

## **The Basis of the Justification for Making Illegal Investigations as Sentencing Factor: The Examination from the Perspective of the Punishment Theory**

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### **Abstract**

Now, in Taiwan, there is no clause and judgment about making illegal investigation as sentencing factor. On the contrary, in Japan, though the court usually uses the exclusionary rule to deal with the illegal investigations, they also making illegal investigations as sentencing factor when they face the illegal investigation in the criminal process. But, the basis of the justification for making illegal investigations as sentencing factor is still unclear. To answer this question, I examine the answers given by the perspective of the punishment. That is to say, I will examine four contemporary theories: Positive general prevention, Special prevention (Spezialprävention), Fair play theory and communicative retributivism. Finally, I argue that communicative retributivism most adequately addresses the question. I will use the perspective of communicative retributivism to understand the punishment and the criminal process as the communication between the country and the defendant. Moreover, I argue the investigation has the same characteristic as the punishment, which both has the element of censure for the offender. Then, when country does an illegal investigation in the criminal process, I understand it as an unjust communication, and it causes an undeserved violation of a legal right to the defendant. I argue that, for removing the undue influence of this unjust communication on the communication between the country and the defendant, we must restrict the country's competence of blaming the defendant. Thus, when the country's authority of punishment is restricted, the country could

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not impose 100% quantity of punishment to the defendant. That is to say, we can reduce the sentence based on this reason. Therefore, in this article, as mentioned above, I use the perspective of communicative retributivism to make the basis of the justification for making illegal investigations as sentencing factor more clear.

**Keywords: illegal investigation, sentencing factor, communication, theory of punishment, communicative retributivism, fair play, positive general prevention, criminal liability, entrapment**