刑事法研究丛书

刑事诉讼目的论

宋英辉 著

中国人民公安大学出版社

刑事法研究丛书简介

刑事法研究丛书(第一批)是学有所成、获得博士学位的学子撰写的学术专著:李希慧博士的《刑法解释论》、孙力博士的《罚金刑研究》、李忠诚博士的《刑事强制措施制度研究》、宋英辉博士的《刑事诉讼目的论》。

这几部学术著作,对古今中外相关问题作了历史考察,吸取了中外的新资料,从理论与实践的结合上,作了深刻的论述,形成了自己的理论体系,在许多方面进行了填补空白的开拓性研究,反映了我国刑事法研究的最新成果、最高水平。

这套丛书,不仅具有较高的学术水平,而且在司法实践中也有很大的实用价值,是立法工作者、司法工作者、科研工作者、律师和政法院校师生必备的参考书。

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ISBN 7-81011-745-9

9 787810 117456 >

ISBN 7-81011-745-9/D・622
定价:14.00 元

●刑事法研究丛书

刑事诉讼目的论

中国人民公安大学出版社
一九九五年·北京

图书在版编目(CIP)数据

刑事诉讼目的论/宋英辉著．—北京：中国人民公安大学出版社，1995
(刑事法研究丛书)
ISBN 7-81011-745-9

Ⅰ．刑…
Ⅱ．宋…
Ⅲ．刑事诉讼-目的(法律)-研究
Ⅳ．D915.3

版式设计：陈　华

中国人民公安大学出版社出版发行
(北京木樨地南里　邮编 100038)
河北迁安县印刷厂印刷
850×1168 毫米　1/32　9 印张　202 千字
1995 年 10 月第 1 版　1995 年 10 月第 1 次印刷

印数 0001—5000 册　定价：14.00 元

内 容 提 要

刑事诉讼目的与构造为现代刑事诉讼法学的两大课题。刑事诉讼目的相对于其构造，属于更深层次的领域。然而，我国刑诉法学界对此问题尚未展开系统、全面地研究。本书以刑事诉讼目的为专门研究对象，力图在对国内外有关理论进行反思的基础上，建构体现均衡价值观的刑事诉讼目的理论。

本书共五章，从刑事诉讼目的的界定及其制约因素的分析入手，系统、全面地探讨了刑事诉讼目的的理论分类、我国刑事诉讼的应有目的、实现目的的手段，以及在实现目的中发生利益冲突时的权衡选择问题。

刑事诉讼目的在刑事程序领域居于核心地位。它既是刑事诉讼立法和司法的内在要素和基本前提，又是与刑事诉讼的主体、职能、构造等紧密相关的刑诉法理学的研究对象。所谓刑事诉讼目的，是指以观念形式表达的国家进行刑事诉讼所期望达到的目标，是预先设计的关于刑事诉讼结果的理想模式。刑事诉讼目的分为直接目的与根本目的两个不同层次，在不同历史时期以及同一历史时期的不同国家，刑事诉讼目的的具体内容可能是有所不同的。制约、影响刑事诉讼目的的因素，主要有诉讼构造及诉讼价值、犯罪状况、法文化等。研究刑事诉讼目的与制约其因素的一般关系，对于正确确立我国刑事诉讼目的具有重要的现实意义。

西方诉讼理论曾从不同角度对刑事诉讼目的进行了分类，本书对犯罪控制模式、正当程序模式、家庭模式、正当程序主义与实体真实主义等刑事诉讼目的的理论分类进行了客观介绍，并阐明

了这样的观点：忽视打击犯罪与保障人权的统一性，主张为高效率地惩治犯罪而限制被告人的诉讼权利，并把被告人作为最佳证据来源，不仅同诉讼文明、进步、民主的发展趋势不符，而且也会产生司法权滥用的弊害，并由此导致较高的错案率，其高效率抑制犯罪的目的的实现也会受到妨碍；反之，如果将被告人利益置于绝对优越的地位，使之凌驾于社会及其成员的利益之上，则难免贬抑实体真实以及刑事程序的秩序价值，法律秩序就得不到有效地维护。因此，刑事诉讼目的的确立，应当尽可能避免价值取向上的单一化和绝对化。

本书重点探讨了我国刑事诉讼应当追求的目的、该目的的确立根据、目的的层次性及其相互关系，以及为实现我国刑事诉讼目的需要完善立法、改进司法的具体方案。我国刑事诉讼的直接目的应当是追求控制犯罪与保障人权的统一，根本目的是维护宪法所确立的制度与秩序。这是通过理论分析及对我国大量的经验教训的有力论证所得出的应有结论。与西方刑诉目的理论中的目的观比较，我国刑事诉讼目的的特色表现为：①体现出刑事诉讼对相互联系着的多方面价值的追求；②其中控制犯罪的前提是诉讼证明应当达到客观真实而非“实质真实”，保障人权也不只限于保障被告人人权，而是具有更广泛的内容。我国刑事诉讼目的要求有关立法、司法和理论研究应当对实体与程序、控制犯罪与保障人权的关系等基本问题予以重新认识。

准确、公平、及时是刑事程序有效地控制犯罪的内在要求。为准确、公平、及时地实现具体的刑罚权，刑事诉讼立法应当为司法活动提供符合认识规律且有效率的程序。在保障人权方面，本书强调：程序性权利的分配与运行均应以刑事程序可能涉及的诉讼参与人的实体性权利为基点；刑事程序中人权保障问题的研究应当谋求诉讼参与人的程序性权利与实体性权利相互适应、相互协调，从而形成完整形态的人权保障，并使刑事诉讼的人权保障实践与

人权保障立法之间的错位减缩至尽可能小的程度。基于程序性权利与实体性权利相统一的思想，并通过翔实资料的大量引证，书中对完善诉讼参与人人权保障的立法提出了构想，特别突出地探讨了被告人防御性权利和救济性权利的划分与完善，以及被害人的权利保障问题。

实现目的需要手段。实现刑事诉讼目的的手段是刑事诉讼的构造，它是指刑事诉讼各构成要素即控诉、辩护、裁判诸项基本职能的划分及其相互关系的格局。诉讼构造决定诉讼的诸多功能，各项功能相互依存、相互作用。国家应当根据实现刑事诉讼目的的需要设计、选择利于某种功能发挥的诉讼构造。同时，诉讼构造与功能的关系具有内在规律性，如果不尊重这种规律性而片面强调某一方面的功能来任意设计诉讼构造，那么，所期望发挥的功能也会受到抑制。刑事诉讼的目的、构造、功能之间的规律性，是刑事程序具有相对独立性的根源和体现。为完善我国刑事诉讼的构造，应当研究现代职权主义和当事人主义诉讼构造在控制犯罪与保障人权方面的优势及不足，吸收其可资借鉴之处。我国刑事诉讼构造的设计，应当遵循刑事诉讼的规律，充分体现秩序、公正、效益诸项刑事诉讼价值，以便为我国刑事诉讼目的的实现提供可靠的保障手段。

刑事程序涉及案件真实与程序正当、控制犯罪与保障人权、国家利益与个人利益等利益关系。在实现刑事诉讼目的的过程中，当发生利益冲突时如何选择，是至关重要的问题。为此，应确立我国刑事程序中的权衡原则，当两种以上的利益不可兼得或相对立的价值发生冲突时，国家及其代表官员应根据一定标准，确定其中某一或某些方面更为优越而放弃其他方面。确立此项原则，应当避免权衡时所依据标准的价值取向的片面性，不宜在实体与程序、惩罚与保障中确立一个绝对优势的价值标准，而是应当依据刑事案件涉及的各种利益，在充分考虑我国不同层次的目的所体现的刑事程序追求的价值目标的根本点或归宿的基础上，确立权衡的一般

标准及其例外情况。基于不同层次的诉讼目的涉及的社会根本利益，刑事程序的某项原则、制度等总体性利益，以及对个案被告人实施惩罚的个别利益，当具体案件上实施惩罚与刑事程序某项保障人权的制度冲突时，一般应放弃个案被告人的惩罚。但是，如果是在放弃个案被告人的惩罚会危及社会根本性利益的少数情形下，则应顾及具体案件中对犯罪的惩罚。基于利益权衡原则，本书对实现刑事诉讼目的中较为敏感而又十分复杂的问题，例如律师保守职业秘密、非法证据的运用、疑案处理等方面的利益冲突与权衡进行了充分探讨，并根据案件具体情况研究了选择的一般标准和例外情形。

ABSTRACT

The objective of criminal procedure and the structure of criminal procedure are the two major subjects in the contemporary study on criminal procedure. Comparatively speaking, the objective of criminal procedure is a subject of a deeper domain than the structure of criminal procedure is. But, on the objective of criminal procedure, not there has been a systematic and overall research to date. This book is oriented to take the objective of criminal procedure as the object of study, aiming at an establishment of a theory on the objective of criminal procedure that can embody the outlook of value balance on the basis of a general survey and review over the relative theories from both home and abroad.

This book is made up of five chapters. Proceeding from the defination of the objective of criminal procedure and the analysis of the restrictive factors of the objective of criminal procedure, it carries out a systematic and overall study on the theoretical classifications, the due objective of criminal procedure in our country, the means of effecting the objective of criminal procedure and the choice by balancing when the collision of different interests happens in the course of the application of the objective of criminal procedure.

The objective of criminal procedure is a core subject in the

field of criminal procedure. It is not only one of the internal elements and the basic premises of criminal procedural legislations and practice but also an object of study of the jurisprudeuce of criminal procedure, in which such aspects as the subjects of criminal procedure, the functions of criminal procedure and the structures of criminal procedure, etc, are inherently involved. In the author's opinion, the objective of criminal procedure is the goal that a state hopes to attain by practising the criminal procedure; it is a state's preconceived ideal model concerning the result of a criminal action; the way of its expression is in the ideological form. The objective of criminal procedure embraces two different gradations, viz, the direct objective and the fundamental objective. In different historical periods or in different countries of the same historical period, the specific contents of the objective of criminal procedure may be not in the same case. The restrictive and influential factors of the objective of criminal procedure mainly include the procedural structure, the procedural value, the situation of crimes and the legal culture and so on. The study of the relation between the objective of criminal procedure and its restrictive factors is of great practical significance for the determination of the objective of criminal procedure in our country.

The Western procedural theories have tried to do classifications to the objective of criminal procedure from different viewpoints. This book presents an objective introduction about the theoretical categories of the objective of criminal procedure, such as, the crime control model, the due process model, the family model, the doctrine of due process and the doctrine of substan-

tive reality, etc, whereupon it raises the following characterized comments: It is not only out of accord with the developing trend of procedural civilization, progress and democracy, but is also liable to cause the abuses of judicial power, and thus to result in a high rate of mishandling of cases to advocate restraining the defendant's procedural rights and take the defendant only as the best origin of evidence in order to highly efficiently punish the offenders with neglect of the unity of punishment on criminals and protection of human rights. But, on the other hand, if the defendant's interest is put in an absolutely favourable position, its priority being ensured to the interests of the society and its members, the substantive reality and the value of criminal procedure will be circumvented evitably, and, as a result, the legal order will be in a failure of safeguarding. Therefore, both singleness and absoluteness in value choice should be denied in the determination of the objective of criminal procedure.

This book mainly takes an exploration on the following issues: the objective that our country should pursue through criminal procedure, the determinative base for this objective, the gradations of this objective and the relation between the gradations and the specific scheme for perfecting the legislations and improving the justice so as to fulfill the our country's objective of criminal procedure. The direct objective of criminal procedure in our country should be an unity of punishment on criminals and protection of human rights. The fundamental objective is to safeguard the system and order set by the consitution. This is a necessary conclusion drawn from the theoretical analysis and a sober evaluation on a lot of experience and teachings of our country.

Compared with the Western outlooks on the objective of criminal procedure, the features of our country's outlook are manifested mainly as follows: (1) It embodies a pursuation of manifold values in criminal procedure; (2) The prerequisite of crime control is that the proof in criminal procedure should arrive at the objective reality instead of substantive reality; The protection of human rights is not limitted to the protection of the rights of the defendant only, but encompasses a wider range of contents. The objective of criminal procedure in our country demands the legislature, the judiciaries and the theoretical researchers to undertake a reconsideration into the relations between such respects as substance and procedure, crime control and human rights protection, etc.

Correctness, impartiality and timeliness are the inherent requirements to modern criminal procedure for an effective control of crimes. For the sake of a correct, impartial and timely realization of the state penal power, the criminal procedural legislations should provide for the judicial practice a scientific and effective procedure. With regard to the protection of human rights, this book stresses the following gists: The distribution and operation of procedural rights should be based upon the possibly involved litigant participants' substantive rights; In criminal procedural law, the research on the question of human rights protection should be to seek an adjustment and harmony between the litigant participants' procedural rights and substantive rights, and thus to constitute an overall protection of human rights, and, as a result, the mistakes in both the practice and legislations of human rights protection may be abated to a minimum degree. Based

on a thought of unity of procedural rights and substantive rights and a great number of citations of factual records, this book raises some propositions for the perfection of the legislations concerning the protection of the litigant participants' rights, among which the questions of the division and perfection of the defendant's defensive rights and remedial rights and the protection of the victim's rights are distinguishingly studied.

The attainment of ends demands means. The means of effecting the objective of criminal procedure is the criminal procedural structure, which refers to the division and the mode of interrelation among the ingredients of criminal procedure, namely, the basic functions of prosecution, defence and adjudication. The structure of procedure decides the functions of procedure. All the functions interexist and interact. The state should, according to the need of realizing the objective of criminal procedure, choose and design a procedural structure that can be beneficial for the play of a wanted function. Meanwhile, the relation between the procedural structure and the procedural functions goes with some inner law. If the law is ignored and some a one-sided function is unduely strengthened and so the procedural struture is casually set, the play of the wanted function will also be hindered. The law of the relation among the objective, structure and functions of criminal procedure is the root and expression of the relative independence of criminal procedure. In the respect of crime control and human rights protection, in order to perfect the criminal procedural structure in our country, we should probe into the advantages and defects of the western procedural structures, namely, the inquisitorial system and the adversary

system, whereupon we can assimilate some experience from them. The design of our country's criminal procedural structure should follow the law of criminal procedure and fully embody the criminal procedural values, such as order, justice and efficiency, etc, so that it may provide reliable means for the realization of our country's objective of criminal procedure.

Criminal procedure involves a number of relations of interests, such as the reality of a case and the justification of procedure, the crime control and the human rights protection, the national interests and the individual interests and soon. In the prosecution of effecting the objective of criminal procedure, how to make a choice when a conflict between different interests happens is a key question. Therefore, the author holds that in criminal procedure, our country should establish a principle of interects balancing. When interests of two kinds or more can not be obtained, concurrently or the conflict between adversary values emerges, the state and its agents should, following a certain criterion, decide one or some of the non-coexisting interests or values' priority to all the other. The establishment of such a principle demands a evasion of one-sidedness that the criterion followed when practising balancing may have with it. No attempt is proper to nominate either one side between substance and procedure, punishment and protection for an absolutely superiorposition, we should, according to all the interests involved in a criminal case and on the basis of a full consideration on the fundamental points of the ends of value or the end-result embodied in the different gradations of our country's objective of criminal procedure, establish a general criterion of balancing and its ex-

ceptional cases. Proceeding from the society's basic interests involved in the different gradations of the objective of criminal procedure, the genenal interest of some principles and systems of criminal procedure and the individual interest of the defendant in a specific case, when, in a specific case, the realization of punishment collides with some criminal procedural systems concerning the protection of human rights, normally, we should abandon the punishment on the defendant. But if, in a few specific cases, the abandonment of punishment on the defendant might imperil the basic interest of the society, we should take into care the punishment on the defendant. In accordance with the principle of interests balancing this book carries out an in-depth study on the conflicts and balancing of interests in a series of considerably sensitive and complicated issues in the prosecution of effecting the objective of criminal procedure, such as the issue of a defence counsel's keeping secrets for his client, the issue of the admissibility of the illegally acquired evidence and the issue of the disposal of doubtful cases and so on, and in addition, with attention to different cases, it also undertakes a research into the general criterion of making a choice and some exceptional cases.

序

刑事诉讼目的是刑事诉讼法学的一个基本理论范畴。近年来，随着我国刑事诉讼法学基本理论研究的不断深入，刑事诉讼目的问题日益引起法学界的关注。宋英辉早在1990年就开始对这一理论课题进行探讨，发表过文章，并在此基础上于1992年完成了博士论文《刑事诉讼目的论》的写作。这篇博士论文在答辩时，以选题有眼力、论述有深度而博得了全体答辩委员的好评。在随后的两年多时间里，他对此论文进行了认真的修改、补充和完善，终于成为一本很有分量的专著。可以说，这是宋英辉同志积五年心血的结晶。

这本专著以辩证唯物主义为指导，对刑事诉讼目的这一重大课题进行了全面的探讨和深入的研究。作者在吸收国内外有关学术成果的基础上，建立了自己的理论体系，并在许多理论和实践问题上提出了自己的见解。本书结构严谨，体系完整，材料新颖，论证充分，具有较高的理论价值和应用价值，并可为我国的刑事诉讼立法和刑事司法实务提供理论参考。

本书是国内第一部以此为题的法学专著，在许多方面都进行了填补空白的开拓性研究。例如，作者站在哲学的高度深入分析了刑事诉讼目的提出的根据，剖析了刑

事诉讼目的概念的内涵，揭示了刑事诉讼目的与刑事诉讼结构等范畴之间的内在联系；作者首次提出并详细阐明了刑事诉讼目的的双重层次理论，对刑事诉讼的直接目的、根本目的以及两个层次目的之间的关系作出了深刻的论述；作者在有关刑事诉讼中人权保障的问题上提出了自己独到见解，如分析了刑事诉讼中三个人权形态的关系，提出了程序性人权与实体性人权相互适应的问题，区分了防御性权利和救济性权利，指出了对被告人与被害人的人权保障加以平衡的问题等等。尤其值得指出的是，作者第一次全面系统地提出了富有创见的“利益权衡原则”，揭示了这一原则的含义和要求，并运用这一原则分析了包括辩护律师保守职业秘密、非法所得证据的运用以及疑难案件的处理等在内的一些具体问题，提出了在这些具体场合下对刑事诉讼中控制犯罪与保障人权加以权衡的标准。这些研究无疑表明作者具有活跃的学术思想和深厚的研究功力，也必将对我国刑事诉讼法学基本理论的深入研究产生积极的影响。

为他人之书作序，往往出于无奈；但为学生之作品作序，我充满着喜悦之情。在此书问世之际，我谨表示衷心祝贺，并期望宋英辉在今后的科研工作中继续进取，取得更多、更加优秀的成果。

陈光中

1995 年 2 月 25 日