



CHINA'S CRIMINAL JUSTICE REFORMS: IMPACTS ON THE PREVENTION OF MISCARRIAGES OF JUSTICE

- *The widespread cases of miscarriages of justice in China - in the form of wrongful convictions and procedural abuses – have revealed deep flaws in the country's criminal justice system.*
- *Such injustices have been a core challenge for the Chinese political leadership, as they have undermined the public's confidence in legal institutions.*
- *Chinese authorities have enacted substantial reforms of the Criminal Law and its procedure in 2012 to remedy shortcomings and improve the protection of defendants' due process rights in litigation.*
- *While those efforts have allowed for advances in principle, the impact of the reform has been limited by the lack of judicial enforcement and persisting institutional and structural deficiencies.*

Introduction

The promulgation of the Criminal Law and Criminal Procedure Law (CPL) of the People's Republic of China (PRC) in 1979 represented an important turning point in the country's legal history, laying out the initial foundations for the development of a comprehensive criminal justice system. One of the key challenges faced by the Chinese leadership, however, has been to adapt and re-adjust criminal legislation to reflect the deep socio-economic changes that the country has experienced over its four decades of reform and opening up, but also to respond to calls from civil society to strengthen the rule of law as well as fundamental human rights.

Over the past decades, the disclosure by Chinese media of a series of judicial scandals involving miscarriages of justice (yuan an cuo an 冤案错案) have highlighted inherent inefficiencies and rigidities in China's current judicial system, creating new momentum for legal transformation. Those injustices have generated demands - from both the society and legal experts - for the construction of a legal framework that will ensure greater fairness and justice in criminal proceedings.

With a view to addressing those concerns, China has initiated a large-scale judicial reform drive, which featured a major revision of the Criminal Procedure Law in 2012. However, flaws in conception and

obstacles in implementation have limited the impact of the reform. Deeper and more substantive changes in China's approach to criminal law are therefore called for.

This backgrounder provides a brief overview of the development of criminal justice in China and illustrates what the current state of affairs is today. It examines the major shortcomings of the criminal justice system, which have led to miscarriages of justice – including violations of defendants' rights and wrongful convictions - through the examination of landmark criminal cases. Finally, taking stock of the 2012 amendment to the Criminal Procedure Law, it discusses how the Chinese leadership has sought to correct those inefficiencies.

The Development of China's Criminal Justice System: A Historical Perspective

The Maoist Era (1949-1977)

After the Communist Party of China (CPC) seized power in 1949, Chairman Mao Zedong abolished the existing legal system established by the Nationalist government, therefore creating a legal vacuum in the newly established PRC.¹ A patchwork of criminal laws and regulations were put in place by the new political leadership, essentially guided by ideological imperatives. Eliminating “counter-revolutionary,” “rightist” or “bourgeois” elements became the priority in criminal law. Initial steps towards the establishment of a rationalized and unified judicial system only began in the mid-1950s.

In September 1954, during the inaugural session of the National People's Congress (NPC), China promulgated its first constitution, as well as the Organic Law of the People's Courts and the Organic Law People's Procuratorates.² The Legal System Committee of the Central People's Government and the NPC coordinated the legislative process in view of the elaboration of a Criminal Code, which culminated in the adoption of the 22nd draft by the National People's Congress in 1957.³ Those efforts were nevertheless halted by the anti-rightist

movement in 1957 and the Great Leap Forward (GLF) in 1958.⁴

In 1961, following the failures of the GLF, China adopted new reforms which aimed at transitioning from a command to a commodity economy. This program mandated the need to rebuild “law and order”, leading to a second wave of efforts in the legislative construction process. However, renewed political instability cut them short: the four clean-ups movement (1963-1965) and the launch of the Cultural Revolution (1966-1976) virtually nullified existing laws and legal institutions.⁵

The Reform and Opening Era (1978-1996)

The onset of the Reforms and Opening-up Policy, launched by Deng Xiaoping in 1978, marked an important rupture with the period of legal nihilism that characterized the Maoist era. The focus shifted from class struggle towards economic development and socialist modernization, paving the way for the establishment of a new comprehensive legal system. The reason for this new direction was that the leadership was intimately convinced that the arbitrariness of Mao's “strongman rule” was a root cause for the failures the country encountered during that period. Therefore, Deng's “Two Hands policy” prescribed that the law was to serve as a tool to restore order and social stability, both considered as pre-requisites for economic development.⁶

In 1979, during the second session of the 5th NPC, China eventually enacted the fundamental laws which form the basis of its current legal system, including the Criminal Law of the PRC and the Criminal Procedure Law of the PRC, which entered into force on January 01, 1980.⁷ To ensure the correct and effective implementation of these new legislations, the CPC issued “Document No. 64” in September 1979, after the Third Plenary Session of the 11th CPC Central Committee, which laid the foundation for the strategy of “governing the country according to the law and building a socialist country ruled by law”.⁸

While the promulgation of these laws represented

significant progress in terms of setting the scope of punishable acts and regularizing the sanction process, the legislation remained predominantly political and repressive in nature. Increasingly, it became apparent that the 1979 Criminal Procedure Law did not only fail to provide for human rights protection, but equally did not meet the practical needs for procedural justice that the rapidly developing socialist market economy called for.

Modern Era (1996-Present)

To meet the new socio-economic realities, a revision of the Criminal Procedure Law was put on the agenda in the late 1980s. In March 1996, the CPL was comprehensively amended - and promulgated on January 01, 1997 - with the aim to establish a modernized legal framework more in harmony with international legal norms.

China moved away from its traditional inquisitorial system, introducing court proceedings in which the defense is permitted to challenge the prosecution, and in which the judge has a more passive and

neutral role. Moreover, this revision strengthened the judicial protection of the rights and interests of criminal suspects, defendants and victims in litigation. It established the notion of “Nullum crimen, nulla poena sine lege”,⁹ which allowed for the abandonment of the notion of “crimes by analogy”. It also introduced the principles of “equality before the law” and “proportionality”, as well as revoked the “counter-revolutionary” crimes classification.¹⁰

Thus, since the founding of the People’s Republic of China, the approach to criminal law has gradually evolved. It is no longer a strictly punitive and repressive revolutionary tool. Legality and the protection of procedural rights are held in greater respect. Yet, despite this positive trend, abuses and miscarriages of justice have nevertheless remained commonplace in criminal proceedings, as demonstrated by the disclosure of several high-profile judicial scandals in recent years.

Figure 1. The Development of China’s Criminal Legislation



Shortcomings in Criminal Proceedings

The Chinese legal system remains associated with abuses and unfair practices, especially in the administration of criminal justice. Wrongful conviction cases such as the ones of Zhao Zuohai, She Xianglin, Du Peiwu, Huugilt or Nie Shubin feature among the many that have sparked a public outcry and undermined the public's confidence in judicial institutions. The miscarriages of justice are above all the result of institutional and structural shortcomings, but the fair and equal administration of justice and the protection of defendants' rights in criminal proceedings have also been impeded by informal rules.

Weakened Institutional Restraints Among Judiciary Organs

The main entities involved in the administration of justice in China are the People's courts, the People's procuratorates and the public security organs (including police forces and state agencies).

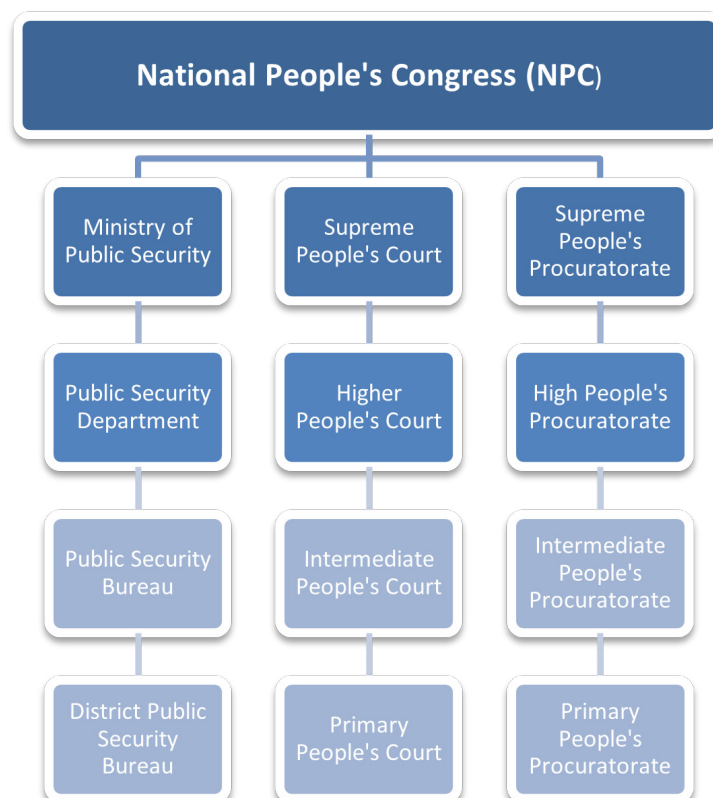
The Chinese court system is divided into four levels. The Supreme People's Court *zui gao renmin fayuan* 最高人民法院 (SPC) is the highest judicial organ at the state level and reports directly to the National People's Congress (NPC) and its Standing Committee (NPCSC), which retains the rights of appointment or removal of its constituents. In contrast to Western court systems, the Supreme People's Court does not supervise the compliance of laws with the constitution, a responsibility which lies with the NPC. Nevertheless, the SPC covers several other important jurisdictional functions such as conducting trials for first-hearing cases, appeals and protests against trials decisions; and giving approval to death sentences. It is also responsible for supervising the administration of justice in the lower courts at all levels – i.e. the Higher People's Courts *gaoji renmin fayuan* 高级人民法院, the Intermediate People's Courts *zhongji renmin fayuan* 中级人民法院 and the Primary People's Courts *qiceng renmin fayuan* 基层人民法院. In parallel, Special People's courts exercise jurisdiction over

specific fields (e.g. maritime, corruption, or military related cases). In contrast with most Western legal traditions, China does not possess any formal system of precedent or jurisprudence. Instead, the SPC ensures a consistent application of the law by prosecutors and judges through its power of judicial interpretation which essentially enables the body to issue specific guidance and recommendations on the implementation of the law.

The People's Procuratorates serve as both the state's legal supervision and prosecutorial organ. The Supreme People's Procuratorate (SPP) (*zui gao renmin chayuan* 最高人民检察院) exercises powers at the central level, while local people's procuratorates have jurisdiction at the provincial and lower levels. Military procuratorates and other specialized People's procuratorates work on special cases. The SPP can exercise prosecutorial powers in cases of “endangering national security, endangering public security, infringing citizens' personal rights and democratic rights, and other major criminal cases”. It is also in charge of reviewing cases investigated by the public security organs and decides whether to arrest and prosecute suspects. It supervises whether the activities of public security organs, people's courts, prisons, and detention centers are conducted in a legal manner. If the Supreme People's Procuratorate uncovers errors in a legally effective judgment or order of a people's court at any level, it has the responsibility to file a protest in accordance with the procedure of judicial supervision.

The public security organs refer to the civilian police forces operating under the jurisdiction of the Ministry of Public Security,¹¹ which account for the vast majority (86 percent)¹² of the country's police forces. The main duties of the public security police include investigating criminal cases and managing detention centers. Investigations into a criminal offense are generally handled by local public security bureaus (*gong an ju* 公安局)- government offices that act as police stations and are affiliated with the Ministry of Public Security - after a complaint is filed by the authorities or individuals who have constated an infraction. When public security organs find that

Figure 2. Organizational Chart: China's Judicial System



the matter may constitute a crime, a case is filed with the procuratorate, which then proceeds to conduct the review and approval processes.

According to Article 7 of the Criminal Procedure Law, the three main judiciary institutions are supposed to “divide responsibilities, coordinate their efforts and check on each other to ensure the correct and effective enforcement of law”.¹³ However, the institutional restraints prescribed by law are not respected in practice. The organs often form a collusive “iron triangle”, collaborating extremely closely without effective checks and balances. The search for consensus between these organs tends to obstruct justice.¹⁴

Given that the evaluation performance system for law enforcers is tied to indicators such as arrests, guilty-verdicts, and convictions rates, the three organs are pressured to punish severely and hastily simply to

meet quotas. Even in doubtful cases or where the evidence produced is unclear, the tendency has been to convict suspects while offering a lighter sentence, instead of granting exoneration.

The system also facilitates abuses from the public security organs by granting them excessive power compared to that of the prosecution and the courts. The police can unilaterally make decisions regarding arrest and detention – without having a warrant from the courts - and even secretly interrogate suspects for up to 37 days¹⁵ before the procuratorate formally approves their arrest.¹⁶

The procuratorates and the courts tend to simply ratify the decisions that have already been made during the investigation and detention phases. The double function of the People’s procuratorate as a prosecutorial and state supervisory organ can interfere with the neutrality of the trial. Combined

with what still largely remains an inquisitorial system, the continued hold of the presumption of guilt as a legal tradition leads to numerous wrongful convictions.

Party Domination Over the Judiciary

Judicial independence, as a pre-condition for impartiality, is a fundamental principle codified in most Western legal systems and recognized by international conventions. According to international norms, this independence shall apply to both the court and the judges.

China, by contrast, rejects the system of separation of powers which ensures necessary checks and balances between the executive, the legislative and the judiciary branches.¹⁷ Instead, it prescribes the system of “democratic centralism”¹⁸ in judicial decision-making, whereby “the minority is subordinated to the majority, the lower to the higher, the individual to the organization and the locality to the center”.¹⁹ This principle has strongly influenced the construction of its legal system and shaped the relationship between judiciary and party organs. Judiciary organs in China are subject to the strict control of the CPC. This absence of judicial independence has been recognized by legal experts as a major problem in the country’s criminal justice system. It has been pointed out that the interconnection of politics and law impedes a proper judicial process and facilitates abuse.

In theory, Article 4 of the CPL states that the “People’s courts shall exercise judicial power independently, in accordance with the provisions of the law, and shall not be subject to interference by any administrative organ, public organization or individual”.²⁰ In reality, however, the CPC retains means of supervision and control over all judicial decision-making through Party Committees installed within the courts. Additionally, judicial organs at all levels operate under the strict leadership of the Central Political-Legal Committee (zhengfa weiyuanhui 政法委员会) and its local counterparts, which oversee the implementation of party policies in the judiciary sphere and supervise the work of judicial organs. The

political-legal committees (PLCs) typically intervene in cases deemed socially or politically sensitive, or in case the three judicial organs cannot reach a consensus. However, PLCs leaders do not always have the necessary legal expertise. The head of the PLC also often concurrently serves as the local public security chief, creating obvious conflicts of interests.

Further, the law states that the courts must report directly to the Standing Committee of the National People’s Congress (NPCSC). The NPCSC is given extended powers that allows the body to appoint and remove the presidents, judges, and judicial committee members of the Supreme People’s Court. Lower level courts are under the supervision of the local People’s Congresses, which have decision-making powers regarding the allocation of budgets and the appointment, promotion, or removal of judges. This configuration makes it difficult for courts to fight off interferences from governmental organs and has led to problems in terms of local protectionism. In several cases, local party officials have covered up wrongful convictions. In some cases, they have continued to do so, even after the real culprit was found.

A notable example is the landmark case of Nie Shubin. In 1995, Nie became the main suspect in a case involving the rape and murder of a young woman in Shijiazhuang, Hebei province. He received a death sentence in first instance trial and was executed the same year. However, ten years later, the truth behind the case came to light when serial killer Wang Shujin confessed to the same crime.²¹ Yet, Nie’s exoneration remained complicated, as the local political and judicial leadership in Hebei deemed that admitting their mistake and reversing the verdict would be too costly for them. Wang was eventually tried but not convicted, despite repeatedly pleading guilty. Nie’s exoneration was only possible in 2016 when the then Party chief of Hebei, Zhou Benshun, and the head of the political-legal committee of Hebei, Zhang Yue, who had been key figures opposing a review of the case, were removed and put under investigation for corruption.²² The case proved that too often local police authorities, procuratorates, and politico-legal committees align to protect their mutual interests at

the expense of justice. In the face of the inertia of the political-legal system, the lower courts lack the power to prevent such miscarriages of justice.

Police Misconduct and Procedural Abuses

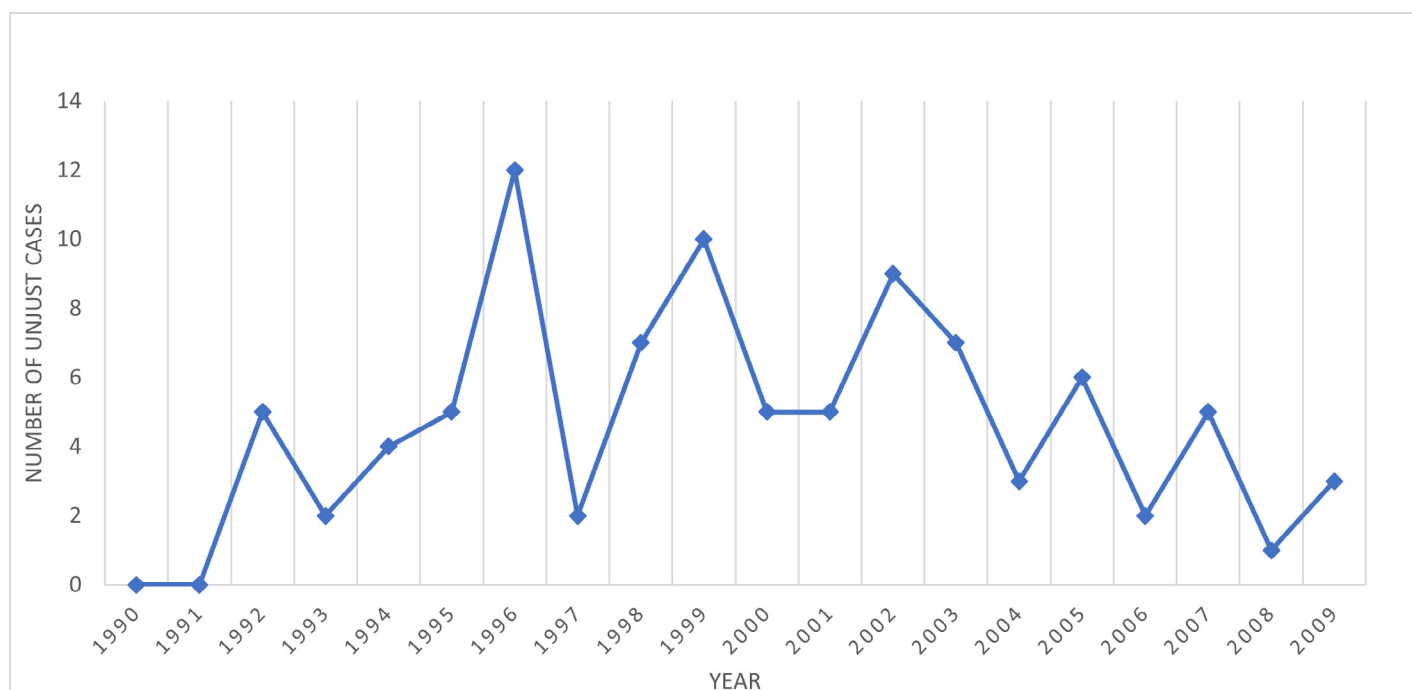
Despite legal provisions prohibiting the practice in the CPL (Article 43), the use of torture on suspects has been an enduring concern in China's criminal justice system. Mistreatments are most frequent during the interrogation phase, as police officers are conditioned to use all means to extract confessions, which remain the predominant basis for convictions. As was noted above, Chinese law enforcers tend to be guided by a "presumption of guilt," which has a negative effect on how they treat suspects.

As a result of police abuses, suspicious cases of deaths in custody are commonplace. Police officers often resort to unlikely excuses to cover-up cases of

misconduct. For instance, in the 2010 Wang Yahui case, officers stated his death resulted from "drinking boiled water" (he kaishui si 喝开水死).²³ In the Li Qiaoming and Li Wenyuan cases, suspects were claimed to have died from "playing hide and seek" (duo mao mao 躲猫猫)²⁴ and "having a nightmare"²⁵ (zuo meng 做噩梦) respectively.

A consequence of the systematic use of torture is the issue of coerced-compliant confessions, whereby innocent suspects falsely confess in order to avoid torture or mistreatment. This problem is exacerbated by the practice of "leniency for those who confess and severity for those who resist" (tanbai cong kuan, kangju cong yan 坦白从宽, 抗拒从严) (Article 67) which encourages suspects to come forward with false confessions. Conversely, when defendants refuse to plead guilty, this works against them, as the courts then impose more severe punishments.²⁶

Figure 3. Reported Judicial Errors in Capital Punishment Cases (1990-2009)



Chinese legal experts estimate that over 80 percent of wrongful convictions are the result of coerced compliant confessions. A study from 2008, which analyzed 57 wrongful convictions, found that 95 percent of such cases were due to confessions obtained by torture.²⁷ The cases of She Xianglin and Zhao Zuohai are two notable examples. In 1995, security guard She Xianglin was convicted for murdering his wife Zhang Zaiyu, who had mysteriously disappeared. Zhang had in fact secretly left and remarried in another province. Mr. She was arrested by local police after the discovery of a cadaver in the same village that was identified as his wife based on “probable similarities”. The police coerced him into confessing under torture, a confession which Mr. She unsuccessfully attempted to revoke. Factual evidence recovered by the suspect’s family was ignored by the prosecutors, and two relatives ended up being arrested for repeated appeals to the case. Mr. She only obtained a re-trial eleven years later when his wife returned to the village, and he was subsequently released.²⁸

Meanwhile, Zhao Zuohai, a farmer from Henan province, was accused of murdering a fellow villager, Zhang Zhenshang, with whom he had had a violent argument. Zhao confessed to the crime after being tortured by police officials and received a death sentence, which was eventually changed into a reprieve of 29 years in prison. Zhao was incarcerated for 11 years only to be proven innocent when his presumed victim turned up alive. In both cases the investigators resorted to torture to extract confessions, and made major errors during the investigation, especially regarding identification and inspection of the victim.²⁹

Further, such miscarriages of justice have been problematic given China’s over-reliance on the death penalty as a criminal punishment. While the exact number of executions is uncertain due to the lack of transparency, statistics from the Dui Hua Foundation estimated them to stand at around 5,000 in 2009 and 2,400 in 2013.³⁰ Despite a downward trend, China remains the leading executioner in the world.³¹

Defendants accused of capital crimes are most likely to receive a death sentence in the first instance trial, often from judges who have weak legal competences and who prioritize political imperatives over the rule of law. Appeal procedures are often limited to a simple closed-door administrative procedure and the tribunal that rejects the appeal is also the one that proceeds to the final examination and confirmation of the execution order. While Zhao Zuohai and She Xianglin escaped death after the reappearance of their presumed victims had proved their innocence, others such as Nie Shubin have not been as fortunate. In the Huugilt case, incompetent criminal examination and illegal procedural measures resulted in the execution of a teenager who was wrongly accused of raping and murdering a woman.³²

Weak Legal Defense Representation and Rights

The right to competent and timely legal counsel and representation is key to ensuring fairness in the administration of criminal justice. In theory, provisions in the Chinese CPL guarantee the rights of defense, even though in practice access to legal counsel or representation tends to be difficult for defendants, therefore facilitating abuses and procedural violations. In about 90 percent of cases, litigants in China still do not have a lawyer or defender, and it is estimated that about 800 million cannot afford lawyers’ fees.³³

The proportion of lawyers participating in criminal defense remains quite low; considered to be less than 30 percent.³⁴ This problem partly stems from the deep entrenchment of the legal community within the political establishment. Chinese lawyers prefer to take up economic or civil cases because defenders involved in public interest or politically sensitive criminal cases risk facing harassment, judicial retaliation, detention, or the revocation of their legal licenses by the government or local CPC organs.

Further, the judicial system tends to give an asymmetric advantage to the prosecution. During both the pre-trial and trial stages, the defense has access to very limited evidence, while the

prosecutorial organ has a monopoly on evidence information that further bolsters its advantage in court hearings. This information monopoly poses difficulties to defenders in their exercise and can also cast doubt on the prosecution's case, given that information which undermines its allegations can be willfully retained or ignored. Since 1997, Article 306 of the Criminal Law also allows authorities to prosecute criminal lawyers on account of perjury, a charge that has often been abused to intimidate lawyers and constrain their rights.³⁵

The Long Road Towards Remediating Miscarriages of Justice

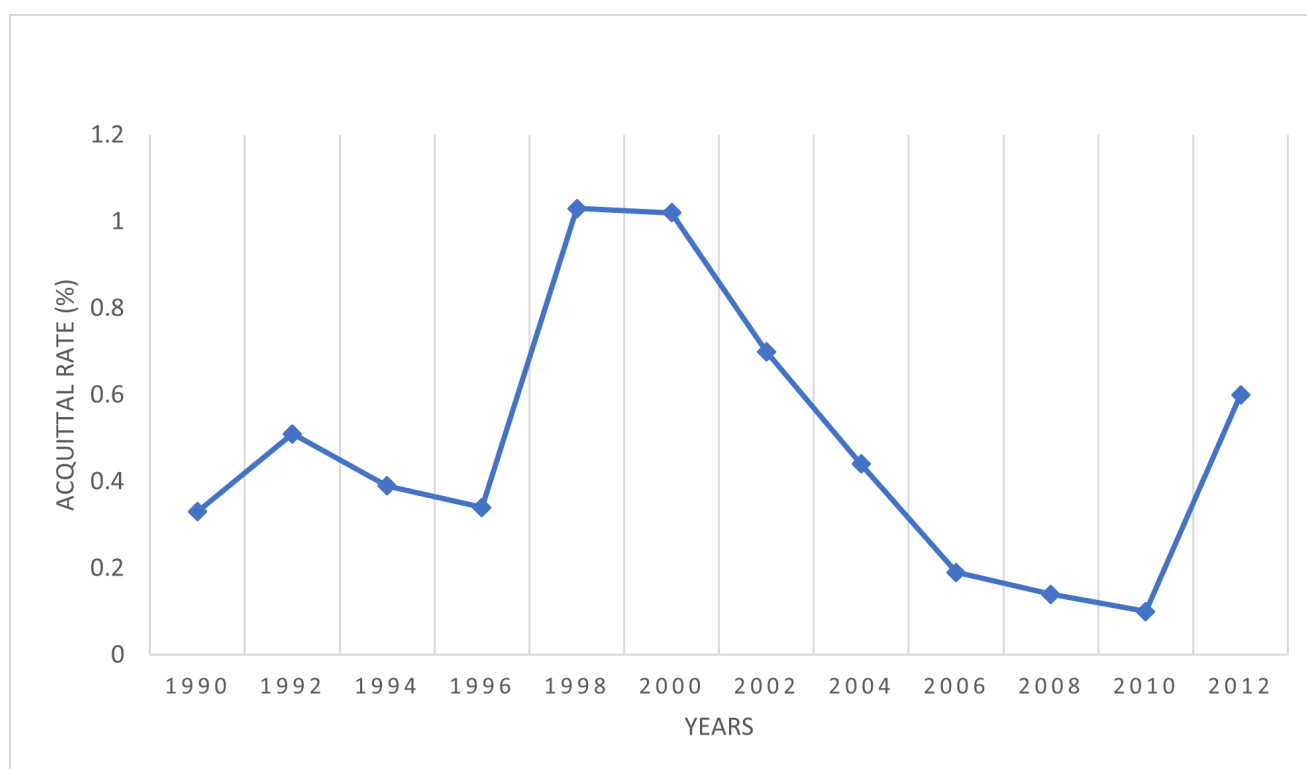
The exposure of the inherent flaws in China's criminal justice system has been of growing concern for the Chinese political elite. Miscarriages of justice undermine the efforts to shore up public confidence in the legal system and erode trust in the regime itself. The Chinese government has therefore launched substantial reforms of the criminal law and procedures, which have introduced improvements in principle.

Following multiple rounds of deliberations, on March 14, 2012, the NPCSC adopted amendment eight to the CPL, enacted on January 01, 2013. The inclusion of the caveat to "respect and protect human rights" in the general provisions of the law was touted as a significant step: it signaled that the detainees' and defendants' rights are to be protected.³⁶ The amendment brought positive changes on three main axes, introducing rules for the exclusion of illegal evidence, reforms of the defense system and statutory rules on self-incrimination. Nevertheless, while these changes were well-received by the public and welcomed by legal experts, other measures that were simultaneously introduced -- coercive measures and residential surveillance -- raised more concerns.

Exclusionary Rules for Illegal Evidence

In 2010, China's Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice had issued, for the first time, a joint regulation aiming at strengthening the rules for scrutinizing and gauging evidence used in cases involving the death; and setting out

Figure 4. Acquittal rates in China 1990-2012 (%)



detailed procedures for examining evidence as well as for excluding evidence obtained illegally.³⁷ The new regulation stipulated that evidence, including material and documents from unnamed sources, testimonies made under violence or threat of violence, and evidence certified by unqualified organizations should be inadmissible. It also stated that a defendant has the right to request an investigation into whether his testimony was obtained properly during a hearing. In case an investigation was approved, the prosecution had the responsibility to provide the notes and original tapes, or videos of the interrogation and the testimony of people present during the interrogation for the court to consider.³⁸

One of the major changes that this regulation introduced was that when the legality of the pre-trial process is under question – i.e. when the defendant makes claims that his/her pre-trial confessions were obtained illegally, under torture or pressure – it is the prosecution that needs to disprove those claims. Previously, the burden of proof rested with the defendant. In case the prosecution fails in its endeavor, the court then has the prerogative to exclude the confession.³⁹

In the 2012 CPL amendment, those regulations pertaining to exclusionary rules were further specified and codified. Article 54 stipulated that “confessions extorted from a criminal suspect or defendant by illegal means such as torture, testimony of witnesses and statements of victims collected by violent means, threat or other unlawful means shall be excluded”. For the first time, it stated that both physical and documentary evidence shall be excluded in case of violation of the statutory legal procedure in case it “might seriously influence judicial fairness.”⁴⁰

Interpretations of the law by the Supreme People’s Court have sought to provide clearer guidance and details regarding the term “torture”, which is defined as any “corporal punishment or disguised corporal punishment,” “other illegal means” and as “measures that result in severe physical or mental pain or suffering and force the defendant to confess involuntarily”.⁴¹

Chinese legal experts estimate that while the reform has deterred misconducts from public security organs, the use of torture has conversely increased on another level, among prosecutorial organs.⁴² Similarly, while fewer cases of torture in detention centers have been reported, there has been an increase of such reported cases related to residential surveillance. While residential monitoring duties are normally to be carried out by the public security organs, a judicial interpretation stipulates that the prosecutorial organs may also assist them.

Defense Rights

The 2012 CPL amendment also sought to improve the legal status and role of defenders in criminal proceedings and expand the scope of legal aid. Addressing a long-standing predicament, Article 33 introduced rights for the defendant to have access to a defender at the investigative stage (before police interrogation). Previously, criminal suspects were only authorized to hire a lawyer or legal representation after being interrogated for the first time or on the first day which they were officially detained.

Article 36 stipulates that the defender can also represent the suspects in appeals and accusations and Article 37 introduced new provisions authorizing unsupervised meetings and consultations between lawyers and defendants. It is nevertheless important to note that those amendments do not apply to crimes deemed as “endangering national security” or “where notification might obstruct the investigation.”

Finally, Article 34 stipulates that if the criminal suspect has not been entrusted a defender due to economic difficulties or other reasons, his or her close relatives may seek legal assistance or apply for legal aid from the government. However, the legal aid agency has implemented strict financial thresholds, making the proportion of suspects that fit the conditions for receiving legal aid restricted.⁴³

Statutory Rules on Privilege Against Self-Incrimination

The revision introduced provisions on statutory rules on privilege against self-incrimination, stipulating under Article 50 that; “judicial officers, prosecutors, and investigators must collect all types of evidence that can prove the guilt or innocence of criminal suspects and defendants in accordance with legal procedures [...] Police forces cannot force suspects to incriminate themselves”.⁴⁴

This principle is deemed vital to prevent torture and forced confessions. Although the amendment represented a step forward for China, several Chinese legal experts have pointed out that the law still fails to provide a proper right to silence and even states under Article 117 that “suspects must answer the police questions truthfully”.⁴⁵ These two regulations directly contradict each other. Given the tendency towards a presumption of guilt, investigators will be inclined to view suspects’ excuses or denials as unreliable rather than truthful answers. The amendment thus fails to substantially address the core deficiencies of the interrogation system.

Coercive Measures and Residential Surveillance

In the early drafting process of the CPL (August 2011) a set of compulsory measures were put forward including provisions that would empower law enforcement authorities to secretly arrest and detain criminal suspects under various custody types, including formal arrest, criminal detention and residential surveillance. Articles 84 and 92 stipulated that the authorities could detain suspects under formal arrest and criminal detention without notifying their families if it “was impossible to give notice”, in cases involving “serious offenses” such as crimes of endangering state security or terrorism. Under draft Article 73, residential surveillance could be enforced at home or at a “designated location” without notification for up to six months in cases relating to state security, terrorism, or serious instances of corruption. In all cases, the revisions would have permitted authorities to keep this detention secret

if they believed that notifying relatives or a lawyer would hinder the investigation.⁴⁶

The “secret arrest” clauses (mimi daibu秘密逮捕), especially the provision on “residential surveillance at a designated location”, provoked a heated debate during the public consultation period for the amendment, with many human rights activists, legal experts and academics opposing such change. Concerns were raised that the law could be used to legitimate arbitrary detention and enforced disappearances of criminal suspects.⁴⁷ The cases of Liu Xiaobo, Ai Weiwei or Gao Zhisheng,⁴⁸ are examples of such disappearances and of the police arbitrarily detaining suspects for extended periods without informing their families. Some NPC representatives and academics also pointed out that because regular detention centre regulations would not apply to the “designated location” chosen by police authorities, this form of custody would effectively hinder efforts to prohibit the use of torture to extract confessions and exclude illegal evidence.⁴⁹

Heavily criticized, the clause on preventing the notification of family members was eventually removed from the residential surveillance provision. Nonetheless, it remained in effect for criminal detention and formal arrest, for which detention could not exceed 37 days. A clause was added under Article 83 stipulating that “when the circumstances of interference with the investigation no longer exist, a relative of the detainee shall be notified immediately”.⁵⁰

In its final form, as presented in March 2012, Article 73 stipulated that “when crimes of endangering state security, terrorist activities or especially serious bribery cases are suspected, and enforcement in the residence might impede the investigation, it may also be enforced in a designated location upon the approval of the people’s procuratorate or public security organ at the level above [...] Where residential surveillance is in a designated location, the family members of the person under residential surveillance are to be notified within 24 hours, unless there is no way to inform them”.⁵¹

Conclusion

China has in recent years made significant strides in improving the functioning of its criminal justice system. High profile judicial scandals have increased awareness that violations of rights must be avoided and prompted the leadership to initiate substantive changes to judicial policies and laws.

The prevention of miscarriages of justice has, nevertheless, remained hampered by deeply entrenched impediments. The lack of check and balances between law enforcement agencies facilitates abusive and unaccountable practices, while the judicial system gives an unfair advantage to police forces and prosecutors in litigation.

The institutional design of the legal system creates inherent tensions between political and legal interests and objectives. China's judiciary does not operate in an independent capacity but under the strict leadership of the party-state, which guides the orientation of reform efforts. Moreover, widespread political interference in judicial decisions and pressure from government agencies – especially at the local level - remain major obstacles in the pursuit of judicial fairness.

While the 2012 amendment to the Criminal Procedure Law has achieved advances towards strengthening the protection of criminal defendants' rights in principle, the gap between the letter of the law and its implementation is yet to be bridged. Insufficient judicial enforcement efforts and bureaucratic malpractices continue to pose obstacles to reform efforts and limit their ambitions. ■

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Figure 1: Created by Author

Figure 2: Created by Author

Figure 3: Created by Author -Chinese lawyer’s assessment of the four major difficulties encountered in their work. <https://www.semanticscholar.org/paper/Political-Liberalism-and-Political-Embeddedness%3A-in-Liu-Halliday/e0009d21b287c647af3d-d84315211b1046448384/figure/1>

Figure 4: Created by Author - Data on acquittal rates in China > <https://thechinacollection.org/chinas-low-acquittal-rates-interesting-statistics/> -