

● 刑事法研究丛书

# 刑事 强

李忠诚 著

# 反研究

中国人民公安大学出版社



● 刑事法研究丛书

# 刑事强制措施 制度研究

李忠诚 著

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# 内 容 提 要

本书对刑事强制措施的基本理论和各项措施的具体运用等问题进行了系统研究。全书分上下两篇,上篇总论共五章,主要从宏观角度对刑事强制措施制度概述、历史沿革、原理、变更和撤销以及系统论等基本理论问题进行了研究探讨;下篇分论也为五章,主要从微观角度对立法确立的五种强制措施逐一进行了分析研究,并提出了相应的立法建议。

总论第一章明确指出:刑事强制措施制度是统治阶级为保证刑事诉讼顺利进行,实现刑事诉讼的目的,以法律形式确定的有关刑事强制措施的种类、适用的主体、对象、条件和程序等项内容的总称。在我国刑事诉讼中,不宜用强制处分一词代替强制措施,两者内容大相径庭而不仅仅是一种称谓上的区别。强制措施的对象应当是人,不应当包括物,否则就难以与刑事诉讼中有关物的诉讼行为相区别。强制措施具有强制性、预防性、时间性、法律性和依附性等属性。强制措施既涉及国家司法机关的职权分担,又涉及公民权利的保护,因此,强制措施的法律渊源表现为宪法、刑事诉讼法、逮捕拘留条例等其他有关法律和司法机关关于刑事诉讼法的实施细则及其司法解释等。

考察刑事强制措施制度的历史沿革,也是强制措施制度理论研究的重要方法之一。总论第二章以外国和中国强制措施制度的历史沿革为主线,对中外强制措施制度发展的轨迹作了历史性的俯瞰,从而对强制措施制度的发展趋势作出尝试性的预测。

强制措施与刑事诉讼目的、强制措施的诉讼价值、强制措施与

人权保障以及强制措施适用中的法律监督等问题,构成了强制措施原理的核心内容。一般而言,刑事诉讼目的对强制措施具有重要的决定作用;强制措施也是实现刑事诉讼目的的有力工具;同时,强制措施对刑事诉讼目的实现,亦有一定的制约作用。强制措施的诉讼价值是指强制措施在刑事诉讼中的存在及其属性、对人们尤其是统治阶级的需要的满足。公正、效率与效益是当代国家进行刑事诉讼所追求的三大价值目标,因此,强制措施与公正、效率、效益有着十分密切的联系,正确理解这些关系才能更好地实现强制措施的诉讼价值。将被告人在强制措施中的应有权利转化为法定权利,并通过依法正确适用强制措施予以保障,使之成为实有权利,这对于保障被告人的人权具有重要意义。强制措施是国家司法权力的重要组成部分,极可能被滥用,因此,必须对强制措施的适用进行法律监督,并建立适用强制措施的责任制度。

强制措施的变更和撤销是强制措施适用中的一般性问题,强制措施变更权、撤销权是强制措施变更或者撤销的核心问题。本书总论第四章将强制措施的变更权划分为决定变更权、变更决定权、系属变更权和复合变更权;将强制措施的撤销权划分为决定撤销权、系属撤销权和复合撤销权,力图使强制措施变更和撤销之权的归属和利用更加合理、更加科学。

强制措施是一个有机的整体、一个系统。总论第五章在分析强制措施的整体性、有机关联性和预决性等特征的基础上,明确地指出:监视居住应当保留和完善;强制措施系统中应当增加财产保,但不能与保释并列,也无必要增加保释;收容审查不仅不应当列入强制措施系统,而且应当予以废止。

为保证刑事诉讼的顺利进行,立法应当将犯罪嫌疑人和证人列为拘传的对象,为防止由此带来的负效应,分论第六章对拘传权、拘传的方式、时间、委托拘传与协助拘传以及拘传后的处理等问题作了系统研究,并提出了相应的立法建议。

取保候审应当包括人保和财产保两方面的内容。人保包括被告人具结和他人担保(包括个人和组织);财产保又分为直接提交财产的直接性财产保和以财产担保书代替担保财产的间接性财产保。取保候审的保人应当处于诉讼参与人的地位,承担相应的法律责任。被告人及其近亲属、监护人、辩护人应当享有申请取保候审而使被告人免除羁押之权。担保的财产随着案情和被告人情况的变化,可以由公安司法机关决定增加、减少或者予以没收,当取保候审结束后,公安司法机关应当及时返还担保的财产,保证人请求返还财产的有效期限为两年。

监视居住指定区域的大小反映了监视居住强制力度的消长。指定区域的大小应当与被告人的危险危险性相适应,对异地监视居住应当严格控制。监视居住和取保候审都应当有时间限制,一般规定为两倍于羁押期间。作出监视居住决定的机关可以自行执行监视,也可以委托公安派出所或者有关单位执行,受委托的公安派出所或者有关单位不得拒绝。

拘留权是侦查权的内容之一。因此,拥有侦查权的检察机关应当享有拘留权,以利于有效地开展侦查工作。拘留作为一种临时剥夺人身自由的应急措施,现有的时间不宜延长。

逮捕权的行使直接关系到公民的人身自由,因此,应当建立相应的制约机制。一般说来,逮捕是羁押的前提,羁押是逮捕的结果。实践中长期羁押与超期羁押是逮捕制度中比较突出的问题。长期羁押主要是立法本身的问题,如立法对退回补充侦查的次数未予限制而导致长期羁押人犯;超期羁押是执法操作问题,如没有法定期限内办理延长羁押手续而导致超期羁押人犯。所以,解决长期羁押的重点在于立法完善、限制退回补充侦查的次数;解决超期羁押的重点在于提高司法人员的执法水平、自觉地履行延长羁押的法律手续。

## **Research on Criminal Mandatory Measures System Introduction**

This book, "Research on Criminal Mandatory Measures System" does a systematical research on the basic theory of Criminal mandatory measures (C. M. M) and how to enforce every measure of those correctly. The book is divided into two parts, the first, "General comment" includes 5 chapters, which mainly do a research on the general survey, the history, the basic theory, the changement and removement of CMM in an intelligent view.

The second section of this book is divided into five chapters. The writer does a research on five kinds C. M. M fomulated by existing laws one by one in microcosmic eyes and gives some constructive advices on perfecting the existing laws.

In the first chapter, "Survey", the writer points out the CMM system is the general term for the ruling class establishes in legal form the kinds, the executive, the subject, the procedure and the conditions of CMM for the purpose of guaranteeing the criminal lawsuits to proceed and of achieving the target of the criminal procedure. In our country, it's not fitting that the term of Compulsive punishment replaces the term of CMM, for there is not only difference between the two terms itself, but also between the contents of those. The object of mandatory measures is Man, not including Matter. Otherwise it's difficult to

distinguish C. M. M from other lawsuits on Matter in the criminal procedure. C. M. M has the natures of enforcement, prevention, time, law and dependment etc. It relates to not only the division of the national judicial departments, but also safeguarding the civil rights. Therefore, the legal sources of M. M. include the Constitution, the Law of Criminal Procedure, Regulations for Arrest and committal and Other connecting Law, the detailed regulations for implementing the law of criminal procedure and the Judicial Comments.

It is a kind of ways to investigate the history of C. M. M system. The second chapter does a historical research on the native and foreign development of C. M. M. in the history, and make a attempt to forecast for the future development of it.

The principal contents of the theories of C. M. M. include C. M. M. and the purpose of the criminal procedure, the value of C. M. M., C. M. M. and civil rights safeguard, the legal supervision for implementing C. M. M. In general, the purpose of criminal procedure makes an important effect on C. M. M., which is an effective means for achieving the purpose of criminal procedure, and is restricted by it. The value of C. M. M. means that itself and its characters meet the needs of the people, particularly the ruling class, Just, Efficiency and Benefit are the valuable purposes which the modern countries seek in criminal procedure. There are very close relations between those. For realizing the values, the relations must be understood correctly. The accused's proper rights should be changed into the legal rights, which are protected by implementing C. M. M. correctly.—that has a very important significance. C. M. M. is the principal part



of the national. judicial powers and may be implemented in random, thus the legal supervision must be strengthened and the responsibility system must be established. This is the main content of the third chapter.

The changement and removal of C. M. M. are the general contents in implementing C. M. M. and the power for doing those are the core. The writer divided the powers of changement into the power of deciding to change it, of changing the decision. of the system for changing and of the compound changement, and divided the powers for removing into the power of deciding to remove it, of compound removal and systematic removal. The writer tries to have the turning and implement of the powers more reasonable and more scientific.

C. M. M. is an organic whole and is a system. In the fifth chapter, on the base of studying the characters of whole, connection and predetermination. the writer points out that [ Residence under watching ] should be reserved and perfected. the Property Guard should be replenished but be reserved and perfected, the property guard should be replenished but shouldn't be juxtaposed with the bail. the detention shouldn't be combined into the system of C. M. M., and should be abolished. It's necessary to add the punishing measures—the judicial punishment into C. M. M.

For guaranteeing the successful implement of the criminal procedure, the law should arrange the Culprit and the Witness into the list of men who can be detentioned for questioning, but for preventing the negative result from it, the writer does a systematic study on the problems of the right, the measures, time,

entrusting and assisting, the result of the detention for questioning, and give some corresponding advices for legislation.

The obtaining a guarantor and pending guilt (O. G. P. G) should include the man guarantee and the property guarantee. The man guarantee can be divided into binding over and being guaranteed by other man (including the person and the organization). The property guarantee can be divided into direct guarantee by handing in the property and indirect guarantee by handing in the written guarantee instead of the property. The guarantor should be listed into the litigating party and should undertake the corresponding legal responsibilities. The accused and his close relative, guardian and counsel should have the right of applying for obtaining a guarantor and pending guilt. Though the property for guarantee can be decided to be increased or confiscated by the public security bureaus or other judicial departments following the change of the case and the condition of accused, the said departments should return the property for guarantee in time when O. G. P. G is over. The effective period when the guarantor applies for returning is Two years.

The dimensions of the appointed district for residence under watching reflect the strength of the force, it should be suitable for the dangerous degree of the accused, and it must be controlled strictly to implement residence under watching in other place. Residence under watching and the O. G. P. G should be limited in the time, which may be stipulated two times longer than the period of detain. The body to decide residence under watching can implement it by itself, and can entrust the local police station or other concern departments to implement it. The

entrusted departments have no right to refuse to do.

The right of detain is one content of the powers of investigating, and the procuratorate which has the power of investigating should have the power of detain. It's favourable for investigating effectively. As a kind of emergency means for provisionally depriving the body's freedom, it's not fitting to prolong the present time of detain.

Performing the right of arrest is connected with the civil freedom, therefore the corresponding system for restricting should be established. In general, arrest is the premise to detain, and detain is the result of arrest. In practice the long-term detain and the exceeding detain are glaring problems in the arrest system. The long-term detain is mainly the legislative problem, for example, legislation hasn't restricted the times of returning to investigate supplemently, and it turns to detain the arrested for a long time. The exceeding detain is the problem of executing, for example, the formalities for prolonging detain haven't been gone through, it turns to exceed the period of detain. Therefore, the main point to resolve the long-term detain lies on perfecting legislation, restricting the times of returning to investigate supplemently; the main point to resolve the exceeding detain lies on improving the level of executor, who should go through the legal formalities for prolonging detain consciously.

# 序

金秋十月，欣闻李忠诚同志所著的《刑事强制措施制度研究》一书即将由中国人民公安大学出版社出版，这是一件值得称道的好事。

刑事强制措施是贯穿于整个刑事诉讼的一项重要制度，在刑事诉讼中占有十分重要的地位。探索刑事强制措施制度的本质与特征，考察刑事强制措施制度的历史与现状，比较不同国家刑事强制措施制度的异同，研究刑事强制措施制度的发展趋势，探讨刑事强制措施制度原理及其系统，解决刑事强制措施制度理论与实践中的问题，进一步健全和完善我国刑事强制措施制度，是刑事诉讼法学研究的重要课题。然而刑事强制措施制度作为刑事诉讼法学中的几根“硬骨头”之一，迄今很少有人从理论与实践的结合上对它作专门系统的研究。李忠诚同志解放思想，发扬敢于啃硬骨头的精神，对刑事强制措施制度进行了深入系统的研究，其中既有宏观的扫描与俯瞰，又有微观的精心构造与雕琢，既有深层次的理论分析，又有丰富的实践经验结晶，应当说，本书是一项具有开创性的学术成果。

刑事强制措施制度不仅是刑事诉讼制度的重要组成部分，而且是一个聚焦点。刑事诉讼中的一些主要原理和

重要理论问题，诸如民主与专政的关系，刑事诉讼目的、价值、构造、功能等，均在刑事强制措施制度中得到鲜明而具体的体现。刑事强制措施制度的实践性更强，动辄涉及人身自由的限制、人权的保障。作者遵循理论结合实践的方针，大量搜集掌握我国刑事强制措施制度的有关法律、司法解释、实践经验和理论成果，广泛参考借鉴外国和港、澳、台地区立法和理论，重点对刑事强制措施的性质与功能、刑事强制措施原理、刑事强制措施的撤销和变更、刑事强制措施系统以及各种刑事强制措施的实际运用和立法完善等问题进行了深入系统的研究和客观全面的阐述。本书的选题、取材、体例编排、研究方法显示出作者有较高的学术洞察力、资料驾驭能力和脚踏实地的务实精神，写作体例严谨，脉络清晰，铺陈细腻，分析深入，逻辑性强，行文流畅。这一系统研究对于完善我国刑事强制措施制度，解决我国刑事强制措施制度理论与实践中的问题，均具有较大的现实意义和理论意义。对于刑事强制措施立法的改革与完善，也有重要参考价值。此书不失为一部优秀的专著。

作者李忠诚系我国自己培养的诉讼法学博士。他插过队、当过工人，长期在基层政法部门工作。经过自学，于一九八九年考取中国政法大学研究生院攻读诉讼法专业硕士学位，因成绩优秀提前于一九九一年考取本校博士研究生，在我的指导下攻读博士学位。一九九四年春完成博士论文并顺利通过答辩，取得博士学位。本书在其博士论文《刑事强制措施制度研究》基础上修改补充而成。

作为他的导师，我对他印象最为深刻的有两点：一是勤奋好学，思维敏捷，刻苦认真；二是为人正直、诚朴，工作热情，踏实肯干。他在学校期间，是老师信赖、同学拥戴的学生干部。我深为他的研究成果感到欣慰，更愿他在今后的工作中、在理论研究上锲而不舍，更上一层楼。

以上草草，聊充序言。

陈光中

1995年10月18日

## Preface

On october of golden autumn, I heard that 《Research on Criminal Mandatory Measures System》 This book written by Doctor Li Zhong—cheng is going to be brought out by the publishing house of China People's security University. It is very exciting.

The criminal mandatoy measures (C. M. M)system is an important system through the whole criminal precedence, and it's of great significance. Research on the nature and the character of the criminal mandatory measures, research on the history and the present situation, research on the difference among the different countries'criminal mandatory measures, research on the trend ,research on the theory and the system of it, solving the problems existing in the theory and the present, prefecting the criminal mandatory measures in our country, those are very important task. Because the criminal mandatory measures system is a very difficult problem in the criminal procedures, and few men have made a deep research from the theory to the present, comrade Li Zhong — cheng emancipates the mind and displays his brave spirit, he made a systematic research on the criminal mandatory measures in macroscopic and microcosmic way ,and the research is the result of experiment. It should be appraised that this book is an initiatial academic one.

C. M. M is not only the important part of the criminal procedure system, but also is the focus. Some main principles and important theories, for example, the relation between democracy and dictatorship, the purpose, value, structure and function of the criminal procedure and etc. reflect in the criminal procedure system distinctly and concretely. The practicality of this system is very weighted, easily touches upon the limitation of freedom and protecting of the civil rights. The writer did a systematic and thorough research, had an objective and comprehensive exposition on the nature and function of C. M. M. the principles, the change and cancellation, the system, the utilization and perfecting legislation, which is based on the principle of combining theory with practice and gathering concerning laws, judicial explanations, experiences and theories, as well as comprehensively referring to the foreign and Hong Kong, Macao, Taiwan's experiences and theories. The choice of thesis, gathering materials, organizing materials and the way for research reflect the writer's deep insight, the ability of driving the materials and his spirit of down-to-earth. This kind of research has a great theoretical and practical significance in reflecting our country's system of criminal procedure and solving the problems in this system. It also has the important reference value to the reform of legislation. In a word, this book is an excellent work.

The writer, comrade Li Zhong-cheng is a doctor educated by our country. He has been to live and work in a production team, and has been a worker, worked at the basic-level unit of politics and law for a long time. Through study on his own, he was admitted to enter into the under-graduate institute of Chi-



na University of politics and law after an examination and specialized in the science of procedure law for a master's degree, he was admitted to study for a doctor's degree in advance under my direction for his excellent achievement. In the spring of 1994, he finished writing his doctorate thesis and succeeded in the reply. so he got the doctor's degree. This book was completed based on his doctorate thesis 《Research on Criminal Mandatory Measures System 》. As his teacher, there are two points impressing strongly on me ; One is his diligence, keen insight and conscientiousness; the another is his honest, upright, warmth for work and down-to-earth. In the school, he was the student cadre trusted by teachers and students. I am gratified at the success of his study, and wish he could study with perseverance and make more progress in the future.

All above as the preface.

Cheng Guong—zhong