



The establishment of the Absichtsdelikte model of criminal law for controlling terrorist crimes: The case of China



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ARTICLE INFO

Keywords:

Absichtsdelikte
China
Criminal law
Crime motivation
Terrorist crimes

ABSTRACT

Under the influence of religious extremism, terrorists in China have used crime and violence as a means of creating terror and spreading panic in order to achieve the goal of splitting China. While criminal law could be an effective instrument for fighting against terrorism, the essential characteristics of terrorism in China require a reconstruction of the criminal legal system around the Absichtsdelikte model by introducing terrorist motivation into the constitutive elements of terrorist crimes. This article argues that this rather innovative legislative model can help to align the crime with the punishment in the field of counter-terrorism legislation and would be helpful for crime prevention as well.

1. Introduction

In criminology, understanding and examining why people commit a crime is very important in the ongoing debate of how crime should be handled, reduced and prevented (Byrne, 2008; Caspi et al., 2006; Mackenzie, 2006; Wilcox and Cullen, 2018). In the conventional sense, while the legal system typically allows motive to be proven in order to make plausible the accused's reasons for committing a crime, motive in itself is not a core element of any given crime. However, this rule may not be applicable to a special category of crime – terrorist crime.

Terrorism has not featured significantly in the criminology literature until recent years (Chermak and Gruenewald, 2015; Freilich and LaFree, 2016; LaFree et al., 2009; Schmid, 2013). Questions have arisen as to how to define terrorist activities in criminal law terms as a special offense and whether they can be distinguished from ordinary violent crimes as defined in criminal codes or by the common law. As most acts that constitute terrorism are also covered by criminal laws, some analysts have argued that terrorist motivation is the key to distinguishing between a terrorist crime and an ordinary violent crime (Baker, 2017; Cassese, 2006; Pi and Zhang, 2014). Overall, however, there appears to be a lack of research discussing whether motivation should be included as one of the constitutive elements of terrorist crimes from a criminological perspective.

Although there is still no commonly accepted definition of terrorism, especially in an international context (Begorre-Bret, 2006; Cronin, 2003; Grozdanova, 2014; Hoffman, 2006; Hu, 2001; Schmid, 2013), terrorist crimes can generally be seen as criminal activities that exhibit the features of terrorism, i.e., the use of violence to attack civilian targets for the purpose of advancing a political, religious or ideological cause (Blackbourn et al., 2013; Greene, 2014; Hoffman, 2006). It is important to highlight the motive element of terrorist crimes and that terrorist acts are both illegal by legislation and inherently immoral (Matusitz, 2013).

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<https://doi.org/10.1016/j.ijlcrj.2019.100366>

Received 21 October 2018; Received in revised form 14 November 2019; Accepted 15 November 2019

Available online 25 November 2019

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Table 1
Historical stages of terrorism.

Stages	Historical period	Types of terrorism	The formation background
Early terrorism	From the 1890s to the beginning of the 20th century	Assassination during the period of Revolution in Europe; Anarchism in the 19th century; Terrorism during the Russian Revolution in the early 20th century.	Revolution based or related
Modern terrorism	From the 1930s to the early 1990s	Nationalist, extremist terrorism formed after World War II (e.g., the Irish Republican Army); Nationalist, extremist terrorism formed after the Cold War (e.g., Chechen terrorists in Russia); Ultra-leftist terrorism (e.g., "Rote Armee Fraktion" in Germany)	Formed in the context of national independence movements
Contemporary terrorism	After the 1990s	Religious extremist terrorism (e.g., the Islamic State).	Against the background of globalization

Countries worldwide have defined terrorism and developed anti-terrorism legislation and strategies, drawing on their own political and social circumstances and experiences (Amirault et al., 2016; Crelinsten and Schmid, 1992; Omelicheva, 2007). While some countries have introduced new provisions containing a general definition of terrorism that highlights its political motivation, a precise determination of terrorist motivation is usually lacking in the statutory provisions and criminal law provisions (Di Filippo, 2008).

In its fight with terrorism, China has established a legislative and governance system that is based on the Absichtsdelikte model incorporating terrorist motives into the constitutive elements of crimes. This present research aims to introduce, explain and articulate the Chinese model for combating and controlling terrorist crimes through the establishment of the Absichtsdelikte model in its legislative and criminal law system. It proposes a plausible way to bring the motives element into the examination of terrorist crimes. A discussion of the Absichtsdelikte model, with its unique characteristics and advantages, could contribute to the academic literature as well as to international anti-terrorism experience and effort.

2. The origin and characteristics of terrorist crimes in China

Generated from clashes of civilizations, terrorism is the reflection of a confrontation with multi-culturalism based on the different demands of different interest groups, leading to regional and global turbulence and chaos (Alonso, 2017; Choi and Kim, 2018; Zhou, 2009). In modern history, the term "terrorism" evolved from Jacobin's Reign of Terror during the French Revolution, when for the first time, a government elucidated and used terrorism as a strategy to rule a country (Laqueur, 1987; Martin, 2016). As shown in Table 1, the historical development of terrorism can be largely divided into three stages (Martin, 2016; Yu, 2015; Zhu, 2006). The early period of terrorism was formed in connection with the wave of revolutions from the end of the 19th century to the beginning of the 20th century, when terrorists used violence to achieve their extreme goals under the banner of revolution. After World War II, the reconfiguration of the world order enabled terrorism to flourish in the context of nationalism. Since the 1990s, the often-fragmented nationalist extremism has been replaced by religious extremism that goes beyond national boundaries and that exists against the background of globalization (see Table 2).

2.1. The origin of terrorism in China

Religious extremism represented by terrorist organizations such as the East Turkestan Islamic Movement (ETIM) is the most

Table 2
Analysis of 50 definitions of terrorism (1982–2001).

Elements	Frequency (%)
Violence & force	92
Political purpose	90
Threat (use violence)	54
Fear and psychological influence	54
Planned, systematic, organized behavior	40
Intimidation, coercion, importune, submission	34
Social purpose	32
The victims are innocent targets such as citizens.	20
A difference between direct victims and targets.	20
Criminality	16
Propaganda	14
Symbolism	12
(Use or threat of violence) Illegality	12
Unpredictability, uncertainty, sudden onset of violence.	6
Randomness, non-selectivity of attack targets.	6
Injustice	2

Source: Hu (2001)

serious form of terrorism in China. The ETIM is a Muslim separatist group founded by militant Uyghur, members of the Turkic-speaking ethnic groups in China's Xinjiang Autonomous Region. Influenced by Pan-Islamism and Pan-Turkism, the ETIM's intention is to split China and establish an independent theocratic state of East Turkistan. Adopting fundamentalism, the ETIM calls on those who speak the Turkic language to create coalitions to rebuild the Osman Turkish Empire (Xu, 2016).

In the early 1930s, terrorist organizations began to implement separation activities within China. In November 1933, Muhamoud Imin and others set up a pseudo regime in Xinjiang Autonomous Region called "the Islamic Republic of East Turkistan". In September 1944, terrorists again called for the establishment of an independent state in Xinjiang under the banner of "the Islamic Republic of East Turkistan" (Zheng and Madania, 2004). Although these two separatist activities were short-lived, core members of the ETIM forces were at large. The leaders of the ETIM fled abroad and continued their separatist activities against China. Most terrorist activities in contemporary China, to some extent, originate from these two ETIM-led separatist activities.

2.2. The characteristics of terrorism in China

Both historical and current evidence suggests that the ultimate goal of the terrorist organizations headed by the ETIM is to split China, and therefore, the relevant terrorist activities are directed toward China. Thus, terrorism in China falls under the classification of both religious extremist terrorism and ethno-nationalist/separatist terrorism (Baker, 2017) and has the following characteristics.

First, in essence, the motive behind terrorism in China is separatism. Irrespective of its ethnical or religious claims, the ETIM has established itself as a separatist organization and has continued to maintain its own existence and build up its strength based on its political goal of splitting China (Xie and Wang, 2002).

Second, terrorist organizations in China tend to use religious extremism to cover up their political motives. Terrorist organizations usually do not directly express the objective of splitting China; rather, this objective is hidden behind the beliefs of religious extremism. Nevertheless, the strategies and mechanisms of their operations aim to spread violence and panic through extreme beliefs, to trigger regional instability and to eventually achieve the purpose of splitting China (Xie and Wang, 2002). Terrorist organizations use religious extremist beliefs to mask separatism due to the propaganda effects, as it enables them to create a more persuasive explanation and justification (Xu, 2016).

Third, terrorist motives are directed towards creating confrontation between people of different ethnic backgrounds. For violence to serve separatism, terrorists need to use violence to create panic. When the panic reaches a certain level, it will cause the trust between people to collapse, spreading suspicion among ethnic groups and thereby destabilizing the foundation of social stability and jeopardizing national security (Pi and Zhang, 2014). For this reason, some scholars note that there are two separate targets of terrorist crimes: one is the object that is being directly harmed, such as the victim who is killed in a terrorist crime; the other is the object that is indirectly affected, such as members of the public who are panicked because of the terrorist crime. While the former is the direct object of terrorist crimes, the latter should be seen as the 'real' object (Cheng, 2002).

Fourth, as with terrorists elsewhere, terrorists in China tend to use violence to show off to the audience in a theatrical performance that will help them realize their motive of splitting China. On the one hand, terrorists intend to shape the consciousness of the real target, i.e., the general public, through criminal behaviors, acting as though they are being fair and just in a performance or drama to acquire a sense of glory and ritual importance (Juergensmeyer, 2013). On the other hand, by using religious extremist ideas, terrorist organizations attempt to instil in perpetrators an identity as volunteers of God while, at the same time, depriving the victims of their rights as human beings. The perpetrators are called Jihadists/soldiers and innocent victims treated as heretics and serve as the theatrical props in perpetrators' fatal performance (Saumur, 2003). The obligation to die is imposed on the victim, who does not deserve to be taken seriously, while the perpetrators must also sacrifice their lives in return for being God's volunteer so that they can go to heaven after death (Zhou, 2009). This demonstration effect may drive more witnesses into life-sacrificing activities and lay a common political foundation for a scattered community (Saumur, 2003). Thus, conflict and violence become the only way for terrorists to communicate with their audience, through which potential terrorists are encouraged, civil society is threatened, social foundations are shaken, and the motive of splitting China can be realized.

3. Introducing the Absichtsdelikte model to legislation

Human behavior is goal-oriented because people can predict the possible consequences of behaviors according to their knowledge of causal relations, based upon which different goals are set and actions are planned towards those goals (George and Johnson, 1985). Teleological criminal activities can often be divided into two stages: in the first stage, the perpetrator presupposes the goal of an act on the basis of the motive of the crime; in the second stage, the perpetrator chooses the appropriate means to carry out the criminal act and ultimately achieves his or her own motive (Welzel, 2015).

A ring structure can be formed for a better illustration of teleological criminal activities (Chart 1): the perpetrator selects the target of a crime according to his/her motive, thus establishing the crime orientation (Ma, 1993); following the orientation of crime, the perpetrator chooses the means of the crime and takes action; finally, the action leads to the satisfaction of the motive of the crime. The defining features of terrorist crimes – terrorist motivations – can be derived from this ring structure.

The overriding motivation associated with terrorism captures the degree of dangerousness of terrorist crimes (Saif-Alden Wattad, 2006). Hu (2001) analyzed 50 definitions of terrorism adopted in the international literature during the period from 1982 to 2001 and showed that terrorism has been most often defined as violent, criminal acts that have a special, especially political, purpose. There has also been a broad consensus in the legislation of many countries that treats terrorism as an activity with a special purpose (Di Filippo, 2008; Greene, 2017). Within the United States, for example, while there are differences between the definitions of

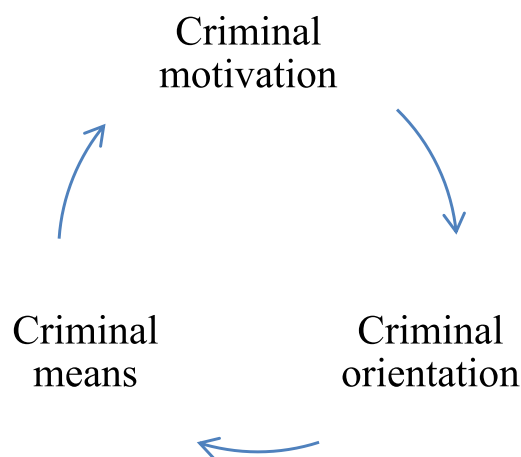


Chart 1. A ring structure of teleological criminal activities.

terrorism adopted by the state and by organizations, the importance of motivation is always highlighted (McCann and Pimley, 2018). Therefore, it is necessary to reveal the motive of terrorism within the constitutive elements of terrorist crimes.

As far as criminal law is concerned, conviction of a crime is achieved by examining the constitutive elements of crime. Every crime has several essential elements: a criminal act or “actus reus”, a criminal intent or “mens rea”, and the concurrence of the criminal intent and a criminal act. According to Hall (1960), the mens rea consists of two elements: the intent to act and the knowledge of the circumstances that makes that act a criminal offense. The principle of mens rea states that defendants should be held criminally liable only for intended events or consequences, indicating that intention together with capacity and knowledge constitute requirements for fault as an element of criminal offenses (Horder, 2016).

As the cause that drives a perpetrator to commit a crime and achieve the purpose of that crime, motive precedes intent in terms of action and is conventionally not part of the core elements of crime (Cassese, 2006; Gao and Ma, 2011). In a careful comparison of intent and motive, Hall (1960) concludes that motive should be considered irrelevant and excluded as an element of legal guilt on both theoretical and practical grounds, as it is too elusive and would undermine objective ethics. Introducing motive into the elements of crime thus may breach several principles of criminal law, including the principle of the presumption of innocence, the policy of ease of proof, and the principle of legality (Ashworth, 1991; Gardner, 1993).

However, some legal scholars argue that motive could be considered as an ulterior intention or intention by foresight and should play a more important role in criminal law (Chiu, 2005; Hessick, 2006; Williams, 1983). It should be noted that civil law countries differ with common law countries in articulating what constitute a crime, where the former follow a model centered on illegality and liability and the latter follow one centered on criminal intent and action. Introducing motive into the constitutive elements of crime could add value to the concept of mens rea and help with the proper conviction of crimes in common law systems (Williams, 1983). In civil law systems, it means adding a subjective element of illegality, which affects the judgement of what constitute a crime (Liu, 2014).

Neither Hall (1960) nor Ashworth (1991) discusses or applies the principle of mens rea specifically to terrorist crimes. Terrorist crimes, as a special category of crime, require a special intention to seriously disturb public order through violence or intimidation. Mueller (1958) comments that in some cases, the law requires a special intent beyond the regular requirement of mens rea. In fact, motive has been included in the definitions of a number of offenses in specific intent crimes, as shown in the legal practice of American criminal law (Chiu, 2005; Hessick, 2006).

As argued by Di Filippo (2008: 543), ‘neither the aim pursued by the perpetrator nor the methods employed are per se conclusive parameters able to provide reliable guidance in the evaluation of the content of an international notion of terrorist crime.’ If the recognition of terrorist activity needs to consider its criminal motive, the motive element will have to be introduced into the constituent elements of crime. This can be achieved through the legislative model of Absichtsdelikte.¹ When the motive of a crime is determined by law as special content of the subjective constitutive requirements, the concept of Absichtsdelikte is created by law. In this way, terrorist motive becomes the purpose element of the Absichtsdelikte (Fu, 2008).

There are two types of Absichtsdelikte: 1) Kuptierte Erfolgsdelikte (severed result offenses), where an actor engages in conduct and realizes his/her purpose at the same time (result-based purpose); and 2) Verkuemmert Zweiaktige Delikte (restricted two-action offenses), where after an actor engages in criminal activity, he/she or a third party must engage in an additional form of conduct to

¹ The term Absichtsdelikte is known as “target of offenses” in the German criminal law. The Absichtsdelikte considers purpose to be one of the constitutive elements of crime. For example, in the German Criminal Law, the crime of “establishing a terrorist criminal organization” adopts the Absichtsdelikte model. As stipulated in Article 129(a), the perpetrator must have a special purpose or a tendency specified by law to be recognized as committing this crime.

realize the purpose (conduct-based purpose) (Fu, 2008). In the case of Kupierte Erfolgsdelikte, the specific purpose of a crime is achieved by the criminal act itself or as a resultant phenomenon attached to the criminal act, and no other act is required to supplement it (Li and Wang, 2002). Such purpose is the material of the crime itself and is not the 'real' purpose in a strict sense. It is rather the semblance of the intentional will of a crime or a repeating expression of a will factor in criminal intent.

However, in the case of Verkuemmert Zweiaaktige Delikte, the specific purpose of a crime can only be achieved if supplemented with a second or subsequent criminal act. The motive that drives the second act is no longer the content of the crime itself but becomes an element that exceeds the subjective elements (Eser, 1966). Wessels (2008) argues that this subjective illegal element has its own independent characteristics and should be treated as independent of the criminal intent. This view has been supported by some Japanese scholars who believe that including the concept of exceeding the subjective element in the constituent elements of crimes is a reflection of moral responsibility (Seiichiro, 2004). Fu (2008) also suggests that Absichtsdelikte should have a subjective, purposeful act that exceeds the objective factors.

4. The Absichtsdelikte model of China's legislation for counter-terrorism

It is impossible to distinguish terrorist crimes from ordinary/conventional crimes based on the subject of the crime, the objective manifestation of the crime, or the social relationship of criminal infringement (Cheng, 2002). The above-mentioned characteristics of terrorist crimes in China have led Chinese legislators to focus on the essence or the defining feature of terrorist crimes, which is the motive for an act rather than the pattern of the act. The argument made by President Xi Jinping during his visit to Xinjiang in 2014 that "the root cause of violent terrorist activities is separatism and the ideological foundation is religious extremism" also signals that the direction of the Chinese government in the fight against terrorism is to focus on recognizing and identifying terrorist motivation. The use of Absichtsdelikte to reconstruct Chinese legislation, including the *Criminal Law of the People's Republic of China*, to combat terrorist crimes reflects this direction.

4.1. The recent development of anti-terrorism legislation in China

China first proposed its definition of terrorist activities in 2011. The *Decision of the Standing Committee of the National People's Congress of China on Issues Related to Strengthening Anti-Terrorism* (hereinafter referred to as the *Anti-Terrorism Decision*) states that "terrorist activities are activities aiming at creating social panic, endangering public security or threatening state organs and international organizations, resorting to violence, destruction and intimidation to cause or attempt to cause serious social harm such as loss of lives and injury of people, serious property damage, damage to public facilities, chaos of social order, as well as activities and behaviors inciting, financing or otherwise assisting in carrying out such terrorist activities." In 2015, the revision of the *Criminal Law of the People's Republic of China* started focusing on four accusations of terrorism-related activities. However, how to legally define and identify terrorist activities remains a challenging task.

Later, in 2015, the definition of terrorism was enhanced in the *Anti-Terrorism Act of the People's Republic of China*. The Act stipulates that "terrorism is the ideology and act that create social panic, endanger public security, infringe on personal security or property, or intimidate state organs and international organizations by means of violence, destruction or intimidation for political and ideological purposes." In its conception of terrorism, the *Anti-Terrorism Act* has further integrated the criminal motive elements defined in the *Anti-Terrorism Decision* (i.e., creating social panic, endangering public security or threatening state organs and international organizations) into the consequential elements of terrorism, adding also new elements of terrorism – political and ideological purposes. Such a conception indicates two main characteristics of China's Absichtsdelikte model for combating terrorism.

The first characteristic is the introduction of the element of motive into the constitutive elements of terrorist crimes through statutory provisions. In terms of content, both the *Anti-Terrorism Decision* and the *Anti-Terrorism Act* stipulate the organization and functions of anti-terrorism agencies of the state. They are the programmatic documents defining the legislative authority to organize the political power of the state to govern the country's anti-terrorism activities, and they adjust the relationships in the political power of the state. Therefore, both are constitutional legal documents. When constitutional legal documents make it clear that terrorist activities have a special motive, the provisions of criminal law as a lower level law should be updated in accordance with the views of the higher level law to include the element of motivation in the constitutive elements of terrorist crimes.

The second characteristic is the purpose element of terrorist crimes, which is filled through the transition from Kupierte Erfolgsdelikte to Verkuemmert Zweiaaktige Delikte. The *Anti-Terrorism Decision* used the model of Kupierte Erfolgsdelikte to define the three types of motivation of terrorist crimes, where legislators merely repeated the will factor of ordinary crimes in the definition of terrorist activities. For example, the phrase "for the purpose of creating a social panic" refers to the motivation of terrorists seeking to create an atmosphere of terror through terrorist activities, thereby causing a social panic (Pi and Zhang, 2014). This purpose is not unique to terrorist crimes. Many ordinary crimes, such as crimes that endanger public safety and disrupt social order, have similar will factors. Another example is the phrase "for the purpose of endangering public safety". Public safety refers to the life and health of the unspecified majority or the safety of major pieces of public and private property and other important interests (Gao and Ma, 2011). This phrase is, in fact, the same as the statement for most ordinary crimes against public safety stipulated in Chapter 2 of the *Criminal Law of the People's Republic of China*. Thus, the *Anti-Terrorism Decision* fails to distinguish terrorist crimes from ordinary crimes. A system of Absichtsdelikte for terrorist crimes has not been fully established.

The amendment of *China's Anti-Terrorism Act* has replaced the Kupierte Erfolgsdelikte model with the Verkuemmert Zweiaaktige Delikte model. The *Anti-Terrorism Act* defines the criminal motivation of terrorist crimes as "political and ideological purposes", which, in fact, introduces a terrorist motive that goes beyond the criminal purpose of ordinary crimes to form one of the constitutive

elements. The political purpose may reflect the attempt to split China, and the ideological purpose may reflect the establishment of the ideological foundation of religious extremism. A violent criminal act may be classified as a terrorist crime when it meets both the requirements of the constitutive elements of ordinary crimes and has a political and ideological purpose. Such criminal motivation is different from and independent of criminal intent. Thus, this approach has enabled the separation of terrorist crimes from ordinary violent crimes in China's criminal legal system.

4.2. The dualist accusation system

It is generally held that the motive is not an element of a crime. This cannot be held true for some crimes, where a defendant is convicted if and when there is a proof to show that the defendant's criminal conduct is motivated by a specific (evil) motive (Wilson, 2015). Terrorist activities are precisely such a crime. Driven by the motive of terrorism and through violent criminal acts that exhibit the nature of theatrical performance, terrorist activities often result in double harm to the audience outside of the crime itself, placing the acts at a higher level of illegality. Therefore, most countries have adopted severe criminal penalties for terrorist crimes, and the *Criminal Law of the People's Republic of China* is no exception. The difference is, however, that there is no such specific accusation of terrorist activity in the *Criminal Law*, and the way that China identifies terrorist crimes is based on a system centered on "political and ideological purposes". When a perpetrator objectively commits a violent criminal act proscribed by the *Criminal Law*, and this violent crime is committed on the basis of a terrorist motive, then the act may be judged as a terrorist crime and be subject to harsh criminal penalty. The harshness of penalty is mainly reflected in the following aspects.

First, in principle, the revised *Criminal Law* punishes the preparatory acts of terrorist activities. Traditionally, the *Criminal Law* does not punish preparations for a crime, and even attempted crimes are only punished when they belong to the category of felony. Preparatory offenses are rarely punished because punishing preparatory crimes means that the acts before the commencement of a crime are included in the scope of the criminal law, which is not consistent with legal theory and not appropriate for criminal policy. Therefore, in China's judicial practice, it is rare to see cases that punish preparatory crimes according to the general provisions of the *Criminal Law* (Che, 2015).

However, if a conduct is judged as a terrorist crime, in principle, its preparatory acts will be punished. For example, according to the *Criminal Law*, an offender who organizes terrorist crimes (Article 120) will be punished, although the offense of organizing terrorist activities belongs to preparatory acts. Other preparatory acts of terrorist crimes are also regarded as targets of criminal punishment and are stipulated in the special provisions of the *Criminal Law* (Article 120.2). The acts of assisting and financing the preparation of terrorist activities have also been included in the scope of punishment of the *Criminal Law* (Article 120.1). Therefore, there is a clear distinction between the provisions in the *Criminal Law* concerning the punishment for the preparatory acts of ordinary crimes and terrorist crimes.

Second, the scope of the crackdown on the risk behaviors of terrorist crimes has been expanded. Risk offenses may also be called abstract dangerous offenses (Liu, 2011). Dangerous offenses are classified into concrete dangerous offenses and abstract dangerous offenses, in which only concrete danger is a real danger, whereas abstract danger is a presumed danger (Roxin, 2013). Abstract danger does not require an intent to endanger public safety, and the law will presume the existence of a dangerous state as long as the act conforms to the constitutive elements of crime (Ren, 2003). The punishability comes from the sense of urgency of an act approaching the status of criminal preparation (Eisler, 2008). This sense of urgency is not an objective manifestation of urgency but a presumption of urgency by legislators. The task of the legal good (Rechtsgut) is to limit the state's power of penalty (Roxin, 1997). The concept of the legal good or legally protected interest should be concrete and realistic so that the rights and freedoms of citizens can be better safeguarded (Zhang, 2000). Therefore, under normal circumstances, the legislative application of an abstract damage offense should be strictly restricted and not promoted as a general means in the criminal legal system. In Chinese legislation, the abstract dangerous offense is not widely used. It may only be considered in areas that involve serious harm to public safety and security.

However, the application of this legislative technique is prominent when dealing with terrorist crimes. The revised *Criminal Law* has established four types of accusations to regulate risk offenses related to terrorist activities.² According to the content of the four types of accusations, a perpetrator can be punished well before he/she engages in the preparation of the instruments of a crime and in creating conditions for a crime (Article 22). This punishability stems entirely from his/her acts, which create an abstract danger of spreading terrorist beliefs and ideas. For example, the use of extremism to undermine the implementation of law (Article 120.4) has the danger of leading citizens to resist the rule of law and to gain trust in the way of life promoted by terrorists, which aims to mobilize more people to participate in terrorist activities. Another example is the illegal possession of materials and objects promoting terrorism and extremism (Article 120.6), which is a typical case of a possession offense. In the traditional sense of criminal law, a criminal act does not exist at this time. The revised *Criminal Law*, therefore, punishes the dangerous state of possession of dangerous goods with the purpose of reducing the possibility that the legally protected interest is infringed upon (Lao, 2007).

Third, the *Criminal Law* has adopted more unfavourable criminal treatments for terrorist crimes than for conventional crimes, in addition to the punishment of preparatory crimes and early criminal strikes. These unfavourable criminal treatments are manifested mainly in the *Criminal Substantive Law* and the *Criminal Procedure Law*. In terms of the *Criminal Substantive Law*, the terrorist characteristics of an act are the prerequisite for the establishment of some special crimes. For example, in the *Criminal Law*, terrorist activities are regarded as one of the predicate offenses for money laundering or terrorist financial activity, in which the wealth

² See the *Criminal Procedure Law of the People's Republic of China*, Article 120.3, Article 120.4, Article 120.5, and Article 120.6.

acquired by the perpetrators through terrorist activities may be used for money laundering. Another example is that both the recidivism system and the probation system in China have adopted a stricter stance towards terrorist crimes. In the recidivism system, the *Criminal Law* has specifically abolished the inspection period for criminals who commit terrorist crimes. As long as a perpetrator had committed a terrorist crime before, he or she will be considered a recidivist once he or she commits another terrorist crime. With regard to the probation system, the *Criminal Law* prohibits the application of probation to the leading members of organized crime groups, which means that the organizers and leaders of terrorist organizations will not be given probation. In the area of criminal procedure law, if an act is identified as a terrorist crime according to the *Chinese Criminal Procedure Law*, the perpetrator will face many disadvantages and restrictions such as to the right to see a lawyer, the right to privacy, and family members' right to informed consent.³

5. The advantages of the Absichtsdelikte model for counter-terrorism

The essence of the Absichtsdelikte model established by the *Anti-Terrorism Act of the People's Republic of China* and the *Criminal Law of the People's Republic of China* for the purpose of combating and controlling terrorist activities is its introduction and incorporation of terrorist motive into the constitutive elements of crime. This approach accurately reflects the harmful effects of terrorist crimes by reconstructing the constitutive elements and allows a more accurate reflection of crime prevention in the application of law. Furthermore, the addition of the constitutive elements to terrorist crimes will serve as a constraint to criminal penalties, thus effectively controlling the scope of punishment for terrorist crimes.

5.1. Balancing crime and punishment

A crime is an illegal act bears criminal responsibilities and legal liabilities. The essence of balancing crime and punishment is that the degree of punishment that a perpetrator receives should match the degree of illegality and the scope of responsibilities that he or she is liable for. Illegality is the infringement of the legal interest (Ren, 2003) and is a concept that has both quality and quantity dimensions (Li, 1995). When a perpetrator who has the ability to carry out lawful actions has committed an illegal act, he or she should be held responsible for the crime that he or she committed. The extent to which a perpetrator unfaithfully breaches laws and regulations determines the amount of his or her criminal responsibility (Welzel, 2015).

As far as terrorist crimes in China are concerned, the degree of infringement of people's legal interest is reflected not only in the offenses per se but also in their ultimate intention to cause social panic and split the country. Therefore, compared with ordinary crimes, terrorism crimes entail more serious infringement of the legally protected interest of people, taking into account the harm to public safety and national security. By adding motive into the constitutive elements of terrorist crimes, the intrinsic hazard of terrorist crimes is highlighted and accounted for, which can also serve as a reminder to prosecutors and other law practitioners that crimes of this kind have more serious illegality.

The degree of legal liability for terrorist crimes is higher than that of ordinary crimes because terrorist crimes illustrate a stance that completely breaks with the order of law; this is well reflected in the motive element of terrorist crimes. Because a perpetrator wants to achieve his/her ideological and political purposes through terrorist activities, he or she wants to break with the civilized world. By emphasizing the status of the motivation element in the constitutive elements of terrorist crimes, the *Criminal Law of the People's Republic of China* has accurately reflected the degree of illegality and liability of terrorist crimes and has adopted more severe criminal punishments for terrorist crimes, which is more conducive to realizing the principle of proportional justice in criminal law.

5.2. Crime prevention

Penalty and punishment aim to hinder and prevent crimes (Liu, 2011). The effect of crime prevention is first shown in the aspect of individual prevention (special prevention) because modern criminal law cannot be formulated without considering socialization (Padovani, 2004). Individual prevention includes three connotations: first, protecting citizens from crimes by imprisoning criminals; second, deterring criminals from committing other crimes through punishment; and third, re-socializing criminals by means of penalty reformation (Wang, 2003). Individual prevention through penalty is usually realized in the execution stage of punishment. This perspective has dominated Western counter-terror responses, where new laws with harsher penalties are issued for terrorist crimes (LaFree et al., 2009). However, the rational choice assumption that individuals would try to maximize their personal gain while minimizing costs may not hold for terrorists. By virtue of their political and ideological purpose, terrorists may commit a crime at the cost of their own lives if necessary. Punishment per se is unlikely to do much to prevent terrorists from engaging in future terrorist activities, as in the eyes of some terrorists, the deprivation of their lives is an honor. The preventive capacity of the penal system may have been overstated for fighting terrorism, and repressive measures may have a backlash effect (Argomaniz and Vidal-Diez, 2015).

Thus, a more effective way for realizing the individual prevention of terrorist crimes should be based on the eradication of terrorist and extremist ideology rather than on punishment. Only when perpetrators have given up their own terrorist beliefs can the means of punishment have a deterring effect on them, and the penalty can have an individual prevention effect. The way that the *Criminal Law of the People's Republic of China* takes the terrorist motive as the motivation element in the constitutive elements of

³ See the *Criminal Procedure Law of the People's Republic of China*, Article 20, Article 37, Article 73, Article 83, Article 148, and Article 280.

terrorist crimes provides a guideline for the correction of terrorists. At the penalty execution stage, punishing terrorists by simply putting them behind the bars is not the ultimate goal. Instead, it is suggested that terrorists should be educated with the rule of law as well as through national and traditional culture to increase their sense of civilization and identity, which helps them to abandon extremist ideologies (Wang, 2013). An assessment of the implementation of sentences on terrorists may also have to consider whether they have abandoned the ideas of terrorism, based upon which a decision can be made as to whether their sentence can be commuted or they can be released on parole.

However, the effect of general prevention should not be ignored, and punishment needs to play a role in general prevention. The purpose of general prevention is to curb or prevent the occurrence of crimes by punishing those who have already committed a crime (Bedau, 1987). A penalty helps to declare the falsity of a crime and to prove the validity of the law (Cheng, 2014), the accuracy of the penalty declaration directly determines the effect of general prevention. If the constitutive elements of terrorist crimes do not include the motivation of terrorism, then the penalties will be no different from ordinary crimes when negating terrorist activities. For instance, whether it is a murder for terrorist purposes or for the purpose of obtaining property, it will be charged as intentional homicide. Thus, the characteristic of the additional harm caused by terrorist activities cannot be expressed through the penalty. This will cause a misunderstanding among people, who may then believe that there is no special harm in terrorist crimes compared with ordinary crimes.

The fact that the *Criminal Law of the People's Republic of China* places special emphasis on terrorist motivation when determining terrorist crimes and imposes more severe sanctions on such crimes has shown its extra negation of the violence committed for terrorist purposes. In this way, when guiding people to abide by the law, the *Criminal Law* releases a clear signal: legislators would rather have people commit a misdemeanour without a terrorist motive (if they have to commit a crime) than commit a felony that has a terrorist motive. This approach helps achieve more effective general prevention of terrorist crimes.

5.3. Limiting the scope of punishment

While there is already global consensus about the need to combat terrorism, there is concern about the tendency towards over-criminalization in counter-terrorism (Edwards, 2018). When the law is seen as a powerful tool, a civilized society with the power to make laws will do its best to draft, interpret and manipulate the law to serve the goal of suppressing terrorism (Tamanaha, 2016). Legal instrumentalism may unconsciously enter the field of counter-terrorism, with an increasing amount of conduct being rated as a terrorist activity to curb the growing terrorism risks. However, over-criminalization has not been effective in curbing the spread of terrorism (Argomaniz and Vidal-Diez, 2015). In contrast, labeling those who do not believe in terrorism as terrorists strengthens the power of terrorist organizations, increases the extent of social panic and has a negative impact on the counter-terrorism effort. Therefore, criminal law should follow the principle of minimum criminalization and try to avoid over-criminalization when handling terrorist crimes (Cheng, 2011). When terrorism can be suppressed through other forms of social governance, the use of criminal law should be minimized or avoided as much as possible (Zhang, 2013).

To achieve this goal, it is necessary to reduce the potential consideration of legal instrumentalism by improving the constitutive elements of terrorist crimes, indicating the real harm of terrorist crimes more specifically through the constitutive elements. Only when the act of a perpetrator reaches the level of harm described in the constitutive elements will the legal penalty be applied. The way that China deals with terrorist crimes is in line with this guideline. Additional investigation is conducted to examine the motivation behind violent crimes, which acts as a valve to avoid over-criminalization, so that acts that do not have terrorist motivation are excluded from the penalty scope of terrorist crimes.

6. Conclusion

To further advance an international anti-terrorism consensus, it is important to recognize the social and cultural differences among countries in their respective anti-terrorism legislation and practices. Although it is not uncommon for terrorist motivation to be factored into the legislation of some countries, China has formed a legislative system in which terrorist crimes are identified and handled jointly through constitutional legal documents – the *Anti-Terrorism Act of the People's Republic of China* and the *Criminal Law of the People's Republic of China*. The *Anti-Terrorism Act* stipulates that the concept of terrorist activities includes a dimension of political and ideological motive. This has formed a unique Chinese legislative model for the identification of terrorist crimes, indicating China's legislative efforts towards combating terrorist crimes organized by ETIM and its associates.

While China has drawn from the German *Absichtsdelikte* model, it has integrated some innovative elements in its anti-terrorism legislative system based on its own legal and social conditions and practices. As revealed in this article, one of the primary goals of this legislative model is to provide law enforcement with the tools necessary to proactively prevent terrorist crimes, as it is able to distinguish terrorist crimes from ordinary violent crimes while revealing the harmful nature of terrorist crimes. This legislative model has also effectively narrowed the scope of criminal punishment for terrorist activities and therefore has important significance for international counter-terrorism strategies.

As far as legal research is concerned, incorporating motive into the core elements of crime remains a contentious topic. This article has argued that motive could serve as a valuable addition to the constitutive elements of crime, especially for terrorist crimes. The introduction of the motivation element in defining and examining terrorist crimes not only has a theoretical underpinning from civil law systems but also may have useful implications for legal practices in common law countries.

Conflicts of interest

The authors declare that they have no conflicts of interest.

Funding

This research did not receive any specific grant from funding agencies in the public, commercial, or not-for-profit sectors.

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