

新中国第一个侦查学本科专业创建三十周年纪念



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RENYI ZHENCHA YANJIU

任意侦查研究

马 方 著

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总 序

1979年至2009年,三十年一路走来,西南政法大学刑事侦查专业建设历尽艰辛,收获辉煌。

歌乐山,人杰地灵,这里不仅有永恒的革命先烈精神,也孕育了无数法学英杰。我国教育史上的第一个侦查学本科专业即诞生于此。1979年6月,由最高人民法院和公安部联合提出在西南政法学院创办刑事侦查专业的申请,获得了教育部的批准。1979年7月,新中国第一个侦查学本科专业在国务院首批公布的重点大学——西南政法学院(现西南政法大学)诞生,由此开启了西南政法大学侦查学专业建设的辉煌历程。1984年西南政法学院侦查学专业开始招收硕士研究生,1985年建立侦查学系,2000年侦查学系组建为刑事侦查学院。历经近三十个不平凡的春秋的辛勤耕耘,西南政法大学侦查学专业不断发展壮大,不仅有独领风骚的辉煌历史,更有阳光灿烂的现在与无限风光的未来。

在西南政法大学侦查学专业建设三十周年之际,西南政法大学刑事侦查学院与群众出版社联合推出“西南政法大学刑侦学子文库”,文库既是对西南政法大学侦查学专业建设三十周年的献礼,也是展示西南政法大学侦查学专业建设三十年的点滴成果,同时也作为西南政法大学侦查学专业建设不断进取、延续辉煌的启程点。

探索侦查学教育、侦查理论研究和侦查实践需要三者之间的正确关系与规律,是西南政法大学侦查学专业三十年建设的主线与核心。人文社会科学的发展,始终伴随着理论与实践关系的争论与摸索。理论紧密联系实践,理论来源于实践并指导实践,是理论与发展的科学理想。但理想与现实永远存在矛盾,理论脱离于实践成

为常态,理论联系实际一直是我国学术理论发展的标尺。相比较于其他法学学科甚或是其他人文社会学科,侦查学更为突出实证研究,贴近实战、指导实战是侦查学生命力所在,也是侦查学教育与理论研究发展方向之一。在西南政法大学三十年侦查学专业建设过程中,始终不懈地探索侦查学教育与发展的科学规律。侦查学是一门应用科学,侦查学教育培养的人才应当是应用型人才。必须既重视实践又重视理论,既重视专业又重视基础,既要追求人才的长期效应,也要重视人才的后劲和潜力。在专业建设过程中,始终密切关注侦查学科发展趋势与侦查实践需要,不断调整侦查学专业人才培养目标与培养方案。侦查学理论研究必须从社会现实出发,研究犯罪特点与发展趋势,及时更新侦查手段与方法,以科学指导侦查实战为目标,实现侦查理论与侦查实践的水乳交融。

求真务实、开拓进取的精神与风范始终贯穿于西南政法大学侦查学专业建设过程中。通过严谨扎实的工作,讲求实效,注重实际,不断创新,三十年的侦查学专业建设硕果累累。西南政法大学侦查学专业成为重庆唯一,西部领先,在全国有重大影响的专业,是“人无我有,人有我强,人强我优,人优我特”的国家级特色专业,也是国家级侦查学创新人才培养模式实验区。与此同时,西南政法大学侦查学教学团队也被评为重庆市市级优秀教学团队。侦查学学科建设不断完善与成熟,从最初的一个本科专业发展到现在侦查学与警察学两个硕士学科点,侦查学、刑事科学技术、治安学、经济犯罪侦查四个本科专业,一个职务犯罪侦查专门化班。三十年侦查学教育培养的学生遍及全国各地,主要从事侦查学教育、理论与实务工作,大多成长为各自领域的业务精英。

三十年如白驹过隙,辉煌已成为昨日。侦查学专业建设任重道远,永续辉煌需要更为艰苦的努力。

今日的纪念是期盼未来的美好。

西南政法大学刑侦学子文库编委会

2009年6月

自序

孩提时曾经有过许多有关未来的梦想,威风凛凛的警察是其中最执著的一个。高二那年,一件老式白色警服上衣成了我的最爱,衣不离身经历了春夏秋冬。高考填报了提前批次的公安大学,憧憬梦想成真,但不良视力无情破碎了美梦。在西南政法学院法律系求学期间,满怀羡慕地出没于一舍,只是为近距离接触破碎的梦想。没想到,大学毕业后命运眷顾,真正成为一名光荣的人民警察。五年的警察生涯,让我体会了酸甜苦辣,也收获了真情、责任与勇敢。再次回到母校西南政法大学攻读研究生,曾以为会从此终止孩提的梦想,但似乎是命中注定,由于曾经的职业经历,留校任教于刑事侦查学院。

西南政法大学刑事侦查学院是我人生历程中的第二个工作单位,可能也是最后一个工作单位。这是一个令人自豪的团队,前辈的艰辛创业造就了辉煌,在三十年侦查学专业建设中,其不断上升的影响力、源源而出的优秀学子从歌乐山麓、嘉陵江畔走向全国。身处其中,自豪之余更多的是压力,延续辉煌需要孜孜不懈的努力。自在学院任教以来,随着对团队归属感的增强,逐渐将个人事业追求与学院发展融合在一起,力图在这个辉煌的集体贡献自己的青春与活力。2009年,适逢西南政法大学刑事侦查学院侦查学专业建设三十周年,谨以我博士毕业论文作为对其献礼,同时也是对我学术生涯的总结与鞭策。

还清晰地记得在博士研究生开学典礼上,导师龙宗智先生在致辞中借用社会学家郑也夫的说法,概括在治学上有三种态度,也是三种境界,即功利、求道与游戏。功利的态度,即学以致用,学习知识来解决实际问题;攻读学位,将学位作为一种敲门砖,使之有助于敲开

自己的幸运之门。这些都是功利。这里所说的功利,既可以功在国家、利在社会,又可以功在个人、利在家庭。无论是为社会还是为个人,其功利心只要是积极的,而且有一个合理的限度,就没什么不好,因为由此可以产生学习的动力。另一种态度是“求道”。即读书是为寻求道理、探求真理,或者用樊纲的说法:求解命运的方程。这种“求道”的学习态度与求知欲以及对真理的崇尚与热爱相联系。为探索真理,寻求真知而孜孜不倦。第三种治学态度是游戏的态度。把学习当游戏是学习的最高境界。治学态度既是功利的,又是求道的,还是游戏的。

导师的劝勉,正是我三年博士研究生生涯的写照。如果说最初考博的动机里有着更多的功利性,求学目的也带有明显的功利性,但随着博士学习的正式开始,在日渐宽松的学习、工作、生活环境中,浮躁与功利逐渐消退,在导师龙宗智先生、徐静村先生、孙长永先生的引领之下,逐渐对学问之“大道”产生极大的兴趣,开始积极、热情地探索、分析、研究。博士论文的写作虽然辛苦,但在殚精竭虑之后的收获却让人无比愉悦。三年的时间也许短暂,最大的收获不是即将戴上的博士帽,也不是由此而来的社会声誉和物质利益,对功利、求道、游戏三种治学态度的认识与体验,将使我受益终生,成为日后学术研究的基本精神追求与目标。

警察是我的第一个职业,也造就了我现在的侦查学的教学工作。我怀念曾经的警察生涯,对警察职业的热爱也决定了我的学术研究方向。导师龙宗智先生是从实践中成长起来的理论学者,多年的司法实践经历形成了其严谨的治学态度、善于发现实践问题并通过正确的理论予以合理解决,这也是我心仪的治学方向。本篇博士论文的写作,我希望不仅仅是帮助我获得博士学位,能够从另一个途径仍然为所魂绕的警营有绵薄之献才是我心底最大的私愿。

博士毕业论文能够顺利完成,首先要感谢导师龙宗智先生于百忙的行政工作中仍然耐心地指导本文的选题、写作,不厌其烦地进行精心修改;导师徐静村先生、孙长永先生对本文的选题、构思、资料组

织给予了重要的指导。更重要的是西南政法大学刑事侦查学院的诸位领导与同仁为我的博士论文写作提供了诸多工作便利。

最后,我必须真诚地感谢我的妻子、家人,没有她们的支持,为我营造宽松的生活环境,解决后顾之忧,我根本不可能完成博士论文的写作。我必须衷心地表示感谢!

马 方

2009年3月于重庆

内容摘要

任意侦查是与强制侦查相对应的概念,是侦查行为的基本分类之一。任意侦查与强制侦查的对应与区分以及任意侦查制度的确立,将使惩罚犯罪与保障人权的双重诉讼目的在侦查程序中有机融合,促进侦查程序法治化的进一步发展,有利于提高侦查效率、节约侦查成本、节制强制侦查手段,对于侦查实践具有极其重要的积极意义。本文通过对任意侦查基础理论与具体任意侦查行为的研析,力图澄清任意侦查概念、标准、立法模式等基础理论,明确具体任意侦查行为的法律构成要件,从而为我国任意侦查制度的建构奠定理论基础。

本文共分为两编:第一编为任意侦查基础理论研究;第二编为任意侦查适用研究。

第一编任意侦查基础理论研究,包括以下四章:

第一章,任意侦查概述重点构建任意侦查的概念,阐明任意侦查的基本要素。通过介绍日本学界对任意侦查的不同定义,结合国内对任意侦查的释义,从主体、客体、权利、义务等法律关系角度最终确立了任意侦查的基本概念。认为任意侦查系指侦查机关在侦查刑事案件过程中,不违背或侵犯侦查相对方自由意志与重要权益,由侦查机关自行判断实施的非强制性侦查行为。同时指出“任意侦查”一词直译自日本刑事诉讼法,本文所借用并非仅指日本任意侦查理论与制度。任意侦查,更为准确地概括实为非强制侦查,与强制侦查所直接相对应,是运用二分法对侦查行为进行的基本划分。更为具体来说,即在所有法定的强制侦查措施、方法之外的其他所有侦查方法与措施都是任意侦查。任意侦查的界定及其与强制侦查的区分,是

从侦查运行中个人意志自由与个人权益侵犯程度角度对侦查行为进行的基本划分,因而其基础涵义是一种侦查行为。在对任意侦查进行界定与辨析基础上,阐述了非强制性、个人意志自由、个人重要权益不受侵犯等任意侦查的基本要素。

第二章,国外任意侦查法制概览。首先考察了大陆法系国家任意侦查立法基础,重点分析作为任意侦查法制起源的法国初步调查制度的发展、性质与初步调查中的主要任意侦查方法,然后分析了英美法系国家任意侦查法制的思想基础、制度基础与主要任意侦查行为,最后对任意侦查法制最为成熟的日本任意侦查立法基础、进程与主要内容进行了重点解析。指出在日本现代混合式诉讼模式的形成过程中,日本特有的民族特性与西方人权思想的不断传播与影响,导致日本在刑事诉讼中特别强调平衡发现实体真实与人权保障之间的关系,这是任意侦查法制在日本开花结果的深厚思想基础。日本先后移植的大陆法系职权主义诉讼模式的侦查权分配体制、在英美法系当事人主义诉讼模式影响下形成的抗辩式侦查构造是任意侦查法制在日本深入发展的制度基础。

第三章,任意侦查标准解构是本文的核心内容。重点论述在日本司法界与学术界先后出现的有形力说、侵犯重要权益说、综合判断说三种有关任意侦查标准的观点。传统观点为有形力说,即将是否行使直接有形力作为任意侦查与强制侦查的界限。有形力说认为,如果行使直接、强制的有形力,就是强制侦查。反之,则是任意侦查。侵犯重要权益说认为,强制侦查和任意侦查的区分,并非取决于是否有有形力的行使,而是以是否未经同意即实施侵害个人权利和利益的处分为基准。综合判断说,是在对有形力说及侵犯重要利益说进行批判与借鉴的基础上,提出从是否行使有形力、是否侵犯重要权益、是否具备侦查的紧迫性、必要性、适当性三个方面结合具体案情进行综合判断。结合英美国家对“自愿”与“同意”的判断标准,本文论证从主观与客观两方面构建任意侦查的综合判断标准,即主观方面侦查相对方有明确意思表示同意或承诺任意侦查、侦查相对方被

明确告知相关权利、不存在任何可能压迫个人自由意志的外部强制或胁迫;客观方面从侦查行为内容来看任意侦查是否侵犯重要权益。从侦查行为发动、运行来看任意侦查是否符合比例原则的具体要求等方面,对任意侦查进行综合判断。

第四章,我国任意侦查考察与分析。从法律层面与实证层面考察了我国任意侦查现状,认为在法律层面上我国现行法律中基本没有任意侦查的直接规定,而在实证层面上,实际的任意侦查行为游离于法律规定之外,为侦查实践所需。由此论证了构建我国任意侦查制度的必要性、现实性,阐明从任意侦查原则法律化、列举规定具体任意侦查行为构成要件、内部规范任意侦查行为程序要件三个层面构建我国任意侦查制度。

第二编任意侦查适用研究,包括五章:对自愿同行(任意偕行)、经同意搜查、任意讯问、任意询问、经一方同意监听五种国外比较常见的任意侦查行为,在我国侦查实践中的适用现状与前景进行研究与探讨。

第一章,自愿同行(任意偕行)。在介绍国内外有关自愿同行概念、各国相关法律规定基础上,指出自愿同行的准确定义应为:为查证犯罪事实,侦查人员要求侦查相对方自愿同意跟随其至附近侦查机关或适当场所接受讯问的行为。阐述了自愿同行启动要件、主观要件、客观要件等构成要件,比较、分析了我国刑事传唤制度的现状与缺陷,提出在任意侦查法律体系内构建自愿同行制度,明确传唤的间接强制性质,紧密结合拘传,确保侦查权的有效运行,从而完善我国刑事传唤制度。

第二章,经同意搜查。确定经同意搜查概念,是指经被搜查人或第三方明确表示同意后,侦查人员直接对被搜查人人身、财产所进行的无证搜查。介绍了各国经同意搜查立法概况与理论基础,阐述了自愿同意、权利告知、同意人有权同意等经同意搜查一般构成要件。比较、分析了我国搜查制度的现状与缺陷,论证了在经同意搜查视角下对我国搜查制度的重构与完善的现实性、必要性与具体立法设计。

第三章,任意讯问。首先,重点论证了侦查讯问的任意性特征,将侦查讯问概括为自愿到案接受讯问、经传唤到案讯问与羁押状态下讯问三种情况,其中,自愿到案接受讯问为典型的任意讯问,而在经传唤到案讯问与羁押状态下讯问中,犯罪嫌疑人自由决定是否接受讯问、是否供述,侦查人员不得进行任何强制。因此,经传唤到案讯问与羁押状态下讯问,同样是完全的任意侦查行为。然后,阐述了权利制衡、权利告知、强制讯问方法绝对禁止等任意讯问构成要件,在比较、分析了我国侦查讯问现状与缺陷的基础上,提出从默示沉默权的完整确立、律师帮助权的实质化、强制讯问方法完全禁止三个方面入手,构建我国任意讯问制度。

第四章,任意询问。介绍了任意询问的概念,结合世界各国有关侦查询问的一般法律规定,论证了在侦查阶段由侦查机关对犯罪嫌疑人以外的其他人进行的询问一般以任意询问为主。但强制询问与任意询问相对应存在,相辅相成。在一般情况下,侦查询问以任意询问为主。但为保证询问的顺利进行,必须有相应的强制询问进行补充与配合,并阐述了自愿陈述与禁止强制陈述方法等任意询问的主客观构成要件。在比较、分析了我国侦查询问现状与缺陷的基础上,指出我国侦查询问从法律上看其性质为强制询问,但实际上是任意询问。因此,提出通过明确区分任意询问与强制询问的不同性质,以完善我国侦查询问制度。

第五章,经一方同意监听。介绍经一方同意监听的概念,论证经一方同意监听的法理基础与性质,阐明绝大多数国家都通过刑事诉讼法一般规则或特别法规形式确认监听的强制侦查性质。但同时也确认,经一方同意监听的任意侦查性质,以适应犯罪侦查的基本需要。论证了经通讯一方当事人自愿同意、未侵犯重要权益、为侦查所必要等经一方同意监听的构成要件。在比较、分析了我国的监听现状与缺陷的基础上,展望我国经一方同意监听立法与适用前景。

Abstract

Non-coercive investigation is the corresponding concept against coercive investigation and one basic category of investigation. The differences between non-coercive investigation and coercive investigation and the establishment of non-coercive investigation system make the double litigation purposes of crime penalty and human rights protection fully integrate in the investigation procedure, prompt further developments in investigation procedure legalizing, increase the investigation efficiency, save the investigation cost saving, restrict coercive measures. Therefore they are of great importance positive significance to investigation practice.

Through Studying and analyzing the basic non-coercive investigation theories and the special non-coercive investigations, the essay strives to clarify some basic theories on non-coercive investigation, such as definition, standards and legislation model etc, specify the law factors of specific non-coercive investigations, thereby lays a theoretic foundation for establishing the non-coercive investigation system in our country.

The essay contains two parts. Part one is the research about basic theory on the non-coercive investigation. Part two is the research about how to apply the non-coercive investigation.

Part one consists of four chapters:

Chapter one, brief introduction on non-coercive investigation, emphasizing defining non-coercive investigation together with clarifying its basic factors. By introducing various definitions from Japanese academe

and link the paraphrase in our country, this chapter finally have defined basic concepts about the non-coercive investigation from angles of several law relationships such as subject and object, rights and duties, etc. and considered non-coercive investigation to be a non compulsory investigation act which is judged and executed by investigation organ itself while don't violated or invade the corresponding party's free will and important rights in the process of investigation. This paper have simultaneously pointed out although the word 'non-coercive investigation' was directly translated from the Japan criminal procedure law, it doesn't merely mean the Japan non-coercive investigation principle and system in the article. In more precisely general terms, non-coercive investigation is non-compulsory investigation which is direct opposite of coercive investigation and a basic classification of investigations through use of dichotomy and more specifically speaking, investigation methods and measures beyond legal coercive investigations are all non-coercive investigation. Because defying non-coercive investigation and distinguishing from coercive investigation should be basic classified from the aspect of the level of invading individual will freedom and rights, the basic meaning of non-coercive investigation is a kind of investigation. On the foundation of defying and discriminating non-coercive investigation, some basic non-coercive investigation factors such as non-coercive, personal will freedom, individual important rights should not be invaded have been set forth.

Chapter two is a glimpse of foreign non-coercive investigation legal system. First, the chapter reviews the non-coercive investigation legislation foundation in the civil law countries, mainly analyzes the evolvement and nature of preliminary investigation in French which is the origin of non-coercive investigation legal system, together with its main non-coercive investigation methods. Then, the chapter analyzes the idea, system foundation and main content of non-coercive investigation legislation in

common law countries. Finally, it concentrates on the interpretation of non-coercive investigation legislation foundation, course and main content in Japan whose non-coercive investigation legislation is considered as the most mature, pointing out in the forming process of Japan modern composite procedural model, the unique Japanese nation characteristics and the continuous diffusion of western human rights idea have made Japan especially emphasize balancing the relationship between discovering the truth and protecting human rights, which is the deep thought foundation. The investigation power assign system which transplanting from inquisitorial model in civil law country and the adversary investigation sight which shaping under adversary model in common law country are system foundation for the non-coercive investigation legislation in-depth development in Japan.

Chapter three, the standard of non-coercive investigation, is the core content of the essay. It discussed three views about the standard of non-coercive investigation: physical power, important right infringement and judging under circumstance of each case which appears successively in Japanese law and macadamia. The traditional viewpoint is physical power theory, that is, the physical power is directly executed or not is used as the boundary between non-coercive and coercive investigation. Physical power theory argues that if direct and physical power is used in an investigation, the investigation is coercive one and, otherwise, non-coercive one. Important right infringement theory considers the boundary between non-coercive investigation and coercive one is an invading personal rights and benefits action is agreed or not before its execution rather than that physical power is used or not. Judging under circumstance of each case theory puts forward that on the basis of animadverting the former two theories and using them for reference, the nature of an investigation should be judging under circumstance of each case, namely, it

should be decided by considering specific cases and three aspects: physical power is executed or not, the important rights are infringed or not and an investigation is of urgency, necessity and suitability or not. Linking the judging standard about voluntary and consent in Anglo-American countries, the article demonstrates how to constructing synthetically judging standards of non-coercive investigation from the objective and subjective aspects, that is to say, from the subjective aspect the corresponding party clearly express consent to accept a non-coercive investigation and the corresponding party has been informed related rights clearly and facing no outside compulsion or threaten while from the objective one non-coercive investigation is also synthetically judged in terms of the investigation content whether an investigation invades important rights and in terms of the investigation launch and operation whether non-coercive investigation fits specific requirements proposed by proportion principle.

Chapter four is Chinese non-coercive investigation review and analysis. It reviews the non-coercive investigation actuality in China from the law aspect and practice aspect, argues that there is few direct stipulation on non-coercive investigation in existing law system while from the practice aspect, actual investigation actions are not constrained in the scope of law, which is needed in investigation practice. Thus this demonstrates the necessity and possibilities for the constructing Chinese non-coercive investigation system, clarifies that we should set up non-coercive investigation system in China from three layers, namely non-coercive investigation principle legalization, listing consisting factors of specific non-coercive investigations and internally standardizing its procedure factors.

Part two includes 5 chapters. It researches and discusses the applying actuality and prospect in Chinese investigation practices for five popular non-coercive investigation in foreign legislation and judicial practices. They are voluntary company, consent search, voluntary interroga-

tion, voluntary inquiry, monitor with one party consent.

Chapter one, voluntary company, on the basis of introducing domestic and foreign definitions for voluntary company and related regulation from various countries, points out that the exact definition of voluntary company should be an action which in order to investigate criminal truth, investigators ask the corresponding party voluntary consent to follow them to the nearby investigation organ or to an appropriate point to receive interrogation, and set forth the its consisting factor, such as start-up, subject and object factor, comparatively analyzes actuality and defects of criminal summons system in our country, and proposed to introduce voluntary company system, clarify the legal nature of criminal summons, and therefore perfect this system.

Chapter two, consent search, ascertain its concept namely, after express consent by searched person or the third party, investigators directly search the person's body and property no writ, introduces legislation and theory foundation on consent search in various countries, sets forth the general composition of consent search, such as voluntary consent, rights inform, consent right party etc. It comparatively analyzes the actuality and disadvantages of our criminal search system, demonstrates how to reconstruct our criminal search system from the consent search point of view, the actuality and necessary of the perfect, and special legislation designs .

Chapter three, voluntary interrogation, the first, this chapter demonstrates criminal interrogation is of voluntary nature, generalizes criminal interrogation into three instance: interrogation under voluntary attend, interrogation under summon, interrogation under detain, interrogation under voluntary is typical voluntary interrogation, then in interrogation under summons and interrogation under detain, criminal suspicion freely decides whether confess, investigator not be execute any compul-