

Fact-Finding Procedures in China

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Abstract

This paper is about fact-finding procedures in Chinese criminal trials. It traces general rules setting out fact-finding procedures, and describes the roles that various legal actors that should play to ensure that they are followed properly. It will further examine how Chinese law balances the duty to determine the truth and the principle of protecting individual rights from potential infringements in criminal cases. Based on the conflicts between truth-seeking and human rights protection, this paper will conclude by discussing limitations in Chinese fact-finding procedures and will suggest how they can be mended.

Keywords: Fact-finding procedures; China's justice system; Truth-seeking; Human rights; Limitations; Further reforms.



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1. Introduction

Many justice systems grapple with conflicts between substantive and procedural justice in the course of seeking the truth. This is also true in China, especially in recent years. Cases conducted contrary to procedures lead to wrongful convictions, even though the protection of human rights and the need to exclude improperly-obtained evidence is recognized by Chinese law. News reports suggest that torture is the most important reason for false confessions and wrongful convictions in China (Deyong, 2016). It has yet to be determined whether these procedural violations result from an excessive zeal to obtain the truth, or if they caused by institutional structures that encourage the authorities to obtain convictions at all costs.

China's authorities often pay more attention to substantive justice than procedural justice in law or practice, and its official media tends to focus on new changes rather than the actual effects of recent justice reforms. Following the revelation of many wrongful convictions by the Chinese media and the submission of recommendations to the authorities by diverse reformers in recent years, lots of critical articles have been published to promote further reforms. (Chao, 2013; Guoqiang, 2013; Peng, 2012; Ping, 2015; Yusu, 2013) They mainly recommend closing legal loopholes, as well as practical difficulties that hamper investigators, prosecutors, judges or defence lawyers from playing their due role, in order to fill in the gap between legal requirements and implementation.. Such difficulties include the misapplication of basic procedural principles and rules, as well as the illegal interference in justice activities by local political-legal committees (CHEN Ruchao, 2015; Lihong *et al.*, 2009; Mingrong *et al.*, 2014; Zhaohua, 2014). Clearly, further reforms are needed. Even so, it is worthy of note that a good understanding of legislative rules and principles also contributes to justice reforms.

An explanative research will be conducted for removing the misunderstandings of fact-finding procedures, in order to clarify the conflict between truth-seeking and human rights protection. This paper will start by describing the general rules on fact-finding procedures. It will proceed by describing the legal actors and delineating the roles they should play in enforcing such procedures by law. Further, this research will examine how Chinese law balances the legal duty to determine the truth and the legal principle of protecting individual rights from potential infringements in criminal cases. Based on their conflicts, this paper will conclude by describing how limitations in Chinese fact-finding procedures can be overcome.

2. Stages and Rules

In China's criminal justice system, procedures for fact-finding relate to several primary stages, with diverse rules applying at each stage. This is particularly true for the legal structure on the procedures according to the *Criminal Procedure Law (CPL)*.

2.1. The First Defence Line

Specifically, the ordinary fact-finding procedures that are universally applicable to all cases basically involve each stage of the criminal process. Among all stages, investigation has been the first defence line. During investigation, the police verify the evidentiary materials on the existence of criminal facts, as per the *CPL*. Investigators must inform suspects of legal provisions on leniency for their honest confessions, and make an entire and complete record of interrogating suspects facing life imprisonment or the death penalty. When questioning a witness, investigators must also require them provide the evidence or testimony based on facts.

2.2. The Second Defence Line

For initiation of public prosecutions, the people's procuratorate should ascertain whether or not criminal facts are clear. Also, the procuratorate should examine whether evidence is reliable or sufficient, whether the nature or charge of crime is correctly determined, and whether the investigative acts used to gather evidence were legal. In examining facts of criminal cases, the procuratorate should further interrogate suspects and listen to the opinions of both the accused and procuratorate. If the procuratorate believes facts to be clear and evidence to be reliable and sufficient, a decision should be made to initiate prosecution, which is the second defence line.

2.3. The Third Defence Line

Concerning this line, where the prosecution can clearly set out facts underlying a given criminal charge, the court must hold an open hearing. After prosecutors read out particulars of the charge at trial, the accused and victims may state the alleged crime, and then the procurator may interrogate the accused. If witnesses should testify in court but fail to do so, the court may compel them to testify. By law, only after the facts and evidence are debated and witnesses have been examined can the court decide a case law. If case facts are clear and evidence is reliable and sufficient, the court should convict the accused. Otherwise, the accused should be acquitted by law.

2.4. More Defence Lines

Apart from aforementioned three basic steps to a criminal trial, fact-finding procedures applying to special cases may involve four more stages, namely, appeal, death penalty review, trial supervision and execution. Either defendants' appeal or the Procuratorate's protest can initiate the appeal procedure. Appeal courts should completely review the facts found and the law applied in original judgements in order to correct errors in conviction or sentencing. After a complete revision, the courts may affirm an initial decision, revise judgements, or return cases for retrial by a new panel.

Chinese law mandates that death sentences should be reviewed by the Supreme People's Court (SPC). During the review of death sentences, the SPC should interrogate the person on whom the sentence has been imposed and should hear arguments from his or her defence lawyers' opinion upon the lawyers' request. The SPP may advise the judges of the SPC of its opinions on the sentences and the SPC should, in turn inform the SPP of its final decision, apart from informing the accused whose sentence is being reviewed.

The court should open a new trial if the party's petition satisfies one of the following conditions: Firstly, if the petition introduces new evidence that proves that the determination of facts in the original judgments or orders was clearly wrong, and that it is likely to affect conviction and sentencing. Secondly, if the petition shows that evidence used when deciding the case or during sentencing is unreliable or insufficient, should have been excluded by law, or that major evidence regarding case facts is conflicting. Thirdly, if the petition can demonstrate that the judges applied the wrong law. Fourthly, if the petition can demonstrate that violations of legal procedures during the initial trial may have impaired its fairness. Fifthly, if it can be demonstrated that the trial judge was engaged in embezzlement, or the acceptance of bribes, the practice of nepotism, or that he or she was influenced to "bend" the laws when making his or her judgement.

In addition, fact-finding procedure is also found in enforcing criminal penalties. By legislation, those instructing execution or enforcement should verify the identity of criminals.

Differing from the above requirements in legislation, death penalty reviews are conducted without transparency, so the SPC actually dominates the review process. Generally the person whose sentence is being reviewed must passively wait for the SPC's decision. In practice, the ability of defence counsel to effectively participate in the process or to bring new facts to the attention of the SPC limits the ability of the procedure to correct errors. The death penalty review procedure does not meet the requirements set down by the minimum guarantees of due process.

3. Actors and Accountability

As important actors in the fact-finding procedure, people's courts, people's procuratorates and the police (the "three justice authorities") should use facts as the basis of handling a criminal case. Parties to the case, mainly including victims, private prosecutors, suspects and the accused, also play an essential role in seeking the truth, albeit they do so when trying to protect their own rights and interests. Other actors, *i.e.*, legal representatives, *agents ad litem*, defenders, witnesses, experts or interpreters, assist their clients or the authorities to efficiently ascertain the facts.

Among these actors, both the people's procuratorates, as the public prosecution organs, and private prosecutors are placed in the position of the accusing party, respectively in the cases of public and private prosecutions. Both public and private prosecutors not only should collect or present evidence to prove the facts of the case or their claims favourable to prosecution in court, but also should bear the burden of proof by law, in order to face adverse consequences for their failure to proving facts or claims. In this point, the police and courts differ from the people's procuratorates because they do not bear the responsibility for proving facts at trial.

The three justice authorities have diverse legal powers and duties relating to fact-finding. Among them, the police mainly exercise investigative powers to find facts or collect evidence in order to assist people's procuratorates to prepare for prosecution. The people's procuratorates must further examine the facts and evidence provided by the police before presenting them to courts. After hearings, the courts should independently and impartially judge which party's claims are well-established. Apart from fulfilling their own responsibilities, the three should coordinate and check with each other to correctly and promptly determine the facts of guilt or innocence by law.

Unlike the prosecution, the accused or suspects should in principle not bear the burden of proving the facts or demonstrating their own guilt or innocence. Together with the accused's legal duty to truthfully answer questions, a lack of the right to silence suggests that they might be forced to confess during interrogation. Also, there are a few exceptions to the above principle in law. For instance, suspects and the accused are legally required to include relevant information or materials relating to illegally obtained evidence in applications to exclude such evidence from use.

As non-parties, representatives, *agents ad litem*, witnesses, expert witnesses or interpreters have no direct interest in the outcome of the cases with which they are involved, but they still play an essential role in fact-finding. For example, legal representatives can directly represent the relevant party, helping him or her exercise rights or complete his or her duties perform duties. Even without the right to state case facts or testify in court on behalf of the party, legal representatives can request the people's procuratorate to lodge a protest against judgments due to errors in the facts of a case. Their general rights or powers are based on legal safeguards, rather than judicial decisions or approval, in order to effectively help the party with no or a limited capacity to actually attend proceedings.

Once entrusted, *agents ad litem* can protect their clients' rights and interests by participating in fact-finding within a commission scope on behalf of victims. Defenders and *agents ad litem* who help to conceal, destroy or falsify evidence, who threaten or induce witnesses to alter testimony, or who perjure or had commit other acts to interfere with judicial activities, are held legally accountable for their offences.

Witnesses who have knowledge of case details have the duty to provide evidence or testimony based on the truth. Those who intentionally give false testimony or conceal evidence of guilt are legally accountable. Assigned or hired experts and translators are involved in fact-finding. Expert witnesses can use expertise or skills to give written examination advice on special problems in order to assist judges to find facts. Those deliberately providing false examination results are legally accountable. Additionally, translators should faithfully provide clients with translation services.

3. Law Balancing the Duty to Determine the Truth and Infringements on Individual Rights

Concerning the balance between a duty to tell the truth and infringements on the right not to self-incriminate themselves, the 2012 CPL imposes the duty on all suspects to "answer the questions of the investigatory personnel truthfully" in Article 118, but it also provides suspects with the right not to "be forced to prove his or her own guilt" in Article 50. The importance of confession is highly stressed, so the right to silence has not yet been established in China. There is a great need for the introduction of legislation to protect the right to silence.

Article 118 of the 2012 CPL implies that suspects have no right to remain silent when being questioned. The provision is very important to investigators, given their dependence on confession in handling criminal cases. Yet, from the perspective of the better protection of the rights of the accused under the principle of human rights, one possible interpretation of Article 118 is that the law allows them remain silent, but requires them to tell the truth if they waive that right (Jiahong, 2012). In other words, there might be the right to silence, but no right to lie. Also, the institutions of the Chinese system do not yet recognize the right to silence as interpretation that Article 118 sets out above.

Meanwhile, it is worthy of note that no article in the 2012 CPL explicitly articulates suspects' right to silence, including Article 50, which comes closest to doing so. Therefore, many legal scholars in China do not consider this right to be fully established. Even if Chinese law has already established an implied right to silence, there is still a long way to go before the ideal system is transformed into a real one.

First, the legislature and judiciary should clarify the right of suspects and the accused to remain silent under interrogation when they implement the interpretative regulations of the CPL. Second, the judiciary should further improve the exclusionary rules on illegal evidence and specify the circumstances in which evidence obtained illegally should be excluded. Furthermore, investigators should be fully recorded when interrogating suspects to protect the human rights of the accused, who are innocent until proven otherwise. Prosecutors should also adhere to the principle of handling cases by law. In a nutshell, it is necessary to make the Chinese right to silence worthy of the name.

In order to balance a duty to determine the truth and infringements on individual rights, the CPL requires the authorities not to seek the truth at any costs, but to protect from abuse the human rights of suspects, the accused and witnesses. Particularly, they should exclude illegally obtained evidence from use, and should also not force anyone to confess or testify by torture or undue coercion. Accordingly, the right of suspects not to self-incriminate themselves, the right of suspects or witnesses not to be tortured or ill-treated, and the right to apply for excluding illegally-obtained evidence should be fully protected throughout the criminal process.

Specifically, the law is concerned with the significance of confessions or other statements, as well as the legality of collecting and using such statements as evidence. As provided in Article 50 of the CPL, confessions in any form can be used for conviction or acquittal if the authorities collect them according to legal procedures. For protecting the right not to self-incriminate and the right not to be forced to prove one's innocence, it is strictly prohibited to extort confessions by unlawful means, including threats, inducement or deceit. When torture or undue coercion are employed, coerced confessions, witness testimony and victim statements should be excluded from use, as required by Article 54 of the CPL.

However, there is no explicit provision in the *CPL* on a standard procedure to test whether or not torture was applied to a suspect. The procedure for excluding illegally obtained evidence may involve examination of evidence extorted through torture to a certain degree, which can be addressed in detail as follows:

There are two main approaches for initiating the procedure for testing whether torture has occurred. One approach is initiated by judges. After noticing the potential that torture was used in the course of evidence collection, they should take the initiative to exercise their legal power during court hearings to investigate the manner in which evidence was collected. The other approach is based on an application by a party in the trial to the relevant court. As provided in Article 56 of the *CPL*, the parties, defence counsel or representatives of the accused have the legal right to apply to the People's Court for the exclusion of evidence obtained by illegal means like torture. The first and foremost issue that courts should examine when deciding whether to exclude evidence is whether torture was used to collect it.

Furthermore, potential difficulties in taking the second approach are implied in Articles 56-57 of the *CPL*, and Articles 97, 101 of its *Interpretation* as well. At first, applicants should provide a court with information and materials on the persons involved with the alleged torture, the time and place when it allegedly occurred, and the means by which it was allegedly conducted in their application for excluding illegally-obtained evidence. Next, it is at the discretion of the court to decide whether to investigate torture in a hearing. If the court initiates a hearing, prosecutors should present evidence to prove the legality of evidence or the fact that torture was not used, i.e., by playing a video or audio recording. Given courts' great discretion when investigating torture, as well as all justice officers' tolerance of torture, the procedure does not actually provide much assistance in revealing whether or not torture was actually used.

The *CPL* entrenches the above exclusionary rules in formal law (Xinhua, 2012). Official reports claimed that the *CPL* would be a significant step towards the rule of law and the protection of human rights in China (Duan, 2012).

One may have doubts whether the legal rules have so far been effective (Hongyao, 2014). SPC Judges admitted that 'almost all of recently identified wrongful convictions resulted from forced confessions', but judges often have difficulties in fully or effectively excluding illegally-obtained evidence as law requires (Yingting, 2015). Their failure results from rational decision-making under institutional arrangements where judges are embedded. Currently, defence lawyers are placed in a very weak position, making it difficult for them to press for the exclusion of evidence (Ping, 2015). Also, judges are often 'unwilling, afraid or unable to exclude evidence in practice (Weimin, 2015). Even after people's courts successfully exclude evidence extorted through torture in rare cases, the use of indirect evidence derived from extorted confessions is still permitted by law and in practice.

4. Conclusion

In fact-finding procedures, Chinese courts generally accept the prosecution's evidence material without cautious examination and prosecutors also follow the police to adopt their evidence of guilt without adequate check. Often, decisions rely on circular logic: judges do not examine case procedures, so cases must have been conducted properly, which means judges do not need to examine them. This is also the case for prosecutors in the criminal process. Tolerating any evidence of guilt or the "fruits of the poisonous tree" cannot make the exclusion of extorted confessions essentially influence final judgements or prevent wrongful convictions.

Based on the above conflicts between the duty to determine the truth and the principle of protecting human rights, limitations in Chinese fact-finding procedures need to be mended. Unless the traditional institutional constraints change, the use of tainted evidence to obtain convictions will continue. Thus, the transformation of China's criminal justice institutions is necessary to prevent the use of torture and illegally-obtained evidence. One of the most important reforms that could be made would be to strengthen the ability of defence counsel to counteract the close cooperation among the three justice authorities in order to seek the exclusionary remedy.

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