

Administrative Trap Investigation

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Abstract

Faced with some offenses which are hidden quite secretly and organized with high degree, administrative enforcement agencies are often unable to obtain evidence or seize offenders through conventional methods of investigation. In that case, public interest and legitimate rights of offenders should be weighed and balanced, and administrative enforcement agencies should be allowed to adopt unconventional means of investigation under certain circumstances. Administrative trap investigation is an unconventional way of investigation. The paper will discuss its meaning and nature, skepticism, realistic rationality, legal regulation and other aspects.

Key words: Administrative trap investigation; Legality; Realistic rationality; Regulation

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INTRODUCTION

Administrative trap investigation mainly occurs in administrative law enforcement activities in the fields of security, traffic management, industry and commerce, medicine and others. Administrative enforcement officers can use administrative trap survey objectively because it is often necessary for offenders to trade with others to finish offenses in administrative matters, which create conditions for law enforcement officers to set trap by transaction. Administrative trap survey is not used quite

often in administrative enforcement practice, yet not an isolated phenomenon. However, it causes considerable controversy in both fields of theory and practice.

The so-called administrative trap investigation means that administrative authorities conceal their identity, design scenarios or provide offenders with conditions or opportunities and then induce them to commit offenses, so that they can gather evidence or seize offenders.

Firstly, it can be seen from the above definition that purpose of administrative trap survey may be obtaining evidence of offenses or determining offenders. In many conditions when offenses have been formed undoubtedly, offenders still are not known, and then the direct purpose of trapping investigation is to track down offenders.

Secondly, administrative trap investigation generally targets offenses with the state or the possibility of continuous occurrence (which is similar as the professional offender or continuing offender in criminal law). A one-time occurrence of the offense generally does not apply to administrative trap investigation. Third, administrative trap survey must be conducted at the time when offenses to be investigated are committed. Therefore, generally evidence obtained through administrative trap survey has greater advantage over that through traditional survey in the aspects of authenticity and relevance. Fourth, administrative trap survey belongs to secret investigation. Officers conceal their identity while doing it and create opportunities or conditions which cause offenses, but counterparts know nothing about it.

According to whether counterparts have offensive intent before trap investigation, administrative trap investigation can be divided into the model of chance offering and the model of intent inducing. Administrative trap investigation of intent inducing refers to that investigators provide opportunity to counterparts who have no intention in committing offenses and then have and commit offenses. Administrative trap survey of chance offering means that investigators offer chance to those

who already have intent that later exposed and who then commit offenses. The significance of the classification is that, for intent inducing type, inducing counterparts with no illegal intent originally to commit offenses is equivalent to manufacture of offenses, which is quite the contrary of purpose of administrative law enforcement agencies (punishing and preventing offenses), and it may violate the principle of equality.

1. SKEPTICISM FACED BY ADMINISTRATION TRAP INVESTIGATION

Administrative trap investigation sparked considerable controversy in both theory and practice fields. This section will analyze skepticism faced by it with depth and details to determine whether skepticism is right and to ascertain whether there is space for the existence of administrative trap investigation under the existing legal system.

1.1 If Administrative Trap Investigation Violates the Principle of Administration According to Law Or Not

Whether administrative departments are entitled to conduct trap survey concerns the relationship between administrative trap survey and the principle of administration by law. Administrative investigation in all countries generally follows authority oriented investigation doctrine, which means that departments exercise power of administrative investigation not upon application from parties but shall take the initiative to investigate in legal situations. Investigation scope is not limited by application in the course of investigation, and full investigation of evidence should be conducted considering various scenarios. In the area of administrative penalty, the doctrine is more prominent because if administrative departments exert penalties on citizens, there must be sufficient evidence to prove existence of illegal facts, which means that administrative departments shall bear the burden of proving citizens' offenses, while citizens shall not. Legislations in many countries have made clear provisions for the doctrine. Article 24, Section 1 in German Federal Administrative Procedure Law stipulates that administrative departments investigate facts *ex officio* and decide manner and scope of investigation, not subject to certification or certification requirements of participants.

Certainly selection of administrative investigation method must be in the legal boundary, then one of the issues related is the relationship between administrative investigation and legal reservation, namely what methods of administrative investigation must be conducted with clear and specific provisions in law and on the other hand what methods can be implemented only on the basis of organization specifications. Professor Yu Lingyun believes that based on the ensuring approaches to effectiveness of administrative investigation, administrative investigation

can be divided into inoffensive and compulsory investigation. Inoffensive investigation solely depends on the agreement and assistance of people investigated with no ensuring methods offered by law and cannot be conducted compulsorily. Compulsory investigation is classified into coercive and indirect ones. The former one means administrative agencies are allowed to use force to enter into counterparts' premises and to investigate them and their property in the event of resistance. The latter one happens when counterparts refuse investigation without justified reason, administrative agencies may adopt administrative coercive measures, refuse to grant expected interest or force them to accept investigation by guarantee making adverse punishment, administrative penalties and criminal penalties on their existing interests, but not making coercive investigation. "All compulsory investigations must comply with the principle of legal reservation without exception, while inoffensive investigations do not have to or not strictly have to" (Yu, 2007, p.208). The author also agrees with the view. For instance, administrative departments are required to hold law writ to enter and check a house or place of business, in the absence of which, examinee agreeing to check shall be deemed to be a voluntary waiver of rights, and evidence thus obtained should also have evidential power. That exists in law and judicial practice in some countries.

Respecting the above-mentioned theory, the author thinks that administrative trap investigation is non-mandatory one, because in it administrative agencies just set some situations or conditions so that offenders make offenses, during which process offenders are free in will and body and can decide to make or not make offenses in accordance with their wishes. Even if they do not make offenses, law enforcement officers would not use national force, forcing them to do it.

Since administrative trap survey is non-mandatory, it does not have to follow the principle of legal reservation or be regulated with mass density. It possibly infringes on the right of civil resident and privacy. Sometimes administrative officers conceal their identity to enter into counterparts' houses or touch their privacy. In that case, it is believed that residence and privacy of counterparts are in the state of being entered or mastered by the average person without being infringed, so officers are not considered illegal as long as they neither forcibly enter their residence nor proliferate privacy obtained.

On the other hand, administrative trap investigation shall be in line with the principle of legal priority, which requires administrative trap investigation not to contradict with prohibitive provisions of law. Some scholars regard evidence obtained through administrative trap survey as that obtained through inducement, as for which the author deems that when inducement is under normal circumstances and evidence has formed, and officers obtain evidence by promising illegal interests to those that grasp evidence, people induced are clearly aware of

identity of the inducing party. For example, some industry and commerce authority receives a report that some person sells inferior milk powder and sends an officer to purchase disguising as a buyer. The officer is just an ordinary buyer for the suspected offender. The price given cannot be considered as inducement in law, instead it is just consideration to illegal merchandise for the suspect, not different from what is given by other buyers.

In summary, the author believes that administrative trap investigation owns space in China's current legal system.

1.2 If Administrative Trap Investigation Violates the Principle of Administrative Openness

Administrative trap investigation is a kind of administrative secret investigation. Secret is relative against open. Since the principle of administrative openness is one of the fundamental principles of administrative law, it inevitably causes the issue of whether the two are conflicting with each other.

Same as other basic principles of administrative law, the principle of administrative openness is not absolute. "Public interest of administrative openness must be balanced against undisclosed one. Balance of all kinds of interests is an important foundation of social life" (Wang, 2005, p.967). When necessary, administrative openness must have exceptions in time or scope.

Activities during administrative investigation shall be open in general. However, public administrative penalty investigation sometimes could lead investigation to predicament. For example, when public investigation is conducted in administrative penalty against fake medicines, witnesses may be reluctant to testify or disclose all the information. Suspected offenders may destroy evidence, temporarily stop illegal activities and even pose a personal threat to law enforcement officers. However stopping investigation will cause a great threat to life and health of people. Therefore, in order to discover illegal facts, methods of secret investigation (including administrative trap investigation) could be used, making no hindrance because of openness. On the other hand, secret investigation is not a permanent but only a temporary secret. After administrative investigation when confidentiality is not meaningful, the whole investigative process can be made public. It is inevitable, because the executive must explain the source of evidence on which decision is based. In possible phase of relief later, administrative investigation should accept supervision and review.

In summary, the author believes that rigid understanding should not be made against administrative openness principle. In administrative investigation, in some cases, after checks and balance of various interests, administrative investigation should be temporarily confidential so as to achieve its purpose.

1.3 If Administrative Trap Investigation Violates the Principle of Good Faith

Some scholars believe that administrative trap investigation is contrary to the principle of good faith in administrative law, while the author believes the principle primarily exists as a means of equity. For example, "good faith principle is often cited by the Administrative Court in China Taiwan, in particular when in the form the defendant authorities have legal basis, which is substantially unfair or unreasonable, to make plaintiff win lawsuit, and the principle of good faith and openness is put together as one" (Wu, 2005, p.39). A prerequisite of violation of the principle of good faith is man has to be malicious, so if dispute appears against whether administrative trap investigation is contrary to the principle of good faith, counterparts must prove that the purpose of executive behavior is not in the public interest but for the sake of personal interest or interest of administrative agency. That's when determination can be made that administrative trap survey violates the principle of good faith and be illegal. Thus, it is not correct to generally deem administrative trap survey as violating the principle of good faith.

2. ANALYSIS OF REALISTIC RATIONALITY OF ADMINISTRATIVE TRAP INVESTIGATION

2.1 Limitations of Conventional Administrative Investigation Means under Special Circumstances

In current society, some offenses seriously endanger life and health of citizens, constitutes a major threat to social and economic order and are increasingly covert and organized. Faced with those offenses, due to survey costs and other factors, relevant administrative authorities using conventional methods of survey often fail to achieve good result. On the other hand, they bear the responsibility to maintain the normal order of society.

Conventional investigation methods like checking and questioning are widely used in practice, but their effectiveness in individual cases have been limited. For example, when Mr. Xu is shopping, someone hands him a small pharmaceutical advertisement. He consults the factory by telephone number on the advertisement and the manufacturer says that they never produce the medicine. He immediately reports to the Food and Drug Administration of the city. In the name of a pharmacy, law enforcement officers contact the salesman Wang through advertisement phone number and want to purchase medicine on proxy ground. Wang is controlled when delivery by officers. In the case, it is very difficult to achieve the purpose of survey by using conventional survey methods like inspection and inquiry.

Implementation of administrative trap survey makes it become simple.

2.2 Administrative Trap Investigation Can Cover the Shortage of Conventional Investigation Means

In certain instances when conventional means of investigation do not work, administrative trap survey can make up for deficiency. Firstly, the success rate of trapping investigation is obviously high and effective. Since before the start of the investigation, the executive has targeted subject of survey and developed a careful plan, these preparations guarantee high efficiency of trapping investigation. During investigation, offenses are totally exposed to the view of administrative law enforcement agencies, who may use a variety of means (such as secret videotaping or tape, etc. certainly on the basis of not infringing upon legitimate rights and interests of others) to collect direct evidences of offenses.

Secondly, administrative trap survey can play a preventive and deterrent role against offenses. Discussion of the role of administrative trap investigation should not be limited to its high efficiency and other advantages in particular cases, its deterrent function should be seen outside certain cases. After implementing administrative trap survey in cases, other offenders or whoever have illegal tendency will know that law enforcement agencies can use this kind of method to investigate their misdeeds, thereby increasing their illegal psychological burden and being forced to give up, reduce, and be afraid of committing offenses. In the opinion of the author, administrative trap investigation plays a more important role in preventing and deterring offenses than in certain cases, which is a more important reason for it to be legitimate.

2.3 The System of Criminal Enticement Investigation and Civil Trap Forensics Have Been Recognized With Limits

In evidence obtainment activity in criminal investigation and civil litigation, same methods of taking evidence as administrative trap investigation have been limitedly recognized. That makes positive significance in the recognition of administrative trap investigation in particular case.

2.3.1 The System of Criminal Enticement Investigation

“Criminal enticement investigation refers to national investigating officers or those employed by state prosecution organs specifically design certain situations to induce them or offer them opportunity and condition to commit crime and then crack cases and arrest criminals” (Wu, 2001).

Enticement investigation is widely used in criminal justice practice, especially in drug, counterfeit money and smuggling crimes. As for its legitimacy, scholars of criminal procedure law also have a great debate. Most of them believe that enticement investigation should

be distinguished between different types and treated separately. Scholars generally divide it into the model of enticement of criminal intent and the model of chance offering. The model of enticement of criminal intent investigation means investigators provide opportunity to who originally have no and then have criminal intent and then commit crime. The model of chance offering investigation means that investigators conduct enticement investigation against whoever has criminal intent, making them expose criminal intent and commit crime. Scholars ordinarily believe that the model of enticement of intent investigation is illegal because it manufactures crime and is contrary to national functions of preventing and combating crime. The model of chance offering has its legitimacy and should be recognized because of being passive response to already existing criminal intent or act. In addition, scholars also believe that enticement investigation should be limited to cases that are significantly harmful to social and economic order, citizen life and property and that are difficult to solve through other methods.

2.3.2 The System of Trap Forensics in Civil Litigation

Trap forensics in civil litigation means that before or during civil action, a party conceals his identity, intentionally contacting the opposing party or engaging in trade to induce the other party to make a civil action, in order to obtain evidence to his advantage. For example, company A was ever the agent of company B, selling laser image setter, and then the relationship of agency terminated. After that A and C companies signed a sales agreement of laser image setter. B company doubted that A continued to use his software, so an employee of company B concealed identity and signed a purchase contract with A company. The laser image setter A provided to the employee installed software that B enjoyed copyright. The two parties brought a lawsuit.

In the case, one of the key questions of the dispute is the validity of evidence obtained from civil trap forensics. Court of first instance thought that trap forensics is not prohibited by law and should be recognized. Appellate court found that such way of forensics is not the only way to obtain evidence of infringement of right, violates the principle of fairness and will damage the normal market order once widely used, thus the court would not recognize it. Court of retrial (Chinese Supreme People’s Court) found that in civil proceedings acts that are not expressly prohibited by law shall mainly be judged by their substantial legitimacy due to the breadth of social relationships and complexity of interests of society. In the present case, the purpose of the way of forensics by B company was not illegitimate, and its behavior did not harm the public interest of society and legitimate rights of others. In addition, infringement of rights shows characteristics of strong covert and hard forensics, so adoption of such forensics helps solve the problem of uneasy obtainment of evidence in such cases, plays a role

of deterrence and containment of infringing acts and also accords with legal spirit of strengthening protection of intellectual property according to law.

3. REGULATION ON ADMINISTRATIVE TRAP INVESTIGATION

3.1 Application of Administrative Trap Investigation: Limited to the Model of Chance Offering

Administrative trap survey should only be limited to the model of chance offering, namely only when certain evidences proves the counterpart to be suspected of offenses can investigation be conducted. In the absence of any indication that violations may occur, generally no administrative trap survey can be performed. If the model of enticement of intent investigation is allowed, any citizen, legal person and other organization are potential objects of administrative trap survey, and administrative law enforcement agencies can aimlessly and randomly select objects, then inequality will form between who is selected as the objects of investigation and who has not been selected. Furthermore, the model of enticement of intent is also possibly be used as a tool for the executive or its staff as retaliation. For example, administrative officials make use of administrative trap investigation to retaliate against persons who have personal grudges against them. Moreover, it makes the already stable social order destroyed, not meeting the purpose of law enforcement to restore and maintain public order. However, the model of chance offering is different. It is performed with evidence of offenses and is responsive reaction to already existed offenses, which aim to restore social order that has been destroyed or prevent social order from suffering real and urgent, or irreparable losses. The model of chance offering investigation generally requires offenses performed by objects to be regular professions, not some illegal acts from abrupt intention.

A challenge now is how to judge whether the objects already have illegal intentions. The author considers that only the executive is the body to determine such things, because illegal intent of persons under investigation is subjective mental attitude, which is impossible to ascertain by the executive in law. Moreover, the executive cannot judge whether there is unlawful intent according to statements after administrative trap investigation is completed, because it has to be done before the survey. Therefore, administrative law enforcement agencies shall determine whether objects have illegal intention only based on their acts before administrative trap survey. In that regard, explanation should be made by distinguishing different situations.

While offenses have formed and the only purpose of the executive is to seize offenders, there is no need to determine objects' unlawful intent which is already

demonstrated through illegal activities. For example, a place is a disaster area of disorderly stick and painting. Officers of city comprehensive law enforcement unit call the number on one of the sewer dredging advertisements in the name of wanting dredging sewer and punish the person who arrives.

In addition to the above situation, unlawful intent can only be determined based on the specific situation of administrative law enforcement personnel. However, the standard should not be too high as long as reaching the reasonable degree of specifically identifying suspicion, not requiring conclusive evidence of criminal intention. Prior to chance offering administrative trap investigation, specific objects of survey must be identified. In an investigation aiming at obtaining offensive evidence, objects investigated should be specific. Besides, through controlling investigative behavior of investigative organ the model of enticement of intent investigation can be prevented. Specifically speaking, trap designed cannot cause excessive temptation that makes a person without illegal intent to commit crime.

3.2 Adoption of Administrative Trap Investigation Should Be Consistent With the Principle of Proportionality

Under the condition of other conventional means of investigation being available to achieve purpose of investigation, administrative trap investigation cannot be used, which means that trap survey should be used as a last resort.

However, when general administrative investigation measures may be effective but may cause significant irreparable loss to national interests, public interests and the legitimate interests of others due to delay in emergency, it cannot be considered the situation that through other conventional means of investigation the purpose of the investigation can be achieved, and in that case, administrative trap survey can be adopted also as a last resort.

If other means of investigation have been exhausted, can administrative trap investigation certainly be implemented? The answer is negative. In administrative investigation, choosing administrative investigative measures within the extent of law is a great discretion, so determining whether administrative trap survey is applied according to the principle of proportionality is now the most appropriate way.

First, the principle of appropriateness requires administration trap survey to be able to achieve purpose of survey when chosen. Secondly, the principle of necessity requires choosing what harms interested parties least among administrative trap survey and other means of investigation. The principle of appropriateness requires that benefits from administration trap survey should be greater than damage produced. It should be noted that benefits here must not only be the tangible ones. More

importantly, appropriate balance between public interests and individual rights and deterrence and prevention functions of administrative trap investigation on offenders outside particular cases shall all be considered.

3.3 The Approval Procedure

Law enforcement officers believe when the executive shall implement trap survey in a particular case, the case should be filed in accordance with normal administrative procedures, before developing programs of administrative investigation considering the specific circumstances. Specific programs should include nature of case, objects determined, necessity of implementing trap investigation, implementer, time, location of investigation, settings of trap and assistance of other sectors. After that, program shall be submitted for approval. In view of the non-public nature as well as its possible impact on rights and interests of relative objects, approval procedure should be strictly provided.

3.4 The Implementation of an Administrative Trap Investigation

After obtaining approval, specific investigators should promptly perform administrative trap survey, strictly following programs already developed, and in the process of survey a variety of means (audio, video, etc.) should be used throughout the whole forensics, preventing investigators from conducting illegal acts (for example, by excessive illegal traps, threats, coercion making counterparts break the law). There should be more than two investigators, except when conditions allow such as when two or more officials in law enforcement are relatively easy to expose or cause doubt and so on. During trap survey, once objects are found not belonging to the scope of the authority's jurisdiction or already constituting a crime or with criminal suspicion, cases shall be immediately delivered to who have jurisdiction based on legal provisions. In addition, special attention should be paid to physical protection of administrative law enforcement personnel.

If evidence achieved is sufficient to make a follow-up administrative act after administration trap survey, administrative law enforcement officers should identify themselves and conduct subsequent behaviors in accordance with general administrative procedures, during which administrative law enforcement agencies should also further ascertain illegal motivation of objects to prove what is have been achieved through the method of trap survey so as to more accurately confirm illegal facts. If evidence has been found that objects violate law in the course of an administrative investigation, there is no need to finish the administrative trap survey but to follow the normal procedures to obtain evidence or take administrative compulsory measures. If trap survey shows that objects have not broken the law, law enforcement officers should identify themselves and inform them of

the ongoing trap investigation, serving as a warning to objects who later in life will consciously abide by the law and influence people around them. That makes trap survey play the role of deterrence outside particular cases indeed.

3.5 Selection of Administrative Trap Investigation and Criminal Investigation Measures

Since administrative trap investigation is a pre-planned manner of survey, which can determine the nature of objects' illegal acts (offenses or criminal behaviors), in practice, issues are usually encountered that it is not sure to apply administrative trap survey or criminal investigation and to determine acts belonging to offenses or criminal behaviors. For instance, some citizen reports trafficking in counterfeit cigarettes to department in charge of tobacco. In the absence of other means of investigation, the department decides to use administrative trap survey to ascertain whether there has been an act of trafficking in counterfeit cigarettes. A law enforcement officer disguise himself as a buyer and contacts with the object on behalf of purchasing cigarettes. At that moment, a very important question of quantity and value of counterfeit cigarettes asked by law enforcement officer arises, because it concerns whether department acts beyond his authority and if the objects' acts are administrative violations or criminal acts. Criminal law of the People's Republic of China stipulates that if law enforcement official asks to buy counterfeit cigarettes worth no more than 50,000 yuan, then law enforcement agency is expecting act of objects to be administrative violations, while if more than 50,000 yuan law enforcement agency expects it to be a crime.

Still set that case above as an example. Upon receipt of report, administrative department for tobacco cannot determine the value of counterfeit cigarettes and the trafficking behavior to be an administrative malfeasance or criminal act, and then the department cannot refuse to investigate on the grounds of not being able to ascertain the nature of act reported. Under that case, the first authority receiving report should start investigation and take measures within their own jurisdiction. On the terms of statutory functions and powers, administrative department does not have the power to enforce trap investigation, so proposing a purchase of counterfeit cigarettes worth more than 50,000 yuan exceeds its authority at least on that part over 50,000 yuan. Therefore, administrative department should not determine the value of cigarettes as more than 50,000 yuan. That is surely the plan in making program, while the situation may change during administrative trap survey. For example, by talking to the person under investigation, officials found the sale of counterfeit cigarettes to worth more than 50,000 yuan, then the act already constitutes criminal behavior and the case should be transferred to criminal investigation authorities with jurisdiction over such cases.

CONCLUSION

When the executive staff develops specific program of administrative trap survey, trap should be within the necessary limits instead of being over the limits. For instance, in the course of buying counterfeit posing as buyers the executive staff should not make too high an offer and should offer a price that is generally accepted by the seller, otherwise it may cause greater illegal intent from person under investigation, which does not fit original aims of using administrative trap survey. In addition, it is forbidden to take the use of compassion of objects to conduct trap investigation that harms public order and good customs like pretending to be sick so as to perform trap survey on a car driver who has been locked as the object.

Administrative trap survey should not be done to minors. Minors may implement some violations, but because they are immature and possess no ability to fully judge between right and wrong, administrative trap investigation, if done, may strengthen their illegal consciousness, which is detrimental to their healthy growth of body and mind. Meanwhile, as a means of pre-planned investigation, administrative investigation

authorities are fully capable of determining whether objects are minors before carrying out administrative trap survey.

Since before making chance offering type of administrative trap survey, objects are simply suspected of having illegal intentions, situation may arise that investigation later proves that person under investigation has no illegal intent before the survey, instead he generates illegal intent after being implemented trap investigation and then makes illegal acts, which means that administrative investigation authorities conduct type of intent inducing administrative trap investigation.

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