

The Preventive Turn in Chinese Criminal Law - From the Perspective of Counter-terrorism

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Abstract

China's preventive counter-terrorism legislation is in line with international trends. The maximum penalties for terrorist crimes have been raised and the crackdown on terrorist activities has been intensified with the implementation of the Criminal Law Amendment III. The Criminal Law Amendment IX has introduced a large number of new terrorism-related crimes, making it possible to punish preparatory acts of terrorist activities. This marks a significant advancement in the legislation aimed at preventing terrorism. The legitimacy of preventive counter-terrorism legislation is justified by the functionalist criminal legislation theory and positive general prevention of the purpose of criminal law. In the domains of law enforcement and justice, it is crucial for law enforcement officials to uphold the principle of proportionality to prevent excessive infringement of citizens' fundamental rights like freedom of speech and privacy. Similarly, judicial personnel should interpret legal provisions restrictively, taking into account the specific circumstances of each case.

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1. Introduction

Terrorist crimes have posed a significant threat to the security of people's lives and property worldwide. Since the events of "911", terrorist activities have increased globally, exhibiting new characteristics such as extremism, localization, networking, decentralization, and targeting civilians. Facing the escalating trend of terrorist crime, numerous countries endeavor their best to fight against terrorist activities. Although the methods and strategies of counter-terrorism vary from country to country, the concept of "prevention is better than suppression" is generally emphasized in national legislation based on the requirement to maintain national and social security. In the counter-terrorism field, criminal law has changed its traditional role as an *ex post facto* law, showing a clear tendency toward prevention. For instance, Canada's Anti-terrorism Act (ATA) was built primarily on the principle of the prevention of terrorist acts. Offenses such as knowingly instructing the carrying out of any activity for a terrorist group or knowingly facilitating a terrorist group are specifically defined to be offenses, regardless of whether the ultimate terrorist activity is carried out and regardless of whether the accused knows the specific nature of the terrorist activity being contemplated. In Japan, The Act on Punishment of Financing of Criminal Activities for Intimidation of the General Public and of Governments enacted in 2002 has made terrorism financing an offense. Section 2 applies to providing money to terrorists, and Section 3 applies to collecting funds for terrorists. In Australia, the 1995 Penal Code stipulates a system of preventive offenses for the preparation of terrorist activities.

As a member of the International community, China is also facing the real danger and potential threat of terrorist crimes. In the past few years, China has witnessed a rise in the frequency and severity of terrorist attacks. From April 2013 to July 2014, twelve significant and large-scale terrorist attacks have launched in China, including several cities of Xinjiang Uygur Autonomous Region, where the terrorists are based, as well as some big cities, such as Beijing and Kunming. In order to combat criminal terrorist activities more rigorously and effectively, China enacted the Counter-Terrorism Law in 2016, which focuses on prevention and integrates punishment and preemptive measures to proactively tackle the enemy. Additionally, the 2015 Amendment IX to the Criminal Law stipulated a series of preventive counter-terrorism crimes, expanding the scope of punishment by defining preparatory acts for terrorist activities as criminal offenses. Preventive counter-terrorism criminal legislation complies with the need of China's counter-terrorism task at this current stage.

Although it has been cautioned and even criticized that preventive counter-terrorism criminal law may have potential adverse effects on the protection of human rights and fundamental values of criminal law, it is still a systematic and efficient response to terrorism. This Article first presents the evolution of counter-terrorism crimes in Chinese criminal legislative developments, from which we can see a clear turn from punishment to prevention. Then, I try to demonstrate why this preventive turn should be justified in China. Finally, several basic rules and principles should be followed in order to avoid infringing on human rights.

2. The Historical Development of Anti-terrorism Crimes in Chinese Criminal Law

2.1 1997 Criminal Law and Criminal Law Amendment III

In the 1997 Criminal Law, terrorist activities were declared a separate crime that would be punished together with other ordinary crimes committed during the process of terrorist activities, such as murder, detonation of explosives, or kidnapping, according to the regulations for punishing multiple crimes. At that time, there was only one provision for preventing terrorist activities (Article 120). This Article made “organizing, leading and participating in a terrorist organization” the object of criminal sanctions, thus advancing the time of criminal law intervention to before the actual criminal act occurs, which is the embodiment of the criminalization of preparatory acts.

After that, in order to better respond to the requirement of the UN Security Council Resolution 1373 and handle the real need of the “East Turkistan” terrorist threat, Amendment III to the Criminal Law of China was made in the Criminal Law in December 2001. This 2001 amendment brought about more severe punishments for terrorist-related crimes. Firstly, the penalty for the crime of “organizing or leading a terrorist organization” has been greatly increased. The first paragraph of Article 120 was revised to read: “Whoever forms or leads a terrorist organization shall be sentenced to fixed-term imprisonment of not less than 10 years or life imprisonment; persons who actively participate in a terrorist organization shall be sentenced to fixed-term imprisonment of not less than 3 years but not more than 10 years; other participants shall be sentenced to fixed-term imprisonment of not more than 3 years, criminal detention, public surveillance or deprivation of political rights.” This amendment has notably increased the penalty for individuals who establish or lead terrorist organizations, now carrying a potential life sentence. In contrast, the 1997 Criminal Law set a maximum imprisonment punishment for such offenses. Secondly, Amendment III to the Criminal Law introduced a new offense, namely “terrorist funding”, and included terrorist crimes as a predicate crime for money laundering crimes. As Article 120a provided that “Whoever provides funds to any terrorist organization or individual who engages in terrorism shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights, and shall also be fined; if circumstances are serious, he shall be sentenced to fixed-term imprisonment of no less than five years, and he shall also be fined or his property shall be confiscated.”

2.2 Criminal Law Amendment IX

An important change made by 2015 Amendment IX to the Criminal Law is the addition of new crimes to prevent terrorist crimes. Specifically, Article 120 added property-related punishment for criminal offenses of forming, leading, or participating in terrorist organizations. Articles 120b, 120c, 120d, 120e, and 120f were added as new criminal offenses. They would be applied to acts that prepare articles for conducting terrorist activities or organize training or contacting overseas terrorist organizations for conducting terrorist activities or so on (Article 120b); to acts that propagate terrorism or extremism or instigate violent and terrorist activities by way of preparing or distributing materials, releasing information and teaching face to face or through audio, video, information network, and so on (Article 120c); to acts that instigate or coerce the general public to disrupt the implementation of marriage, judicial, education and social management system, and other systems, by making use of extremism (Article 120d); to acts that force anyone else to wear the costume or symbol that advocates terrorism or extremism in a public place using violence or coercion (Article 120e); and to the possession of the articles, books or audio or video materials that propagate terrorism or extremism with serious circumstances (Article 120f).

In summary, Amendment IX to the Criminal Law introduces preventive measures against terrorist crimes in two aspects. Firstly, it broadens the scope of combating terrorist crimes. The constructive elements of these new crimes cannot be attributed to the direct commission of terrorist activities. However, these types of acts might be committed before the occurrence of terrorist activities or might be associated with the commission of terrorist activities. In order to prevent terrorist activities, these acts were criminalized by Amendment IX to the Criminal Law, reflecting a distinct preventive nature. Secondly, the focus has shifted from emphasizing the “consequence” of terrorist crimes to the “conduct” itself. In other words, if the perpetrator’s conduct aligns with the elements of specific crimes, it would be considered a terrorist crime even if no harmful consequences have transpired or objective danger is present. Take Article 120b for example, as long as the perpetrator prepares weapons or organizes terrorist training, or makes plans for the purpose of conducting terrorist activities, even if no harmful consequences occur, he would be punished. Thirdly, citizens are required to assist judicial authorities in combating terrorism and extremist crimes. Article 311 of Amendment IX to the Criminal Law stipulates that individuals who refuse to provide evidence of terrorist and extremist crimes to judicial authorities, under aggravating circumstances, would be charged with the crime of “refusing to give evidence”. This provision requires people to provide relevant evidence as a positive legal obligation, rather than a moral obligation, which is undoubtedly an extreme manifestation of the preventive trend in criminal law against terrorism.

3. The Justification of Preventive Criminal Law in the Counter-terrorism Field

The traditional criminalization adheres to the concept that the ‘paradigm form of substantive criminal offenses’ should be that of the “‘harm plus culpability’” model’, which requires proof of both harms was done and culpable wrongdoing. Although this model of offenses also possesses the aim of preventing future harm, especially through the idea of deterrence through the communication of censure and the threat of punishment, its primary rationale is said to be punitive, not preventive. However, compared with traditional violent crimes, terrorist crimes are significantly more harmful, posing a threat to both individuals and public safety. If the government fails to actively prevent these crimes, it will not only result in irreparable damage but also amplify people’s fear and even trigger more intense social conflicts. Therefore, the criminalization of terrorist activities is necessary for current social practice, the function of criminal law should shift from punishment to prevention, especially in the counter-terrorism field. The following theories and necessities could be relied on to illustrate the justification and reasonableness of criminalizing terrorist crimes preventively.

3.1 Functionalist Criminal Law Legislation Theory

Functionalism is a theory that originated from the risk society theory. In a risk society, the risks present different characteristics. Firstly, these risks usually cannot be recognized until actual harm occurs. Secondly, new types of risks tend to be more global than limited to local or regional areas. Thirdly, the inevitability of risk makes it impossible for criminal law to eliminate risks in this risky society, but can only attempt to regulate and control the unwanted risks before they materialize. Therefore, in order to reduce the harm caused by these risks, functionalist criminal legislation theory regards criminal law as a tool or instrument for social governance and risk prevention, it mainly focuses on how to actively achieve the function of criminal law from a utilitarian perspective.

The typical embodiment of the functionalist perspective on criminal law in combating terrorism is to intervene in the preparatory stage of terrorist crimes before actual harm occurs. Terrorist activities consist of core acts and preparatory acts, which should be considered as a whole when assessing terrorist activities. The core act refers to the violent attack on target objects, which severely violates the legal interests of individuals, society, and national security. The preparatory acts include not only the establishment of terrorist organizations, preparation of material resources, financing, and recruitment, but also include advocacy of ideological extremism. Some people may argue the act of “advocate” should not be prohibited as the freedom of expression should not be forbidden unreasonably. However, when this advocacy crosses the line and becomes a form of extremism, it can lead to the escalation of ethnic and religious conflicts, which in turn can fuel terrorist activities. Therefore, considering the necessity of combating extremist religious ideology, China’s Criminal Law stipulated that the propagation and incitement of terrorist extremist ideologies should be sanctioned before the real harm occurs.

3.2 The Purpose of Criminal Law

The purpose of criminal law has two main objectives: retribution and prevention. Retribution involves punishing the criminal in a way that balances their guilt with the concept of justice. Prevention, on the other hand, refers to the utilitarian effect of preventing crime through the application of punishment to criminals. Generally, preventive criminal law aims to achieve positive general prevention, which means that by applying certain penalties to criminals, it has a deterrent effect on other members of society to prevent them from committing crimes. The core of general prevention is intimidation, which is achieved through the punitive nature of punishment on members of society. A frequently cited example is that after drunk driving was made a crime in criminal law, people generally refuse to drink alcohol at the dinner table for fear of driving afterward. In the context of terrorism, the criminal law system should shift from ex post facto sanctions to ex ante prevention to some extent, which would be more complied with the expectations of the public and better reflects the social benefits of the law. Because preventive criminal law against terrorism can have a general effect through the forbidden provisions, even if it does not yet have a specific preventive effect through punishing defendants. For example, suicide bombing is a common characteristic of contemporary terrorism that radically undermines the criminal law’s specific prevention effect, since the perpetrators are unlikely to be inhibited by the threat of punishment. However, if criminal law is permitted to interrupt them in the initial preparation stages, not only these catastrophic consequences could be possibly avoided, but also it creates a general deterrence among potential terrorists.

4. How to Balance Between Human Rights Protection and Deterring Terrorism Crime

The function of criminal law is to punish crime and safeguard human rights. In order to effectively achieve these two objectives, criminal law must strike a balance. It should avoid excessive regulations that could infringe upon individual liberty, hinder economic and technological progress, and even violate human rights. At the same time, it should also avoid allowing risks to overflow, as this could potentially lead to irreversible harm to society.

4.1 Proportionality Test

The principle of proportionality is considered a safety valve for safeguarding human rights, and it is an inevitable choice to reconcile the conflict and balance between protecting national security and protecting human rights. It has mandatory constraints on legislation, judiciary, administration, etc., and also enables the formation and healthy development of modern constitutional states. Therefore, many Western countries have elevated the principle of proportionality to the level of constitutional principles. In China, the principle of proportionality has become a standard for judging the rationality of criminal legislation and judiciary, so the rationality of counter-terrorism work should be examined based on the principle of proportionality.

In general, the principle of proportionality encompasses three main aspects. First, is appropriateness, which entails that the measures implemented should effectively contribute to achieving the intended legislative objective. Second, necessity, which means that among various measures capable of achieving the legal purpose, the one causing the least harm to individuals should be selected. Third, balance, it requires that the public interest pursued by the law must outweigh any harm inflicted upon individuals.

In the counter-terrorism field, I think the proportionality test should be presented in two aspects. First, there should be a balance between public safety and freedom of expression. Second, for law enforcement, the authorities should carefully assess whether the potential harm to public safety outweighs the importance of personal privacy.

For the first aspect, on the one hand, terrorist activities disrupt social peace and instill fear in the public through physical destruction. The more significant the threat to public security posed by the terrorist act, the stronger interference a government should pose. It is for this reason that criminal legislation expands its scope to encompass areas that originally belong to social management and administrative control. Thus, crimes such as “promoting terrorism, extremism, and incitement to commit terrorist activities”, “compulsory wearing of clothing and symbols promoting terrorism and extremism” and “illegal possession of terrorist and extremist objects” have been added to mitigate the damage caused by terrorism or extremism to public security. On the other hand, through these punitive preventive measures in the counter-terrorism field, criminal law intensely interferes with the life and expressive freedom of individuals. In the meantime, the protection of freedom of expression has limitations, particularly when it involves speech that poses a threat to “public order” of “national security and public safety”. Terrorist speech, due to its severe disruption to public order and safety, is naturally excluded from this protection. Chinese criminal law encompasses three main categories of crimes related to terrorist and extremist speech: incitement speech, propaganda speech, and assistance speech. These types of speeches all contribute to the promotion of terrorist activities from various angles, thereby facilitating the growth of terrorist organizations. Consequently, criminal law prohibits the unrestricted dissemination of such speeches. However, in judicial practice, due to the lack of a rigorous definition of terrorism and extremism speech, judicial personnel sometimes confuse the boundary between freedom of expression and terrorist speech. This results in the inclusion of neutral expressions or expressions that do not overtly endorse terrorism within the crackdown scope. The intervention of criminal law in freedom of speech should be approached with great caution. Expanding the definitions of terrorism and extremism will inevitably lower the threshold for criminalization, resulting in citizens being hesitant to express themselves for fear of their words and actions being deemed criminal. This will be detrimental to the development of freedom of speech and will ultimately hinder social progress.

In my opinion, criminal law should strictly restrain itself when it infringes upon individuals’ freedom of speech. It is important for judicial personnel to thoroughly assess the perpetrator's subjective intentions, specifically whether they deliberately advocate, incite, or endorse terrorist activities. This evaluation can be based on factors such as his language usage, everyday routines, religious convictions, and subsequent behavior. There is already a growing inclination to meticulously scrutinize the perpetrator's subjective characteristics.

For the second aspect, the fight against terrorism and the protection of citizens’ personal privacy information are highly consistent, because the purpose of counter-terrorism is to maintain social stability and safeguard human rights, and the right to privacy is part of citizens' legitimate rights. There is no essential difference between the two. Counter-terrorism actions should prioritize privacy protection, which requires adhering to the principle of proportionality. In 2016, the Federal Bureau of Investigation (FBI) requested Apple Inc. to provide technical assistance to help crack the passcode of a suspect's phone. The purpose of this action was to combat crime and achieve justice. However, for Apple Inc., this was not just a simple technical assistance request, but a violation of customer information that posed a significant threat. Therefore, Apple Inc. refused the request. This example reflects the importance of strictly adhering to privacy protection principles in counter-terrorism operations.

China still has shortcomings when it comes to addressing terrorism and safeguarding the privacy of its citizens. The main concern revolves around the inadequacies in the counter-terrorism legal framework. The Anti-Terrorism Law of the People's Republic of China explicitly states that all personnel information collected by counter-terrorism agencies should be promptly reported to the National Counter-Terrorism Intelligence Center.

However, the Personal Information Protection Law of the People's Republic of China stipulates that State organs processing personal information to fulfill their statutory functions shall fulfill the obligation of notification in accordance with the provisions of this Law, except notification will hinder state organs' fulfillment of their statutory functions. There are inconsistencies in the structure and content of these two laws. For example, who has the authority to determine whether the information is necessary for fighting terrorism? If the information is collected incorrectly, what recourse do citizens have? In my opinion, in order to balance the conflict between counter-terrorism intelligence work and the right to privacy, it is crucial to define the scope of authority for national counter-terrorism agencies and enhance coordination and cooperation among relevant departments, which will help to improve the effectiveness of counter-terrorism operations. In addition, it is important to consider methods of compensating for any damages caused by such operations. From a legal perspective, individuals whose personal privacy is violated should have the ability to seek compensation through appropriate legal provisions. This not only offers psychological and economic support to those affected but also reflects the humanization of national laws.

4.2 Limited Explanation

As a statutory country, China's laws are somewhat lagging behind the social reality, particularly in the field of criminal law. In order to conquer this disadvantage, the legislature often employs abstract and ambiguous language, which would also cause great difficulties in application. Therefore, in China, The Supreme People's Court and the Supreme People's Procuratorate will issue judicial interpretations on specific problems of legal application. These authority interpretations aim to define and clarify the specific meaning of obscure words and eliminate conflicts in the process of law application. For example, Article 120f of China's Criminal Law stipulates that a person could only be held criminally responsible and subjected to punishment if they possess articles advocating terrorism or extremism with knowledge. This mental element should be extremely limitedly explained, as an incorrect interpretation could largely expand the scope of punishment and impact the relationship between the government and religious organizations. Generally speaking, in Chinese Criminal Law, "knowledge" in Article 120f refers to "knowing or should have known," which includes both the perpetrator's clear knowledge and the knowledge they should have. The term "clear knowledge" means that the perpetrator knows without any doubt that the items they possess propagate terrorism and extremism. The term "should have known" means that although the perpetrator does not have clear knowledge, based on both objective and subjective evidence, he should be able to recognize and acknowledge that the items he possesses promote terrorism and extremism.

In order to further clarify, on 18 March 2018, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice issued opinions on specific matters regarding the application of law in dealing with criminal cases related to terrorism and extremism. This interpretation stipulates that the determination of "knowledge" in Article 120f should be based on the specific circumstances of the case, the objective acts committed by the perpetrator, combined with his consistent performance, specific acts, means, and attitude afterward, as well as his age, cognitive and educational level, and the occupation he is engaged in. Even if the perpetrator: (1) used to be held criminally liable, or to be subject to administrative punishment within two years, for conducting terrorist activities or committing an extremist crime, or conducting or committing the same after being ordered to take corrective action; or (2) when the law enforcement personnel conduct inspection, committing the conduct such as escaping or discarding articles carried and escaping or resisting inspection, with articles that promote terrorism or extremism found among those carried, concealed, or discarded; or (3) making, giving out, or possessing articles that promote terrorism or extremism by camouflage, argot, gesture, code, or any other covert means; or (4) completing consignment or delivery formalities by a false identity, address or any other means, with articles that promote terrorism or extremism seized among those consigned or delivered. As long as he can give a reasonable explanation, or there is sufficient evidence to prove that he is deceived, the person still should not be held liable for lack of "knowledge".

With this in mind, in judicial practice, there has been a trend of strict examination of the subjective element of this crime. In a judgment made by the Jinshui District People's Court of Henan Province, 2018, the Prosecutor charged that the defendant illegally possessed terrorist and extremist videos. The accused argued that he did not know the videos were promoting terrorism, therefore he did not commit this crime with intent. But after realizing the videos he possessed were promoting terrorism and extremism, the accused did not take measures such as deleting the videos or reporting them to the relevant authorities. Instead, the accused still intended to share these videos with others for benefit. Based on these objective facts, there was sufficient evidence to conclude that the accused knew the videos were promoting terrorism.

5. Conclusion

The objective of implementing preventive criminal law in counter-terrorism is to mitigate the potential threat of

terrorist activities before they result in significant harm. However, how to avoid the damage that preventive criminal law may cause to the fundamental rights of citizens in the field of counter-terrorism field is a major issue that cannot be disregarded in a state governed by the rule of law.

The present development of preventive justice in Chinese Criminal Code and its amendments involves several changes that diminish the significance of the "result" in *actus reus*. This change is conducive to combating terrorist activities and protecting national security. At the same time, the government should also avoid infringing upon citizens' freedom of speech and privacy. It is necessary to strictly follow the principle of proportionality in law enforcement processes and provide restrictive interpretations of specific terms in judicial practice.

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