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ARTICLE

THE PROCESS OF LEGALIZING SPECIAL INVESTIGATIVE TECHNIQUES IN CHINA

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Compared with conventional investigation methods, special investigative techniques are specific investigation measures that are conducted without informing the parties being investigated. Although these measures are effective means for fighting crimes, they can also easily violate human rights. Before the modification of the Criminal Procedure Law of China in 2012, only the State Security Law of the People's Republic of China, the People's Police Law of the People's Republic of China, and the departmental rules enacted by the Ministry of Public Security contained provisions on special investigative techniques. However, in practice, special investigative techniques have been widely employed to investigate hidden crimes or major complex crimes, such as crimes endangering state security, organized crimes, and drug-related crimes. To standardize the use of special investigative techniques, the Criminal Procedure Law of China has included a new paragraph about special investigative techniques, including technical investigation measures, hidden identity investigation, and controlled delivery. And the Procedure Rules for Public Security Organs Handling Criminal Cases (2012) and the Tentative Rules for Criminal Procedure of People's Procuratorate (2012) provide some supplemental provisions. Although the importance of special investigative techniques stipulated in the Criminal Procedure Law should be affirmed and approved, the provisions of the Criminal Procedure Law and the relevant interpretations are too simple and too principled, which will likely lead to the improper application or abuse of special investigative techniques. Rules regarding which types of cases and under which conditions special investigative techniques are appropriate, the necessary approval procedures, and the legal consequences and relief mechanisms for illegal special investigative techniques should be clarified or added to promote the legalization of special investigative techniques — by striking a balance between power authorization and power control as well as between the values of crime control and human rights protection.

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INTRODUCTION

Compared with conventional investigation methods, special investigative techniques are specific investigation measures that are conducted without informing the parties under investigation. Neither the Criminal Procedure Law of 1979 nor the 1996 version contains a provision for special investigative techniques. The Decision of the National People's Congress on Amending the Criminal Procedure Law (the Amendment) adopted and promulgated on March 14, 2012 contains five provisions on special investigative techniques, including technical investigation measures, hidden identity investigation, and controlled delivery, in Chapter 2, Paragraph 8 of the second part of the Criminal Procedure Law of China in 2012 from Article 148 to Article 152. Therefore, it has formally established technical investigation measures and other special investigative

techniques. This change is commonly referred to as the law-based regulation of special investigative techniques.[1] However, on August 30, 2011, the Standing Committee of the National People's Congress (NPCSC) announced the Amendment to the Criminal Procedure Law (the Draft) to solicit public opinion. Should technical investigation measures and other special investigative techniques be regulated under the Criminal Procedure Law? Are the new provisions in accordance with the requirements of the modern rule of law? Will technical investigation measures and other special investigative techniques be abused when implemented? These questions have aroused significant disputes in theory and in practice, including those in the media. Whether technical investigation measures and other special investigative techniques should be stipulated in the Criminal Procedure Law has become one of the most controversial issues during the drafting of the Criminal Procedure Law of 2012. To bring special investigative techniques into the context of the rule of law, this article examines the past, evaluates the present situation, and considers the future of the legalization of special investigative techniques in China.

I. THE CONCEPT AND TYPES OF SPECIAL INVESTIGATIVE TECHNIQUES

The terms "technical investigation" and "secret investigation" are closely associated with the term "special investigative techniques." The concept of technical investigation may be understood either broadly or narrowly. In the broad sense, technical investigation is a general term for a variety of investigative techniques that use modern scientific knowledge, methods, and technologies,[2] including electronic eavesdropping, telephone monitoring, electronic monitoring, secret e-mail checks, and various additional secret techniques as well as investigative means with technical applications in general investigations, such as the use of certain equipment for inquests and examinations. In this sense, technical investigation occurs in most criminal investigations. Technical investigation in this case may be equivalent to investigative techniques. In the narrow sense, technical investigation is a special type of secret investigation that is supported by specific investigative techniques and cannot be known to those being investigated; that is, it involves secrecy. It is based on specific technology, but it differs from investigative technology. However, some scholars suggest that technical investigation also includes some measures being used openly, such as polygraph tests.[3] Technical investigations in China generally refer to the narrower concept; indeed, the measures stipulated in the State Security Law of the People's Republic of China and the People's Police Law of the People's Republic of China refer to technical investigation in the narrow sense.

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[1] LEI Xiaozheng, *Chinese Model of the Legal Regulation of Technical Investigation*, 4 Social Sciences in China 179, 179 (2012).

[2] SONG Yinghui, 刑事诉讼中的技术侦查研究 (*An Approach of the Technical Investigation in the Criminal Procedure*), 3 法学研究 (Chinese Journal of Law), 73 (2000).

[3] Id. at 73.

According to the relevant explanations, technical investigation refers to "technical investigation measures taken by the state security organs and the public security organs to detect crimes, including electronic eavesdropping, telephone monitoring, electronic monitoring, secretly taking photographs or recording videos, obtaining certain physical evidence and checking e-mail secretly, and other secret special techniques."[4] Technical investigation measures stipulated in Articles 148 to 150, Paragraph 8, Chapter 2 of the second part of the Criminal Procedure Law (2012) refer to technical investigation in the narrow sense, which is defined in the Procedure Rules for Public Security Organs Handling Criminal Cases issued by the Ministry of Public Security on December 13, 2012. According to Article 255 of the Procedure Rules for Public Security Organs Handling Criminal Cases, technical investigation measures involve such activities as record monitoring, location monitoring, communication monitoring, and workplace monitoring of subjects. All these measures must be taken by the technical investigative department in the public security organs at the level of districted cities or above.

Secret investigation is an activity with which the investigative organs, by concealing their identity, purpose and approach, discover crime clues, collect criminal evidence, and capture criminal suspects without the knowledge of those being investigated. Technical investigation is also secret, but secret investigations have a broader scope. In addition to technical investigation, secret investigation also includes other types of investigation measures, such as temptation investigation, undercover investigation, informants and controlled delivery.

The relevant international conventions include provisions on the above investigation measures. For example, special investigative techniques stipulated in the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption discuss controlled delivery, undercover operations, and electronic or other forms of surveillance. Undercover operations typically include temptation investigation, undercover investigation, and informants. Neither technical investigation nor secret investigation can encompass all the characteristics of these investigation methods. Moreover, compared with conventional investigation measures, both technical investigation and secret investigation have specific characteristics. From this perspective, it is more appropriate to label these investigative techniques special investigative techniques.

Although the special paragraph of the Criminal Procedure Law (2012) is titled "Technical Investigation Measures" and includes five provisions, "hidden identity investigation" and "controlled delivery" in Article 151 in the Criminal Procedure Law (2012) are considered secret investigation methods using human resources and are not technical investigation measures. Therefore, in the drafting process, some have suggested that the title of the paragraph should be "Technical Investigation and Secret

[4] Id. at 73–74.

Investigation"; some have suggested that it should be changed to "Special Investigation" and others have suggested that it be titled "Special Investigative Techniques." I believe changing the title to "Special Investigative Techniques" or "Special Investigation Measures" would be more appropriate.

II. THE HISTORY OF LEGISLATION ON AND THE PRACTICE OF SPECIAL INVESTIGATIVE TECHNIQUES IN CHINA

Although special investigative techniques had not been officially established in the basic law until 2012, special investigative techniques had been widely used before the Criminal Procedure Law was amended in 2012. For example, controlled delivery played a role in February, 1988 when China's public security organs, with the help of International Criminal Police Organization (INTERPOL) and the U.S. law enforcement officials, cracked a major drug-related crime involving using koi to smuggle heroin into the U.S. In addition, informants, temptation investigation, and technical investigation are regularly used in the investigation of drug-related crimes. Meanwhile, informants, undercover investigation, and technical investigation are employed to investigate organized crimes or criminal syndicates. Practical experience shows that investigative techniques are effective for seizing evidence, stopping pilferage, and arresting suspects. Special investigative techniques are also effective in detecting and fighting hidden crimes or major complex crimes, such as crimes endangering state security, organized crimes, drug-related crimes, corruption or bribery.

Although the Criminal Procedure Law does not have a provision for special investigative techniques, other legal documents have addressed these techniques. In an attempt to crack down on duty crimes, in 1989, the Supreme People's Procuratorate (SPP) and the Ministry of Public Security issued the Notice on the Public Security Organs to Assist the People's Procuratorates in Major Economic Cases Using Technical Investigation Measures, which first proposed the idea of "detecting cases using technical means." Article 10 of the State Security Law of the People's Republic of China (1993) stipulates, "Where the reconnaissance of an act endangering state security requires, the state security organs may, in accordance with the relevant provisions of the state and after going through strict approval procedures, take technical reconnaissance measures." To implement the State Security Law of the People's Republic of China, the Ministry of Public Security issued a notice to all public security organs that stipulated, "The public security organs must be strictly in accordance with the relevant provisions of the Party Central Committee and the State Council and carry out the procedures of examination and approval for using the technical reconnaissance measures. Violation of the law or the regulation and abuse of the power must be severely punished." Article 16 of the People's Police Law of the People's Republic of China (1995) stipulates, "As necessitated by investigation of a crime, the public security organs may, in accordance with the relevant provisions of the state and after going through strict approval procedures, take technical

reconnaissance measures."[5] However, because the Criminal Procedure Law, as the fundamental law that regulates criminal procedures and criminal investigations, failed to provide for special investigative techniques, the legality of these techniques was widely questioned.[6]

Before the amendment in 2012, the legislation of special investigative techniques had been explored for many years. Special investigative techniques have also frequently been used in major complex crimes, such as crimes endangering state security, organized crimes, and drug-related crimes. However, the provisions of Article 10 of the State Security Law of the People's Republic of China (1993) and Article 16 of the People's Police Law of the People's Republic of China (1995) are too simple and too vague. The implementation of the general provisions in these two laws mainly depends on the Ministry of Public Security's departmental rules, including the Working Rules on Criminal Informants issued in 1984 and the Regulation on the Technical Reconnaissance Work issued in 2000. The department has a strong focus on fighting crime, and it ignores the protection of human rights. Furthermore, because the public security organs control the regulations secretly, supervising them effectively is difficult. In practice, three possibilities exist for the use of special investigative techniques. First, they are not used when they are needed. Second, they are used when they are not needed. Third, they are abused when they are used. Special investigative techniques may neither fight crime effectively nor protect the legitimate rights and interests of citizens because of misuse and abuse. Moreover, because the Criminal Procedure Law does not regulate special investigative techniques, the materials obtained through special investigative techniques cannot be used directly as evidence, which greatly reduces the effectiveness of the proceedings.

Special investigative techniques experienced an extensive legislative process before they were officially established in the basic law in 2012. The modification of the Criminal Procedure Law was included in the legislation program as early as the 10th National People's Congress. The Legislative Affairs Commission of the NPCSC had prepared a draft amendment that did not involve technical investigation measures and other special investigative techniques.[7] However, provisions related to special investigative techniques appeared in the draft announced on August 30, 2011, and they were retained in the

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[5] The National Security Law and the Police Law employ "technical reconnaissance," a quasi-military title, mainly because "technical reconnaissance" is used idiomatically in Chinese judicial practice, and has no special meaning. "Technical reconnaissance" is the same as "technical investigation." See LANG Sheng & WANG Shangxin, 《中华人民共和国国家安全法》释义 (*Interpretation of the National Security Law of the People's Republic of China*), Law Press (Beijing), at 1–72 (1993); LANG Sheng, 《中华人民共和国人民警察法》实用问题解析 (*Resolution and Analysis of the Practical Problems of the People's Police Law of the People's Republic of China*), China's Democracy and Legal Press (Beijing), at 80 (1995).

[6] ZHANG Yang, 聚焦刑事诉讼法修改：技术侦查从幕后走向台前 (*Focus on the Modification of the Criminal Procedure Law: The Technical Investigation from Behind to Front*), 人民日报 (People's Daily), Oct. 12, 2011.

[7] DAI Jia, 技术侦查：捆住左手放开右手 (*Technical Investigation: Tied His Left Hand to Release the Right Hand*), 检察日报 (Procuratorate Daily), May 14, 2012.

Amendment in 2012. Is it necessary to specify special investigative techniques in the Criminal Procedure Law?

During the drafting process, it was suggested that unconstrained special investigative techniques would be harmful. Some believed that special investigative techniques should not be regulated in the Criminal Procedure Law because they might be abused in practice, which would result in the unrestricted expansion of investigative powers and the infringement of citizens' rights. Others did not approve of the stipulation of special investigative techniques in the Criminal Procedure Law and suggested deleting the provisions related to special investigative techniques. However, most people approved of including special investigative techniques in the Law. For example, Professor CHEN Weidong argued that establishing a paragraph about special investigative techniques, such as technical investigation measures, constituted the brightest spot of the amendment.[8] Professor CHEN Guangzhong believed that the inclusion of special investigative techniques in the legal track represented progress.[9] How can special investigative techniques regulated in the Criminal Procedure Law be evaluated?

Adding the provisions on special investigative techniques to the Criminal Procedure Law was necessary to combat crimes. With the development of society and the progress of science and technology, changes have occurred in criminal practices. Criminals are increasingly cunning, and criminal means are increasingly complicated. Crimes are becoming more intelligent, organized, secretive, and internationalized, and conventional means of investigation are facing unprecedented challenges. If the effectiveness of criminal investigation cannot be improved, the dominant position in crimes cannot be maintained, which will likely make public safety and security unstable. Accordingly, special investigative techniques are stipulated in the law because of social situations and the development of criminal circumstances.

The legalization of special investigative techniques is a common practice in modern criminal procedure systems throughout the world.[10] Some countries, including the U.S., the UK, and Japan, have adopted a separate legislative model, establishing separate legal documents for technical investigation measures such as communication monitoring. For example, in the U.S., Chapter 3 of the Crime Control and Safe Streets Act (1968) specifies the use of wiretaps, electronic surveillance equipment, and eavesdropping. The Electronic Communication and Privacy Act (1986) amended and supplemented the provisions of Chapter 3 of the Crime Control and Safe Streets Act (1968). The Law Enforcement Communications Assistant Bill (1994) requires mobile telephone providers

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[8] CHEN Weidong, 理性审视技术侦查立法 (*Rational Examination of the Technical Investigation Legislation*), available at http://www.legaldaily.com.cn/bm/content/2011-09/21/content_2978957.htm?node= 20737 (last visited Jun. 6, 2013).

[9] CHEN Xiao & JIAO Hongyan, 刑诉法修正案草案：六大方面有待完善 (*The Amendment to the Criminal Procedure Law (Draft): Six Aspects Need to Be Improved*), available at http://www.legaldaily.com.cn/zmbm/content/2011-09/07/content_2931317.htm?node=7571 (last visited Jun. 6, 2013).

[10] See CHEN, fn. 8.

to design a standard compatible system to make it easier for the FBI to monitor telephones. Countries such as France, Germany, Italy, Russia, and Sweden provide for technical investigation in the code of procedure law. For example, in France, Law No. 91-646 stipulated communication surveillance from Article 100 to Article 100-7[11] of the Code of the Criminal Procedure Law on July 10, 1991. Article 100 states: "If the suspects should be condemned to imprisonment for two years or more than two years, the examining magistrate can command to intercept, record, and transcribe the communication transmitted through telecommunications when there is a need in the investigation."

By stipulating special investigative techniques in the Criminal Procedure Law, China has met the requirements of international conventions. The United Nations Convention against Transnational Organized Crime was adopted on November 15, 2000 by the 55th session of the UN General Assembly, was signed by the Chinese government on December 12, 2000. It was also adopted by the 4th session of the Standing Committee of the 10th National People's Congress (NPC) on August 27, 2003. Article 20 states: "1. If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime." Article 50 of the United Nations Convention against Corruption, which was adopted on October 31, 2003 at the 58th session of the UN General Assembly and approved by the 18th session of the Standing Committee of the 10th NPC on October 27, 2005, has similar provisions. In accordance with the obligations of the contracting party, the Criminal Procedure Law of China should implement the provisions on special investigative techniques of the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption based on Chinese circumstances.

The premise of the rule of law is legislation. The premise that "laws must be observed" depends on the existence of laws to go by. If laws do not exist, then the rule of law will become an empty slogan. As noted in the Explanations on the "Amendment to the Criminal Procedure Law (Draft)," the stipulation of special investigative techniques in the Criminal Procedure Law is an effort to respond to "the development of economy and society and the change in criminal circumstances."[12] The legislative objective was aimed at "strengthening the intensity of combating the crimes, strengthening the norm of,

[11] From Article 100 to Article 100-7 include Article 100, Article 100-1, Article 100-2, Article 100-3, Article 100-4, Article 100-5, Article 100-6 and Article 100-7 herein.

[12] See 关于《中华人民共和国刑事诉讼法修正案（草案）》的说明 (*Explantions on the Amendment to the Criminal Procedure Law of the People's Republic of China*), available at http://www.npc.gov.cn/huiyi/lfzt/xsssfxg/2011-08/30/content_1668529.htm (last visited Jun. 6, 2013).

restriction to and supervision on the investigation measures, and preventing them from being abused."[13] The Amendment stipulates special investigative techniques are conducive for the investigative organs to combat crime and protect human rights by strengthening the procedural controls on these measures. Based on the provisions in the Amendment, special investigative techniques are clearly authorized, ending the "secret" legislative status of special investigative techniques and resolving the dilemma of the "legitimacy of the evidence" obtained by special investigative techniques. However, the dilemma of the realistic necessity of using special investigative techniques and the possible dangers of infringing citizens' rights, such as privacy, limit the application of special investigative techniques.

III. EVALUATION AND PROSPECT OF THE PROVISIONS ABOUT SPECIAL INVESTIGATIVE TECHNIQUES IN THE AMENDMENT AND THE RELATED INTERPRETATIONS

Article 148 of the Criminal Procedure Law (2012) specifies "the applicable scope of cases and the approval formalities of technical investigation measures." Thereinto Paragraph 1 provides for "the applicable scope of cases and the approval procedures for technical investigation measures taken by public security organs"; Paragraph 2 provides for "the applicable scope of cases and the approval procedures for technical investigation measures taken by people's procuratorates"; and Paragraph 3 provides for "the scope of cases and the approval procedures for taking technical investigation measures during pursuit." Article 149 focuses on "the valid period and the extension procedure of technical investigation measures." Article 150 is about "the execution and confidentiality of technical investigation measures and restrictions on the use of the materials obtained by technical investigation measures." Paragraph 1 of Article 152 is about "hidden identity investigation"; Paragraph 2 of Article 152 is about "controlled delivery." Article 152 focuses on "the special provisions about the materials collected by special investigative techniques to be used as evidence."

Many controversies have surfaced before and after the adoption of the five articles, and many people have offered criticism and proposed suggestions. For example, some argue that these provisions are only authorized regulations; without strict restrictions, citizens' rights, such as privacy, will be violated.[14] Others suggest that these provisions can only be described as "a type of clause of declaration" without strong applicability, and the procedural controls for special investigative techniques should be defined further.[15]

After the adoption and promulgation of the Amendment on March 14, 2013, the

[13] Id.

[14] See CHEN, fn. 8.

[15] See ZHANG, fn. 6.

Ministry of Public Security issued the Procedure Rules for Public Security Organs Handling Criminal Cases. The SPP issued the Tentative Rules for Criminal Procedure of the People's Procuratorate. The two rules have further regulated the use of special investigative techniques. Nonetheless, some problems remain unresolved.

A. The Types of Special Investigative Techniques

Special investigative techniques stipulated in the Criminal Procedure Law (2012) include technical investigation measures, undercover investigation, and controlled delivery. The Criminal Procedure Law does not define technical investigation or explain types of technical investigation. The Procedure Rules for Public Security Organs Handling Criminal Cases also does not specify the types of technical investigation, but it includes a provision defining the concept of technical investigation. However, Article 149 of the Criminal Procedure Law (2012) stipulates that the approval decision determines the types of technical investigation measures to be adopted. In the process of soliciting public opinion, it has been suggested that further definition of the types of measures that comprise to technical investigation and how to operate them is necessary.[16] Nonetheless, the Amendment did not specify the types of technical investigation measures. According to the interpretation of the criminal chamber of the Legislative Affairs Commission of the NPCSC, technical investigation measures continue to develop and change with the development of science and technology. Therefore, the types of technical investigation measures were not specified.[17] Some scholars believe that technical investigation measures should not be too transparent, and defining the measures in law would allow criminals to understand investigative procedures, which would eventually result in the failure of these means.[18]

According to the Draft, in hidden identity investigation, "special personnel may be appointed to carry out secret investigation." During the modification process and the solicitation of public opinion, GU Shengzu and ZHOU Guangquan argued that the formulation of secret investigation was incorrect and would be easily misunderstood because secret is the opposite of open, and technical investigation measures are also conducted secretly. They have proposed to adopt the formulation of informant. The Amendment modified the text to read "relevant personnel may be assigned to conduct a hidden identity investigation." Unfortunately, the *Criminal Procedure Law*, the *P*rocedure Rules for Public Security Organs Handling Criminal Cases and the Tentative Rules for Criminal Procedure of the People's Procuratorate all failed to clarify the types of hidden identity investigation.

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[16] Id.

[17] The Criminal Chamber of the National People's Congress Standing Committee's Legislative Affairs Commission (全国人大常委会法制工作委员会工作委员会刑法室), 中华人民共和国刑事诉讼法解读 (*Interpretation of the Criminal Procedure Law of the PRC*), China Legal Publishing House (Beijing), at 332 (2012).

[18] See DAI, fn. 7.

The failure to specify provisions for the allowed types of technical investigation measures and hidden identity investigation is not conducive to practice. Because new means of technical investigation will likely appear with the development of science and technology, it is understandable that the Criminal Procedure Law cannot enumerate them all, but it is unreasonable that the law does not specify the types of hidden identity investigation. If the types of technical investigation measures and hidden identity investigation are not specifically defined, the investigation organs will have unbridled authority because they will have the power to use any means in the scope of technical investigation measures and hidden identity investigation. This means that they may infringe on citizens' privacy with disturbing consequences.[19] Some types of investigation measures are likely to violate citizens' privacy and freedom, and these types should be enumerated in the law, including technical investigation. When a new technical capability is developed, it can be added through an amendment or judicial interpretation.

B. The Applicable Scope of Special Investigative Techniques

Article 148 of the Criminal Procedure Law (2012) defines the scope of cases to which technical investigation measures may be applied. Technical investigation measures can only be used in cases that are regulated by the law. The public security organs may use technical investigation measures to investigate crimes endangering state security, terrorism, organized crimes, major drug-related crimes, or other crimes seriously endangering society. The people's procuratorates may use technical investigation measures to investigate major corruption or bribery cases or cases involving major crimes that gravely impair the personal rights of citizens through the abuse of power. This means that the acceptable scope of cases is so restricted that technical investigation measures can only be used for major crimes that cause relatively serious harm to society, which can prevent the abuse of technical investigation measures and is the embodiment of the principle of the rule of law.

The scope of cases to which technical investigation measures may be applied is the same in the Amendment and the Draft. In the process of soliciting public opinion, one suggestion was that the phrase "other crimes seriously endangering the society" was too ambiguous, and it should be deleted or the crimes should be specified. Some suggested that the scope of cases to which technical investigation measures that might be applied by public security organs should be limited to crimes endangering national security, terrorism, organized crimes, and major drug-related crimes. Some suggested that crimes of major dereliction of duty, cases of a suspect escaping, and major financial crimes, such as crimes related to stocks and futures, should be added. However, the Amendment maintains the expression of other crimes seriously endangering the society.

The adoption of both the means of enumeration and summary in Article 148 leaves

[19] See CHEN, fn. 8.

room for improper implementation. Broadly speaking, the statement "other crimes seriously endangering the society" is likely to become a fallback clause when applied. This is particularly true when technical investigation measures are reviewed and approved internally by investigative organs and is likely to result in a situation in which whether the case is serious or not depends on the investigation organs' choice, thus formalizing control over the applicable scope of cases. Consequently, Article 254 of the Procedure Rules for Public Security Organs Handling Criminal Cases and Article 263 of the Tentative Rules for Criminal Procedure of People's Procuratorate have clarified the applicable scope of cases.

According to Article 254 of the Procedure Rules for Public Security Organs Handling Criminal Cases, the public security organs may use technical investigation measures for crimes that seriously endanger the society, including: (1) crimes endangering national security, terrorism, organized crimes and major drug-related crimes; (2) intentional homicide, intentional assault causing serious injury or death, rape, robbery, kidnapping, arson, explosions, placing of dangerous substances and other serious violent crimes; (3) group, series, and cross-regional major crimes; (4) major crimes using telecommunications, computer networks, delivery channels and major crimes against computer networks; and (5) other crimes which [can] cause serious harm to society. Offenders can be sentenced to more than seven years in prison according to the Criminal Law.

According to Article 263 of the Tentative Rules for Criminal Procedure of People's Procuratorate，"major corruption or bribery cases" in Paragraph 2 of Article 148 of the Criminal Procedure Law refers to criminal cases involving property valued at more than RMB100,000 in which evidence is difficult to collect, including embezzlement, acceptance of bribes, a unit committing acceptance of bribes, offering bribes, offering bribes to a unit, introducing a bribe to a state functionary, a unit offering bribes and using the influence of accepting bribes, which are all specified in Chapter 8 of the Criminal Law. "Cases involving major crimes that gravely impair the personal right of citizens by abuse of power" in this paragraph refers to crimes of illegal detention, unlawful search, extortion of confessions by torture, obtaining evidence by violence, maltreatment and retaliation, which all have serious social consequences.

In the process of soliciting public opinion, some proposed to clarify the scope of cases in which hidden identity investigation can be applied as involving crimes endangering state security, terrorism, organized crimes, major drug-related crimes, weapons trafficking, counterfeiting currency, and negotiable securities-related crimes. However, none of the Criminal Procedure Law, the Procedure Rules for Public Security Organs Handling Criminal Cases, and the Interpretation of How to Apply the Criminal Procedural Law specifies which cases officials can adopt hidden identity investigation. Although the Criminal Procedure Law and the Procedure Rules for Public Security Organs Handling Criminal Cases indicate cases that may adopt controlled delivery are those "with respect to criminal activities involving the delivery of drugs, contraband goods or property," the

provisions are too vague. The situation would definitely lead to the abuse of hidden identity investigation and controlled delivery. The cases appropriate for hidden identity investigation and controlled delivery must be further elaborated in the legal interpretation.

C. The Applicable Time for Special Investigative Techniques

In accordance with Article 148, technical investigation measures can only be used in an investigation process after the case is initiated. If a case is not filed, no technical investigation is allowed to be used. Before a case is filed, no technical investigation may be taken to collect evidence in the case, which means that no technical investigation can be taken for cases that cannot meet the requirements for initiation. This procedure can prevent the investigators from infringing other people's privacy by using the investigation as an excuse.

The Amendment embodies the spirit of strict control of the application of technical investigation measures because it stipulates that technical investigation measures can only be taken after a case is filed, and it should therefore be affirmed. However, exceptions from the practice of investigation also exist because the criminal justice system is increasingly used as an instrument to regulate the present and the future rather than to punish behavior in the past. Moreover, the pretrial investigation is no longer about uncovering the truth of a committed crime but about the elimination of potential social danger.[20] For example, for crimes endangering state security and terrorism, prevention is more valuable than subsequent penalties, and the prospective investigation or survey before the initiation of a case plays an important role. For these two types of crimes, the process of technical investigation is artificially divided because the law stipulates that technical investigation can only be taken after a case is filed in two phases, namely, technical investigation for collecting evidence and technical investigation for collecting information before the initiation of a case, which coexist and are interrelated.[21]

This point is more obviously reflected in hidden identity investigation and controlled delivery. Hidden identity investigation in particular is usually employed before cases are formally filed. The Criminal Procedure Law and related interpretations do not require that hidden identity investigation and controlled delivery shall be employed only after a case was filed, which means that hidden identity investigation and controlled delivery could be employed before cases are formally filed.

D. The Applicable Conditions for Special Investigative Techniques

According to Paragraph 1 and Paragraph 2 of Article 148, the public security organs and the people's procuratorates' use of technical investigation measures must be "based on the need for criminal investigation." This statement is too ambiguous. Paragraph 2 of

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[20] John A. E.Vervaele, *Special Procedural Measures and the Protection of Human Rights General Report*, 5 Utrecht Law Review 2, 77 (2009).

[21] See CHEN, fn. 8.

Article 151 of the Criminal Procedure Law states that the use of controlled delivery is "based on the need for criminal investigation," the Procedure Rules for Public Security Organs Handling Criminal Cases clarify that the provision allows the use of controlled delivery "to discover the personnel involved in the crimes and the criminal facts." Nevertheless, the statement is still too ambiguous. To prevent the abuse of the term "need" in practice, this article argues that first, the principle of last resort should be adhered to in understanding and action. In other words, although the public security organs and the people's procuratorates are allowed to take technical investigation measures, this does not mean that they should always take technical investigation measures when handling cases. Instead, technical investigation measures should only be used when conventional investigative techniques are ineffective. When evidence may be collected or the suspect of a crime may be discovered and seized through either technical investigation measures or conventional investigative techniques, then conventional investigative techniques should be used.[22]

Second, in practical operations, the principle of necessity should be followed. "The need for criminal investigation" could be defined further as follows: "The investigative organs must undergo a preliminary survey or investigation to collect clues and evidence that prove that the suspect has real criminal intent, has committed a crime, or is otherwise associated with the case." Without applying measures to collect evidence or discover and seize the suspect, the purpose of the investigation is difficult to achieve.[23]

Hidden identity investigation could be allowed in cases "when necessary," which is as broad as the statement "based on the need for criminal investigation." During the modification process for these laws, some suggested to clarify what is included. Additionally, as the law suggests itself that "when necessary" shall also be restricted to "the need for criminal investigation" to prevent the abuse of "when necessary."

E. The Approval Procedures for Special Investigative Techniques

The Amendment and the Draft specify that technical investigation measures may be used "after going through stringent approval procedures." During the modification process and the solicitation of public opinion, much criticism and many suggestions emerged about that statement. For example, CHEN Weidong argued that the statement was too macroscopic to have any binding force. However, without approval procedures, the provisions for technical investigation measures will likely become simple authorized legislation, which is not conducive to the rule of law governing technical investigation measures, and civil privacy will likely face a serious challenge.[24] HE Yehui and LI Zupei

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[22] See fn. 16 at 332–333.

[23] LEI Xiaozheng, 技术侦查合法化：是利剑还是隐患 (*The Legalization of Technical Investigation: Is It a Sword or a Risk?*), 科技日报 (Science and Technology Daily), Sep. 15, 2011.

[24] See CHEN, fn. 8.

suggested that because the statement lacked definition, provisions about specific procedures for approval should be added, such as the approval of the main principals of the provincial procuratorate and the provincial public security body. ZHOU Shengtao suggested that specific provisions should be stipulated about the necessary procedures for examination and approval prior to technical investigation measures as well as the institutional level that may implement them. Other scholars have opined that the phrase "stringent approval procedures" was unclear and the specific content of "stringent approval procedures" should be defined to prevent abuse in practice.

This article argues that the statement "after going through stringent approval procedures" is inconsistent with the legislative standard. The term "stringent" has no standard and is not operational.[25] A stringent approval procedure should be further clarified; otherwise, gaps will remain in the interpretation and practical implementation. Therefore, a "stringent" approval is difficult to achieve. The controversies over the "stringent approval procedures" are mainly related to the approval body. During the process of soliciting public opinion, some suggested that technical investigation measures should be approved by the public security organs or the people's procuratorates at or above the municipal/prefectural level. Some suggested that they should be approved by the investigation organs at or above the level of municipality with districts, approved by the provincial investigation organs, or approved by the Ministry of Public Security, the Ministry of State Security or the SPP. Some suggested that powers of approval and implementation should be separated, with the people's procuratorates approving the use of technical investigation measures by public security organs, the courts should approve the use of technical investigation measures by the people's procuratorates, and the higher procuratorate should approve the measures required when hunting down fugitives. Others suggested that technical investigation measures should be approved by a neutral judicial authority.

The Draft states that hidden investigation may be used "with the approval of the director of a public security organ above the county level." During the drafting, some suggested to modify the provision to say "with the approval of the director of a public security organ above the municipal/prefectural level." Some even suggested to modify the provision to read "with the approval of the director of a public security organ above the provincial level" or "with the approval of the director of a procuratorate." The Amendment modified the provision to state "with the approval of the director of a public security organ." However, the Procedure Rules for Public Security Organs Handling Criminal Cases is still interpreted as "with the approval of the director of a public security organ above the county level." In addition, the Draft and the Amendment both require that hidden investigation be implemented "in accordance with relevant provisions."

Special investigative techniques — including technical investigation measures, hidden

[25] See CHEN & JIAO, fn. 9.

identity investigation, and controlled delivery — are types of coercive investigation. The law in developed countries often strictly controls such measures through the judicial review system or the judicial writ system. Investigative organs must submit a written application, and the application must be approved by a neutral legal institution, usually an examining magistrate. Before the adoption of the Amendment, the internal hierarchy system of approval was part of the investigation organs in China's judicial practice.[26] After the Amendment came into force, according to Article 256 of the Procedure Rules for Public Security Organs Handling Criminal Cases, the public security organ that wishes to use technical investigation measures should create a report documenting technical investigation plans, receive the approval of the director of the public security organ at or above the district municipality level and then make the decision document. According to Article 265 of the Tentative Rules for Criminal Procedure of People's Procuratorate, the people's procuratorate that wishes to use technical investigation measures should obtain approval in accordance with the relevant provisions. In addition, according to Article 20 of the Provisions of the Supreme People's Court, the SPP, the Ministry of Public Security, the Ministry of State Security, the Ministry of Justice and the Commission of Legislative Affairs of the National People's Congress on Certain Issues Related to the Implementation of the Criminal Procedure Law, when any materials collected using technical investigation measures are adopted as evidence, the legal documents approving the adoption of the technical investigation measures shall be attached. Defense attorneys may consult, cite, and reproduce such legal documents and present them in court. With respect to hidden identity investigation and controlled delivery, Article 262 and Article 263 of the Procedure Rules for Public Security Organs Handling Criminal Cases require the approval of the director of a public security organ to be above the county level.

This article argues that if the public security organs and the people's procuratorates continue to independently decide, approve, and even execute special investigative techniques without effective supervision and restriction, guaranteeing the freedom and rights of the citizens will be difficult, potentially causing disasters. The approval power and the enforcement power should at least be separated. The investigators themselves should not both approve and execute special investigative techniques. The effective separation of the approval power and the enforcement power is a basic requirement of the principle of power restriction.

In the long run, the establishment of a judicial review system or a judicial writ system is an inevitable trend in the development of China's criminal procedure structure. However, the integrity of the rule of law of the investigation should be emphasized in this process. Before the system of judicial review or judicial writ is established for conventional investigation techniques, such as arrest and search, establishing legislation

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[26] FAN Chongyi, 2012 刑事诉讼法：解读与适用 (*Criminal Procedure Law in 2012: Interpretation and Application*), Law Press (Beijing), at 207 (2012).

that mandates the judicial review or judicial writ system only for special investigative techniques will likely be difficult.[27] Furthermore, the introduction of the judicial review or judicial writ system must alter the current judicial system. The costs of reformation will be high. The separation of approval power and enforcement power is crucial. Because the people's procuratorates are the legal supervisory bodies and have accumulated a wealth of experience in the supervision of investigations, it is more convenient and practical for the procuratorates to examine and approve special investigative techniques. Public security organs using special investigative techniques now should be approved by the investigative supervision department of the people's procuratorate at the same level. The use of special investigative techniques by the investigation department of the people's procuratorate should be approved by the investigative supervision department of the procuratorate at the next higher level. Supervisory power over the special investigative techniques should also be granted to the procuratorate; the investigative supervision department of the procuratorate at the same level or at the next higher level should implement supervisory power.

In addition, this article argues that the principle of proportionality should be followed when conducting approval decisions. To determine whether a crime is serious, whether special investigative techniques must be used and what type of special investigative techniques are appropriate, the nature of the crime, the complexity of the case, the seriousness of the criminal offence, the punishment to be imposed, the personal danger, and other factors should all be considered.

F. The User and Executive Body of Special Investigative Techniques

1. Issues of the People's Procuratorates Using Special Investigative Techniques. — For issues related to procuratorates using technical investigation measures, the SPP and the Ministry of Public Security have issued the Notice on the Public Security Organs to Assist the People's Procuratorates in Major Economic Cases by Using Technical Investigation Measures (hereafter "the Notice") in 1989. This notice stipulates that technical investigation measures cannot generally be used in economic cases. For major economic crimes in which technical investigation measures must be used to fight criminal suspects involved in corruption, bribery or major economic crimes, technical investigation measures may be used only with prudent and strict examination and approval formalities and must be used with the assistance of the public security organs. Since the release of the Notice, when procuratorates address economic crimes, technical investigation measures can be used with the assistance of public security organs. However, the Notice itself does not have the force of law and lacks a clear legal basis for procuratorates to use technical investigation measures.

In practice, the procuratorates are in charge of investigating duty crimes. This type

[27] CHENG Lei, 秘密侦查立法宏观问题研究 (*Research on the Macro Legislation of Secret Investigation*), 5 政法论坛 (Political Science and Law), 83 (2011).

of crime is covert, and it is difficult to collect evidence. Therefore, technical investigation measures are often needed. In accordance with the Notice, procuratorates can take technical investigation measures, but they cannot apply them directly. In other words, when procuratorates need to take technical investigation measures, they must "ask for examination and approval" and "ask for implementation" first. Technical investigation measures are mainly implemented with the assistance of the public security organs, which inevitably involves cooperation between the procuratorates and the public security organs. Problems in cooperation may result in delaying the investigation, collusion, destruction of evidence, the escape of suspects, and other issues that are not conducive to effectively fighting crime. Therefore, when dealing with corruption crimes, procuratorates often depend on measures such as "*Shuanggui*" and "*Shuangzhi*"[28] conducted by the commission for inspecting discipline,[29] which tend to arouse criticism.

Paragraph 2 of Article 148 of the Criminal Procedure Law (2012) stipulates that the procuratorates can take technical investigation measures. The provision meets both the procuratorates' practical need and the obligation to implement the United Nations Convention against Corruption. Article 50 stipulates "to combat corruption effectively, the use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations are allowed." In accordance with the provisions of Paragraph 2 of Article 148 of the Criminal Procedure Law (2012), in taking technical investigation measures, the procuratorates aim to address the suspects of severe corruption, bribery, and other major duty crimes. Suspects of these crimes are often in high-ranking positions, have a wide range of social relations, and possess strong anti-detection capabilities. The use of conventional means often makes it difficult for officials to resolve the case. Therefore, the amendment stipulates that, in these cases, the procuratorates can take technical investigation measures, which play a positive role in strengthening the fight against corruption and ensuring the quality of handling the cases.[30]

Neither the Criminal Procedure Law nor the Tentative Rules for Criminal Procedure of People's Procuratorate allows the people's procuratorate to adopt hidden identity investigation and controlled delivery. According to the principle that public power should not be exercised beyond what is expressly granted, the people's procuratorate cannot

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[28] "Shuanggui" is a disciplinary measure outside the regular legal system under which Chinese Communist Party members are detained and interrogated. "Shuangzhi" is a disciplinary measure outside the regular legal system under which non-party memers are detained and interrogated.

[29] YE Doudou & WANG Heyan, 刑诉法大修：技术侦查权滥用隐忧 (*Worries on the Potential Abuse of the Power of Conducting Technical Investigations Caused by the Amendment to the Criminal Procedure Law*), available at http://china.caixin.com/2011-08-25/100294674.html (last visited Jun. 6, 2013).

[30] XU Yinyan, DAI Jia & ZHENG Henan et al, 刑诉法大修中的 15 个看点 (*15 Aspects in the Modification of the Criminal Procedure Law*), 检察日报 (Procuratorate Daily), Aug. 29, 2011.

adopt hidden identity investigation or controlled delivery.

2. The Executive Body of Special Investigative Techniques. — In the process of drafting the law, the allocation of the executive powers for technical investigation measures was disputed. According to the Draft, the public security organs are responsible for the implementation of technical investigation measures. With respect to this provision, DAI Yuzhong suggested that because the Draft stipulated that the people's procuratorates might have the power to take technical investigation measures, the people's procuratorates should also have the power to implement technical investigation measures. Except for the public security organs, the national security organs can also implement technical investigation measures. He proposed that the people's procuratorates, the public security organs, and the national security organs should all have the power to implement technical investigation measures. Others suggested that because the central government had stated that the national security organs should lead and manage technical investigation measures with help from the public security organs, the provision that "the technical investigation measures shall be implemented by the public security organs" should be deleted. Some recommended that "the technical investigation measures should be implemented by the decision-making authority." Others suggested that when technical investigation measures were decided by the people's procuratorates, they should be executed by the people's procuratorates themselves.

The Amendment omits the provision that "technical investigation measures shall be implemented by the public security organs." According to the Amendment, technical investigation measures taken by the public security organs should be implemented by the public security organs; technical investigation measures taken by the people's procuratorates should be given to the relevant bodies to implement, pursuant to applicable provisions. Although the text suggests that the people's procuratorates will be unable to implement these measures independently, pursuant to applicable provisions, such vague legislative language will more than likely arouse disputes about implementation.[31] Therefore, Article 256 of the Procedure Rules for Public Security Organs Handling Criminal Cases stipulated that if the people's procurator or other departments decided to adopt technical investigation measures, the measures should be implemented by the public security organs or the national security organs. If the measures are sent to the public security organs to implement, the public security organs at or above the level of municipality with districts should complete the required process, pursuant to applicable provisions, then send the appropriate approvals to the department in charge of technical investigation to implement. Departments such as the people's procuratorate will then be notified of the implementation.

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[31] CHEN Lei, 授权与控权：技术侦查措施的法治化 (*Authorization and Control of Powers: The Legalization of Technical Detection Measures*), 检察日报 (Procuratorate Daily), Apr. 27, 2012.

G. The Intended Targets of Special Investigative Techniques

Article 149 of the Criminal Procedure Law (2012) specifies that the intended targets to which technical investigation measures apply shall be listed. Based on the interpretation of the criminal chamber of the Legislative Affairs Commission of the NPCSC, the intended targets are "persons," meaning the specific person to whom the technical investigation measures may be applied, rather than on whom the case should be defined.[32] Article 255 of the Procedure Rules for Public Security Organs Handling Criminal Cases further states, "technical investigation measures are applicable to the suspects, the accused and others who have direct connection with the crimes."

Taking technical monitoring as an example, the communication of criminal suspects and persons who help criminal suspects to send and receive communications can all be monitored. However, communication with lawyers and the communication of lawyers should be excluded unless evidence exists that can prove that the lawyer is a criminal accomplice or has committed a crime that should be monitored in accordance with the law.[33] Lawyers in criminal proceedings should safeguard the legitimate rights and interests of the parties and should supervise the law enforcement of the investigation bodies. It is not conducive for a lawyer to work effectively and to fulfill the function of defense if the communication between the lawyers and the party concerned is monitored.

H. The Applicable Duration of Special Investigative Techniques

Special investigative techniques shall not be applied without limitation or the privacy of citizens will be violated. The Amendment specifies the applicable duration of technical investigation measures. In accordance with the provisions of Article 149 of the Criminal Procedure Law (2012), the valid period for technical investigation measures is three months from the date that approval is issued. Within the valid period, technical investigation measures should be promptly terminated when they are no longer necessary. With respect to difficult and complex cases, if the technical investigation measures are still required upon expiration of the time limit, the term of validity may be extended upon approval, subject to a maximum of three months per extension.

With respect to hidden identity investigation and controlled delivery, in the process of modification, some suggested adding a provision to set a time limit of one month, whereas others suggested setting a time limit of three months. However, the Amendment does not specify time limits for hidden identity investigation and controlled delivery.

Many controversies exist about the period of validity stipulated by the Amendment. Taking technical investigation measures for example, some worry that if no restriction is placed on the valid period or the number of extensions of technical investigation

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[32] See fn. 16 at 335.

[33] ZHAO Bingzhi &YANG Cheng,《联合国反腐败公约》在中国的贯彻 (*The Implementation of the United Nations Convention against Corruption in China*), Law Press (Beijing), at 258 (2011).

measures, citizens are likely to be monitored for an extended time.[34] Some argue that because the period of validity is three months each time and it can be continuously extended, a citizen can be monitored for decades or even for his or her entire life.[35] Therefore, during the process of modification, many opinions and suggestions were expressed regarding the strict limitation of the valid period for technical investigation measures and the number of possible extensions. For example, some propose that the number of extensions and the longest time limit should be clarified; some recommend that the period of validity should be one month, which can be extended upon approval; some propose that the extension should not be granted more than twice; others suggest that the period of validity of "three months" should be changed to "no more than a month," and the total number of extensions should be no more than three.

After the adoption of the Amendment, the Procedure Rules for Public Security Organs Handling Criminal Cases and the Tentative Rules for Criminal Procedure of People's Procuratorate had few changes to the provision of technical investigation measures, hidden identity investigation, and controlled delivery. Because the use of special investigative techniques would seriously interfere with the private lives of citizens, the period of validity should be strictly limited. Otherwise, citizens will likely continuously lack security and trust, and basic rights will cease to exist except in name. In terms of technical investigation measures, the provisions of the valid period specified in the Amendment appear to have no limitation. The cases to which technical investigation measures may be applied are all "serious criminal cases," which can easily be interpreted as "difficult and complex cases," and the term can be extended indefinitely. Because the period of validity stipulated by the Amendment is three months, modifying it immediately is unrealistic. However, when formulating judicial interpretations and departmental rules, the number of possible extensions and the maximum duration for the investigation should be further clarified. For example, the investigation period may only be extended once or may only last six months. With respect to hidden identity investigation and controlled delivery, the period of validity shall be clearly defined based on that of technical investigation measures.

I. Matters Requiring Attention in the Execution of Special Investigative Techniques

1. The Principle of Strict Implementation. — In accordance with the provisions of Article 149 in the Criminal Procedure Law (2012), the approval decision document for technical investigation measures in China resembles a judicial writ, with the purpose of establishing restrictions and guarantees between the investigative bodies and the persons being investigated. When implementing technical investigation measures, the investigation bodies and staff must strictly abide by the legal provisions and the norms of

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[34] See YE & WANG, fn. 28.

[35] WANG Yijun, 逐字之争：刑诉法修改激烈博弈 (*The Intense Game of the Modification of the Criminal Procedure Law*), 中国青年报 (China Youth Daily), Sep. 15, 2011.

technical operations, and they must implement technical investigation measures in strict accordance with the approved type of measure, the intended target, and the valid period. According to Article 258 of the Procedure Rules for Public Security Organs Handling Criminal Cases, during the period of validity, if the types of technical investigation measures or the intended targets need to be changed, the approval procedures should be repeated.

Paragraph 1 of Article 151 of the Criminal Procedure Law states hidden identity investigation "shall not induce others to commit crimes and shall not endanger public security or seriously threaten others' personal safety." In the process of formulating the law, ZHOU Guangquan suggested that inducing others *mens rea* is forbidden if they lack no *mens rea*, although it is allowed when others have already demonstrated their *mens rea*. Therefore, he proposed that the statement "shall not induce others to commit crimes" should be amended to state "shall not induce other's *mens rea*." Nonetheless, the Amendment retained the statement "shall not induce others to commit crimes." Paragraph 2 of Article 262 of the Procedure Rules for Public Security Organs Handling Criminal Cases explains that the phrase "shall not induce others to commit crimes" means "shall not induce others to commit crimes through methods that induce others' *mens rea*." According to the provision, for example, employing temptation investigation that provides others with opportunities is lawful, whereas employing the type of temptation investigation that induces others' *mens rea* is unlawful.

2. Confidentiality and the Destruction of Information. — In the process of using technical investigation measures, investigators will inevitably become aware of state secrets, commercial secrets, and personal privacy. To protect national security and the legitimate interests of businesses and citizens, the protection of the privacy of citizens and relevant secrets in the authorization and application of technical investigation measures should also be strengthened. When the law was being discussed, some suggested that data obtained through technical investigation measures may be related to personal privacy, commercial secrets, and even state secrets. Even if information and materials are irrelevant to a case, they may cause insecurity or other negative effects for relevant individuals.[36] Therefore, the Amendment provides for a system of confidentiality and destruction of information. According to the provisions of the Amendment, any private or secret data obtained through technical investigation measures should be kept confidential, such as by limiting which staff have access to the information. During or after the investigation, the obtained private or secret information and carriers, such as envelopes and folders, should be preserved properly. Information and materials unrelated to the facts of the case and that can neither be used as evidence nor promote the investigation should be strictly prohibited from being reproduced or propagated in any form. Carriers or records created by the information should be destroyed immediately, and the

[36] SONG Yinghui, 中华人民共和国刑事诉讼法精解 (*Selected Analysis on the Criminal Procedure Law of the PRC*), China University of Political Science and Law Press (Beijing), at 190 (2012).

destruction should be recorded.

3. Limits of the Use of the Materials. — If materials collected through technical investigation measures are used improperly, the related person's legitimate rights and interests are injured. Therefore, strictly limiting the use of the materials is necessary. Paragraph 3 of Article 150 of the Criminal Procedure Law and Article 260 of the Procedure Rules for Public Security Organs Handling Criminal Cases limit the use of materials obtained by technical investigation measures. Evidence, clues, and other materials should be deposited, pursuant to applicable provisions, and the materials can only be used for the investigation, prosecution, and trial of a crime and cannot be used for other purposes, including administrative management, administrative penalties, mediation, the settlement of civil disputes, discipline action, or commercial use.

4. Cooperative Obligations of the Relevant Entities and Individuals. — The implementation of technical investigation measures depends on scientific and technical means. Technical investigation measures cannot be implemented by relying exclusively on the force of public security organs. With the acceleration of information technology, the use of technical investigation measures will increasingly rely upon social resources and socialized information. For example, such measures as telecommunication and mail monitoring require equipment, support and assistance from telecom operators and postal companies. In some cases, measures also require the coordination of the public. Therefore, the Amendment provides for the cooperative obligations of the relevant entities and individuals, which can be referred to as the principle of coordination. In accordance with the provisions of the Criminal Procedure Law, the relevant entities and individuals are obligated to cooperate and cannot impede the investigation when they receive a request from public security organs in accordance with regulations. Additionally, the relevant entities and individuals should keep the implementation of technical investigation measures confidential.

J. Issues on the Materials Obtained by Special Investigative Techniques Being Used as Evidence

1. Competence of the Materials Obtained by Special Investigative Techniques Being Used as Evidence. — Although special investigative techniques had been widely used in judicial practice before the adoption of the Amendment, because no provision for special investigative techniques existed in the Criminal Procedure Law, different understandings exist in theory and practice about whether the materials obtained by special investigative techniques can be used as evidence. For a long time, materials obtained by special investigative techniques could only be used for investigation and had to be transformed before being used in a trial. The transformation from materials to evidence not only reduces the efficiency of special investigative techniques, but also affects the efficiency of the entire criminal proceeding, potentially even resulting in the indulgence of certain offenses.[37] In addition, not all materials can be transformed. The materials that cannot be

[37] See ZHANG, fn. 6.

transformed cannot be used as evidence to accuse a criminal in a trial. In these cases, the effectiveness of special investigative techniques for fighting crime is severely constrained. In contrast, the transformation of the materials obtained by special investigative techniques is often completed by an explanatory paper from the investigating organs. Such an approach facilitates maintaining the confidentiality of special investigative techniques, but the defendant is unable to cross-examine the materials in court, which is not conducive to protecting the legitimate rights and interests of the defendants.

To solve the problem of whether the materials obtained by special investigative techniques can be used as evidence, the Supreme People's Court, the SPP, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice issued the Provisions on Several Issues Concerning the Examination and Judgment of the Evidence in Death Penalty Cases on June 24, 2010. Article 35 states: "The material evidence, documentary evidence and other evidence collected by the investigation authority through special investigative techniques in accordance with the relevant provisions may form the basis for conviction after being verified by the court. The court should not disclose the procedures and methods of special investigative techniques." Article 152 of the Criminal Procedure Law (2012) confirms and improves the provisions of Article 35 of the Provisions on Several Issues Concerning the Examination and Judgment of the Evidence in Death Penalty Cases. In accordance with Article 152 of the Criminal Procedure Law (2012), for the first time, the materials obtained by special investigative techniques may be used as evidence directly. The law also authorizes the judges to unilaterally verify evidence outside the court. These provisions resolve dilemmas of the transformation of the materials obtained by special investigative techniques.[38] They have progressive significance.

Although Article 152 of the Criminal Procedure Law (2012) states that materials obtained by special investigative techniques may be used as evidence, the statement "may be used" does not mean that all materials will be used as evidence. The principle of final use must be adhered to when using materials obtained by special investigative techniques as evidence to avoid or postpone negative consequences resulting from the exposure of the methods and the procedures of special investigative techniques. Those methods and procedures include problems of confidentiality and counter-investigation techniques. For technical investigation measures in particular, the principle of final use can also prevent an increase in the financial expenditure because the database and the technical equipment must be transformed to meet the needs of the use and storage of materials. Adherence to the principle of final use means that the materials can only be used in unavoidable cases. For example, only in the circumstance that no other evidence leads to a conclusion may the materials be used directly as evidence. In most cases, special investigative techniques are used to obtain investigative clues rather than to collect evidence for the final decision.

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[38] Id.

2. Protective Measures for the Use of Evidence. — Many countries have taken necessary protective measures in the process of using evidence obtained by special investigative techniques. According to Article 152 of the Criminal Procedure Law (2012), protective measures should be adopted for materials obtained by special investigative techniques to be used as evidence. When the use of such evidence may threaten the personal safety of relevant personnel or result in other serious consequences, such as leaking secrets or improving of criminals' ability to interfere with investigation, protective measures should be adopted to avoid the exposure of the applied techniques and the true identity of personnel. Moreover, if these protective measures are not sufficient to convince the judges of the authenticity of the evidence and to allow them to make a decision or if these protective measures cannot prevent serious consequences, the evidence may be verified by judges outside the courtrooms. Judges who verify evidence outside the court must also keep the identity of the relevant personnel and the techniques confidential.

K. Legal Consequences and Relief Mechanisms for Using Special Investigative Techniques Illegally

Although the Amendment includes restrictions on the use of special investigative techniques, no legal consequence or relief mechanism for using special investigative techniques illegally is stipulated in the existing five provisions. This omission is regrettable. To prevent the abuse of special investigative techniques and the violation of citizens' privacy, when the Criminal Procedure Law is amended again and judicial interpretations are formulated, legal consequences and relief mechanisms for using special investigative techniques illegally should be included. Specifically, these provisions should include at least three aspects. First, when special investigative techniques are illegally used and the legitimate rights and interests of citizens are violated, the relevant personnel should have legal liability, including civil liability, administrative liability, and criminal liability. Second, the right to request relief should be granted to those to whom the special investigative techniques are applied and their close relatives, and the relief approach should be defined. For example, a person who finds himself illegally monitored has the right to file a charge, or a person whose legal rights have been infringed upon has the right to claim compensation. Third, the materials obtained by using special investigative techniques illegally should be excluded in accordance with the law. The mechanism to exclude the materials obtained from the illegal use of special investigative techniques will be discussed below.

As noted, the Amendment specifies that the materials obtained by special investigative techniques may be used as evidence, but it does not include the exclusion of illegal evidence for this type of material. When the Amendment was being discussed, some suggested that the Amendment should explicitly stipulate that the information and materials collected by using special investigative techniques illegally could not be used as

criminal evidence. Although the Criminal Procedure Law (2012) stipulates the exclusionary rule for illegal evidence, specific provisions are often made for the exclusion of illegal evidence obtained by special investigative techniques, such as monitoring, in the legislation of countries both in the civil law system and the common law system. For instance, in the U.S., in accordance with the judicial precedent of the Supreme Court, monitoring can only be practiced in necessary cases. If the core elements of the procedure are violated, the materials obtained may not be used as evidence. In Germany, if the crimes do not belong to the applicable scope of cases in Article 100a of the German Code of Criminal Procedure, even if the monitoring procedure is in accordance with the provisions of the law, cassettes and their derivative materials obtained by monitoring are all banned from being admitted as evidence.[39] Lessons from comparative legal analysis demonstrate that when special investigative techniques, such as monitoring, are uncontrolled, the bottom line of public privacy will likely be crossed, and significant social risk may be incurred. The exclusionary rule of illegal evidence aims to exclude evidence obtained by illegal means. The Criminal Procedure Law (2012) establishes the principle of limited exclusion for material evidence and documentary evidence collected by illegal means, but it fails to provide separate stipulations for how to address materials collected by the illegal use of special investigative techniques. Because the abuse of special investigative techniques may result in serious consequences, the exclusionary rule of materials collected by illegally using special investigative techniques should be stricter than that of other inadmissible evidence. Based on the experience of other countries, this article argues that in addition to the exclusionary rule of illegal evidence in the general sense, it is necessary to stipulate specific provisions for the exclusion of materials collected illegally through special investigative techniques. In other words, no information or materials collected through special investigative techniques in violation of legal provisions can be admitted as evidence.

CONCLUSION

Although special investigative techniques stipulated in the Criminal Procedure Law have generated many controversies, they are probably necessary depending on the timing and circumstances of various cases. The Criminal Procedure Law makes provisions to standardize and streamline the use of special investigative techniques; the improved special investigative techniques strengthen the fight against crime. However, the normalization, restriction, and supervision of special investigative techniques can be strengthened to prevent their abuse and misuse. Only when the measures and the methods that are likely to violate human rights are brought to the legal horizon can they be strictly regulated by the law. Because of the provisions in the Amendment, technical investigation

[39] LEI Xiaozheng, "光芒" 还是 "阴霾": 聚焦科技证据与《刑事诉讼法》修改 (*"Shine" or "Haze": Focus on Scientific and Technical Evidence and the Modification of the Criminal Procedure Law*), 1 山东警察学院学报 (Journal of Shandong Police College), 27 (2012).

measures change from those of a secret state to a state in which "there must be laws to go by" and a state of "handling affairs in accordance with the law."

Rome was not built in a day. The system cannot be improved overnight. Although many aspects can be improved or specified in the provisions for special investigative techniques in the Amendment, the importance of the technical investigation measures stipulated in the Criminal Procedure Law cannot be denied. The existing deficiencies must be rectified, supplemented, or perfected, particularly those for which the terms are vague or for which no stipulation exists, by amending the law again or by formulating judicial interpretations and departmental rules to strike a balance between the value of crime control and the value of protecting human rights.