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**指定居所监视居住的五大问题**

**Five Major Problems of Residential Surveillance at a Designated Location[[1]](#footnote-1)**

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指定居所监视居住（以下简称“指居”）是刑诉法规定的五种强制措施之一，单从法律概念解释而言，当然比拘留、逮捕更为轻缓、人性化，但司法适用中却是与字面规定完全不一样的存在。这种由公安指定特定居所监视居住的措施，实际上是让犯罪嫌疑人或被告人处于一种不受监督，由公安机关强制限制其人身自由的状态。具体来说有五大问题：

Residential surveillance at a designated location (hereinafter “RSDL”) is one of the five coercive measures provided for in the Criminal Procedure Law. Understood solely as a legal concept, it is certainly more relaxed and humane than detention and arrest. But in judicial practice is, on the contrary, completely the opposite of the black-letter rule. This measure of residential surveillance, in which the police designate a specific residence, in fact puts the criminal suspect or defendant in a situation where the public security organs coercively restrict his personal freedom without any supervision. Specifically, there are five major problems.

**一、指定居所监视居住的适用条件不明确**

**I. The conditions for the application of RSDL are unclear**

指定居所监视居住，首先是监视居住。它分为两种情形，一种是基于“人道主义考虑”，例如对孕妇、哺乳期妇女，患有严重疾病导致生活不能自理的人等，给予他们作为弱势群体的特殊对待.

RSDL is first of all residential surveillance. It occurs in two different situations. The first is based on “humanitarian considerations,” such as pregnant or nursing women, or those who are unable to care for themselves do too serious illness.

另一种是公安认为“案件具有特殊情况或基于办案需要”采取监视居住更为适宜，也就是“办案需要”，但是“办案需要”的标准是什么，十分不明确，适用的时候可能就变成个筐，什么都可能解释成“办案需要”，甚至公安为了取证的办案需要都能往里装，所以，这种取证的正当性将面临很大的考验。

The second situation is where the public security organs find that adopting residential surveillance is more appropriate because they believe that the case involves special circumstances or that handling the case requires it. This is called “the needs of the case”, but the standard for what constitutes quote needs of the case unquote is quite unclear. In actual application, the term can turn into a general basket and everything can be interpreted as “the needs of the case”, to the point that the needs of the case for evidence gathering can be stuffed into it. Therefore, the legitimacy of this way of gathering evidence faces a severe test.

更为重要的是，刑诉法明确规定，采取监视居住，必须得符合逮捕条件。那谁来判断符合逮捕条件呢？正常程序是由检察院判断并批准逮捕，这就形成了检察权对侦查权的制约。但指居的决定、执行都归公安，公安就可以在制度上绕过检察院的监督，直接适用。这种在一般程序中例外的做法，必然会出现漏洞：长时间限制甚至剥夺公民人身自由的强制措施，却未经检察院批准。

Even more important is the fact that the criminal procedure law stipulates that when imposing RSDL, the conditions for arrest must be met. So who judges whether the conditions for arrest have been met? The normal procedure is for the procuracy to make this judgment and approve the arrest. This is the constraint that procuratorial power exercises over investigative power. But with RSDL, the decision and the implementation are both in the hands of the public security organs. This allows the public security organs to systematically evade procuratorial supervision and directly use residential surveillance. This method, which lies outside of regular procedures, will invariably have loopholes: a coercive measure that limits or completely eliminates citizens’ personal liberty has not been approved by the procuracy.

**二、指定居所监视居住被当做侦查取证手段**

**II. RSDL is used as a method of investigation and evidence collection**

刑诉法规定，对涉嫌国家安全犯罪、恐怖活动犯罪的犯罪嫌疑人、被告人，如果在住处监视居住，有碍侦查，可以经过批准指定居所监视居住。也就是说，法律明确规定只有两种犯罪，可以明确地采取指定居所监视居住，这是监视居住的例外原则。

The Criminal Procedure Law provides that where the execution of residential surveillance at the residence of a criminal suspect or defendant suspected of compromising national security or terrorist activities may obstruct criminal investigation, the surveillance may be executed at a designated residence with the approval [of the public security organ at the next higher level]. In other words, the statute clearly stipulates that there are only two kinds of crimes under which RSDL can be openly executed. This is the principle of exception to residential surveillance.

但现实中这两类犯罪明明没有这么多，指居却有一定的适用面，尤其在涉黑涉恶的案件中，可以说是“标配”。因为公安具有“异地管辖、异地办案”的权力，比如你住所地在淮安、但案件指定由南通公安机关侦办，这种情况下，就造成了犯罪嫌疑人在办案机关所在地南通，没有固定住处的事实，因此可以在指定的居所执行监视居住。也就是说，虽然可能有固定住处，但公安通过“异地管辖”可以让犯罪嫌疑人、被告人的固定住处“消失”，进而就能采取指居。这样一来就为公安“取证”提供了有力的制度工具。

However, in practice there are clearly not many cases of these two kinds of crimes, while RSDL is in fact applied more broadly, particularly in cases of organized crime and vice, in which RSDL has become virtually a standard procedure. That is because the public security authorities have the power of cross-regional jurisdiction and cross-regional case handling. For example, your residence is in Huai'an, but your case is designated to be handled by Nantong public security organs. In this case, the fact would be created that the suspect has no fixed residence in Nantong, where the designated organ handles the case. Therefore, residential surveillance can be executed at a designated location. In other words, although the suspect may have a fixed residence, the public security organs, through cross-regional jurisdiction, can make the suspect or the defendant's fixed residence disappear, so that they can execute RSDL. This provides a powerful institutional tool for public security organs to "gather evidence".

指居措施最长6个月，在执行期间犯罪嫌疑人未经侦查机关批准不得会见他人或者通信，几乎与外界隔绝，可以说，指居与拘留、逮捕的唯一不同就是不在看守所，但是看守所本身就是监督侦查行为的场所，在侦查机关指定的场所中侦查，无异于取消一切限制和监督措施，取证的合法性取决于侦查人员的自觉，但自觉往往是靠不住的。这也是涉黑涉恶案件，指居成为标配的原因。

The maximum period of RSDL is six months, during which the suspect is not allowed to meet or communicate with anyone without the approval of investigative organs, and is almost completely isolated from the outside world. In other words, the only difference between RSDL and detention or arrest is that it is not executed at a detention center. However, a detention center itself is the site for supervision over investigation. Conducting investigation at a designated location is the same as eliminating all the limitation and supervision over it. The legality of evidence collection will rest completely on the investigators’ self-awareness, which tends to be unreliable. This is also why RSDL has become a standard procedure in cases involving organized crime or vice.

**三、指定居所监视居住，造成律师会见需“实质批准”**

**III. RSDL forces lawyers to get “approval in substance” to meet the client**

虽然指定居所监视居住不能在羁押场所和办案场所执行，但指定的居所不管是酒店、医院还是其他“办案点”，也是由公安统一管理的，外人无法得知。律师要想会见，就必须得通过办案机关同意，这实际上是一种批准。

Although RSDL cannot be executed in custody or case handling locations, the designated locations, regardless of whether they are a hotel, a hospital, or another “case handling site”, are uniformly managed by the public security organs. Outsiders cannot get any information about them. If a lawyer wants to meet a client, they have to have the consent of the case handling organ, which is in fact a kind of approval.

依照法律规定，只有两类犯罪的律师会见需要批准，就是国家安全犯罪与恐怖犯罪，这也是指居唯二适用的两种犯罪类型，其他犯罪的律师会见都无需批准。由于“办案需要”“异地管辖”的制度存在，就会形成犯罪嫌疑人、被告人无固定住所的事实，如果采取监视居住，就是公安指定居所，律师会见就需要申请，进而由公安“批准”，这就是环环相扣的组合拳，根本目的是限制律师会见。

According to the law, there are only two types of crimes where lawyers need approval to meet their clients. These two are national security crimes and terrorist crimes, which are also the only two types of crimes where RSDL can be applied. Other than these two, lawyers do not need approval to meet clients in criminal cases. But because of the existence of “the needs of the case” and cross-regional jurisdiction, the fact of the suspect or the defendant having no fixed residence will be created. If residential surveillance is to be executed, the location will be designated by the public security organs. Lawyers will have to apply to meet the client, and in turn have to ask for public security organs’ approval. This is a combination blow with every part linked with each other, the fundamental purpose of which is to limit lawyers’ right to meet with their clients.

**四、对指定居所监视居住的监督失灵**

**IV. The failure of supervision of RSDL**

虽然，“人民检察院对指定居所监视居住的决定和执行是否合法实行监督。”检察院的刑事执行检察部门，也对指定居所监视居住、羁押必要性等问题进行审查。但问题在于指定居所监视居住在理论上不是羁押，检察院就无法开展“羁押必要性审查”。加之公安机关可以将刑事案件“指定管辖”或成立“专案组”负责，这就导致一种怪现象：出具指居文书的基层公安机关，并不负责案件具体侦办，只作为对外协调机关，而案件具体侦办在上一级公安机关。这时，基层检察院向基层公安了解案件情况，基层公安则以具体案件侦办在上级为由推卸责任；而上级检察院又因为指居不向检察院报捕，没有案件具体信息，无法进行监督。最终，造成了看似检察院监督权能充沛，实则进退失据，甚至出现对指居监督真空的危险现象。

Although “the people's procuratorates exercise supervision over the legality of the decision and execution of residential surveillance at a designated location”, and the criminal enforcement department of the procuratorate also reviews matters such as the necessity for RSDL and detention, the problem is that RSDL is theoretically not detention, which means the procuratorate cannot carry out a "review of the necessity of detention" over RSDL decisions. In addition, the public security organs can utilize designated jurisdiction or set up a "special case group" to handle criminal cases, which leads to a strange phenomenon: the basic-level public security organ that issues the RSDL document is not responsible for the specific investigation and handling of the case, but acts only as an external coordinating body, while the specific investigation and handling of the case is conducted by the public security organ at the next higher level. At this point, if the basic-level procuratorate asks the basic-level public security organ for information of the case, the basic-level public security organ will shirk its responsibilities on the ground that the specific case investigation is run by a higher-level organ, and the higher-level procuratorate is unable to supervise the case, because RSDL is not reported to the procuratorate so that it has no specific information about the case. In the end, the result is that it seems that the procuratorate has sufficient supervisory power, but in fact, it is in a dilemma and there could even be a dangerous vacuum in the supervision of RSDL.

由此造成在指居期限最长的六个月里，犯罪嫌疑人、被告人无法会见律师，也无法获得有效救济的困境，这严重违背宪法和刑诉法的人权保障精神。

As a result, during the maximum period of six months of RSDL, suspects and defendants are unable to meet with their lawyers or obtain effective relief. This is a serious violation of the spirit of human rights protection of the Constitution and the Criminal Procedure Law.

**五、指定居所监视居住异化为实质羁押**

**V．Conversion of RSDL into Substantive Detention**

指居具有高度限制人身自由，期限极长的羁押性特点，这与监视居住作为羁押替代措施的立法初衷相悖。如果制度允许办案机关凭自己认为的“办案需要”而对“符合逮捕条件”的犯罪嫌疑人、被告人采取监视居住，无疑给了办案机关规避法定批捕程序，转而采用长时间限制甚至剥夺公民人身自由违法取证的机会。

RSDL is characterized by a high degree of restriction on personal freedom and extremely long duration, which are in contradiction with the original legislative intent of having residential surveillance be an alternative to detention. If the system allows the case handling organ to execute residential surveillance[[2]](#footnote-2) on suspects or defendants who “meet the conditions of arrest” based on their own “needs of the case”, there is no doubt that it creates chances for it to circumvent the statutory arrest procedures and to gather evidence illegally by the limiting or even deprivation of citizens’ personal freedom.

司法实践中，刑讯逼供大多发生在将犯罪嫌疑人、被告人送交看守所之前，正因如此，刑诉法才明确规定，拘留、逮捕后都应当立即将被拘留、逮捕的人送看守所羁押；办案人员对其进行讯问，也应当在看守所内进行；加之录音录像制度、非法证据排除规则等。

In judicial practice, most of the extortions of confession by torture occur before the suspect or defendant is sent to a detention center, which is why the Criminal Procedure Law clearly stipulates that the detained or arrested person should be sent to a detention center immediately after detention or arrest. The interrogation by the case handling officer should also be conducted in the detention center, coupled with the audio and video recording system and the rule of excluding illegal evidence, etc.

指居的存在，造成法律规定的逮捕条件、批捕程序、防范刑讯逼供的制度越完善，指居被滥用的可能性就越高。宛如一个十分精致的茶壶，但壶底却是漏的，只是看上去很美，无法发挥应有价值。

As a result of the existence of RSDL, the more complete the legal stipulations are regarding conditions for arrest, the arrest approval process, and the system for preventing the extortion of confessions by torture, the greater the likelihood that RSDL will be abused. It is like a beautiful teapot with a leak at the bottom. It just looks good on the outside, but it cannot perform its valued function.

设立监视居住制度的目的，是限制犯罪嫌疑人或被告人离开居所，保障刑事诉讼顺利进行。在现有技术条件下，采用电子监控设备、GPS定位等技术措施完全可以实现。

The purpose of establishing a residential surveillance system is to restrict the suspect or defendant from leaving their residence and to ensure the smooth conduct of criminal prosecution proceedings. With existing technologies, the use of electronic monitoring equipment, GPS positioning and other technical measures can fully achieve the same purpose.

极端点说，废除监视居住，丝毫不影响刑事诉讼程序，甚至可以激活刑事诉讼法的制度价值。对于没有羁押必要性的犯罪嫌疑人，完全可以取保候审；对于有羁押必要性的就采取拘留、逮捕等监督程序完备的措施，这才能回归刑事诉讼法的人权保障价值！

To put it a little extremely, abolishing residential surveillance will not affect the criminal procedure in any way, and can even activate the institutional value of the Criminal Procedure Law. For criminal suspects who do not need to be detained, it is completely reasonable to grant bail; for those who need to be detained, [the authorities can] take measures that have a complete supervisory system, such as detention or arrest. Not until then can we return to the value of human rights protection of Criminal Procedure Law!

1. Translated by Donald Clarke and Changyun Pan. [↑](#footnote-ref-1)
2. Translator’s note: Probably “RSDL” is intended here. [↑](#footnote-ref-2)