

诱惑侦查中的 刑法问题研究

翟金鹏◎著



诱惑侦查是指国家侦查部门为了侦破某些疑难案件或者重特大案件，由侦查人员或者侦查工作的协助者设置诱饵，诱使侦查对象上钩，借此抓获侦查对象或者搜集犯罪线索、证据的一种秘密侦查手段。以侦查对象被诱前有无犯罪意图为标准，诱惑侦查分为犯意诱发型与机会提供型诱惑侦查。原则上犯意诱发型诱惑侦查是禁止的，而机会提供型诱惑侦查在一定程度上则是允许的。



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摘 要

本书以《诱惑侦查中的刑法问题研究》为题,对由于诱惑侦查所致的刑法问题主要围绕罪、责、刑三个大的方面进行了相对全面的分析研究。本书共六章,计 15 万余字。

第一章:诱惑侦查概说。本章主要阐述了诱惑侦查的概念、类型以及侦查主体与被诱惑者之间的关系。笔者认为,诱惑侦查是指国家侦查部门为了侦破某些疑难案件或者重特大案件,由侦查人员或者侦查工作的协助者设置诱饵,诱使侦查对象上钩,借此抓获侦查对象或者搜集犯罪线索、证据的一种秘密侦查手段。根据不同标准,可以把诱惑侦查划分为许多不同的具体类型。其中的二分法,即以侦查对象被诱前有无犯罪意图为标准,诱惑侦查分为犯意诱发型与机会提供型诱惑侦查,是本书的基本出发点。原则上说,犯意诱发型诱惑侦查是应该禁止的,而机会提供型诱惑侦查在一定程度上则是允许的。

诱惑侦查主体与被诱惑者及其相互关系。诱

诱惑侦查主体是指诱惑侦查行为的决定者以及具体参与实施者。目前,实施诱惑侦查的职能部门基本上是公安机关系列的侦查部门。对于人民检察院的侦查部门能否成为诱惑侦查的职能主体,笔者持肯定的观点。除职能主体外,诱惑侦查的具体参与者包括侦查部门的决策者、具体执行的侦查人员以及侦查工作的协助者。侦查工作的协助者主要是指刑事特情。被诱惑侦查者的具体类型主要有特定的侦查对象与不特定的侦查对象。针对前者实施诱惑侦查,一般不会产生违法的问题,但是针对后者实施诱惑侦查则要谨慎处理。因为诱惑侦查权力存在较大的被滥用风险,同时清白之人很可能会因为警方诱惑而成为警方故意制造的犯罪对象。诱惑侦查主体之间存在诸多关系组合,诱惑侦查主体与被诱惑者之间也存在诸多关系组合。不同的关系组合直接影响着诱惑侦查主体以及被诱惑者行为的性质、责任的分担以及量刑等问题。

第二章:诱惑侦查行为非犯罪化与犯罪化问题研究。诱惑侦查中所致刑法问题主要分为两个大的方面,一是诱惑侦查主体可能导致的刑法问题,二是被诱惑者可能面临的刑法问题。对于上述问题,本书从两条线展开了相对全面的分析研究,即一条线是围绕诱惑侦查主体所致刑法问题展开论述,另一条线是围绕被诱惑行为进行分析论证。

诱惑侦查行为的非犯罪化与犯罪化问题。笔者认为凡是需要探讨是否犯罪化处理的某种行为都应该是具有极大特殊性的行为。即使社会生活中存在与此相类似性质的行为,但是它们之间又有较大的区别,如现行刑法的相关规定难以包容它们,或者某种行为缺乏实质的社会危害性等,正因如此,需要进行特别的讨论。安乐死问题即是如此。诱惑侦查行为所致刑法问题较安乐死问题更为复杂、特殊,所以,深入研究诱惑侦查行为的犯罪化与非犯罪化问题是必要的。

犯罪发生在前、侦查启动在后的反应式(被动性)侦查是刑事侦查基本属性的表现。基于这一认识,笔者认为犯意诱发型诱惑侦查是应该禁止的,而机会提供型诱惑侦查在一定程度上则是允许的。对于犯意诱发型的诱惑侦查行为原则上应作为犯罪化处理的对象,与此相对应,无犯

意被诱惑者的行为原则上应作为非犯罪化处理。机会提供型诱惑侦查行为作非犯罪化处理的具体理由主要是:机会提供型诱惑侦查不仅没有社会危害性,反而是有益于社会秩序稳定的行为。诱发犯意的诱惑侦查行为进行犯罪化处理的主要依据是:严重侵犯了被诱惑者的权利,诱惑手段是被诱惑者实施犯罪的重要原因力,行为人在主观上具有可以谴责的罪过。

第三章:被诱惑行为的非犯罪化与犯罪化问题研究。被诱惑行为是否进行犯罪化处理,要区分具体情况。原则上说,有犯意的被诱惑行为应作为犯罪处理,无犯意的被诱惑行为应作非犯罪化处理。后者的主要依据有四,即缺乏实质上的犯罪构成要件该当性,罪责自负原则的内在要求,教育刑刑罚目的的内在要求以及刑事政策的客观需要。有犯意被诱惑行为之所以被作为犯罪处理,主要根据在于:有犯意的被诱惑者具有主观罪过,有犯意的被诱惑行为具有一定的客观危害。

第四章:诱惑侦查主体的刑事责任问题研究。本章主要集中于对行为人辨认能力与控制能力方面的分析,此外,对于期待可能性问题也作了一定的探讨。由于诱惑侦查主体的类型主要是决策者、执行者与侦查工作的协助者,所以本书分别分析了各自的辨认与控制能力问题,其中对于执行者与侦查工作的协助者——刑事特情的辨认、控制能力问题进行了相对深入的分析。诱惑侦查执行者的辨认、控制能力问题与执行命令行为有着重要的关联。当上级下达执行非法诱惑侦查任务的命令时,有两种不同的处理方法。首先,当下级工作人员不知命令的非法性质时,他们没有或者缺乏控制能力,从而行为人对危害结果无罪过。其次,当下级工作人员明知命令内容违法,仍然依法执行命令,由于其主观上并没有丧失意志选择的自由,因而其对非法诱惑侦查行为的发展方向并没有失去完全的控制能力。所以,执行者仍应承担相应的刑事责任。刑事特情没有识别、辨认诱惑侦查行为性质是否合法的法定义务,更谈不上对诱惑侦查行为发展方向的控制,因此,在一般情况下,其不是刑事责任评价的对象。

关于期待可能性问题。就诱惑侦查的决策者来说,影响其期待可能性的因素大概有:上级关于限期破案的压力、群众要求破案的压力、量化的办案指标等。这些因素均不能成为阻碍其选择适法行为的理由。当执行者不知命令的非法性质时,在这种情况下,一般不可能期待命令的执行者另行选择合法行为。当执行者了解命令的非法性质时,其有义务拒绝执行,如果其继续实施非法诱惑侦查行为,那么对于该行为所导致的严重后果,执行者应该承担相应的刑事责任。

第五章:被诱惑者的刑事责任问题研究。本章重点分析了有认识错误的被诱惑者的刑事责任问题。诱惑侦查中的事实认识错误具有一定的特殊性,其在以下方面有别于刑法理论传统上的事实认识对象错误。首先,被认识错误的侵害对象具有特定的身份;其次,被认识错误的侵害对象对于将要发生的侵害有充分的心理准备,并有相应的安全防护措施;再次,被诱惑者实施的侵害行为是可控的;最后,被认识错误的侵害对象有时可能是真实的,但是被侵害对象的周围环境是经过刻意设计的,因此,被诱惑者的事实认识错误实际上就包括了对象错误(周围环境的错误所导致的“真实”错误),以及被侵害对象周围环境的错误。事实认识错误问题如同其法律认识错误问题一样,均不会影响单数无犯意被诱惑者的刑事责任问题。复数被诱惑者链条中无犯意被诱惑者法律认识错误、事实认识错误也不会影响其刑事责任。

第六章:诱惑侦查所致犯罪的定罪量刑问题。本章分别分析了诱惑侦查主体以及被诱惑者两方所涉及的相关问题。本章对于诱惑侦查主体出于陷害他人动机实施诱惑侦查能否构成教唆犯罪的情形做了相对深入的分析。笔者认为,在这种情况下,不能以教唆犯的形式追究诱惑者的刑事责任。诱惑侦查中的这种教唆是一种不同于普通教唆、陷害教唆的一种特殊教唆,可以称为诱惑侦查的教唆。教唆者对被教唆行为以及被教唆后果的心理认知方面的不同是区别上述三种不同倾向的关键。上述三种形式教唆的不同点主要表现在:普通教唆行为人对危害结果的是否发生的主观心理没有过失存在的余地,陷害教唆行为人则主要表现

为间接故意,特例情况下不排除直接故意与过失心理,而诱惑侦查教唆行为人对危害结果的发生则持完全否定的态度,即没有故意心理存在的余地,过失心理的存在是例外。

就被诱惑者来说,不同的犯罪地位、犯罪情节、犯罪形态均影响其刑事责任的程度。对于毒品案件被告人的定罪量刑,要充分考虑到警方诱惑的因素,要贯彻刑罚的谦抑精神。基于此种认识,笔者认为,最高人民法院《关于印发〈全国法院审理毒品犯罪案件工作座谈会纪要〉的通知》的有关内容没有正视上述问题,所以存在较大缺陷,应予以相应调整。

最后,本书提出了几点立法建议。一、从刑事程序法的角度规范诱惑侦查。建议立法机关制定专门的秘密侦查工作规范,对诱惑侦查的启动程序进行规定;或者在刑事诉讼法中增加相应规制条款。二、从完善刑事实体法的角度解决诱惑侦查的相关问题。建议完善刑法典第29条,增加陷害教唆与诱惑侦查教唆的内容;建议完善刑法典第28条,增加“对于被诱骗犯罪的应当减轻或者免除处罚”的内容;建议完善刑法典关于正当化事由的类型,增加职务行为与依法执行命令行为。

Abstract

This paper takes “*on the Criminal Law Issues in the Encouragement Investigation*” as its title, and through centering on the three respects of crime, responsibility and punishment, performs a relatively complete analysis and research on the criminal law issues caused by encouragement investigation. It has six chapters, over 150,000 words.

Chapter one is the outline of encouragement investigation, which mostly illuminates the functions and categories of encouragement investigation and the relations between the investigating subject and the encouraged. This paper believes that encouragement investigation is one kind of secretly investigating method, through which, for the purpose of detecting some complex or significant cases, the investigators from the state investigating authorities or their assistants devise some lure to attract the investigated targets and then arrest them or collect the clue to some

crime or its evidences. In light of different standards, encouragement investigation can be classified into many specific categories. The dichotomy, which, taking as its standard whether the investigated target has the intention of committing a crime before being encouraged, classifies encouragement investigation into two categories: entrapment detection and opportunity encouragement, is the basic position of this paper. In principle, the entrapment detection shall be prohibited, but the opportunity encouragement shall somewhat be permitted.

In terms of the interrelation between the encouragement investigating subject and the encouraged, it is the encouragement investigating subject who decides and specifically implements the encouragement investigating act. At present, the functional departments implementing encouragement investigation is generally the investigating departments under the public security agency. And in respect to the investigating departments under the people's procuratorate, this paper believes that they are also the functional departments implementing encouragement investigation. Besides the functional subjects, the participants in encouragement investigation include policy - makers, the investigators who specifically perform the policy and the assistants to investigation. The assistants to investigation mainly refer to the informers. The encouraged can primarily be classified into definite investigative targets and indefinite ones. To perform encouragement investigation against the former will generally not be illegal, while to perform encouragement investigation against the latter should be cautious, for there is the risk that the power of encouragement investigation will probably be abused and there is a good chance that an innocent person become a guilty target intentionally produced by the police because of their encouragement investigation. There are many relational combinations among the encouragement investigating subjects, and it is true of between the

encouragement investigating subjects and the encouraged. The various relational combinations have direct effects on the nature of the acts by the encouragement investigating subjects and the encouraged, on the sharing of responsibilities and the measurement of penalty, etc.

Chapter two is on the criminalization and decriminalization of the encouragement investigating acts. The criminal law issues caused by encouragement investigation are largely as follows: one being the possible criminal law issues by the encouragement investigating subjects, the other the possible criminal law issues faced by the encouraged. With regard to the above issues, this paper performs a relatively complete analysis and research on them from the following two points of view: one centering on discussing criminal law issues by the encouragement investigating subjects, the other analyzing and demonstrating the encouraged acts.

The criminalization and decriminalization of the encouragement investigating act. This paper holds the view that whatever is the act which needs handling, it shall be an act of great particularity. Although in social life there is some acts of similar nature to it, there is a big distinction between them, for example, the provisions in the existing criminal code do not govern it, it does not have the nature of substantially social danger, etc. Hence, it needs discussing specially. And it is true of euthanasia. The criminal law issues by the encouragement investigating act are more complex and special than that by euthanasia, thus it is very essential to research on the criminalization and decriminalization of the encouragement investigating act in depth.

The passive investigation which follows the occurrence of a crime is the manifestation of one basic characteristic of criminal investigation. On the basis of this cognition, we hold that the entrapment detection be prohibited, while the opportunity encouragement be somewhat permitted. And in

principle, the entrapment detection shall be viewed as the target of criminalization; on the contrary, the opportunity encouragement shall be handled as the target of decriminalization. The reason for this is that the opportunity encouragement does not have any harm to the society, further, it is an act which benefits the stability of society. And the main grounds for viewing the entrapment detection as the target of criminalization are that it severely infringes the rights of the encouraged, and the encouraged method is the significant cause for the encouraged to commit a crime, subjectively the doer having culpability.

Chapter three is on the criminalization and decriminalization of the encouraging acts. Whether the encouraging act shall be viewed as criminalized act depends on the concrete conditions. In principle, the act with the intention of entrapment shall be taken as a crime, whereas the act without the intention of entrapment shall be viewed as an act of decriminalization. The grounds for the latter are as follows: it substantially lacking the constitutive requirements for a crime, not having the inherent requirements for the principle of bearing responsibility for an offense and the purpose of criminal law on educative punishment, and also lacking the objective needs of criminal policy. And the reason why the act with the intention of entrapment shall be taken as a crime is that the encouraged with the intention of committing a crime subjectively has culpability, and that the encouraged act with the intention of committing a crime has somewhat objective danger.

Chapter four is on the criminal responsibility of the encouragement investigating subjects. This chapter primarily concentrates on the analysis of the abilities of the doer to recognize and control his act, besides, exploring the possibility of expectation. Since the encouragement investigating subjects are the policy-maker, performers and the assistants, this paper analyzes the

abilities of them to recognize and control their acts respectively, especially probing more in depth the abilities of the performers and the assistants i. e. the informers, to recognize and control their acts. There are important interrelations between the abilities of the performers of encouragement investigation and the acts to implement the orders. And there are two different approaches when the high authorities order to perform the illegal encouragement investigation, the first being that when the investigators at the lower level are not aware of the illegality of the order content, they lack the controlling abilities, thereby the doer are not guilty of the dangerous result; the second being that the investigators at the lower level are awake to the illegality of the order content, but they still perform it—since subjectively they haven't lost the freedom of intention selecting, they haven't completely lost their abilities to control the development of the illegal encouragement investigating act, correspondingly, they shall still bear their criminal responsibilities. The informers don't have the legal duty to recognize the legality of the encouragement investigating act, not to speak of controlling the development of the encouragement investigating act, therefore, generally, they are not the assessed target of criminal responsibility.

The possibility of expectation. So far as the policy – maker of the encouragement investigation is concerned, the factors affecting the possibility of expectation are as follows: the pressure from the high authorities to crack a criminal case within the specified time, the pressure from the masses demanding to crack a criminal case and the quantized index of solving criminal cases, etc. But all of these above factors cannot constitute the good reason for preventing he/she from determining legal acts. On the condition that the performers are not awake to the illegality of the order, it is generally impossible to expect the performers to choose legal acts separately. But when the performers are aware of the illegality of the order, they shall have the

duty to refuse to implement it. And if they continue implementing the illegal encouragement investigating act, they shall bear the corresponding criminal responsibilities for the severe consequences caused by such act.

Chapter five is on criminal responsibilities of the encouraged. It attaches great importance to analyzing the issue on the encouraged with error recognition. The error recognition of facts in encouragement investigation has some specialty, which is different from the mistake of factually recognizing the target in traditional criminal law in the following aspects: firstly, the infringed target being mistakenly recognized having special identity; secondly, the infringed target being mistakenly recognized psychologically having good preparation for the approaching infringement and having taken corresponding secure preventive measures; thirdly, the infringing act by the encourage being controllable; and fourthly, the infringed target mistakenly recognized sometimes maybe being practical, but the surroundings around the infringed target having been devised intentionally, hence in fact, the error recognition of facts by the encouraged covering the mistake of target (the "true" mistake caused by the error surroundings) and the mistake of the surroundings around the infringed target. Like the error recognition of law, the error recognition of facts won't affect the criminal responsibilities of the single encouraged without the intention of committing a crime. The error recognition of law and the error recognition of facts by the plural encouraged without the intention of committing a crime won't affect their criminal responsibilities, as well.

Chapter six is on the issues of the conviction and measurement of a crime caused by encouragement investigation. It respectively analyzes the issues involving the encouragement investigating subject and the encouraged. And it analyzes more in depth the condition whether the encouragement investigating subject constitutes an instigator when he/she implement

encouragement investigation, motivated by framing up someone else. In this circumstance, we think, the encouraging subject shall not be prosecuted for the criminal responsibility as an instigator. This instigation in encouragement investigation is a special instigation, which is different from the ordinary instigation and framing – up instigation, and it can be called instigation by encouragement investigation. The difference of psychological cognition between the instigated act and the instigated consequence by the instigator is the key to differentiating the above three kinds of different inclinations. The differences among the above three forms of instigation are as follows: the ordinary instigator subjectively having no fault for the occurrence of the dangerous consequence, while the framing – up instigator having indirect intention for it, and exceptionally he probably having direct intention and fault for it, and the instigator in encouragement investigation completely holding a negative attitude to the occurrence of the dangerous consequence, namely he/she not having the deliberation for it, and the fact that he/she has fault for it being an exception.

In respect to the encouraged, different criminal status, circumstances and patterns all affect the degree of his/her criminal responsibility. And in terms of the conviction and measurement of the crime by a defendant in a drug case, we shall take into consideration the factors of the encouragement by the police, and implement the spirit of restraining criminal punishment. On the basis of the above understanding, we believe that the concerned contents in *the Notice on Printing and Distributing the Summary of the Working Forum on Hearing Drug Cases by the National Courts* by the Supreme People's Court have not taken the above problems seriously, thereby have some deficiency, and should be amended correspondingly.

Finally, this paper puts forward some suggestions on legislation: firstly, to govern encouragement investigation through criminal procedural law, and

it advises that the legislative establishment lay down special working norm on secret investigation, enact provisions on the starting - up procedure of encouragement investigation; or add corresponding governing articles in the *Criminal Litigation Law*. Secondly, to solve the concerned problems on encouragement investigation through criminal substantive law, and it suggests perfecting Article 29 in the *Criminal Code*, adding the content of framing - up instigation; improving Article 28 in the *Criminal Code*, adding the content of "mitigation or annulment of punishment to the crimes by the encouraged"; perfecting the categories of legitimate grounds in the *Criminal Code*, adding the acts of official duties and implementing an order in light of law.

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