The Re-engineering Path of Technical Investigation in China from the Perspective of Comparative Law

Luning Pang
Institute of Evidence Law and Forensic Science, China University of Political Science and Law, Beijing, China
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Abstract: With the rapid development of modern Internet technologies and high-tech innovations, technical investigation measures have emerged as a novel and effective means to solve major complex cases. However, due to the vagueness and absence of procedural legal regulations in the field of technical investigations, practical challenges, including difficulties in implementation and instances of unlawful practices, have arisen. To address these issues, this study takes the application of technical investigation measures and institutional procedures as its central focus. It begins with an examination of legislative regulations and practical operations, analyzing the judicial application challenges they reflect. By studying the current practices and institutional frameworks of countries such as the UK, the US, Germany, and Japan, this research explores their detailed classifications of technical investigation measures and the legal procedures for approval and review. Additionally, it examines the application of rules such as compelled third-party information disclosure and the exclusion of illegally obtained evidence in foreign jurisdictions. Based on these insights, this study rethinks the procedural framework for the initiation, execution, and remedies of technical investigations in China.
***Keywords*:** comparative law perspective; criminal technical investigation; procedural re-engineering

1. Current Situation and Problem Examination of Technical Investigation

On October 26, 2018, the Sixth Session of the Standing Committee of the 13th National People's Congress adopted a resolution to once again revise the Criminal Procedure Law of the People's Republic of China, marking significant progress. However, in practice, the Criminal Procedure Law does not provide clear theoretical or practical regulations on technical investigation measures. Establishing explicit legislative regulation and operational practices is a crucial prerequisite for their reasonable and lawful use. Analyzing the shortcomings reflected behind these measures is a key strategy for improving practical applications.

1.1 Legislative Regulation and Practical Operation

1.1.1 Legislative Regulation

In terms of legislation, similar to Germany, Japan, and other civil law countries, China primarily regulates technical investigations through the Criminal Procedure Law. According to the Criminal Procedure Law, the Supervision Law, and other relevant regulations, the entities responsible for carrying out technical investigations are public security agencies, specifically those at the municipal level or above. The intent of strict control and approval is clear.

Beyond this, the provisions in the Criminal Procedure Law concerning technical investigations are relatively concise. Articles 150 to 154 stipulate principles, time limits, requirements, and evidentiary effectiveness of technical investigations, with Article 153 specifying conditions for covert investigations. The Supervision Law only includes one article (Article 28) regarding the approval and duration of technical investigations. The Procedural Provisions on Handling Criminal Cases by Public Security Organs, revised by the Ministry of Public Security in July 2020, provides comparatively more regulations on technical investigations. Chapter 7, Section 10 under "Investigations" specifically addresses "technical investigations."[1]

According to these provisions, when procuratorial and supervisory authorities require the initiation of technical investigations to handle cases, the implementation must also be carried out by public security agencies. Based on the hierarchical effectiveness of legal norms, the Procedural Provisions on Handling Criminal Cases by Public Security Organs apply only within the public security system. Furthermore, this regulation focuses primarily on the initiation of technical investigations and does not systematically address the review and evaluation of evidence obtained through technical investigation methods.

1.1.2 Practical Operation

In practice, the use of technical investigation measures often operates on the margins of legality.

(1) In ordinary criminal cases, the approval and execution of criminal investigations are typically handled internally

within public security agencies. However, for cases involving senior Party cadres, members of the Chinese People's Political Consultative Conference (CPPCC) , deputies to the National People's Congress (NPC) , or personnel from classified units, technical investigation measures must be employed. These measures require approval from the relevant level of Party committee leadership before implementation by public security agencies.

(2) China's legislative framework for criminal technical investigations is relatively underdeveloped, and judicial practices often fail to strictly adhere to legislative norms. Technical investigations are conducted in specific environments and may infringe on citizens' rights to some extent. This creates an inherent secrecy in the process, making it difficult to supervise and manage these measures effectively. Consequently, instances of institutional abuse occasionally occur.

(3) The remedy procedures are not standardized. In the process of implementing technical investigation measures, the remedy procedures constitute a critical component of China's judicial regulations. However, in judicial practice, due to the closed nature of technical investigations, citizens remain completely unaware of the investigative process. This results in the absence of remedy procedures.

Moreover, China currently lacks a well-developed punitive mechanism for the misuse of technical investigation measures. There are no explicit legal provisions for violations of legal requirements in this area. When citizens' rights are infringed, they are unable to seek protection, and there is no avenue for remedy.

1.2 Issues Reflected in the Application of Technical Investigation Procedures

The laws and regulations concerning the investigation system in China remain underdeveloped in both procedural and substantive aspects. In the Criminal Procedure Law, the provisions on the investigation system are relatively vague. With the development of science and technology, criminal activities have shown increasing trends of technological sophistication and networking. In 2012, "technical investigation" was incorporated into the Criminal Procedure Law, but its provisions are minimal, spanning only Articles 150 to 154. Although the Procedural Provisions on Handling Criminal Cases by Public Security Organs, effective September 1, 2020, outline the approval procedures and validity periods for technical investigations, these are general and lack specificity, failing to impose substantial restrictions. The main issues are reflected in the following two aspects:

1.2.1 Lack of Measures to Address the Illegal Use of Technical Investigation

In practice, a significant issue lies in the use of evidence obtained through technical investigation measures. The Criminal Procedure Law not only affirms the legal validity of technical investigation evidence but even grants it immunity from scrutiny. The legislative intent is to protect the personal safety of technical investigators; however, in judicial practice, this impedes the examination of technical investigation evidence. In this process, the conclusions of technical investigations are directly presented without visibility into the reasoning and explanation process. Furthermore, the entire approval and execution process of technical investigations is conducted in secrecy. Beyond a brief statement of circumstances, the procuratorial authorities have no access to additional information.[2]

1.2.2 Lack of Effective Supervision and Remedies

The latest revision of the Criminal Procedure Law provides limited coverage of the supervision of technical investigation measures. In judicial practice, supervision of technical investigations can only refer to general methods of investigation supervision, which lack adaptability. Technical investigation measures are highly specialized and technical, making general methods insufficient to achieve effective supervision. Coupled with their secretive nature, illegal investigation activities become even harder to detect in a timely manner.

Additionally, China's laws do not clearly define the supervisory authority of procuratorial agencies over technical investigation measures, rendering timely investigations into related violations impossible. Overall, the application scope and approval procedures for technical investigations are largely autonomous for the procuratorial authorities, making it difficult for these agencies to intervene in the supervision of technical investigation measures.

2. Examination of the Current Legislative Regulation of Technical Investigation Abroad and Its Implications

2.1 Examination of the Current Legislative Regulation of Technical Investigation Abroad

2.1.1 Refined Classification and Regulation of Specific Types of Technical Investigation Measures

In many countries and regions, courts have refined the prerequisites for initiating specific types of technical investigation measures based on their nature. Taking wiretapping as an example, many jurisdictions have made special provisions for communication interception as a technical investigation method. Article 100a, Paragraph 4, Sentence 2, and Article 100c, Paragraph 5, Sentence 3 of the German Code of Criminal Procedure prohibit the use of evidence obtained from the core

area of personal rights through lawful telecommunications or residential surveillance. Article 100, Paragraph 2 stipulates that only judges are permitted to decide on the monitoring and recording of telecommunications.[3]Under Article 179 of the Swiss Federal Code of Criminal Procedure, secret telephone recordings are considered a criminal offense. However, judges weigh the defendant's private interests against the public interest in detecting and punishing crimes.[4]

2.1.2 Legal Procedures for Reviewing and Approving Technical Investigation Measures

Taking the acquisition of network electronic data in technical investigations as an example, as mentioned earlier, network electronic data is vital for solving cases, whether addressing traditional crimes or combating new types of crimes. However, if the legal procedures for reviewing and approving network data investigations are not strictly defined, this technical investigation measure poses potential risks to the protection of citizens' rights, such as privacy and freedom of communication.

Globally, there are four main approaches to approving network surveillance measures:

(1) The U.S. Model: Implementing network surveillance measures requires approval from a prosecutor of a certain rank, followed by submission to a competent judge. In other words, law enforcement agencies cannot directly apply to a judge for a warrant.

(2) The German Model: German police can directly apply to a judge for a warrant, which must generally be issued by a judge. However, in cases of "danger in delay," prosecutors may make the decision.[5]

(3) The Taiwan Region Model: During the investigation phase, warrants are reviewed and issued by prosecutors. During the trial phase, they are reviewed and issued by judges.

(4) The U.K. Model: Communication interception warrants are issued through an administrative approval process by the Home Secretary. However, these warrants must also be approved by a judge to be effective.[6]

In contrast, China's current judicial interpretations and normative documents share a common characteristic: they only provide technical rules for collecting and reviewing network data, aiming to ensure the authenticity and integrity of the collected data. However, there is almost no provision for the legal procedures to review and approve network data investigations. This legislative gap leaves room for investigators to abuse their power.

2.2 Implications of Legislative Regulation of Technical Investigation Abroad for China

Through the examination and comparison of foreign legislation discussed earlier, it is evident that the use of technical investigation in China lacks sufficient regulation to a certain extent. The author believes that this "regulation" should be understood broadly, encompassing the precision, intensity, and scope of restrictions.

2.2.1 Refining the Corresponding Conditions for Different Technical Investigation Measures

Different types of technical investigation measures pose varying degrees of impact and threat to citizens' rights to privacy and freedom of communication. Therefore, it is necessary to objectively and scientifically evaluate the potential risk level of infringement on citizens' legitimate rights for each type of technical investigation measure. Based on the evaluation results, differentiated activation conditions should be formulated according to the risk levels of different technical investigation measures.

For example, as discussed earlier, communication interception is a type of technical investigation measure where investigative authorities use modern technological equipment to monitor the communications of individuals to collect relevant evidence and ascertain the facts of crimes. Given the need to combat major and organized crimes, communication interception has been widely applied. However, communication interception directly infringes on individuals' autonomy in communication with the outside world. Establishing specific legal norms and regulations for communication interception is an inevitable choice in social development. Laws should clearly stipulate under what conditions, by what means, and with what approval procedures communication interception can be implemented.

2.2.2 Optimizing the Approval Procedures for Initiating Technical Investigation Measures

Compared to conventional measures, technical investigations are more likely to infringe on privacy rights. However, China’s Criminal Procedure Law does not explicitly specify the authorities responsible for reviewing and approving technical investigation measures or the procedures for such approval. It only provides a broad stipulation that technical investigation measures must undergo strict approval processes. Given the covert nature of technical investigations, the affected individuals have no opportunity for defense, making the use of such measures particularly delicate.

Regulating the technical investigation measures of investigative authorities requires confining them within the legal framework. To prevent unnecessary infringements, a neutral third party should review the necessity of these technical measures in advance and provide written approval specifying the targets, timeframes, and scope of application.

In China, technical investigation measures are generally decided and implemented by investigative authorities themselves, and the issued documents lack third-party review. Many countries worldwide adopt the principle of warrants for

approving technical investigations, with warrants issued by courts responsible for judicial review. Since the procuratorate in China is the legal supervisory authority, it is more suitable to serve as the approving entity. The approval system for technical investigations by the procuratorate should be improved. This includes reviewing whether the investigative actions intrude into the protected realm of privacy and examining whether the investigative actions have justifiable grounds.

3. Procedural Reconstruction of Criminal Technical Investigations in China

3.1 Optimizing the Approval Procedures for Initiating Technical Investigations

The approval procedures for technical investigations must be improved to address the current issue of ineffective approval mechanisms. Specific measures are as follows:

(1) As an essential part of the legal regulation of technical investigations, strict limitations must be imposed on the process from application and approval to execution. During the application procedure for technical investigations, the initiation should be requested in writing by case-handling personnel from the public security or procuratorate authorities. The application should detail the suspected crime, target, duration, reasons, and methods of the proposed technical investigation measures. Additionally, evidence of the necessity of the technical investigation measures, such as previous investigative methods used and their effectiveness, should be provided. Following departmental review, the application should be approved by the chief procurator. No technical investigation measures may be taken against any individual without such approval.

(2) China's Criminal Procedure Law does not explicitly define the approval authority for technical investigation measures. This is due to the significant adjustments involved in redistributing powers and restructuring the procedural system within the judicial system. Moreover, since the procuratorate holds certain criminal investigation powers and functions as a supervisory body, forcibly introducing an approval mechanism into its scope is less feasible. Judicial practice has shown that the approval authority for technical investigation measures is primarily internal self-approval.

To further prevent the expansion of authority, consideration could be given to incorporating the technical investigation approval process under the jurisdiction of the People's Court. As a neutral judicial body, the People's Court would exercise supervisory powers, achieving better regulatory and restrictive effects. Once technical investigations are approved, relevant circumstances should be reported through multiple levels, and any evidence obtained through unauthorized use of technical investigation measures should be deemed invalid.

(3) The content of the approval review should be based on legal and regulatory standards. The review should examine the necessity, statutory conditions, and compliance of the application with relevant regulations and requirements. It should also verify whether the application specifies the target and concrete measures of the technical investigation. These are essential elements and criteria for determining whether the approval of technical investigation measures is necessary. These components serve as indispensable evidence and judgment criteria for granting approval.

3.2 Standardizing the Execution Procedures for Technical Investigations

The judicial warrant system in investigative procedures refers to investigators obtaining warrants from judicial authorities to justify the implementation of compulsory investigative actions. Technical investigations must be applied for, reviewed, and approved in accordance with legal procedures. Only after approval can the investigation authority use the decision document as the basis for executing technical investigations. While legislation on judicial warrants varies across countries, most adopt the warrant system for investigations that involve significant infringement on personal rights. This approach relies on judicial authority and judicial impartiality to ensure the effective implementation of the warrant system. For China:

First, the executing authorities for technical investigation measures need clarification.Article 148, Paragraph 2 of the new Criminal Procedure Law clearly stipulates that technical investigation measures are executed by public security authorities, while the procuratorate initiates technical investigations, and the specific executing authority is referred to as the "relevant authorities." However, the term "relevant authorities" is not explicitly defined. This provision separates the decision-making power from the execution authority for technical investigation measures. Although the law grants certain technical investigation rights to procuratorial authorities, the executing authority remains the public security agency, which limits oversight and checks during technical investigations. Therefore, clearly defining the term "relevant authorities" and specifying the executing body of technical investigation measures will not only enhance the application of investigative technology but also ensure clearer accountability during technical investigations.

Second, the execution procedures for technical investigation measures should be enriched and specified. Specific measures include:

(1) The principle of "serious crimes" is the basis for the scope of technical investigation in most countries. However, there

is no uniform standard for defining serious crimes, leading to significant differences in scope and expression. Enumerating offenses and prescribing statutory sentencing are crucial criteria for determining whether to initiate technical investigations and serve as specific standards for the principle of serious crimes.

China's Criminal Procedure Law uses a combination of generalization, enumeration, and fallback provisions to define the scope. However, the criteria remain unclear, leaving room for ambiguity and potential abuse of technical investigation measures. Drawing on international best practices, the scope of technical investigations could be more clearly defined by combining enumerated offenses with sentencing thresholds. For instance, cases involving crimes punishable by more than three years of fixed-term imprisonment for serious threats to society or crimes punishable by more than ten years of imprisonment for official misconduct could qualify for technical investigation measures. Clearly defining the targets of technical investigations, beyond just the case or individual, will enhance the effectiveness of these measures.

(2) The targets of technical investigations should not be limited to a single category of cases but should extend to individuals, restricted to those connected to the case. The targets of technical investigations must strictly adhere to the principle of relevance, focusing primarily on parties and suspects involved in the case.

However, with the advancement of modern high-tech methods, investigations must occasionally consider public interest protections, allowing third parties to be subjected to technical investigations when necessary while imposing certain restrictions on personal rights. This professional approach would help achieve investigative objectives more effectively, improving the investigation process and advancing cases. China's criminal procedure lacks comprehensive regulations to protect groups and govern technical investigation measures, increasing the risk of misuse. Therefore, the targets of technical investigations and the personnel conducting them should be clearly defined. For example, third parties such as lawyers and doctors with significant connections to citizens' privacy rights should not be subjected to technical investigation measures unless they are themselves suspected of a crime.

(3) The latest revision of the Criminal Procedure Law stipulates that the validity of technical investigation measures is three months, with provisions for complex cases. However, it does not specify the types of applicable cases or the number of extensions allowed. Referring to provisions related to detention, the effective duration of technical investigations should generally be three months from the date of approval.

For complex cases requiring an extension, a step-by-step approach should be taken, allowing for up to two extensions in principle, with each extension not exceeding three months. Each extension must be approved by higher-level public security and procuratorial authorities based on the actual circumstances of the case.

3.3 Improving the Remedy Procedures Based on Illegally Obtained Evidence

China’s Criminal Procedure Law stipulates that evidence obtained through technical investigations is valid, but there are no clear provisions regarding the circumstances under which such evidence should be excluded or the procedures for collecting evidence. As a result, the procuratorial authorities lack rigid mechanisms to supervise investigative activities, making it difficult to achieve the goal of oversight. However, in practice, relevant laws such as the Exclusionary Rule for Illegally Obtained Evidence, the Regulations on Evidence Collection and Retrieval by People's Courts, People's Procuratorates, Public Security Organs, and Other Agencies, and the Provisions on the Collection, Extraction, and Review of Electronic Data in Criminal Cases can be directly applied, provided that the procuratorate initiates the evidence retrieval.

In the near term, China should strengthen the procuratorate's power to sanction illegal investigative actions. For investigations that seriously infringe on citizens' privacy rights or violate legal procedures, the law should grant the procuratorate both procedural and substantive authority to exclude illegally obtained evidence. This would implement the illegal evidence exclusion system into the legal supervision powers of the procuratorate, thereby maintaining the authority of the law, strengthening the law-abiding mindset of investigators, and reducing illegal investigative actions. Looking ahead, China could align this with the broader reform of the litigation system, centered on trial, by granting judges the corresponding review authority. This would allow for the exclusion of illegal evidence and extend judicial powers into the investigative phase, thereby better supervising and promoting the healthy development of technical investigations.[7]

Regarding the destruction of technical investigation materials, China’s Criminal Procedure Law stipulates that evidence obtained through technical investigations should be attached to the case file as evidence. However, in judicial practice, only the conclusions of the technical investigation are provided, with the process not disclosed. Therefore, when reviewing evidence obtained through technical investigations, the procuratorate has the right to require the department that carried out the technical investigation to provide the original evidence. The Regulations on Handling Criminal Cases by Public Security Authorities state that materials unrelated to the case should be destroyed. However, the destruction of evidence from criminal technical investigations has not been a focus. Theoretically, evidence that is unrelated to the case at hand but related to another case, or evidence that is unrelated to the current crime but related to another crime, is not subject to destruction.

While Western countries do not have a unified stance on the identification of evidence from other cases or crimes, the author believes that as long as the technical investigation has been approved and the procedures are lawful, the evidence obtained can serve as evidence in the investigation of new crimes.

4. Conclusion

The primary objective in the implementation of criminal investigation measures is to strike an effective balance between combating crime and protecting human rights. However, as times evolve, this balance remains in a constant state of flux, requiring legislative adjustments to restore equilibrium. In the case of technical investigations, due to their limited use and numerous restrictions, there has been relatively little research in the theoretical field. However, from the perspective of judicial practice, some measures that are nominally non-technical investigations have already fully integrated into citizens' lives. Meanwhile, some strictly limited technical investigations have not shown significant effects. Particularly with the rise of internet technology, technical investigations have become an open concept. It is possible that in the near future, all investigative measures will inevitably have a technological component. This is why the future society may be referred to as one without privacy. Against this backdrop, re-evaluating the scope of criminal technical investigations and making legislative and judicial adjustments to measures that truly fall under technical investigations is not only a practical necessity but also an essential step in developing the socialist rule of law system.

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