之行，始于足下”，任何宏大的事业都必须从一点一滴做起。北京师范大学刑事法律科学研究院深知，“百年之计，莫如树人”，因此，十分重视刑事法学学科的人才建设，在建院不长的时间里，不仅引进了多位学术功底深厚、科研能力突出、在国内外有一定学术影响的中青年法学学者，而且招聘了一批毕业于国内外著名法学院、综合素质优秀、学术功底扎实的青年才俊。为了培育新人，使其在学术上不断推陈出新，北京师范大学刑事法律科学研究院凭借学校坚实宽广的学术综合实力与浓郁深厚的人文氛围，决定建立“京师刑事法学博士文库”，支持年轻的法学博士和博士后将其博士学位论文、博士后出站报告以学

术专著的形式付梓出版，以此作为促进京师刑事法学发展的重大举措之一。由北京师范大学刑事法律科学研究院的资深学者组成的编委会负责“京师刑事法学博士文库”的运作。

“京师刑事法学博士文库”主要面向北京师范大学刑事法律科学研究院所培养的法学博士、博士后以及引进的具有法学博士学位的教学科研人员。鉴于目前刑事法律科学研究院已经初步形成学历层次高、年龄结构年轻化、专业知识结构合理、团结和谐、奋发向上的学术研究梯队，本文库将同时兼顾实体法学与程序法学，以多学科、多维度的精神兼容并蓄，以开放的态度欢迎跨学科方面的研究成果，使其具有视野宽广、包容性强的时代特征。简言之，“京师刑事法学博士文库”将以质取文，唯质取材，但凡有所创新、质量上乘的著作，均可入选。

京师刑事法学博士文库编委会将主动联系新加盟的北京师范大学刑事法律科学研究院的法学博士和研究院毕业的博士生，了解其博士学位论文的选题、内容及结构等，以宁缺毋滥、铸造精品的原则及严谨、踏实、创新的学术态度从中谨慎选择优秀之作，并认真审读，提供切实的修改补充建议，供作者修正参考，并负责联系出版，虚心接受国内外刑事法学同行和社会读者的批评指正。我们希望“京师刑事法学博士文库”的作品虽属阳春白雪之作，却能洞明世事，传递俗理；虽属曲高之作，却不至于和者甚寡。同时郑重声明：文库的范围不仅限于博士学位论文，只要是加盟刑事法律科学研究院的法学博士同人创作出的学术精品，均可列入此文库见诸世间。愿同人闻弦歌而知雅意，愿我等奏流水而遇知音。

“泰山不拒细壤，故能成其高；江海不择细流，故能就其深”。学术事业的发展与壮大依赖于理论的点滴积累。“京师刑事法学博士文库”在目前也许只是我国刑事法学学术事业中刚刚吐青的新芽，但是我们相信，它会在京师刑事法学博士文库编委会、加盟刑事法律科学研究院的诸位博士以及国内外方家学者和同行的精心培

育之下，逐步成长为国内外瞩目的参天大树，从而为繁荣、深化我国刑事法学学术研究，推动国内外刑事法学思想交流与学术合作，促进社会主义法治建设，作出有益的贡献。

北京师范大学刑事法律科学研究院
京师刑事法学博士文库编委会
二〇〇七年三月三日

Doctorial Series of books of Metropolitan Criminal Law Science

Preface

After carefully planned and prepared, "Doctorial Series of books of Metropolitan Criminal Law Science" has been established in this distinguished University with over a century history. We can well say that the establishment of "the Series" is on a proper occasion, in a proper situation and at a proper place.

Being on a proper occasion means "the Series" was established in the exquisite stage of China's criminal law scientific theory. This is a stage which needs and may produce profound masterpieces of criminal law scientific theory. The content of "the Series" is just right catering for the requirements of this era.

Being in a proper situation means while "the Series" being established, China's law reform and modernization are experiencing her development in the ascendant, just like a raging fire. "The Series" is lucky to witness and participate in the development of this great cause.

Being at a proper place means Beijing Normal University has facilitated "the Series" with healthy environment and fertile soil. It's well known, Beijing Normal University is one of the few distinguished Universities with over one century's history. She grew out of the Faculty of Education of Metropolitan University founded in 1902. After a century of development, through a century of accumulation, she not only holds deep-seated cultural foundation and good environment of the humanities, but also her disciplines of the humanities and social science have reached to the world standard or at the level of First Class in China. She has culti-

vated large numbers of National Talents. Firm and steady style and the conception of “studying to teach and acting to example” of running a school has provided the unique condition for the development of law science which requires rigorous logic, deep content and high value. Our ancestors said: “Fountainhead being not deep enough but hoping the water can flow farther, the root being not solid but hoping the trees can grow big, morality being not high but thinking about the safe of our State” is just as “cutting the wood in order for the exuberant trees, blocking up the fountainhead in order for the water flowing far”. Without deep-seated cultural foundation and long term academic accumulation as its base, it seems a bit superficial and ne’er-do-well to get major attainments in the field of law science, even though momentary mental and physical efforts have been used. The establishment of “Doctorial Series of books of Metropolitan Criminal Law Science” avoided the congenital deficiency from the very beginning.

No need for reticence, compared with the many ripe and steadily developed disciplines, the Law Science for Beijing Normal University is still very young. For the varieties of reasons, discipline of law science seems inferior to other social sciences, either in the cultivation and introduction of talents or in the innovation and development of academic theories. It not only made the Law Science of Beijing Normal University lost the chance of development in 1990s, but it is not matching with her famous international and national status as well. To be relieved, things have changed dramatically since 2005. With the support of the leaders of Beijing Normal University, College for Criminal Law Science of Beijing Normal University was solemnly founded in Beijing on August 18, with the noted jurist Professor Zhao bingzhi as the Dean. She has become the only independent and comprehensive academic unit in the criminal law scientific field specializing in taking on the criminal research and the talents

cultivation. Based on the Faculty of Beijing Normal University, Law School of Beijing Normal University was formally founded on July 26, 2006. Successive founding and rapidly well developing of these two schools signifies the prosperous new era is coming. "Human and nature have their own metabolization, old events have passed by. The world left wonders and interests, our generations step up". With the construction of Law Science of Beijing Normal University opening comprehensively, we believe absolutely we can enable Law Science of Beijing Normal University to rank among the world's most advanced influential universities nationally or even globally.

"If we are strict with ourselves, others will surely respect us". With deep-seated cultural foundation and free educational environment, Beijing Normal University has attracted young learners out of admiration home and abroad to pursue for spiritual promotion and cultural development. "A thousand-li journey is started by taking the first step". Any great cause should be done bit by bit. College for Criminal Law Science of Beijing Normal University knows deeply "as to a project of vital and lasting importance, human should be cultivated first". So she strongly emphasizes the construction of talents. Not long before the establishment of the college, she not only has absorbed many middle and young law experts who hold deep-seated academic foundation, good scientific research ability and academic influence home and abroad, but also has engaged a number of young talents who graduated from the famous universities home and abroad and hold good comprehensive qualities and solid academic foundations. In order to cultivate new talents and gradually make them weed through the old to bring forth the new and depend on her solid and wide comprehensive academic ability and strong and deep environment of the humanities, College for Criminal Law Science of Beijing Normal University decides to establish "Doctorial Series of books of Metropolitan

Criminal Law Science” to support young law doctors and postal doctors to put their fruits to be published in the form of academic books, as one of the great measures of promoting law science of College for Criminal Law Science of Beijing Normal University. Noted Editorial board organized by College for Criminal Law Science of Beijing Normal University is responsible for the management of “Doctorial Series of books of Metropolitan Criminal Law Science”.

“Doctorial Series of books of Metropolitan Criminal Law Science” is designed to face the young law doctors and postal doctors cultivated by College for Criminal Law Science of Beijing Normal University and the teaching and researching staff who have doctor degrees in law introduced by the College. Because College for Criminal Law Science of Beijing Normal University has preliminarily formed her united and harmonious academic research group with high record of formal schooling and reasonable specialized knowledge of structure, “the Series” will give considerations to both substantial and procedural law science and welcome multiple disciplines’ academic fruits with her open minded attitude and her spirit of multiple disciplines and sides. Thus she will hold her strongly magnanimous character of era with her wide vision. In brief, “Doctorial Series of books of Metropolitan Criminal Law Science” will choose the fruits merely according to its high quality. If the works are creative and is of high quality, it can be chosen. “Editorial board of Doctorial Series of books of Metropolitan Criminal Law Science” will positively contact the new doctors graduated from College for Criminal Law Science of Beijing Normal University, getting to know the topic, content and structure of their essays. We will abide by the principle of putting quality before quantity and producing fine works and strict and steady and innovative academic attitude, choose the excellent works from them and carefully read and check, provide practical supplementary suggestions of amendments for the

authors to amend as a reference. We will be responsible for contacting publishing house, listen to criticisms with an open mind from our fellow scholars and social readers. We hope the works of Editorial board of Doctorial Series of books of Metropolitan Criminal Law Science can find and know affairs of human lives, communicate common saying, even though they belong to the spring snow works; They are welcomed by many, even though they belong to the elegant works. Meantime we declare particularly the scope of "the Series" is not restricted in the field of doctoral degree essays, all the fine works or articles from the fellow law doctors in law are welcome. These articles and works can be listed in "the Series" and can be published throughout the world. May our fellow researchers know the real meaning while listening to the music; May we can meet our bosom friends while playing the flowing water.

"Mountain Taishan accepts small soils, so it can become high; Rivers and seas accept small streams, so they can become large". The development and expanding of academic causes depends on theoretical accumulation bit by bit. "Editorial board of Doctorial Series of books of Metropolitan Criminal Law Science" may be the heading sprouts in the process of academic causes of our State's Criminal Law Science. But we believe that she can gradually become towering tree, attracting the attention home and abroad. It can make beneficial contributions for making our state's academic research of Criminal Law Science, promoting exchange and cooperation of Criminal Law Scientific thinking home and abroad, and accelerating rule of law's construction of our Socialism.

College for Criminal Law Science of Beijing Normal University
Editorial board of Doctorial Series of books of
Metropolitan Criminal Law Science
March 3rd, 2007

序

人权保障是刑事诉讼理论研究中一个永恒的话题。在某种意义上，刑事诉讼的发展史就是对人权保障日益重视和完善的历史。公民权利保障的方式是多元的，但法律救济无疑是最基本和最重要的保障方式。可以说，一个人的权利受到侵害后能否得到及时、有效的救济是衡量一个国家司法水准高低和法治实现程度的重要标尺。在刑事诉讼制度中，犯罪嫌疑人、被告人的自由和权利是人权保障的核心，这是因为整个刑事诉讼过程都是围绕着犯罪嫌疑人、被告人的刑事责任展开的。在刑事诉讼中，犯罪嫌疑人、被告人处于被追究的诉讼地位，其权利极易受到代表国家行使权力的追诉机关的侵害。在诉讼过程中加强对刑事被追诉人权利保护使其不受侵害固然重要，但权利受到侵害后能否得到及时救济也是很关键的问题，救济是刑事被追诉人权利保障的最后防线。

英国法律理论素来就有“无救济即无权利”之说，故他们的研究更多关心的是法律主体的利益在受到侵害时怎样才能得到补救，并将注意力集中在程序法上。以美国为代表，将许多刑事被追诉人享有的权利规定为宪法基本权利，因而对刑事被追诉人权利救济也就相应地上升到了宪法救济的高度。同英美法系国家相比，大陆法系国家则注重诉讼行为理论，往往从诉讼行为，尤其是侦查行为效果的角度来关注对刑事被追诉人的权利救济问题。可以说，

对于刑事被追诉人权利的救济机制和理论研究，世界上不同的国家各有特色。在国内，现代意义的刑事民事诉讼法学研究起步较晚。过去无论是在司法实践还是在理论研究中，刑事诉讼目的注重打击犯罪、强调实体正义的实现，而对犯罪嫌疑人、被告人权利的保障较为薄弱。改革开放以来，随着我国民主法治进程的加快，一系列国际人权公约的签署，犯罪嫌疑人、被告人的权利保障日益受到重视。理论界与实务界就刑事诉讼中打击犯罪与保障人权并重、实体正义与程序正义兼顾已经达成共识。这在1996年修改民事诉讼法和已经出版的大量文章、学术著作中均有体现。但是，我们也注意到，现有的研究多是从应然的角度探讨问题，而对犯罪嫌疑人权利遭到侵犯后为什么应当对其进行救济以及到底如何救济的论述并不多见。在司法实践中侦查阶段发生的超期羁押、刑讯逼供、辩护权行使不畅等可以说是顽症性问题长期得不到解决，这些问题无不与犯罪嫌疑人权利救济密切相关。从我国刑事诉讼立法来看，刑事案件一般要经历立案、侦查、起诉、审判、执行几个阶段。如果说第一审程序结束后，还有第二审程序、审判监督程序以及死刑案件的死刑复核程序作为救济程序对被告人的权利进行救济，而在审判前阶段，几乎不存在完备的救济程序。我们知道，审判前的侦查阶段是犯罪嫌疑人权利最容易受到侵害的阶段，因而这一阶段对于犯罪嫌疑人权利的保障尤为迫切。本书以犯罪嫌疑人权利救济为题进行研究，具有重要的理论意义和实践价值。

权利救济是这一研究领域广泛的课题。在刑事诉讼中，救济权利是刑事诉讼当事人享有的一项具体权利。按

主体划分，有对犯罪嫌疑人、被告人的权利救济和对犯罪被害人的权利救济；按所处的诉讼阶段划分，有审判前的权利救济、审判中的权利救济和审判后的权利救济。本书以侦查程序中犯罪嫌疑人的权利救济作为研究基点。在内容安排方面，本书对犯罪嫌疑人权利救济的特征、性质、功能、正当性根据、救济内容、救济方式、发展趋势等方面的问题进行了系统论述。作者致力于从客观上探讨决定对犯罪嫌疑人权利救济的基本原理和基本规律，并对以下几方面的内容作了重点探讨：首先，刑事诉讼中犯罪嫌疑人享有的救济权利究竟是一种什么性质的权利？在刑事诉讼法乃至宪法意义上，救济权利是程序基本权利，即它既是基本权利，又是程序权利。作为基本权利，它是宪法的研究范畴；作为程序权利，它是刑事诉讼法的研究范畴。救济权是基本权利和程序权利的有机结合。其次，如何理解刑事诉讼中权利救济的正当性根据？民事权利救济、行政权利救济都有较完备的理论支撑，也有一套比较成熟的制度保证。相对于民事侵权和行政侵权而言，刑事司法侵权，尤其是侦查行为侵权对被侵权人的危害更大，而我国偏偏对此研究不够，现实中发生的问题也最多。对救济制度的研究，通行的观点是以自然法理论作为理论根据。本书中作者把这种根据归结为是人类经验的总结，经验告诉人们不这样做就会带来不利的后果。没有一种理论能够对犯罪嫌疑人权利救济作出完美的解释，国家侵权理论和程序正义理论也同时是犯罪嫌疑人权利救济制度的正当性根据。犯罪嫌疑人权利救济制度的产生是多种理论共同作用的结果。最后，对犯罪嫌疑人的权利存在何种有效的救济