



3-29-2024

Legal Regulation of Communication Wiretapping

Lian Chen

Southwest University of Political Science & Law, 245654430@qq.com

Wenyu Zhong

Southwest Petroleum University Law School

Follow this and additional works at: <https://gensoken.toyo.ac.jp/japanese-society-and-culture>



Part of the [Comparative and Foreign Law Commons](#)

Recommended Citation

Chen, Lian and Zhong, Wenyu (2024) "Legal Regulation of Communication Wiretapping," *Japanese Society and Culture*: Vol. 6, Article 8.

Available at: <https://gensoken.toyo.ac.jp/japanese-society-and-culture/vol6/iss1/8>

This Article is brought to you for free and open access by Institute of Social Sciences. It has been accepted for inclusion in Japanese Society and Culture by an authorized editor of Institute of Social Sciences.

Legal Regulation of Communication Wiretapping

Keywords

communication surveillance;communication privacy;separate legislation;the principle of necessity;procuratorial supervision

Creative Commons License



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

[Received 6 August 2023 / Revised 21 November 2023 / Accepted 25 November 2023]

Legal Regulation of Communication Wiretapping

Lian Chen^{*}, Wenyu Zhong^{***}

Abstract

The technical investigative measure with the highest rate of application in judicial practice is phone tapping, which is a form of communications wiretapping. Communication wiretapping is a technical investigation measure that violates the will of citizens and seriously infringes on their constitutional rights, and most countries or regions outside the region have adopted the dual regulation path of prior procedural regulation and strict examination of the admissibility of evidence obtained by this investigation measure after the fact. Although China's incorporation of communication wiretapping into the regulatory level of technical investigation has had a certain regulatory effect, there are still problems such as the difficulty of realizing the regulatory purpose of the internal approval and ex-post supervision model; the expansion of the scope of application of communication monitoring; and the lack of standards for admissibility of evidentiary materials in other cases. Drawing on Japan's regulatory procedures for communications wiretapping, the improvement of China's communications wiretapping procedures can start from the following four aspects: determining the scope of communication interception cases under the felony principle; constructing a complete procedure for the initiation, application, and post-event notification of communication wiretapping; constructing a supervisory mechanism centered on procuratorial supervision; and conditional recognition of evidentiary material in a separate case obtained through communications interception.

Keywords: Communication Wiretapping, Communication Privacy, Separate Legislation, The Principle of Necessity, Procuratorial Supervision

1 Problem Elicitation

The usage of communication wiretapping in criminal investigation is a realistic response to the upgraded criminal violations, and is also an objective requirement for the investigative organ to use technology and enhance their investigation capabilities. China is promoting the trial-centered reform of the criminal procedure system, requiring a gradual change in the past “investigation center” under the framework of excessive reliance on the suspect’s confession of investigation mode, that is, gradually guiding the investigation activities from the subjective to the objective mode of investigation.¹

^{*} Lian Chen (1990—), Lecturer at the Law School of Southwest Petroleum University, Researcher at Hitotsubashi University, Japan, Ph.D. in Litigation Law, mainly on criminal procedure law, evidence law, judicial system, From Chongqing, China. Contact details: 18883897458. Email: 245654430@qq.com.

^{***} Zhong Wenyu (1999—), Graduate student of Southwest Petroleum University (Sichuan Chengdu 610500)

¹ Hongyang Liu & Xia He, On the Reconstruction of the Legal Supervision System of Telecommunications Wiretapping Measures in China, *Hebei Law*, 2013, Vol. 31, No.10, p.132.

Communication wiretapping does not positively “force” the suspect to confess guilt, however obtains information about clues related to the crime through surveillance, and thereafter, explores other objective evidence, to prevent the use of torture and other illegal measures to obtain confessions. Therefore, unlike the function of conventional investigation methods mostly as a means of evidence collection, the primary function of technical investigation measures, including communication wiretapping, is not evidence collection, but a means of investigation to obtain clues related to the case.² As the primary applicable purpose of communication wiretapping is not to obtain evidence, it is difficult to subject this conduct to review at the trial stage and thus, is difficult to regulate. While technical investigation has the nature of forced disposition that seriously infringes on citizens’ important rights and interests, notwithstanding that the “prior strict approval procedure” has raised the threshold of application to a certain extent, the lack of supervision of investigation behavior and post-event review makes it difficult to form a investigation power operation regulation system, which makes it difficult to ensure the standardized exercise of investigation power, and individual rights may be unreasonably violated. Therefore, this purpose of obtaining leads may result in technical investigations not being regulated by law. In judicial practice, cell phone tapping,³ which is communication wiretapping,⁴ is the technical investigative measure with the highest application rate. Cell phone tapping is a type of communication tapping, and the legal term “communication tapping” is strictly defined in the Act on Communications Interception for Criminal Investigation⁵ of Japan. “Communications” means telephones and other telecommunications whose transmission lines are wholly or partially wired or have switching equipment. “Wiretapping” is the act of obtaining the contents of a communication conducted by parties without the consent of either party to the communication. Freedom of communication is directly related to personal privacy and is an important condition for the free development of individual personality. Communication wiretapping is a technical investigative measure that violates citizens’ constitutional rights. To strictly limit the admissibility of evidence obtained from communication wiretapping, most extraterritorial countries or regions have adopted the dual regulatory path of ex-ante procedural regulation and ex-post strict limitation. In China, several problems exist with regard to communication wiretapping procedures, both in the design of the procedures themselves and in the manner they are applied. In the context of crime prevention and human rights protection, regulation of communication wiretapping should be carefully discussed.

2 Deficiencies of China’s communication wiretapping system

China has not established the defense mechanism for personal rights and interests against the operation of investigative powers model based on the Western countries’ rule of law, rather established it

² Lei Cheng, Study on the Use of Technical Investigative Evidence, Chinese Journal of Law, 2013, Vol. 40, No.05, p.170.

³ By combing through the cases of application of technical investigation measures in China's adjudication documents network, our scholars have found that the highest usage rate is cell phone wiretapping. Japan is similar to China's judicial practice, and all of the 53 communications wiretaps announced by the Japanese Government for 2022 were cell phone wiretaps. Refer to National Police Agency, Report under the Act on Communications Interception for Criminal Investigation (January 1, 2022 to December 31, 2022), February 2023, <https://www.japaneselawtranslation.go.jp/ja/laws/view/3857>, last visited November 16, 2023.

⁴ Cheng, *supra* note 2, at 156.

⁵ For the English translation of the name of the act, we followed that in the Japanese Law Translation Database System. Japanese Law Translation Database System, <https://www.japaneselawtranslation.go.jp/ja/laws/view/3857>, last visited December 4, 2023.

from the perspective of the operation of investigative powers and the maintenance of national and social stability,⁶ to design the investigation process. It is undeniable that in the process of procedural design, China has accorded due consideration to the basic rights of individuals, however, the focus continues to remain on how to effectively combat crime and develop the relevant investigative system. Communication wiretapping as a type of technical investigation can be considered from the provisions of China's criminal procedure involving technical investigation, which continues to follow the traditional investigation system design paradigm. The technical design shortcomings of the communication wiretapping system have gradually emerged owing to the lack of intervention of the rights protection model.

2.1 Internal approval and ex-post supervision model can scarcely achieve the purpose of regulation

In China, technical investigative measures generally include three levels of supervision: internal supervision of investigative organs, prosecutorial supervision, and trial supervision. However, from a practical viewpoint, from the initiation of the communication wiretapping procedure to its execution and thereafter, to its termination, the investigating authority itself authorizes and executes the procedure, and thus, the whole process of communications interception does not allow other authorities or agencies to intervene or supervise. Thus, our communication wiretapping, at all three levels of oversight aforementioned, demonstrates a sense of powerlessness.

First, internal approval is a mere formality. The principle of procedural legality requires that all matters involving the allocation of powers of the national criminal judiciary and the protection of the major rights and interests of criminal suspects and defendants should be clearly stipulated only by the basic law enacted by the legislature as the representative of the nation.⁷ However, China's "Criminal Procedure Law" for the technical investigation measures, including communication wiretapping is only a relatively rough specification, and therefore, other regulations, such as "Public security organs to handle criminal cases procedural provisions" are required to be referred to for the procedure of operation. In China, despite using several laws and regulations to derive the framework of application of technical investigation, from China's "Criminal Procedure Law," "Procedural Provisions for Handling Criminal Cases by Public Security Organs," and other laws and regulations, the "strict approval procedure" of technical investigation measures is essentially an administrative internal control mode, and the "Decision Letter" of technical investigation measures represents only a formal sense of legality.⁸ This internal approval model has resulted in the concentration of both approval and enforcement powers in the investigating authority. Internal prudence and self-restraint of investigative agencies alone can scarcely achieve power restraint.

In addition, in terms of the scope of application of technical investigation, the miscellaneous provisions provide the investigating authorities considerable scope to apply technical investigation measures without any clear standard of review. In the approval process, the use of technical investigation measures will be subject to the will and instructions of the leadership, of the local government, and other factors

⁶ Ping Sun, *Systematic Construction of a Fundamental Rights Model for Personal Information Protection Legislation*, Law Science, 2016, No.4, pp.72-73.

⁷ Youping Xie & Yi Wan, *On Wiretapping in Investigations*, Chinese Criminology Review, 2003, No.3, p.22.

⁸ Hua Guo, *Examination of the Use of Material Obtained Outside of Wiretap Writs as Evidence in the United States and Germany—An Examination of Article 152 and Paragraph 3 of Article 150 of the Criminal Procedure Law of China*, Global Law Review, 2013, Vol. 35, No.04, p.20.

outside the case, resulting in a vacancy of the rule of law, that is the approval process of the strong color of the rule of man.⁹ Formal approval is difficult to play the role of strict quality control at the entrance of the program.

Second, it is difficult to intervene in prosecutorial supervision and the lack of post-event supervision. The procuratorial organs as China's legal supervisory organs have the power and responsibility to supervise the whole process of investigation, including technical investigation. However, as the wiretapping of communications is a type of secret investigation, its confidentiality also excludes the intervention of the procuratorial authorities, and the investigative authorities will not take the initiative to report the wiretapping to such authorities. Supervision is mostly after-the-event, in writing and on a selective basis, and the content of the supervision is mostly the investigative materials submitted by the investigating authorities. Therefore, it is difficult to regulate the application of communication wiretapping measures by the investigating authorities in this manner.

Third, the positioning of communication wiretapping leaves no room for trial supervision. The information obtained by the investigative authorities through communication wiretapping is mostly used as clues rather than evidence material, which implies that information thus obtained is less likely to be used as evidence. Thus, communication wiretapping has become a means of obtaining leads in cases and is often used as a means of obtaining confessions from suspects. Consequently, more emphasis will be placed on the traditional investigation method of obtaining incriminating confessions through interrogation. This may run counter to the development direction of avoiding over-reliance on confessions as required by the reform of the trial-centered litigation system. Much of the material obtained from communications wiretaps is not used in the trial for review and judgment by the court. In such a case, there is no scope for the court to perform its supervisory function. Simultaneously, based on the secret nature of communication wiretapping, China's law does not specify the right to information of the wiretapped and the obligation of the investigative authorities to inform. Therefore, they do not inform the wiretapped of the fact that they are being wiretapped. Once the wiretap material is not submitted as evidence in court, the person being wiretapped may be unaware that his or her rights have been violated as well as that the violation is ongoing (the investigating agency did not end the wiretap in time). Moreover, the wiretapped person is unable to take appropriate remedial measures, which indicates the gap in the protection of personal rights and interests in criminal investigations.

2.2 There is an expansion of the scope of application of communication monitoring

The infringement of citizens' privacy rights by investigative agencies listening to communications can be said to have no boundaries, as it is impossible to predict the extent of privacy that will be exposed by the subject of the wiretap through the call. The investigation capability of the investigating authority is enhanced through communication wiretapping, and the boundary of the investigative power is extended. Therefore, to prevent investigative authorities from arbitrarily activating wiretapping to excessively violate the legitimate rights and interests of citizens, countries under the rule of law generally limit communication wiretapping to felonies and it can only be applied when other investigative techniques cannot achieve the purpose of the investigation.

⁹ Lei Cheng, Study of Macro Issues in Covert Investigation Legislation, *Tribune of Political Science and Law*, 2011, Vol.29, No.05, p.77.

Article 150 of China's Criminal Procedure Law¹⁰ clarifies the scope of application of technical investigation by way of enumeration and miscellaneous provisions. However, in practice, the miscellaneous provisions of "other cases of crimes that seriously endanger society" lack specific criteria for recognition and have been interpreted in an extremely expansive manner. Thus, it is up to the discretion of the investigating authorities to decide whether or not to "classify the case as a crime that seriously endangers society," which implies that almost any crime can be "classified as a crime that seriously endangers society." Communication wiretapping may become a dangerous area of abuse of procedural discretion by investigating authorities in criminal investigation procedures. Technical investigation, including communication wiretapping, is highly confidential,¹¹ and the implementation of such technical investigative measures by the investigative authorities is internally closed, which makes their investigative activities free and difficult to be monitored. This helps achieve effectiveness in fighting crime, however, the secret state of technical investigation is both inconsistent with the concept of procedural due process, and makes it difficult for citizens to predict the limits of the violation of their personal rights and interests, leaving civil rights in a state of uncertainty.

2.3 Lack of standards for admissibility of evidentiary materials in other cases

Article 152, paragraph 3 of the Code of Criminal Procedure stipulates that materials obtained through technical investigative measures may only be used for the investigation, prosecution, and trial of crimes, and may not be used for other purposes. However, it is controversial whether the crime here includes crimes other than the suspected facts that are the basis for initiating technical investigation or for the investigation, prosecution, and trial of all the facts of the crime, which has not been studied in depth by the theoretical circles to date. Moreover, Article 154 of the Criminal Procedure Law specifies that materials collected through investigative measures in accordance with the provisions of this section can be used as evidence in criminal proceedings. From a logical analysis, as long as the technical investigation measures undergo a strict approval process and are conducted within the statutory scope and period of application, the materials obtained by them can be used as evidence in the trial. Directly, as long as the technical investigation is legal, the material obtained by the investigative measure can be used as evidence of the suspected facts underlying the initiation of the technical investigation measure, and as evidence for the determination of other crimes. China's criminal investigation has not established the principle of incident unit, and the aforementioned ambiguity of the Criminal Procedure Law, leaves scope for the investigating authorities to investigate other crimes in the technical investigation. The practice community generally believes that in the course of lawful communication wiretapping, accidental access to another case of evidentiary materials, neither by illegal collection, nor by any other violation of the rights and interests of the person being listened to, from the perspective of maintaining fair justice and the discovery of the true purpose of the case, this evidence does not affect the admissibility of evidence.¹² It is necessary to discuss the theory and practice of how to limit the practical scope of application of technical investigation through procedural design and prevent the investigating authorities

¹⁰ Article 150 of the Code of Criminal Procedure: "After a case has been filed, the public security organ may, in the case of a crime against national security, a crime of terrorist activity, a crime of an organization of a triad nature, a major drug crime, or any other crime that poses a serious danger to society, adopt technical investigation measures in accordance with the needs of the investigation of the crime, and after a strict procedure of approval."

¹¹ Cheng, *supra* note 9, at 75.

¹² Chaoyi Huang, *The Concept of Procedural Justice* (I), 2010, Yuanzhao Publishing Co., Taipei, p.258.

from investigating other crimes on the grounds of investigation of specific crimes.

3 The basic direction of the design of the communication listening system

3.1 Clarify the nature of communication wiretapping which causes serious violation of communication privacy

Although there is no explicit provision on the right to privacy in China's Constitution, Article 40 of the Constitution clearly states that citizens' freedom and secrecy of communication are protected by law, which can be regarded as an important vehicle and concrete expression of the right to privacy. Therefore, there is no doubt that our citizens enjoy the right to privacy of communication.¹³ Making the constitutional defense of privacy function is a clear basis for constructing due process for communications wiretapping.

Thus, wiretapping interferes with the confidentiality and freedom of communication, and violates citizens' right to privacy attached to their communications. In a modern country governed by the rule of law, freedom of communication and privacy are the basic human rights that citizens enjoy in social life, and the basic connotation of a peaceful life free from interference by others.¹⁴ The core of the right to privacy is the protection of one's thoughts, conversations, and actions from unlawful infringement.¹⁵ The investigative act of listening to the contents of calls without the consent of the person being investigated is essentially a violation of the person's privacy.¹⁶ It is clearly unreasonable to assume that the communication wiretapping conducted by the investigating agency is not a mandatory sanction on the grounds that it is not accompanied by actual force, and that it can be performed without a legal basis. Considering studies on the right to privacy in the field of criminal procedure, new types of investigation measures, such as GPS investigation, communication wiretapping, face recognition have seriously violated citizens' right to privacy, which has not yet been elevated to a constitutional right; therefore, the traditional model of guaranteeing basic rights in criminal investigation has not been adjusted to the field of new types of technical investigation, and the model of criminal procedure protection related to the right to privacy of individual personality development has not been established. However, as China's private law field established the status of the right to privacy through the introduction of the Civil Code, the criminal field has been studied and has attracted attention, and the legislation regarding right to privacy protection into the criminal proceedings is only a matter of time.

The development of information technology has raised new issues regarding the protection of citizens' privacy in criminal investigation, and it has become an inevitable trend to shift the definition of investigative acts from form to substance.¹⁷ From the viewpoint that communication wiretapping essentially restricts the right to privacy, this investigative act essentially restricts the important rights and interests of individuals. When designing the communication wiretapping system, in addition to national and social security, the concept of privacy protection should be considered. The system design under this

¹³ Yun Zeng, Rule of Law Practice in Wiretapping Investigations: American Experience and Chinese Paths, Chinese Journal of Law, 2015, Vol.37, No.03, p.161.

¹⁴ Jiahong He, My View on Covert Investigation Legislation, Law Science Magazine, 2004, No.06, p.26.

¹⁵ Qihong Xiong, Rule of Law for Covert Investigations, Peking University Law Journal, 2007, No.02, p.145.

¹⁶ Midori Daisuke (author) & Ping Xiao (translator), The Principle of Legality of Compulsory Measures in Japan, Journal of National Prosecutors College, 2014, Vol.22, No.02, p.171.

¹⁷ Ming Hu & Chuanxi Zhang, Expansion and Regulation of Investigative Powers in the Age of Big Data, Legal Forum, 2021, Vol.36, No.03, 5-14.; Zhilong Guo, Formal Legitimacy of Data Access for Communications Records, Journal of National Prosecutors College, 2021, Vol.29, No.06, pp.17-36.

main line can ensure that it meets the basic requirements of a rule of law state.

3.2 Gradually implement the separate legislation of communication wiretapping

Communication wiretapping is confidential, however, the legal provisions regulating communication wiretapping should be clarified through legislation. This is a basic requirement of the principle of democratic decision-making and the principle of transparency in government in modern rule of law countries. For wiretapping, an investigative act closely related to the rights of individual citizens, more detailed legislative provisions should be enacted on the basis of existing laws.¹⁸ Communications technology has enhanced investigative capabilities, however, the related legal regulatory process has lagged behind. To prevent the abuse of wiretapping and infringement of citizens' basic rights, the scope, principles, procedures and elements of communication wiretapping must be clarified through legislation.¹⁹ There are three primary models of national (regional) legislation on communication wiretapping:²⁰ the codex model,²¹ the hybrid model,²² and the single law model.²³ From the perspective of communication wiretapping, the construction of a complete communication wiretapping system involves a wide range of subjects, such as investigative organs, procuratorial organs, people's courts, and communication practitioners. The procedures for the application of the communication listening system are complex, such as the scope of application, the conditions for activation, the approval process, and the means of listening to be used. Moreover, the construction of a complete system of communication wiretapping includes a system of protection of the rights of the subject being listened to, such as informing the situation being listened to, the content of the wiretapping, and the complaint filed by the person being listened to. It is difficult to cover such a large amount of content under the traditional Criminal Procedure Law, therefore, a separate legislation on communication wiretapping is the solution.²⁴ Regarding the method of legislation, we can refer to Japan's authorization and regulation model on communication wiretapping, that is, to make general and principled provisions on wiretapping measures in the criminal procedure law, and simultaneously to introduce a separate law to make detailed and comprehensive regulation of the entire wiretapping system. Such a legislative model can also survive in our judicial system. However, we should not be hasty in achieving separate legislation on communication wiretapping, and we can adopt a gradual separate legislative path.

Before the Standing Committee of the National People's Congress issued a separate law on regulating communication wiretapping and other technical investigative measures, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice jointly issued judicial interpretations on the application of communication session wiretapping and other technical investigative measures in criminal cases, including detailed provisions

¹⁸ Haiyan Cui, Study on Countermeasures to Improve Wiretapping Legislation, People's Tribune, 2013, No.14, p.118.

¹⁹ Mu Li & Hewen Wang, Review of Japan's Communications Interception Act and Its implications, Journal of Wuhan University of Technology, 2017, Vol.30, No.02, p. 97.

²⁰ Wende Yang, The History and Future of Macao's Communications Interception Legislation, Gansu Social Sciences, 2022, No.05, p.168.

²¹ Placement of wiretapping of communications in the Code of Criminal Procedure. For example, Chapter 8 of the German Code of Criminal Procedure contains specific provisions on "seizure, interception of telecommunications, scanning investigations and the use of technical means."

²² Provision is made in a comprehensive law that mixes substantive and procedural law.

²³ Establishment of specialized communications interception laws, such as the Act on Communications Interception for Criminal Investigation of Japan.

²⁴ Cui, *supra* note 18, at 118.

on the scope of application of technical investigative measures, conditions for initiation, application procedures, and consequences of procedural sanctions. When the conditions are conducive, the judicial interpretation will be amended in the view of its application, and a separate law will be introduced specifically for the application of measures for the communication wiretapping.²⁵

3.3 Guiding the program design by the principle of necessity

The principle of necessity is the basic rule of law principle of criminal investigation procedures,²⁶ therefore, according to this principle, the institutional design of communication wiretapping should follow the following logic.

First, communication wiretapping can only be applied to a specific range of cases. As the principle of proportionality is one of the elements of the principle of necessity, the application of investigative techniques should be proportional to the seriousness and difficulty of the investigation case, to prevent the use of the most serious violations of rights and interests and the use of investigative techniques to investigate minor criminal offenses, to avoid the phenomenon of imbalance between the effectiveness of the investigation and the loss of rights and interests. Communication wiretapping can only be applied if the former benefits outweigh the latter, after taking into account the national and public interests and the personal interests harmed by communication wiretapping.

Second, based on the infringement of citizens' significant rights and interests and the difficulty of controlling the extent of infringement and the secret nature of communication wiretapping investigation, it should be positioned as the "last resort" of criminal investigation. In comprehensive consideration of the case only in cases where conventional investigation cannot achieve the purpose of investigation, can communication wiretapping be used. This implies that communication wiretapping is the necessary, if not the only, means of obtaining important evidentiary information.

Third, an experienced investigator should determine whether a case requires communication wiretapping to obtain corresponding evidence information. Thus, communication wiretapping should only be applied if it can achieve the purpose of fighting crime.

Fourth, communication wiretapping should not be employed arbitrarily and without restriction; it should be limited to a level of ethical tolerance and prohibited from unreasonably restricting the legitimate rights and interests of those being investigated.²⁷ Therefore, detailed and complete procedures and technical means that can be used in communication wiretapping should be developed to provide guidelines for its specific application by the investigative authorities.

4 The specific program design of communication wiretapping

In the digital age, the right to free development of citizens' personality has been largely inseparable from computers and the Internet, particularly as citizens may exchange much personal information through communication devices, and through access to this information, it is entirely possible to obtain a person's complete personality characteristics.²⁸ Communication wiretapping has the dual attributes of

²⁵ Liu & He, *supra* note 1, at 129.

²⁶ Jinghua Ma, *Exploration of Due Process in Covert Investigations*, *Journal of Shandong Police College*, 2005, No.03, p.73.

²⁷ Ma, *supra* note 26, at 73.

²⁸ He Huang, *On the Legal Regulation of Telecommunications Wiretapping in Germany - A Fundamental Rights-Based Analysis*, *Journal of Comparative Law*, 2017, No.03, p.98.

fighting crime and violating human rights, therefore, the system should be designed along two logical lines of authorization and restriction. However, it should be clear that the investigative authorities have the power to initiate and apply communication wiretapping, which has been clarified such as by the Criminal Procedure Law. Furthermore, regarding the power to limit the application of communication wiretapping by the investigative authorities, as aforementioned, the existing system in China does not have a well-constructed system of power limitation. Communication wiretapping directly interferes with citizens' freedom of communication and the important rights and interests of communication secrecy, and it must build a complete system of applicable conditions, practical procedures, and supervision mechanisms to ensure that the application of this technical investigative measure meets the requirements of a state under the rule of law.

4.1 Determining the scope of communication interception cases under the felony principle

The analysis of the scope of application of communication wiretapping measures in western countries, clearly stipulates that communication wiretapping measures can only be applied to major criminal cases causing serious social harm, that is, the "felony principle."²⁹ It is a manifestation of the modesty of state power to use communication wiretapping measures as carefully as possible, and not to use such investigative measures that seriously infringe upon the basic rights and interests of individuals in crimes causing minor social harm. Under the felony principle, countries (regions) have primarily adopted the following models to determine the scope of communication wiretapping. First, the generalized sentence model; both the French Code of Criminal Procedure and China's own Interception of Communications and Wiretapping Ordinance in Hong Kong SAR determine the scope of communication wiretapping that may be imposed through the range of possible sentences. Second, the enumerated offense model, as implemented in Germany. Third, the hybrid model, which uses a combination of generalized sentences and enumerated crimes, has been adopted in the United States, Japan, and China's Taiwan region.³⁰ The Supreme Court of Japan explained the term "significant crimes" in its decision of 1999,³¹ where it held that one of the elements to determine the constitutionality of communication wiretapping is that the subject of the wiretapping is a major crime. The evaluation criteria for major crimes is not the crime or the statutory penalty, but the judgment is made from the viewpoint of the seriousness of the crime against the national interest and the danger to society. Although this standard of judgment can substantially protect the legitimate rights and interests of citizens, the simple and clear rules can better provide the investigating authorities with guidelines for implementation. Therefore, Japan has adopted a crime plus statutory penalty to limit the scope of communication wiretapping. The first two models are too mechanical. To flexibly apply communication wiretapping and limit the scope of its application, such that it cannot easily violate the important rights and interests of individuals, the third model can be adopted, that is, a model that combines the severity of statutory penalties and the enumeration of crimes.³² Whether the original scope of technical investigation cases should be used or re-established based on the characteristics of communication wiretapping needs to be carefully explored when listing crimes.

²⁹ Liu & He, *supra* note 1, at 131.

³⁰ Yang, *supra* note 20, at 171.

³¹ The Supreme Court's decision of December 16, 1999, Keishu, vol. 53, no. 9, p.1327.

³² Liu & He, *supra* note 1, at 131.

Considering the increasing number of cases involving organized killings and illegal transactions of drugs and weapons, it is difficult to establish the truth without listening to phone calls and other communications between the criminals involved, which makes it legitimate to conduct communication wiretapping in such cases. On the basis of the existing system, the scope of specific cases can be specified as crimes against national security, crimes of terrorist activities, crimes of organizations of triad nature and major drug crimes, crimes of organized homicide and illegal trade in firearms, and non-negligent crimes that fall under the category of crimes that may be sentenced to more than three years of imprisonment.³³ However, from the perspective of separate legislation, the scope of application should be redefined for the characteristics of communication wiretapping, from the perspective of the criminal-like offense. In this regard, we can refer to the Act on Communications Interception for Criminal Investigation of Japan regarding the setting of the scope of communication wiretapping, which appears to expand the scope of communication wiretapping, however, does not, because the elimination of the miscellaneous provisions, even with the additional charges, essentially limits the scope of application.

4.2 Construction of a complete procedure for the initiation, application, and post-event notification of communication wiretapping

As communication wiretapping is related to the freedom and privacy of communications, a fundamental human right, its implementation in a society governed by the rule of law must fully comply with the legal prerequisites, procedures and means and other norms, and should be subject to strict judicial supervision.

First, design the communication wiretapping approval process with reference to the arrest approval process. It will take time to establish a system of judicial review by the courts in our country, however, during the interim period, for adequate power control, a solution path should be explored from the existing judicial system. From the perspective of the positioning of China's procuratorial organs, it belongs to the legal supervision organs, as well as the judicial organs, therefore, the procuratorial organs as the approval authority for communication wiretapping is realistic and feasible. The review and approval of wiretapping warrants can be based on the current procedure of approving arrests by the procuratorial organs in China. The procuratorial authority should strictly examine the strength and scope of the wiretapping investigation, the substantive elements and provide the judicial authority the power to examine and supervise it before and during the process.³⁴ By transferring the approval authority, we can avoid the drawback of overlapping approval and execution authority, and prevent the abuse of communication wiretapping by monitoring the procedure.

Second, the communications monitoring and approval instruments in detail to record the object and scope of monitoring, and monitoring time frame. First, with respect to the subject of the wiretap, there must be considerable reason to believe that he or she is relevant to the suspected facts and likely to exchange criminal information through communications. In the case of telephone tapping, only the telephone number used by the suspect can be tapped. If the suspect changes his telephone number, the investigating authorities should notify the procuratorial authorities and obtain their approval before tapping the new number. Second, regarding the scope of listening, as defined at the beginning of the

³³ Our academics generally consider cases with sentences of three years' imprisonment or more to be felony cases.

³⁴ Li & Wang, *supra* note 19, at 101.

article on communication listening, only communication listening, not conversation listening, such as through the installation of listening devices in the suspect's residence to listen to the conversations of the occupants, including the suspect. The type of coercive measure that listening devices are installed in the suspect's residence and whether it is included in the communication listening measures needs to be discussed separately. However, in this case, conversation listening is not communication listening. Third, on the time limit of wiretapping, which should not be in accordance with the traditional technical investigation "3 months" as the limit, and in view of the unpredictability of communication wiretapping infringement of personal privacy rights, should be shortened. According to Articles 5 and 7 of the Act on Communications Interception for Criminal Investigation of Japan, the time limit for communication wiretapping in Japan is ten days or less, which may be extended at the request of the judicial police or prosecutor, however, cannot exceed a total of 30 days. Although our country does not necessarily copy this duration, the law strictly controls the time limit of communication wiretapping. To determine the duration, the legislature can conduct empirical research, based on the period of useful information obtained by the investigative agencies' communication wiretapping in previous years, to make a setting that meets the reality of crime investigation and prevents too much infringement of personal rights and interests.

Third, technical means are used in the wiretapping process to limit the investigative powers. Against the background of the confidentiality attributes of communication wiretapping, the introduction of technical means to prevent the operation of investigative powers from exceeding the legal boundaries can be considered as one of the options worth considering. In 2016, the Act on Communications Interception for Criminal Investigation of Japan was amended to abolish the previous system whereby communications practitioners must be present to witness the process of communication wiretapping, and to introduce a new mode of wiretapping with encryption technology. Specifically, when it is determined that communication monitoring is to be conducted, transmission equipment is installed at communication carriers, listening equipment is installed at prefectural police stations, and record-playback equipment is installed at district courts. A communications practitioner listens to a specific communication at a specific time pursuant to a communications interception warrant, encrypts the contents of the interception, and transmits them to the investigative authorities. The investigating authorities use the key to decrypt and then play back the content to determine its relation to the crime. The entire process of playing back the contents of the wiretap is automatically recorded to prevent tampering. The investigating or prosecuting authorities submit the original records to the court, which can decrypt and play them back using a key. Although the temporary recording of all information at a given time by communications practitioners has faced some criticism, such as in the case of communications wiretapping,³⁵ it may lead to a relaxation of the relevance of suspected facts. However, finally, such a system was established in consideration of the special nature of wiretapping and the significance of the case. Originally, a system requiring communications practitioners to witness did not exist in our country, and the introduction of technical controls is somewhat feasible.

Fourth, after the communication wiretapping is completed, the person being listened to is informed,

³⁵ In addition, Article 14, subparagraph 2, of the Act on Communications Interception for Criminal Investigation permits "total wiretapping" of foreign-language communications, however, it should be noted that this is also regarded as an exception.

within an appropriate period of time, of the reason and the contents of the wiretap, the manner in which the content of the communication wiretapping is stored, and the purpose for which it is to be used. In this regard, the relevant provisions of Japan's Communication Wiretapping Act can be drawn upon, and the following system design can be conducted in accordance with the specific conditions of our country. Except in cases where there may be circumstances that impede the investigation, the investigating authorities shall, within 30 days of the conclusion of the wiretapping, inform the person who has been wiretapped in writing of the circumstances in which he or she has been wiretapped, and the person who has been wiretapped may apply to the procuratorial authority or the court for a rewire of the wiretapped communication records. The procurator's authority or the court, if it considers that the complaint of the person under wiretapping is justified, shall initiate the investigation procedure and hear the person under wiretapping and his/her defender when they ask for clarification. Simultaneously, the results of the investigation shall be communicated in writing to the person under investigation and his or her defender. Simultaneously, the evidence material obtained through communication wiretapping should be judged, and if it meets the conditions for the exclusion of illegal evidence, it should be excluded.

4.3 Constructing a supervisory mechanism centered on procuratorial supervision

First, as aforementioned, the examination and approval authority for communication wiretapping should simultaneously supervise the operation of this technical investigative measure on the track of the rule of law, abandon the past monitoring model of ex-post facto and selective monitoring, and use communications monitoring as directed. It is noteworthy that because communications occur in real time, it is difficult to determine the content of the wiretapping in advance, and therefore, it is inevitable that authorization for the wiretapping of communications will be granted on the basis of generalized facts of the crime. Despite the emphasis on strict prior approval, there is inevitably a possibility of expansion in the real process of wiretapping. Thus, a neutral third party should supervise the implementation process of communications interception and ensure that the operation of investigative powers does not depart from the legal system. The procuratorial authorities have the right to participate in the entire process of communications wiretapping, to prevent any unlawful wiretapping that exceeds the prescribed limits, and take the appropriate sanctions in accordance with the circumstances of the violation.

Second, prosecutorial oversight may require concessions based on the covert nature of communications wiretapping, however, the investigating authorities must justify the oversight by the prosecuting authorities. Upon completion of the wiretapping, the investigating authorities shall promptly produce a wiretapping report for submission to the procuratorial authorities, which shall examine and retain it.

Finally, the communications monitoring should be included in the annual report on the work of the procuratorate submitted to the National People's Congress. The amended Communications Security and Wiretapping Act of Taiwan in 2014 requires the Ministry of Justice to report annually to the Legislative Yuan on communication wiretapping³⁶. When necessary, the Legislative Yuan may request the Ministry of Justice to report and access relevant information, and the Legislative Yuan may send its staff to the eavesdropping assistance unit to supervise the implementation of communications eavesdropping.

³⁶ Zhanchuan Gao, A Qualitative Assessment of the Recent Reform of the Wiretapping System in Taiwan, *Gansu Social Sciences*, 2016, No.03, p.204.

Moreover, the revised Japanese Communications Interception Act has similar requirements. The Act requires the Japanese government to report annually to the Diet on the number of arrests made through wiretaps.³⁷ In the context of China's judicial system and the system whereby the People's Courts and the People's Procuratorates report annually to the National People's Congress, and in the context of the approval model envisaged in the foregoing, including communications wiretapping in the annual report on the work of the People's Procuratorates to the National People's Congress, implies that former is subject to the supervision of the latter. As communication wiretapping is approved by the procuratorial authorities, it has the duty to guarantee the reasonableness and legality of the application of communication wiretapping, in view of its legal supervisory organs as well as the nature of the judiciary's positioning; and in the absence of judicial review in our country, the best choice is that the procuratorial organs' acts should be subject to the supervision of the National People's Congress. The acceptance of supervision by the National People's Congress, the public work report is in essence to accept the supervision of the entire people, thus forcing the procuratorial organs to prudently authorize the communication wiretapping. Simultaneously, the People's Congress is able to keep abreast of the operation and implementation of communication wiretapping and prepare for the next amendment to the law.

4.4 Conditional recognition of evidentiary material in a separate case obtained through communications interception

Absolute and unconditional approval of the communication wiretapping for the acquisition of evidence materials of another case and the total denial of the admissibility of evidence materials are not operable; the former may lead the investigative organs to abuse the communication wiretapping to acquire materials of another case and the latter ignores the fight against the reality of major crimes. Determining a compromise between the two is a better choice. Conditionally recognizing the admissibility of evidence in another case is the best choice based on the protection of rights, the norms of power, and the needs of reality, that is, in consideration of relevance, necessity and legitimacy, the evidentiary value of the evidence in another case is recognized within the appropriate scope.

In the case where material of another case is obtained through the communications interception measures, the evidentiary attributes of the material may be recognized on the basis of the principle of relevance, that is, the homogeneity of the suspects. With regard to the acquisition of materials relating to the criminal suspicion of a third person other than the suspect, the evidentiary attributes of the materials shall be recognized only if the criminal suspicion of the third person falls within the scope of cases to which technical investigation is applicable as expressly provided for by the law; otherwise, the materials shall not be used. It is noteworthy that the admissibility of these materials is subject to the legality of the procedure for initiating communication wiretapping measures, and cannot be recognized in the case of unlawful communication wiretapping.³⁸ However, the investigative process is dynamic in nature, and some of the crimes are gradually being clarified as the investigation progresses, so that a blanket denial of the admissibility of materials obtained through illegal communication wiretapping is not in accordance

³⁷ Article 36 of the Act on Communications Interception for Criminal Investigation.

³⁸ Hua Guo, Examination of the Use of Material Obtained Outside of Wiretap Writs as Evidence in the United States and Germany—An Examination of Article 152 and Paragraph 3 of Article 150 of the Criminal Procedure Law of China, *Global Law Review*, 2013, Vol.35, No.04, p.31.

with the reality of the investigation. Tolerating procedural defects within a reasonable range is a relatively reasonable choice for balancing crime-fighting and human rights protection. Specifically, in the case of communication wiretapping, which falls within the scope of technical investigative measures that can be applied, the only problems are related to the flaws in the approval process that do not seriously affect the administration of justice, and after procedural remedies or corrections can continue to be used. Thus, the evidence of another case obtained by communication wiretapping cannot, in principle, be used as evidence for the conviction and sentencing of the case, however, if it has relevance to the case to which communication wiretapping can be applied, its admissibility should be recognized.

In the event that the investigating authority obtains evidentiary information on another case by chance, it shall expedite (within three days) the retroactive approval procedure; only by obtaining the approval authority's post facto approval can the obtained evidentiary information on another case be used as evidence, otherwise, it cannot be used as the basis for the conviction of another crime.

Afterthought

Communication wiretapping is implemented for the purpose of efficiently combating crime, diversifying investigative techniques, and preventing over-reliance on interrogation measures to obtain confessions from suspects. However, under the current law, the results of wiretapping are in most cases not used as evidence in trials, but as a means of obtaining confessions from suspects during interrogations.³⁹ This may create the concern that communication wiretapping may be used flexibly as a means of obtaining suspect confessions (primarily confessions of guilt) and witness statements, simultaneously making it difficult to escape from the subjective tendency to focus on obtaining suspect confessions at the investigative stage. From the perspective of reforming the system to promote trial-centered litigation, whether enhancing the investigative authority of the investigating agency has produced a positive effect should be further explored. Simultaneously, in addition to the problem of institutional design of communication wiretapping, the problem of how to apply the evidentiary material obtained from communication wiretapping in the law of evidence exists (or whether the legality of the source of an evidence affects the use of the evidence obtained), which needs to be carefully explored.

³⁹ Cheng, *supra* note 2, at 170.