CHENG XU FA WEN KU

程序法文库

诱惑侦查研究

YOU HUO ZHEN CHA YAN JIU

杨志刚 著

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序 言

《诱惑侦查研究》一书，是杨志刚修改其同名博士学位论文写成的。

诱惑侦查指侦查人员设置圈套，诱使侦查对象暴露其犯罪意图并实施犯罪行为，从而获得罪证并拘捕被诱惑者。作为一种有效的侦查方法，它在刑事侦查手段体系中有一定地位。然而，由于这种方法具有欺骗性，需要利用人性的某些弱点（如对金钱、毒品、色情的欲望等），因此有人称其为“肮脏的手段”。在这个意义上，诱惑侦查中存在侦查的谋略性与合道德性之间的紧张关系。如何对这种侦查手段进行合理规制，使其能有效发挥侦查效益，同时降低使用成本，是一个难题。在我国，由于法律对诱惑侦查未作规定，导致了实践中的认识分歧与操作失范。《诱惑侦查研究》一书正是围绕诱惑侦查法制化问题，作了有意义的研究。

作者界定了诱惑侦查的概念、特征、分类，分析了诱惑侦查与卧底侦查、控制下交付、诱捕行为、特情侦查、陷害教唆、侦查圈套等概念的关系，论述了诱惑侦查的风险性、实践必要性与法理正当性等问题。在此基础上，作者运用较多资料包括部分最新资料，对11个国家、2个地区诱惑侦查发展变化进行了分析，梳理和勾勒出各国诱惑侦查发展变化的历史脉络和基本法理。在分别论述各国诱惑侦查特色和发展演变轨迹的基础上，作者归纳出诱惑侦查发展的四大趋势，对研究我国诱惑侦查法制化问题有启发意义。

研究我国诱惑侦查的法制化，是本书的落脚点。作者多年从事公安工作，对诱惑侦查的实务比较熟悉，这为他研究我国诱惑侦查法制化问题提供了较好条件。就诱惑侦查的合法性的判定，国外形成了主观标准、客观标准、综合标准。在我国，学术界和

实务界比较公认的是“两分法”的观点，即认为机会提供型诱惑侦查合法、犯意诱发型诱惑侦查非法。作者对这些标准进行了客观的评述，分别指出其利弊所在。特别是对“两分法”这一学术界的“通说”提出质疑，指出这种观点在理论渊源上是对于美国判例的误读，在实践中可能造成某种误导。在此基础上，作者提出了自己关于诱惑侦查合法性的标准，即以因果关系为中心的综合标准。围绕这一标准，作者提出了我国诱惑侦查应当坚持的八项原则。在此基础上，作者进一步探讨了连环式诱惑侦查、连续性诱惑侦查、反向诱惑侦查、网上诱惑侦查等问题。这些分析研究应当说颇具新意。

本书思路清晰，资料翔实，研究深入，显示了作者严谨认真的学术态度。应当说，该书是目前国内系统、深入地研究诱惑侦查法制化问题的一部力作。不过，书中有些问题论述还不够深入，有些观点并不一定周全合理，还需要作者进一步思考修正。最后希望作者以本书出版为新的起点，在理论研究方面取得更大的成绩。

龙宗智

二〇〇八年七月三十日

内容提要

诱惑侦查指国家机关侦查人员采取一定的诱导性策略，暗示或诱使侦查对象实施某种犯罪，并在犯罪实施时或结果发生后拘捕犯罪人的一种侦查取证方法。采用诱惑侦查的方法侦破毒品犯罪等具有高度隐蔽性特征、高度组织化程度的犯罪，在许多国家是普遍的实践。鉴于这一特殊侦查措施可能侵犯侦查对象合法权利的潜在风险，一些国家和地区通过成文法或判例法对其进行规制。在我国，诱惑侦查的运用存在的问题集中体现为理念缺失、制度阙如、操作失范，既不利于权利保护，也不利于犯罪控制。在推进依法治国的进程中，不应当容许这一隐含较大侵权风险的侦查措施长期处于“法外运行”的状态。从程序法的角度研究对这一侦查手段进行法律规制，不仅具有重要的理论价值，也正是实践中的迫切需要。本书以诱惑侦查法制化为主线，围绕诱惑侦查合法性把握、违法诱惑侦查的处理这两大核心问题，共分三章展开研究。

第一章为基本理论。力图通过对相关理论问题的阐释，更加准确、全面地把握这一侦查手段的本质。本文分析了诱惑侦查的概念，揭示了诱惑侦查具有主动性、欺骗性、诱导性三大显著特征；在目前主流观点的基础上，提出了笔者自己关于诱惑侦查的四种分类；对诱惑侦查与卧底侦查、控制下交付、“诱捕行为”、特情侦查、陷害教唆、侦查圈套等易于混淆的概念进行了比较与辨析；剖析了诱惑侦查实际运行存在较大的风险性，但对于打击某些特殊犯罪具有实践的必要性；从诱惑侦查包含的侵权行为具有一定的许容性；在其他情形下可能视为违法甚至犯罪的行为具有一定的许容性，对尚未真正实施犯罪的人采取主动性的侦查具

有一定的许容性，可能引起司法伦理困境的欺骗、诱导策略具有一定的许容性四个角度，探讨了诱惑侦查正当化的法理基础；基于对诱惑侦查本质特征的把握，对诱惑侦查属于强制侦查还是任意侦查、诱惑侦查是否违反不得强迫自证其罪原则这两个重要理论问题进行了初步的回答。

第二章为诱惑侦查的历史发展与比较考察。从法理、制度与实务三个层面，分析了主要法治国家和地区诱惑侦查的发展演变，介绍了国际法上对于诱惑侦查的基本态度和做法，力图从中揭示出一些共通的理念，以为我国建构诱惑侦查法制之借鉴。关于美国的诱惑侦查，在国家权力空前扩张这一背景下，论述了早期诱惑侦查在实务中被大量采用的实际情形以及司法上的宽容态度；分析了从私法解释理论到现代圈套法理萌芽这一重要的理论转型，揭示了其中蕴涵的重要观念变化；讨论了美国最高法院关于圈套问题的几起重要判例，论述了美国圈套法理的五大新近发展趋势：合法性审查的重点从被告主观心理朝着因果关系转变、合法性判断方法倾向于综合审查、强调警方在采取诱惑侦查之前应具有合理怀疑、认可一定程度的积极介入行为、更加注重对被告人权利的保护。关于英国诱惑侦查的历史发展，介绍了从18世纪以来的两大发展阶段，重点阐述了1980年Sang案以后在制定法与普通法规制方面取得的长足进展。以英国上议院对于2001年Looseley案判决为标本，论述了英国法上关于诱惑侦查合法性的若干要点：一是强调诱惑侦查的最后手段性；二是强调诱惑侦查行为适度，包括以普通人行为作为检验标准、要求诱惑行为限度区别化、积极介入适度许可；三是强调诱惑侦查的目的正当性；四是注重因果关系；五是注重审查监督。概括了英国诱惑侦查法理的三大特色：一是在合法性的终极标准上，表现为一系列抽象法律理念；二是在个案考量上求诸多种相关因素，表现出综合审查而非孤立认识的特点；三是在判断方法上注重利益权衡，诉诸法官自由裁量。揭示了英国司法实践中对待诱惑侦查仍然持相当宽容的态度，

典型地反映出“纸面上的法”与“行动中的法”在某种程度的背离，并分别从观念层面、方法层面、证据可采性标准方面深入剖析了造成这种背离的原因。关于澳大利亚的诱惑侦查，根据历史发展的脉络，分别讨论了前瑞积威案阶段、瑞积威案判决与后瑞积威案阶段的法理与实务，着重论述了这一过程中合法性检验标准以及违法诱惑侦查的处理等方面的发展变化。此外，还分别论述了加拿大、日本、德国、荷兰、法国、瑞士、意大利、葡萄牙以及中国香港特别行政区和台湾地区诱惑侦查法理特色与实务状况，分析了欧洲人权法院关于1998年的Teixeira de Castro诉葡萄牙案判决和联合国禁毒署于2003年公布的《控制毒品相关犯罪模型法》，力图从中揭示出国际法上对待诱惑侦查的倾向性态度。在历史考察的基础上，对各国诱惑侦查法理进行了比较分析，阐述了诱惑侦查的四个方面的发展趋势，如对待诱惑侦查的态度普遍经历了由放任而至规制的历程，最终走上了法制化的道路；在顺应人权保障大趋势的前提下，对于犯罪控制表现出格外关注等。

第三章论述了我国诱惑侦查法制化。这是本论文的最终落脚点。这一部分对我国诱惑侦查的立法与实务现状进行了实证分析，指出当前诱惑侦查存在四个方面的突出问题：一是适用案件范围掌握比较随意，缺乏合理限制；二是对诱惑侦查缺乏有效的监督制约，不利于被告人权利保护；三是如何把握诱惑侦查合法性界限，做法不尽一致；四是对明显不当的诱惑侦查，缺乏权利救济措施。提出我国对于诱惑侦查应当秉持的基本态度：一是承认诱惑侦查具有一定的必要性与合理性，二是积极推进诱惑侦查法制化。关于诱惑侦查合法性判断，对主观标准、客观标准、综合标准以及流行的“两分法”进行了全面反思，提出我国应当采取以因果关系为核心的综合审查方法，具体论述了我国诱惑侦查的必要性原则、合理怀疑原则、目的正当性原则、主体特定原则、行为适度原则、因果关系原则、风险控制原则、审查监督原则八项原则。在阐述一般原则的基础上，注意把握实践脉动，讨论了我

国实务中存在的连环式诱惑侦查、连续性诱惑侦查、反向诱惑侦查、网上诱惑侦查几种特殊形态诱惑侦查的合理性把握。关于诱惑侦查合法性的证明，论述了证明责任分配、证明标准设定，指出我国应当加强相关配套制度建设，主要是妥善处理秘密侦查员以及特情、线人作证与公共利益保护的关系，赋予技术侦查取得的视听资料以证据能力。关于违法诱惑侦查的处理，认为我国应当根据其程序性违法程度，适用不同的制裁措施，对于诱使无辜人员犯罪，即构成因果关系的诱惑侦查，应当终止相关诉讼，并宣告被告人无罪；对犯意强化型的诱惑侦查，应当适当从轻或减轻处罚，对于轻微犯罪可以免除处罚。

关键词：诱惑侦查 合法性 证明 程序制裁

A Study on Inductive Investigation

Inductive investigation refers to the investigation mode in which law enforcement officers take certain inductive strategies so as to lure or incite a subject to commit certain crime, thus arrest the subject. It has become a common practice in many countries when investigating crimes such as drug dealings which have the features of covertness and good organization. Considering that this mode of investigation has the potential risk of infringing the subjects' lawful rights, some countries and districts regulate this practice through written law or case law. In our country, the problems in the inductive investigation practice are mainly as follows: lack of correct theories, lack of sound regulations, and lack of sound practice guidance. This is not only harmful for the protection of lawful rights, but also harmful for the control of crimes. During our process of "ruling under law", we should not allow this mode of investigation, which has great potential risk of infringing lawful rights, to operate beyond the regulation of law. To study the standardization of inductive investigation from the angle of procedural law not only has great theoretical significance, but also can meet the urgent need in practice. This thesis is threaded by the legalization of inductive investigation, and focuses its study on the standards of legalization and the handling of illegal inductive investigation. The whole thesis is composed of three chapters.

The first chapter deals with the basic theories about inductive investigation. It tries to expound relative theories so as to accurately reveal the essence of this mode of investigation. This part analyzes the definitions of inductive investigation, and shows that it has three apparent fea-

tures of positiveness, duplicity, and inductiveness. Based on the main opinions presently exist, this part divides inductive investigation into four categories, and differentiates some concepts which are often confused, such as undercover investigation, delivery under control, framing abetting, entrapment, etc. Although inductive investigation has potential risks, it is very important in the practice of fighting certain special crimes. This part probes into the theoretical basis for the justification of inductive investigation, and provides an answer to the two questions: whether inductive investigation is free investigation or enforcement investigation; whether inductive investigation actions should abide by the self – incrimination rule.

Chapter two takes a look at the history of inductive investigation and makes comparison between such operations in different countries. It analyzes the development of inductive investigation in various countries from three levels: theory, system and practice. Through an introduction of the basic attitudes and approaches to inductive investigation in the world, this part tries to reveal some common ideas, so as to lay a basis for the legislation on inductive investigation in our country. As to inductive investigation in the United States, inductive investigation was ever broadly applied, and the judicial system was tolerant to this approach. This part discusses the transfer from private law interpretation to modern entrapment theory, and reveals the change of important ideas. Through an analysis of several significant cases by the U. S. Supreme Court, this part introduces the five new trends in the development of theories on inductive investigation: The focus in the legitimacy examination shifts from the subjective aspects of the defendant to the causal relationship; the approach to legitimacy examination shifts to comprehensive examination; law enforcement officers should form reasonable doubt before implementation of inductive investigation; tolerance of active interference to cer-

tain degree; attach more importance to the protection of the human rights of the defendant. As to the development of inductive investigation in the United Kingdom, this part introduces the two important stages of development from the 18th Century, and makes a detailed introduction about the development of this approach since the Sang case in 1980. Taking the Loosely Case in 2001 as an example, this part introduces the key points on the legitimacy of inductive investigation in the United Kingdom: the necessity of inductive investigation; the appropriateness of inductive activities; the rightful purpose of inductive investigation; the causal relationship; the supervision and examination of inductive investigation. It summarizes the three features of the theories on inductive investigation in this country: the ultimate standard for legitimacy is embodied by a series abstract legal ideals; in individual cases, the court takes a comprehensive examination approach which takes many relative elements into consideration; balancing of interests plays an important role in judgment approaches, and is done through the free evaluation of judges. Such aspects show that the United Kingdom still takes a pretty tolerant attitude toward inductive investigation, which indicates the disagreement between "written law" and "practical law". This part analyzes the reasons for such disagreement from the ideal level, approach level and the admissibility of evidence. As to the inductive investigation in Australia, taking its historical development as a clue, this part discusses the theories and practice in the pre – Ridgeway stage, the Ridgeway judgment and the post – Ridgeway stage. It emphatically explores the changes in the standards of legitimacy and the handling of unlawful inductive investigation. Moreover, this part takes a brief look at the theoretical features and practical conditions of inductive investigation in such countries and districts as Canada, Japan, Germany, the Netherlands, France, Switzerland, Italy, Portugal, Hongkong, and Taiwan. Still, it

analyzes the case Teixeira de Castro v. Portugal judged by the European Human Rights Court and the Model law on the control of drug – related offences issued by the UN in 2003, so as to explore the attitude of international laws toward inductive investigation. Through such historical angles, this part makes a comparison between the theories on inductive investigation in different countries, and expounds the four trends in the development of inductive investigation. For example, the legalization of this investigation approach; stress on the control of crime on the basis of protection of human rights, etc.

Chapter three deals with the legalization of inductive investigation in our country. This is the conclusive part of the thesis. It makes a positivist analysis on the legislation and practice of inductive investigation in our country, and points out the four outstanding problems existing: first, the casual application of this approach needs reasonable limits; second, the lack of supervision on inductive investigation is harmful for the protection of the defendants' human rights; third, there exists no commonly acknowledged standards for the legitimacy of inductive activities; fourth, there is no effective remedial measures for unlawful inductive actions. This part puts forward a basic attitude toward inductive investigation in our country: first, we should admit the necessity and rightfulness of inductive investigation; second, we should promote the legalization of inductive investigation. In the judgment of the legitimacy of inductive investigation, based on an overall reflection on the subjective test, the objective test, the comprehensive test, it holds that we should apply the comprehensive test which evolves around the causal relationship, and expounds the eight principles of necessity, reasonable doubt, rightful purpose, limited subjects, reasonable activities, causal relationship, control of risks, supervision. Besides the general principles, this part pays attention to the practice in our country, and discusses the several

special forms of inductive investigation, such as interlocking inductive investigation, continual inductive investigation, reverse inductive investigation, on－line inductive investigation, etc. On the proof of legitimacy of inductive investigation, this part deals with the distribution of burden of proof, and the establishment of standards of proof. It points out that we should promote the establishment of relative mechanisms, and reasonably deal with the relationship between the protection of public interests and such investigation approaches as secrete investigation, undercover investigation, and informer investigation. As to the handling of unlawful inductive investigation, we should apply different remedial measures according to the seriousness of illegality. When an innocent person is allured to commit a crime, in other words, when there exists causal inductive investigation, the accusation should be terminated and the accused should be sentenced non－guilty. In the cases in which the subject has a preponderance, we should mitigate the punishment on the accused, and when the crime is obviously petty, we should abate the punishment on the accused.

Key Words: Inductive Investigation, Legitimacy, Proof, Procedural Sanction

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