

# **The Improbabilities of Criminal Procedure: Can Torture Be Effectively Abolished in China?**

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For presentation @ Law & Economics Summer Workshop Student Colloquium

University of Chicago

(Paper in progress, please do not circulate)

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## **I. Introduction**

Although long in existence in world history, torture is now internationally outlawed by almost all modern governments. Scholars of different disciplines have articulated various explanations for this transition. Michael Foucault, the French sociologist, argued that nations invalidated torture because it was no longer a crucial governmental instrument to control the society in the modern world. With the rapid advancement of technologies and the development of power structure, nations are now able to discipline the people through various institutions, while the display of brutality and cruelty is less effective or even counter-productive. Steven Pinker, the American Psychologist and political scientist, reasoned that the emergence of modern nations, together with better economy and education, and increasing social interaction and feminism, all contribute to the decline of torture in human history.

The past three decades have witnessed China's significant achievements in tackling torture in the criminal justice system. China's first Penal Code and Criminal Procedure Law, both enacted in 1979, outlawed torture for the first time in the Communist Party's ruling history. Later laws have all followed the same route, and in 2010, two judicial interpretations introduced exclusionary rules, which require that no confession or testimony obtained through torture shall be admitted in court. The 2012 revision of China's Criminal Procedure Law (CPL2012) adopted these rules and installed further safeguards to prevent torture, including recording police interrogations in major cases and corruption cases, and an ambiguous provision of privilege against forced self-incrimination. Despite the progresses in legislations and academic research, police practice has never reached a satisfactory level in reducing torture in crime investigations. Few would deny the fact that after 30+ years of economic boom and social development, torture is probably still the most prominent problem of China's criminal justice. Recent discovery of several high-profile wrongful convictions, including the Zhang Hui-Zhang Gaoping case in Hangzhou, the Wu Changshuo case in Fuzhou, the She Xianglin case in Jingmen, and the Zhao Zuohai case in Shangqiu, all demonstrated that torture is probably the most dangerous factor in wronging the innocent and skipping the real perpetrators.

But why China has yet succeeded, to an expected degree, in battling torture? Most literatures attribute the failure to institutional defects or personal violations. The lack of technical supports in police investigation, for instance, has long been cited as a major reason to rely on confessions. Other frequently mentioned factors include the political-social pressure upon police to solve a case, the cooperative relationship between the judiciary and the police force, and the fall of police professional responsibility and personal morality. It seems to many observers that torture can be surely abolished or at least successfully constrained once better institutions or better police officers are installed. I agree with this argument in part, but I also believe that no matter how many efforts are put into legislations and personnel training, torture will continue to exist in a considerably large size and could not be effectively abolished in a significantly long time, particularly under China's current unique circumstances. I also argue that to certain degree, not only China in particular, but also the entire human civilization would have to face torture in the criminal justice system, although the Western world may find them in a less serious situation. The fundamental reason for such a pessimistic perspective is the several indispensable components of human nature, including sympathy, empathy, shame and expectation of future interaction, of which all have contributed to the civilization of criminal justice in human history, but could also jeopardize any state's ambition to abolish torture through powerful institutional design. It is due to such human natures that I contend it is almost improbable to effectively abolish torture.

## **II. Empathy: Rises from Tragedy, but also sinks in Tragedy**

Let us look at the history for a moment. Why China outlawed torture for the first time in 1979? Many may suspect the resumer of a responsible government after the Culture Revolution, particularly a new group of national leaders headed by Deng Xiaoping and his colleagues. It might be true. But why the new government and new leaders chose to ban torture in criminal investigations? In fact, 1979 was the time that the entire society was almost in chaos or right out of chaos and social order needed to be restored immediately. Therefore, heavy and strict punishments were expected by both the government and the society, and torture, always proved to be an effective weapon against crimes in the history, should have been preserved or at least acquiesced, if not encouraged by the government.

As a matter of fact, when the 1979 national congress released the earlier drafts of the Penal Code, which prescribed extracting confession through torture as a crime, the Ministry of Public Security, or the police force, strongly opposed that provision and stated that it was explicitly intended to attack the police. It was true that at time, only police officers were eligible of committing this crime, as the prosecution has yet been empowered to investigate corruption cases. But why did the 1979 legislature pointed their fingers at the police? An open remark by Peng Zhen, then Chairman of the Standing Committee of the National People's Congress, would be the best answer:

“Do not take this article as an attack against the police force. No! It is a ban on any person, any organization to extract confession from torture. It is not only intended to protect the people, but also intended to protect police officers. My comrades, please take a look back, during the Culture Revolution, was there any Minister or Deputy Minister of Public Security,

except for Xie Fuzhi, able to escape from torture? The ban of torture is to protect all people (including the criminals), all cadres and lay persons.”

Peng Zhen revealed the most important factor for the 1979 legislature to ban torture in police investigation: to protect all people, police officers and other government cadres included. Without such a ban, no one could be safe, and the Culture Revolution had just proved that. It is the legislators’ cares for their future life, as well as for the lives of their descendents, that motivated them to ban torture. This psychological mechanism is called empathy effect, or thinking in other’s shoes. Only when the legislators, or decision-makers, believe that one day they may also face criminal investigation, would they choose to ban torture.

Empathy effect has long been a major contributor to the enhancement of rule of law and legal civilization in the world. The individual rights preserved by the bill of rights of American Constitution, for instance, are mostly reflection of the painful history of the colonial ages under the British tyranny, which had been experienced by many of the “founding fathers” or their ancestors, therefore prompted the “founding fathers” to put these safeguards in the highest law.

The experience of torture and other police cruelty, as demonstrated by Chinese and Western history, is a major motive for legislators to ban torture, which means after a national disaster, such as the Culture Revolution of China, or the British tyranny to the North American, a significant enhancement of legal civilization can often be expected. The legislators, often survivors of the previous national tragedy, would cherish individual rights more and have more cautions against the government’s absolute power of deploying violence against its citizens. As a result, a legislature right after a national disaster is more likely to impose stricter bans upon police brutality, although the price for such a progress is often too high.

However, true in every country and particularly in China, when the political system has been stabilized after a national chaos, empathy effect would gradually decline in the legislative process. No one shall expect that every generation of legislators must have a torturous experience which would shape their attitude towards torture and other forms of police brutality; in fact, all normal societies shall expect that most of their legislators would come from a normal background, without any criminal experience or jail time. The reality in China, and most likely in many other countries as well, is that no convicted person, at least no convicted felon, shall be elected to be a member of the congress or a judge of the highest court, who are often the major figures making policies regarding torture. In other words, in a regular society, those who have previously encountered police torture are often deprived of the right to make relevant decisions, and those who make such decisions are often those without any personal experiences of torture. As a result, compared to a post-chaos society, less empathy effect would function in a regular society.

What worse for current China is not the decision-makers’ lack of experience of torture, but their belief that their future will less likely to encounter torture. An alarming reality for China’s criminal justice system is that corrupt officials, high or low in their ranks, often receives better treatment than other criminal offenders. A Shanghai report revealed that in the year of 2010, 80% of corruption cases ended in probation sentences, while only 10% of juvenile defendants were

granted probation. In contrary to the practice, the Supreme Court and the Supreme Procuratorate have issued guidelines limiting probation sentences in corruption cases while expanding probation in juvenile cases. Such discrepancy might be partly explained by possible penetration of bribery or conditions of probation, but it nevertheless demonstrates the institutional preferential treatment of governmental officials in the criminal justice system. With such a expectation, legislators or other decision-makers may care less about torture against criminal offenders, as they believe that even if one day they may also face criminal charge, they are very likely to be immune from police torture and receive better treatments.

One more negative side of empathy effect in the criminal justice system rests in the public opinion. It is true that few judicial decisions were grounded upon public opinion in China, but with the rapid development of information technology and the increasing mistrust of government authorities, public opinion is playing a bigger role in the legislative process. However, when it comes to crime and torture, most members of the public automatically switch to the victim side, instead of the offender side, as compared to the probability of being a criminal suspect facing police torture, most people are more likely to suffer from being victimized by crimes. In other words, empathy effect does not push the public to give mercy to those facing police torture, but in fact drives the public to take a harsher position against criminal offenders,

### **III. Sympathy: the Better Angel Far away**

Few would contend that to a certain degree, human sympathy prevents police officers from using torture. World history has proved the indispensable role of sympathy in enhancing legal civilization. For instance, no country in today's world still allows beheading as an execution method, let alone cutting the criminal into small pieces or even cannibalism. To most people of the modern world, putting a fellow human being into such extreme pains is beyond imagination and surely unacceptable. In many countries, death penalty itself, regardless how humane it might be enforced, is considered an excessive cruelty and fundamentally inhumane, and therefore has been abolished. This history also proves that human being's sympathy toward suffering fellows keeps growing, and as time goes by, previously acceptable cruelty may become unacceptable for later generations.

As Adam Smith and David Hume both believed, sympathy is an indispensable component of human nature. Even for police officers combating criminals at the front line, few would have lost the instinct of pain when witnessing others suffering. But how could a human being's sense of sympathy be enhanced? Is there any practical method to accelerate such an elevation by man hand?

Conditions and limitations of sympathy

- 1) Eye-witnessing
  - a) On-site witnessing enhances sympathy
    - i. Recoding requirement for police interrogation
    - ii. Influences of model information technology

- b) Police investigation is often off the eye-sight of the public
- 2) Slow elevation of human sympathy
  - a) Today's action rooted in the understanding of yesterday
- 3) Privilege of the rich?
  - a) The economic base determines the superstructure?  
Torture-free police investigation often requires additional resources
  - b) Warehouse is etiquette?
  - c) In a developing country, torture is almost a historical certainty?
- 4) Broken window effect
  - a) A person's living environment affects his action
  - b) Unique police environment: violence, anxiety, masculinity and chaos

#### **IV. Shame: the Force of Bystanders**

- 1. Shame as a driving force for legal civilization
  - a) Shame-oriented culture vs. Sin-oriented culture
  - b) Criminal procedure as a shaming mechanism to correct offenders
    - i. Open trials
    - ii. Shaming sentences
- 2. Conditions and Limitations of shame in tackling torture
  - a) Shame rests on openness
    - i. Recording of police interrogations
    - ii. Freedom of press coverage of police torture
    - iii. International pressure
    - iv. Police interrogation is mainly a secret process
  - b) Shame requires acquaintance
    - i. Stranger society
    - ii. Atomization of individuals
  - c) Shame rests on value difference
    - i. Unique police attitude toward violence
    - ii. Reverse phrasing?

#### **V. Anticipation for Future Interaction**

- 1. One-shot games vs. repeated games
  - a) Moral hazard induced by one-shot games
  - b) Anticipation for future interaction reduces moral hazards
- 2. Criminal procedure as a one-shot game
  - a) Regular offenders: one-shot game
  - b) Corrupt officials, business people: repeated games
  - c) Broken society: urban crimes and immigrants workers

#### **Conclusion**

1. Advancement of information technology will significantly reduce torture in police investigation
  - a) Bolster communication and idea-exchange: promote empathy effect
  - b) Create “distant witnessing”: promote shame effect and sympathy effect
  - c) Facilitate interaction: Anticipation for future interaction
  - d) Public awareness
  - e) Technical support for crime investigation
2. Economic development helps reduce torture
  - a) More government resources to investigate crimes
  - b) Common people care more about others

1) Particularly in China, the legislators, or the real decision-makers in criminal justice system, are often those immune from criminal prosecution or at least granted better protection, and therefore are not well concerned by improving human rights protection. Those with experiences of torture, however, are generally excluded from policy-making. 2) Sympathy is the “better angel” of our nature and is often the major driving force of abolishing torture, but people’s sympathy for suffering individuals grows slowly and is limited by material conditions and surrounding environment, and police officers, who are more accustomed to violence and brutality, may find less sympathy to a tortured suspect than their fellow citizens. 3) The pressure of shame pushes people to behave civiler; therefore informational technology has remarkably changed the criminal justice system. However, the atomization of the modern society offsets this effect, and the uniquely masculine atmosphere of police force may lead to an opposite direction. 4) The anticipation for future interaction makes judicial officers treat accused fellows leniently, while suspects from lower classes enjoy much less protection. As a result, the civilization of criminal procedure cannot be easily achieved and the effective abolition of torture in the criminal justice system requires not only state ambition and institutional designs, but more importantly, the advancement of information exchange and economic foundation.