

Value Conflict and Balance Between Security and Freedom

Reflections on the Anti-terrorism Criminal Legislation in China

Gaolun Li

Criminal Justice School
Zhongnan University of Economics and Law
Wuhan, China

Abstract—In order to deal with the flood of terrorist crimes, the anti-terrorism criminal legislation in China has gradually improved and constituted a system. In the gradual expansion of legislation, there comes a conflict between the value of security and freedom. The choice of safety priority value can easily cause the risk of the rule of law. Even if it is justified by the actual needs of counter-terrorism, it still applies the freedom of value to limit the expansion of criminal law caused by the pursuit of security value, thus ensuring the legitimate freedom of citizens and achieving the balance between the value of security and the value of freedom.

Keywords—*terrorist crimes; security; pre-emptive; legislation*

I. INTRODUCTION

Terrorism is a plague that spreads the world today and has brought enormous disasters and suffering. When the war mode is not enough to deal with the terrorist forces, countries begin to seek the governance path of the anti-terrorism judicial model. In the aspect of the rule of law, the global legal field embodies the value orientation that security takes precedence over freedom. China is no exception. In recent years, in addition to the Anti-Terrorism Law of the People's Republic of China (hereinafter referred to as the Anti-Terrorism Law), China has adopted a series of amendments to Criminal Law of the People's Republic of China (hereinafter referred to as the Criminal Law), which have increased the crime names and expanded the range of criminal punishment. In addition to strike terrorist crimes and ensure security, the further expansion of the scope of criminal law punishment and the further advancement of criminal law intervention have also made citizens' freedom rights space compressed. It is worth thinking about whether the risk of the rule of law is justified when using criminal law to protect national security. What value choices should criminal legislation make when security values conflict with free values? What is worth pondering is whether the rule of law risk caused by the criminal law is justified when the national security is protected by the expansion of criminal law. Which value should be selected by criminal legislation when security value and freedom value conflict?

II. THE VALUE CONFLICT OF ANTI-TERRORISM CRIMINAL LEGISLATION IN CHINA

A. An Overview of the Current Situation of Anti-terrorism Criminal Legislation in China

Since the current Criminal Law was enacted in 1997, China has successively adopted nine amendments, forming a system of anti-terrorism charges consisting of nine exclusive crimes (refers to the crime of terror in the name and the description), such as crime of organizing, leading, or participating in terrorist organization, as well as a number of other terrorism-related offenses. In general, it expanded the scope of criminal law regulation of terrorism, tightened the criminal law network, and increased the punishment for terrorist crimes.

Amendment to the Criminal Law III (the Amendment III), Amendment to the Criminal Law VIII (the Amendment VIII) and Amendment to the Criminal Law IX (the Amendment IX) have successively added eight exclusive crimes of terrorism, namely, the crime of providing assistance in terrorist activities in Article 120A, the crime of preparing for committing terrorist activities in Article 120B, the crime of promoting terrorism or inciting terrorist activities in Article 120C, the crime of using extremism to undermine the implementation of law in Article 120D, the crime of compelling the wearing of clothes or marks promoting terrorism or extremism in Article 120E, the crime of illegally possession of articles promoting terrorism or extremism in Article 120F, the crime of making up or knowingly spreading the false terrorism information in paragraph 1 of Article 291A, the crime of refusing to provide the evidence of crime of espionage, terrorism or extremism in Article 311. The new offenses include both actual damage offence and potential damage offence. These also make accessory become principal offender and attempted crimes become accomplished crimes. In addition to directly expanding the actual damage crimes, increasing potential damage offence and preparatory crimes shows the characteristics of earlier protection of the legal interest and expanding the scope of criminal punishment and has woven the legal network of terrorist crimes.

These three amendments have successively enhanced penalties for terrorist crimes. By raising the statutory penalty and adding the regulations about special recidivist, the criminal sanctions for terrorist crimes have been severely tightened. For example, the Amendment (III) provides different statutory penalties for criminals who organize, lead or participate in terrorist organizations, and raises the maximum statutory penalty to life imprisonment. The Amendment (VIII) adds terrorist crimes into the conditions of special recidivist. The Amendments (IX) adds supplementary punishment of fine and confiscating property for organizing, leading, or participating in terrorist organization, and other new terrorist crimes are added property penalty. What's more, the direct provision of statutory punishment for accessory and preparatory crimes makes the penalties severer.

Generally speaking, China's anti-terrorism criminal legislation has gone through a process from germination to development to gradual system. In this process, the scope of the criminal law for terrorist crimes has gradually expanded, interventions have gradually advanced, and punishments have become severer, showing obvious preventive features.

B. Value Conflict Embodied in China's Anti-terrorism Criminal Legislation

Hobbes believed that "the safety of the people is the supreme law." At the same time, Kaufman proposed that "social justice, human rights, human dignity and even responsibility and guilt are rooted in human freedom." Western philosophy of law generally holds that order, fairness and individual freedom are the three indispensable values of law. Security and freedom are the two values of modern criminal law legislation. The criminal law pursuing value of security is different from the criminal law pursuing the value of freedom. The security criminal law pursues the value of security. For this purpose, it reforms the traditional criminal law, expands the scope of crime in legislation, and sets up more abstract potential damage offenses. While the liberal criminal law still adheres to the criminal law concept of ruling by law, putting the protection of human rights first, and adheres to restraining criminal law. Obviously, there is a conflict between the pursuit of value in security and freedom.

The current anti-terrorism criminal legislation in China is the result of the pursuit of security value. The logic followed in China's anti-terrorism criminal legislation is that safeguarding national security, social stability, and people's security by cracking down on crimes. The freedom of people is included in national security, social stability and the safety of life and property. It emphasizes protecting freedom by pursuing the security. The principle of anti-terrorism China has established is that giving priority to prevention, integrating punishment and prevention, anticipating the enemy and maintaining activeness. Such a counter-terrorism strategy is to take risks and pursue the priority of security value. Anticipating the enemy and maintaining activeness shows that sanctions should be imposed when terrorism has not caused significant damage, which means that the criminal law will show a strong tendency of prevention when it is projected into the criminal law. As mentioned earlier, in

the existing criminal law, there are many abstract potential damage offenses which do not take the actual damage to the legal interests as the conditions for establishment. At the same time, advancing and expanding the regulation of criminal law are achieved by making accessory become principal offender and attempted crimes become accomplished crimes. At present, the protection of legal interests in the criminal law is constantly ahead and continuously extended in the expansion of the criminal circle. The criminal law tends to take active intervention and early regulation.

The value pursuit of security priority conflicts with the traditional criminal law. In modern western politics, the core of ruling of law is forming and restricting the public power of the state through the certainty of law, and ensuring that the interference of state power to civil liberties conforms to the principle of justice. Recently, with the development and changes of society, the functions of the state have gradually expanded and affected to the field of legislation and judicature, and the function of criminal law has also gradually expanded and become the means of social governance. Traditional criminal law pursues liberal order and is of reaction type. It holds that prevention is a matter for the police and intelligence services, not for prosecutors and criminal courts, whose task is to determine the legal responsibility of the past time, not to prevent danger. In China's anti-terrorism criminal legislation, the expanding criminal law not only guarantees social security, but also causes the erosion of civil liberties and rights, resulting in the risk of the rule of law.

III. THE RULE OF LAW RISK ARISING FROM THE PRIORITY OF SECURITY VALUE

A. Pre-emptive Legislation Impacts the Principle of Modesty

Traditionally, criminal law regards punishing actual damage offenses and accomplished crimes as principle and punishing the potential damage offense and attempted crimes as exception. Criminal law has the character of hindsight. Pre-emptive criminal law is characterized by the increase of dangerous crime, the criminalization of preparatory act and the criminalization of aiding act. In the preparatory stage, criminal sanctions can be launched to nip terrorist activities in the bud, and at the same time, the consequences of punishment can be strengthened in a disguised way, so as to achieve the deterrent effect.

China's anti-terrorism criminal legislation is obviously pre-emptive. There are several potential damage offenses in the seven exclusive terrorism crimes in Article 120 of Criminal Law. What's more, some crimes like the crime of preparing for committing terrorist activities are the result of criminalization of preparatory acts. Some crimes like the crime of providing assistance in terrorist activities are the result of criminalization of aiding acts.

Stipulating the original aiding acts or preparatory acts as principal acts or accomplished acts, and establishing separate statutory penalties in special provisions lead to that the regulation of these original acts in criminal law gets rid of

the punishment restriction of accessory and preparatory offense in the general provisions, which strengthens the punishment. It also expands the scope of sanctions.

The principle of modesty of criminal law is the basic principle of criminal law. It can be expressed as the incompleteness, complementarity and tolerance of criminal law, which means that legislators should strive to prevent and control crime effectively with minimum expenditure—using little or no penalty to obtain the greatest social benefit. It is generally believed that the criminal law, as a last resort, must maintain its characteristics as the last resort of the protection law and not interfere with the characteristics of every corner of the citizen's life. The proposition of criminal legislation and the expansion of the criminal circle have impacted the status of the last resort of criminal law, making a large number of acts with relatively weak risk brought into the scope of the criminal law, and making the boundary between the launching of the criminal law against terrorism and the launching of the anti-terrorism law becoming blurred. The necessity of initiating criminal law is not proved. The reason why the criminal law is modest lies in the harsh nature of criminal sanctions and the strong position of state power. When the expansion of the crime circle impacts on the bottom line of the criminal law, it also means the extensive use of the means of criminal sanctions and the expansion of state power. The space of individual right of citizen is compressed, even be infringed upon.

B. Abstract Legislation Leads to Expand State Power

Abstract legislation corresponds to explicit legislation. Abstract legislation is characterized by simple crime setting, lack of explanation of concept, and keeping room for expansion in incrimination. The value pursuit of security priority favors abstract legislation because it can not only improve the backwardness and incomprehensibility of legislation to a certain extent but also expand state power and combat crime more effectively. This has led to a lack of clear provisions on many concepts in China's anti-terrorism criminal law, such as "terrorism" "extremism" "propaganda" and "terrorist activities". Although these concepts have been stipulated in the Counter-Terrorism Law, it makes the Counter-Terrorism Law and even the local laws and regulations become an important basis for the criminal judicial recognition, and the role of the public security organs is enhanced at the same time. At the same time, abstract legislation has blurred the threshold of incrimination, expanded the flexibility of judicial judgment and expanded the power of the state.

In May 2018, the Supreme people's Court, the Supreme people's Procuratorate, the Ministry of Public Security and the Ministry of Justice jointly issued the Opinions of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice on Certain Issues concerning the Application of Law in Handling Criminal Cases Involving Terrorism and Extremism (hereinafter referred to as the Opinions). This file provides specific provisions for the determination of terrorist offenses, practical procedures and working mechanisms. The Opinions specifies in detail the unrefined provisions in the criminal law, and defines the identification mode and the

standard of incrimination of each crime in the way of enumeration and generalization. It is worth noting that, for the determination of terrorist crimes, basically "other circumstances" are reserved for each crime, which leaves room and space for judicial judgment. This can make the application of the law more flexible, and give a timely and adequate response to the new situation in the development, but there is the risk of expanding the scope of regulation, blurring the boundaries of incrimination, and expanding the power of the state.

The Opinions points out that when it needs determine the books, audio or video materials, clothes, marks, or other articles that promote terrorism or extremism, the public security organs shall put forward an examination opinion and hand it over to the people's procuratorates for examination together. The people's procuratorates and the people's courts may make comprehensive examination and judgment, taking into on-record evidence, the circumstances of the case, and the experience in processing cases. The adding of the power of examination opinions enhances the power of the public security organs to determine the core problems of such crimes in a disguised way. If they are not regulated in practice, it is easy to cause the expansion of the power of public security organs and the risk of improper influence on the judicial power.

Abstract legislation also brings the opening of barriers between criminal law and other legal boundaries. Words like terrorism and extremism are used in the Criminal Law but their concepts need to be found from the Counter-Terrorism Law. Stipulates in the Counter-Terrorism Law, which are not comprehensive or exhaustive, need be understood by local laws. Criminal law is no longer self-sufficient and relies on other laws as the basis of interpretation and judgment. This makes it possible for other state organs to interfere with the powers of the judicial organs. The cooperative criminal law governance between the judicial and administrative organs will further alienate the criminal law from the status of the safeguard law. And it will also reduce the protection of the rights of offenders.

IV. BALANCE BETWEEN THE SECURITY AND FREEDOM

In view of the risks and hidden worries that may be brought about by the priority of the security value of China's anti-terrorism criminal legislation at present, some scholars have proposed that "the security values based on the premise of freedom" should be constructed. Under the premise of respecting and protecting the basic human rights and freedoms of citizens, we should pursue the security of our country and society and use the criminal law discreetly and modestly. To prevent the criminal legislation of terrorist crimes, try to limit the legislation of terrorist crimes to a reasonable range. The author believes that the social protection of criminal law and the function of human rights protection should be paid equal attention to, and the dynamic balance between them should be the goal criminal legislation pursues.

A. Pursuit of Security Value Meets the Needs of Counter-terrorism

Not like other types of crimes, terrorist crimes often has disastrous consequences, not only undermining national security and affecting the stability of regimes and societies, but also causing enormous losses of public property and individual lives and property of citizens. Its extreme ideological core and retaliatory means of impact will even damage the overall civilization of mankind. Therefore, there is a strong need for prevention. At the same time, it also has extremely strong contagious. It can spread extreme thoughts with strong spiritual ties and spread the inner spiritual power of crime. It can use the theater effect, which means it can regard the criminal sanction as the theater that propagates the criminal spirit motive force, to arouse the resonance and response of the potential criminal elements. Without more thorough prevention and control, the spread of terrorism risks cannot be controlled. In addition, terrorist crimes are also extremely difficult to be prevented. The reasons of it includes that terrorist crime a conviction of crime, the criminal will of criminal is rooted in his heart and belief, and it is difficult to eliminate the criminal basis of extreme thought from the root cause, to reform and to make it difficult. Also, with the rise of single-wolf terrorist activities, terrorists often have no representation before committing terrorist crimes, and the difficulty of carrying out terrorist attacks is reduced, and it is difficult to stop them before disasters occur. The risk of harmful consequences can only be controlled by means of an external behavior sign as far as possible.

What drives the function of criminal law to turn to the security pursue lies in the security request of society. It must be noted that the sanction of the criminal law can make the public feel the stability from disorder to order. Even if the return after the disorder does not produce a sustained and stable state of security, it can still increase the sense of security of the society. This is the greatest role criminal law can play in process of pursuing of security value. The damage caused by uneasiness to the society is diffuse. In the face of terrorist crime, both the victim and the potential victim need to calm down the sense of uneasiness and satisfy the vengeance mood and restore the social order, which promotes the symbolic response of the criminal law. That means appeasing the public and increasing the public's sense of security by way of criminal legislation declares the state's position and value on terrorism. In that way, criminal legislation has become a normative response to security demands.

The legal status of criminal law determines that it should do something in anti-terrorism. The tasks of China's criminal law are to "use punishment struggle against all criminal acts to defend national security, the political power of the people's democratic dictatorship, and the socialist system; to protect state-owned property and property collectively owned by the laboring masses; to protect citizens' privately owned property; to protect citizens' right of the person, democratic rights, and other rights; to maintain social and economic order; and to safeguard the smooth progress of the cause of socialist construction." China's criminal legislation

has the tendency of pursuing security value, which embodies the security value structure of "national security-social security-personal security." Therefore, when the realistic needs fit with value tendency of criminal law, the security value can become the pursuit of anti-terrorism criminal legislation.

But even for the sake of security, it does not mean that there is no limit of anti-terrorism criminal law. Criminal law is a double-edged sword, so it ought to advance and retreat properly. We must guard against the excessive pursuit of security which leads to the crossing of criminal law, violates the constitutional principle and erodes civil liberties. Therefore, the pursuit of the freedom value of criminal law should be used to balance and abate the risk of crossing the boundary of criminal law arising from the pursuit of security value.

B. Balance and Abstinence of Liberal Value

In the process of pursuing the value of security, not any adjustment to the value of security is feasible and appropriate. The spiritual values of justice, civilization, modesty and conservatism behind the criminal law are the crystallization of human society's exploration for hundreds of years, and should not be easily abandoned in modern society. Every expansion of the crime circle should be able to withstand more legitimate heckles. Even if the pursuit of security value is the development trend of criminal legislation, it is also necessary to consider the method of risk control on the basis of the social needs and the functional transformation of criminal law. Even if the pursuit of security is legitimate, the possible risks and transgressions of sharp expansion of criminal law should not be ignored.

The liberal value of criminal law emphasizes the safeguard function of criminal law for human rights. At the macro level, we must adhere to the Constitution as the basis for criminal legislation. The Constitution stipulates the basic rights and duties of citizens, and the reduction of civil liberties in criminal law must be carried out within the framework of the Constitution. The constitutional principle of proportionality also requires the criminal law to uphold the principle of modesty and restraint and to adhere to the principles of appropriateness and necessity in the criminal legislation. On the one hand, it is necessary to consider whether such legislation can achieve the legislative purpose, that is, the appropriateness of the means. On the other hand, among all the ways to achieve the legislative purpose, we should choose the way that is least harmful to the rights of the people. At the same time, even if it is necessary to achieve the goal, a comparison should be made between the purpose pursued and the method used by the law in relation to the loss of rights to the people. This requires that anti-terrorism criminal legislation must consider comprehensively the necessity, appropriateness and proportion of the means, carefully use the extremely strong preventive legislative means and techniques, and exercise restraint in the use of abstract damage crimes and pre-emptive legislation.

As to micro level, on the one hand, we should limit the scope of the crime and delimit the boundary of the crime. In the current legislation, there are still many aspects of the

description of crimes that are not specific and clear enough. Abstract legislation can easily lead to the expansion of the crime circle across the border, and the regulation used the word "other circumstance" will lead to the blurring of the line of incrimination. In the anti-terrorism criminal legislation, we should pay attention to the boundary of criminalization and choose the legislative mode of advance prevention carefully. If the intervention point of criminal law is too advanced, which is beneficial to the value of security, it will lead to violation of the culpability principle. When criminalizing the behavior without actual damage, we should synthetically consider the risk of this behavior, and select the best intervention point by investigating the subjective mentality of the perpetrator, the distance from the actual harm, the influence of the actual harm result, and so on.

The principle of urgent and uncontrollable must be adhered to in the case of the criminalization of preparatory act. Not all the preparatory acts that of same danger should be criminalized. The danger and the need to punishment of the preparatory acts should be judged objectively. In the aspect of criminalization of aiding act, we should not only investigate objectively the danger of legal interest infringement brought about by aiding behavior, but also examine the subjective mentality of the perpetrator. For example, the Opinions points out that the subjective intent to provide assistance in the crime of terrorist activities shall be comprehensively determined, based on the specific circumstances of the case, taking into account the specific conduct, cognitive ability, consistent performance, and occupation, among others. When it comes to neutral acts of providing assistance, the severity of the plot and the cognition of accessory will be. For example, the Opinions point out that a founder, initiator, operator, or manager of any network platform, or network application service, who knows that others use the said network platform, or network application service to disseminate and promote terrorism or extremism, allow or permit others to make publications after being punished by the relevant administrative departments in charge.

On the other hand, criminal law should leave the disproof path to the abstract potential damage crime. The Opinion stipulates that "If articles that promote terrorism or extremism are illegally possessed for more than one time, without being dealt with, the articles shall be counted cumulatively." The penalty basis of criminal law for possession crime lies in the danger of legal interest infringement embodied by its dependence on related crime groups. If the former possession did not militate actually and even be destroyed by actor himself, should this be counted cumulatively? Criminal law should allow actor proof his behavior had no abstract potential damage, leaving a path of decriminalizing.

V. CONCLUSION

If the criminal law changes in time and corresponds to reality, it will be meritorious and work. The current social is different from where the traditional criminal law developed. It is necessary for the value pursuit of the criminal law to turn to meet the needs of the times and the national

governance strategy. However, criminal law always has its internal principle, the pursuit of freedom should not be abandoned in the pursuit of security, otherwise, the civilization and morality of criminal law cannot be questioned. In the field of counter-terrorism, if we deal with the danger of human civilization with the ways lack of civilization and morality, it is afraid that it will deviate from the original intention and purpose of anti-terrorism. The ultimate aim of criminal legislation is to ensure social development and citizen's happiness, and the value orientation of criminal law cannot be separated from this standard. Whether the pursuit of security or freedom, it should regard that standard as the principle and mission, so that the criminal law can maintain rationality and legitimacy and become the shape weapon of good governance.

REFERENCES

- [1] Liu Yanhong, "Evaluation and reflection on the value of Criminal legislation of terrorist crimes in the past 20 years," *Peking university law journal*. Beijing, vol. 30, No.1, pp.37-58, 2018.
- [2] Zhang Mingkai, "Regarding the terrorist crimes prescribed under the Amendment ix to the Criminal Code," *Modern Law Science*. Beijing, vol. 38, pp.23-36, Jan, 2016.
- [3] He Ronggong, "The expansion of preventive criminal law and its limits," *Chinese Journal of Law*, Beijing, vol. 38, pp.138-154, Jan, 2017.
- [4] Jiang Min, "The boundary of anti-terrorism legislation of criminal law," *Tribune of Political Science and Law*, Beijing, vol.35, No.5, pp.79-93, Sep. 2017.
- [5] He Ronggong, "Thinking on the preventive criminal legislation of anti-terrorism," *China Legal Science*, Beijing. No.3, Mar, 2016, pp.145-163.
- [6] He Ronggong, "Liberal order and liberal theory of criminal law," *Peking University Press*, Oct. 2013