



京师刑事法学博士文库 (12)

刑事强制措施的正当性基础

ON THE DUE BASIS OF
CRIMINAL COMPULSORY MEASURES

杨 雄 著



中国人民公安大学出版社



“十一五”国家重点图书出版规划项目

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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世界或者国内一流水平,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

大器。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际与国内地位极不相称。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法学院。两院相继成立并得以迅速良性发展，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。”随着法学科学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”，十分重视刑事法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。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。同时特别申明：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仁创作出的学术精品，均可列入此文库见诸世间。愿同仁闻弦歌而知雅意，愿我等奏流水而遇知音。

“泰山不拒细壤，故能成其高；江海不拒细流，故能成其大”。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
二零零七年三月三日

Doctorial Series of Criminal Law Science of BNU

Preface

After a careful plan and preparations, “Doctorial Series of Criminal Law Science of BNU” 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 catering for the requirements of this era.

Being in a proper situation means that at the time of the establishment of “the Series” 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 that 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 Imperial University of Peking founded in 1902. After a century of development, through a century of accumulation, she has built up a deep seated cultural foundation and good environment of the humanities; what’s more, her disciplines of the humanities and social science have reached to the world standard or at the level of First Class in Chi-

na. She has nurtured and brought up large numbers of National Talents. Firm and steady style and the conception of “studying to teach and acting to set an example” for 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” just like “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 Criminal Law Science of BNU” avoided the congenital deficiency from the very beginning.

No need for reticence, compared with many ripe and steadily developed disciplines, the Law Science in Beijing Normal University is still very young. For varieties of reasons, the 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 made the Law Science of Beijing Normal University not only lose the chance of development in 1990s, but also not match with her famous international and national status as well. Now we are glad that 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 criminal law scientific field specializing in criminal research and the talents cultivation.

Based on the Faculty of Beijing Normal University, Law School of Beijing Normal University was founded on July 26, 2006. Successive founding and rapid development 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 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 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 absorbed not only many middle and young law experts who hold deep seated academic foundation, good scientific research ability and academic influence home and abroad, but also 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 Criminal Law Science of BNU" to support young law doctors and postal doctors to publish their

fruits 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 Criminal Law Science of BNU”.

“Doctorial Series of Criminal Law Science of BNU” is designed for 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 Criminal Law Science of BNU” will choose the fruits merely according to its high quality. The works that are creative and of high quality can be chosen. Editorial Board of Doctorial Series of Criminal Law Science of BNU will positively contact the new doctors who 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, to 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 houses, listening to criticisms with an open mind from our fellow scholars and social

readers. We hope the works of Editorial Board of Doctorial Series of Criminal Law Science of BNU can find and know affairs of human lives, communicate common saying, even though they belong to the works of the elite; 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 meet our bosom friends while playing the music of flowing water.

“Mount Tai 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 Criminal Law Science of BNU 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 to 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 Criminal Law Science of BNU

March 3rd, 2007

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汪建成*

呈现在读者面前的这部《刑事强制措施的正当性基础》，是我指导的博士研究生杨雄先生的力作，该书是在其博士论文的基础上，历经两年的时间修改而成。

强制措施解决的是未决状态下被追诉者的法律控制问题，科学的强制措施制度构建既能保障刑事诉讼的顺利进行，又能保障被追诉者的基本权利，因此研究这一问题既有重大的理论意义，又有现实针对性。博士论文的生命力在于创新，在我看来，本论文的创新性体现在以下几个方面：

第一，研究内容的系统性。本文将刑事强制措施定位为以程序保障为目的的实体处分手段，不仅将传统意义上涉及人身自由的刑事强制措施作为研究对象，而且将干预财产权、隐私权、职业利益的强制手段亦纳入研究视野中。在研究思路上，本文以刑事强制措施的正当性基础为核心，从理念到制度，从宏观角度探讨程序理论、诉讼模式中的强制措施定位；从中观角度探究刑事强制措施在整个宪政体系中的合法地位；从微观的层面研讨刑事强制措施的诉讼制度保障和社会基础，最终以上述三个角度审视

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我国刑事强制措施立法、执法中的非正当性因素。这种研究思路摆脱了传统的零敲碎打式的具体分析路径，体现了刑事强制措施研究的系统性和完整性。

第二，研究观点的创新性。本文在对刑事强制措施基础理论进行系统分析、深入探讨的基础上，对于一些问题提出了富有启发意义的独到见解。具体而言：首先，基于刑事强制措施根据、本质以及不同程序目的的要求，本文从刑事强制处分权的实施主体、程序和对象三个角度提出正当化的刑事强制措施制度必须贯穿三重理念，即刑事强制处分权力的节制观念应当得到彰显；刑事强制措施的实施必须以程序为指向；被处分者必须具有诉讼主体性。其次，本文对刑事强制措施的运作进行了类型学的分析，指出在不同刑事诉讼价值观与诉讼构造的影响下，刑事强制措施会形成保障型和追诉型两种基本的运作模式。再次，本文从强制的对立面——“自愿”出发，分析了刑事强制措施中的同意制度体系，倡导以同意行为来缓和国家权力与公民权利之间的利益冲突，缔造“双赢”的和谐局面。最后，本文分析了刑事强制措施正当性的社会基础，指出我国有必要以国家司法机关为主导力量，适当吸收社会力量参与刑事强制措施的适用，应从组织控制和信息控制两方面来提高社会管理和控制能力，为刑事强制措施制度的正常运转奠定良好的社会基础。

第三，研究视角的开放性。在研究过程中，本文在一定程度上保持了学术视角的开放性，摆脱了学科的局限和桎梏，积极吸收和借鉴政治学、社会学研究的成果来审视刑事强制措施制度。作者不仅在诉讼法学、证据法学的框