Miscarriages of Justice and the Construction of Criminality in the People's Republic of China

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Abstract

Another high-profile miscarriage of justice was reported recently by the media in China, highlighting widespread issues concerning torture and other police malpractices within the Chinese criminal justice system. Drawing from analysis in my book on the *Construction of Guilt in China*, this Note outlines the key drawbacks of the Chinese criminal process which contribute to wrongful convictions, namely that none of the legal institutions exhibits the autonomy to check the credibility of the evidence impartially. Alongside the problems caused by miscarriages of justice, they are also indicative of the symptoms of a weak criminal justice system, thereby opening up opportunities for future reforms.

Keywords: miscarriages of justice; China; criminal justice; case construction.

[A] INTRODUCTION: ANOTHER MISCARRIAGE OF JUSTICE

From the early 2000s, wrongful conviction cases have often been newspaper fodder in China. As many as 180 cases in which innocent people were falsely convicted of serious crimes have been reported by the media over the last two decades. In August 2020, the Chinese media headlined another quashed wrongful conviction. This time, the victim of the miscarriage of justice, Zhang Yuhuan, achieved a record—he was China's longest-serving wrongfully convicted inmate, having spent 27 years within a prison in Jiangxi Province. Zhang Yuhuan was convicted in 1995 of murdering two boys, whose bodies were found in a local reservoir. Like many other wrongful convictions, the key evidence which

the prosecution relied upon was Zhang's confessions (Xinhua Net 2020). There were six versions of his confession, providing inconsistent details of the crime scene, weapons used and his motivations. These confessions were later proved to be elicited by torture which entailed a deprivation of sleep, physical violence and quadriceps savaged by a trained police dog (Pengpai 2020). The retrial judgment announced by the Jiangxi High Court declares that the confession evidence was 'irrelevant (*quefa guanlianxing*)', 'lacked exclusiveness (*buju paitaxing*)' and was not 'reliable enough' (*zhenshixing cunyi*) to support the conviction of Zhang. This final evaluation confirmed the harm caused by torture, police brutality and other malpractices in the Chinese criminal justice system.

[B] CONSTRUCTING THE CASE FOR THE PROSECUTION

Despite the exceedingly long-term incarceration of the innocent man, the case of *Zhang Yuhuan* (2019) is in many ways a 'typical' miscarriage of justice case in China. In this instance, we can find the shared pattern of fallibility in which cases are routinely processed and develop into wrongful convictions. In my book on the construction of guilt in China, I have analysed how these wrongful convictions have come about (Mou 2020: 3-18). Whilst it is true that the origins of most miscarriages of justice can be traced to the early stages of the police investigations, these cases demonstrate the functional deficiency of the criminal justice system as a whole in preventing innocent individuals from being wrongly accused and convicted. It should be noted that all criminal cases are primarily constructed by the police and, to a lesser extent, the prosecutor. The case construction is not limited to a certain aspect of the process (such as recording interrogation records, witness statements or compiling forensic analysis). It infuses 'every action and activity of official actors from the initial selection of the suspect to final case disposition' (McConville & Ors 1992: 12). In most circumstances, the way in which a prosecution case is presented has been a joint effort of the police and the prosecutor.

The way cases are constructed in mainland China today is therefore a very important issue. Article 200 of Criminal Procedure Law 2018 states that, in order to convict the defendant, the *corpus delicti* must be clear and the incriminating evidence should be reliable and sufficient (*zhengju queshi chongfen*). This Article, interpreted by the Supreme People's Court, requires an establishment of a chain of inculpatory evidence,

pointing to the same facts without reasonable doubt.[1] This is known as the corroboration rule (*yinzheng zhengming yuanze*), according to which a conviction should be based on facts of the prosecution case which are supported by corroborating evidence. In carrying out their investigation function, the police must engage in activities that acquire, select, reject and edit evidence in such a way as to ensure that all evidence in a case is consistent and points to the guilt of the accused without reasonable doubt. Once the prosecution case has been constructed by the police, the case dossier containing all the evidence is then transferred to a prosecutor, who is responsible for evaluating the strength and persuasiveness of the police case and decides whether a supplementary investigation is needed. The prosecutor will then carry out a series of actions, including a thorough examination of the case dossier, interrogating the suspect, interviewing the victim and witnesses, if needed, and drafting a case report on her decisions. The review process is designed to facilitate prosecutors to reach a rational decision on whether the case should proceed to trial. Although prosecutors are often portrayed as guardians who ensure the correct enforcement of law under the Chinese Criminal Procedure Law (Article 104 of the Criminal Procedure Law 2018), in reality they are mostly concerned with conviction rates. Their oversight of the police's case is usually lost from view by pressures to secure guilty pleas, to tidy up dubious statements or inconsistencies, and to maximize the chances of conviction.

[C] IN WANT OF FAIR TRIALS

While the courts demonstrate laudable courage to correct the wrongs of their own making in cases like the *Zhang Yuhuan* case, the sheer number of wrongful convictions revealed and quashed in the last two decades strongly suggests that the judiciary has failed to serve as the last bastion against injustice (He 2016). It has long been acknowledged that the concept of the Iron Triangle[2]—the coalition of the police, the procuratorate and the judiciary—defines the criminal process in China, leaving the defence with

[1] See Article 104 of Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China 2012: 'the truthfulness of a piece of evidence shall be examined by taking into consideration the overall evidence of a case. The strength of a piece of evidence to prove a fact shall be examined and judged based on actual circumstances from the perspectives of the degree of relevance between the evidence and the fact to be proved, and the linkage between different pieces of evidence. A piece of evidence shall be admitted as the basis for deciding a case only if: it is inherently related to other pieces of evidence; it and other pieces of evidence all point to the same fact to be proved; and there is neither any irremovable contradiction nor any inexplicable question.'

[2] In China, the three criminal justice institutions have dominated the criminal process. They are known as being of 'the same family', collaborating and protecting one another.

little standing, status or influence within the system (Nesossi & Trevaskes 2018). Indeed, defence lawyers have played a robust role in reopening and quashing the convictions in the reported miscarriages of justice. But their input in the initial critical trial phase has often been absent. In the case of *Zhang Yuhuan*, no defence lawyer was appointed to defend the accused, although the law had made it clear that it was the court's duty to notify a legal aid agency and to designate a defence lawyer in representing a defendant who might be sentenced to life imprisonment or the death penalty (Article 34 of Criminal Procedure Law 2018). This omission of the judiciary, luckily, was too significant a procedural irregularity to be ignored, which enabled the case to be reopened (Pengpai 2020).

It is worth noting that miscarriages of justice are certainly not limited to major and influential cases. There are a vast number of 'ordinary' cases which are treated in an equally unfair (if not worse) manner as those serious cases being reported. These 'ordinary' cases may not be interesting enough to attract public attention, and therefore may never be reported by the media. They are sometimes considered less important because the suspect is not of significant social standing, or the offence does not carry a long-term of imprisonment or the death penalty. All victims of miscarriages of justice, however, suffer similar long-lasting consequences. The implications of miscarriages of justice include and are not limited to: an imposition of unnecessary pain and psychological trauma on the falsely accused individuals and their families; a waste of resources of the criminal justice system; a jeopardized safety level of the public at large if the real perpetrator was not apprehended; undermining the legitimacy of the criminal justice system; distortion of the popular beliefs about crime through the dissemination of inaccurate information (Cole 2009); and the irreversible outcome of lost lives in jurisdictions where the death penalty still widely applies, as in China. Amongst the damage that can be enumerated, the moral harm caused by the conviction of an innocent person to society has the most far-reaching impact and is the hardest to repair (Choo 1996).

[D] OPPORTUNITIES FOR CRIMINAL JUSTICE REFORMS

Despite the dangers and harm caused by miscarriages of justice, it is undeniable that they are also symptoms of a weak criminal justice system. They may signify the underlying 'unhealthy condition' of the system which needs urgent treatment. In the past, high-profile miscarriages of justice have produced many reforms of criminal justice. In the UK, for

example, the establishment of the Criminal Cases Review Commission, the statutory body responsible for investigating miscarriages of justice in England, Wales and Northern Ireland, was a direct product of a number of convictions exposed as wrongful in the 1970s.[3] These miscarriages of justice also prompted the setting-up of the Crown Prosecution Service and a national duty solicitor scheme for providing legal advice to suspects in police stations. These reform measures have now become an integral part of the criminal justice system in England and Wales. In the context of mainland China today, miscarriages of justice also have widespread repercussions. Perhaps the most prominent of these have been two revisions of Criminal Procedure Law, which occurred in fairly quick succession, in 2012 and 2018 respectively. New measures, such as synchronized video-recording during interrogation were introduced to prohibit torture and other police malpractice (Article 121 of Criminal Procedure Law 2012; Article 123 of Criminal Procedure Law 2018).[4] Exclusionary rules have also been incorporated in criminal procedure law.[5] To date, the effect of these reform measures has been conspicuously disheartening.

Using the exclusionary rule of evidence as an example, studies have found that the evidential threshold for triggering and surviving the exclusionary procedure is particularly high. Evidence to be admitted in order to open the exclusionary inquiry is expected to satisfy the tough requirement that proves the direct link between misconduct of the police officer and the procedural irregularity. Although the burden to prove the source of illegally obtained evidence is on the prosecution, this burden of proof has often unwittingly been shifted to the defence, which was invariably asked to offer critical information on the names of the interrogators, when, where and how the torture took place, the disputed intended content, etc (Zhang 2015). Even if the illegally obtained evidence in question was excluded, there was no guarantee of an outcome in favour of the defendant. Ye and Wu's (2015) and Xu and Fang's (2016) research show that none of the cases in which unlawfully obtained evidence was excluded ended with acquittal in their samples. Similarly, other studies have persistently found that video-recordings produced by the police have

[3] These wrongful convictions include the Guildford Four (1974), the Birmingham Six (1975), the Maguire Seven (1976) and Judith Ward (1974).

[4] Also, video-recording mainly applies to serious crimes, including crimes in which defendants might be sentenced to the death penalty or life imprisonment. According to the police reform agenda, video-recording during the police interrogation will gradually be applied to all criminal cases in China.

[5] Article 56 of Civil Procedure Law 2018 (Article 54 of Civil Procedure Law 2012) states that 'confessions by a suspect extorted through torture and other illegal means should be excluded'.

regularly been tampered with. They were either edited, did not record the entire interrogation session, or were directed in such a way that the interrogation was apparently rehearsed, failing to effectively constrain police behaviours (Ma 2015).

[E] CONCLUSION

Clearly, there has been a strong resistance within the criminal justice system to meaningfully implementing the reform measures. The criminal justice institutions have, it would seem, continued to fail to effectively prevent innocents from being convicted and punished. Changing the law, in this sense, has not in any significant way transformed the behaviour of the police and courtroom actors in ordinary, everyday cases. A new round of criminal justice reform may have been initiated to emphasis the harm of and to prevent miscarriages of justice. But the new reform measures, given the context of continuing policies and practices, will likely not impact significantly on the legal culture of the system, so that meaningful change is frustrated.

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