

Volume 2, Number 9

Published December 9, 2021

How to Prevent Miscarriages of Justice

Courts should not consume badly prepared police “meals”

By [Grace \(Yu\) Mou](#)

Miscarriages of justice have profound ramifications for the Chinese criminal justice system. In 2014, the Supreme People’s Court announced that miscarriages of justice had a damaging effect on public trust in the judicial system and said that to resolutely combat the problem, “[systematic pitfalls must be tackled at the institutional level](#).” This raises two questions: what are these “systemic pitfalls” potentially connected to wrongful convictions? And how should such pitfalls be addressed?

Judicial reform efforts so far have been geared toward the second question. Almost all the judicial reforms launched in recent years have been explained as aiming to prevent wrongful convictions. The first question, on the other hand, has been largely overlooked by the criminal justice institutions. While academic studies abound, no comprehensive official report has been produced to identify the systematic risks that are likely to lead to wrongful convictions.

In my book, [The Construction of Guilt in China: An Empirical Account of Routine Chinese Injustice](#), I analyze the functional

deficiencies of the criminal justice system that allow individuals to be wrongfully accused and convicted. In particular, I found that police methods of constructing the prosecution case (i.e., the case dossier) are what chiefly give rise to miscarriages of justice. China’s criminal justice procedures have commonly been described this way: “The police prepare the meal, the prosecutors cook the meal, and the court consumes the meal.” However badly police prepare the meal, it is still delivered to and consumed by the courts.

[T]he current design of the criminal justice system and political system limit what courts and procuratorates can do to prevent miscarriages of justice.

Both the courts and the procuratorates - China’s public prosecutors - know very well the crux of the problem. But the current design of the criminal justice system and political system limit what courts and procuratorates can do to prevent miscarriages of justice. The [recent judicial accountability reform](#), the [trial-centered reform](#), and the optimization of internal oversight departments within the procuratorates and the courts can help detect and mitigate the risk of wrongful convictions. However, these judicial efforts, like other earlier endeavors, have no direct impact on police practices. Police investigations remain largely shielded from external scrutiny. Police lack genuine

incentives to change the ways they gather evidence and construct cases.

Over the last few years, many proposals and attempts have been made to prevent miscarriages of justice. One of the most important reforms on which high hopes were pinned was video recording of police interrogations. Initially introduced in 2012, recording devices in interrogation rooms were heralded as a key breakthrough for curbing torture and other police malpractice. The optimism, however, was short-lived. Soon after the practice was rolled out, video recordings were constantly found to have been edited. Defense lawyers complained vehemently that the video recordings did not match police interrogation records and that their content was a product of rehearsal directed by the police. More worryingly, even when the validity of a video recording was in dispute, it still was used to reject defense applications for exclusion of illegally obtained evidence. Rather than serving as a mechanism to regulate investigative misconduct, the primary function of video recordings became “safeguarding” the police and “defending against groundless allegations.”

The Regulation Concerning Video Recordings (the Regulation) issued by the Ministry of Public Security in 2016, which requires a “continuous, complete recording without selective editing, clipping or revision,” hardly resolved the problem. A common problem with prohibitive norms in China is that no legal consequences are specified when the rule is breached. Neither the Criminal

Procedure Law of 2018 (CPL 2018) nor the Regulation set out any sanctions for tampering and falsifying video recordings. There are more relevant questions to be answered. Who is responsible for investigating whether a police interrogation recording was unlawfully edited? What procedure should be followed?

Perhaps at the heart of these issues is the nature of the video recording: is it an independent source of evidence to corroborate the confession evidence or merely a minor by-product of a police investigation?

[W]henver the validity of a video recording is in doubt or the recording is proven to have been tampered with, the confession evidence should be presumed to be inadmissible.

Article 123 of the CPL 2018 states that interrogators *should* (*yingdang*) record the interrogation process if the suspect could be sentenced to the death penalty or life imprisonment or if the crime under investigation is major and serious. As for other cases, video recording is optional, subject to the interrogating officer’s discretion. This provision implies that video recordings are part of the interrogation record in major and serious cases. As far as these cases are concerned, the admissibility and probative value of the accused’s confession are, by and large, dependent on the legality of the interrogation procedure, for which the video recording provides

corroboration. Video recordings, in this sense, should be recognized as independent evidence based on legal prescription which must be used to ascertain the reliability of the confessions. Following this logic, whenever the validity of a video recording is in doubt or the recording is proven to have been tampered with, the confession evidence should be presumed to be inadmissible until the prosecution rebuts such presumption.

If the evidentiary nature of a video recording is thus understood, it should be uniformly applicable to video recordings across the board, however serious or minor the cases are. Meanwhile, the prosecution is under the obligation to provide the defense with video recordings. In challenging the validity of video recordings, the defense questions the admissibility and/or the probative value of the confession evidence, which in turn may trigger the procedure to exclude unlawfully obtained evidence.

Logical as this chain of inquiry may sound, the lived reality is rather different. Although video recordings have often been reported to be tampered, damaged, or lost, no adverse consequences have been pursued against the police, and the disputed confessions are still used to support the prosecution case.

The problematic implementation of the video recording regulation is certainly not a unique problem in Chinese criminal justice. Parallels can be drawn to reforms such as introducing the exclusionary rules and the trial-centered justice policy, which aims to reduce reliance on dossiers and bring more live witnesses into trials. Similar to the video

recording Regulation, these judicial reforms have proved to be ineffective tools in regulating police conduct, not least in their failure to provide remedies for the wrongfully accused. Empirical evidence suggests that fewer than 1% of applications for excluding illegally obtained evidence are successful. Despite somewhat more witnesses appearing at trial, courts still routinely rely on investigative dossiers to determine the guilt or innocence of the defendant. Defense lawyers are still not allowed to be present during the police interrogations. The accused has no right to silence, but rather has the duty to confess the truth. New wrongful convictions will likely be the result.

Grace (Yu) Mou is a senior lecturer in criminal justice at SOAS University of London where she teaches criminal justice, Chinese law, and law and justice in contemporary China.

Watch Dr. Mou discuss this same topic [here](#).

Suggested Citation:

Grace (Yu) Mou, "How to Prevent Miscarriages of Justice: Courts should not consume badly prepared police 'meals,' " in USALI Perspectives, 2, No. 9, Dec. 9, 2021, <https://usali.org/usali-perspectives-blog/how-to-prevent-miscarriages-of-justice>.

The views expressed in USALI Perspectives essays are those of the authors, and do not represent those of USALI or NYU.

This work is licensed under a [Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License](#).

