

An Analysis of Prosecutorial Accountability Mechanism for Wrongful Cases

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Abstract

Prosecutorial accountability mechanism for wrongful cases will encourage legal handling of cases and ensure judicial justice. Despite the problems emerging in the process of prosecution, such as misapprehensions of arrests that do not result in criminal charges and of releases after a series of prosecutorial procedures, we cannot risk abolishing the mechanism that holds involving prosecutors liable for their mistakes and misconduct in wrongful cases, but endeavor to improve in ways that define wrongful cases, prosecutorial accountability and immunity from prosecutorial mistakes.

Key words: Prosecutors; Wrongful cases; Prosecutorial accountability mechanism

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Prosecutorial accountability mechanism for wrongful cases is at the center of judicial accountability, the most stubborn part in judicial reform. The future of judicial reform will be largely determined by whether this prosecutorial accountability mechanism is put in place. According to the *Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively*

Promoting the Rule of Law (hereinafter referred to as the *Decision*), approved in the Fourth Plenary Session of the 18th CPC Central Committee, all prosecutors will be liable for their performance of duties in case handling for life and be disciplined in a bottom-up manner within the judicial system if any mistakes or misconduct are found in the cases they have handled. In fact, the topic of prosecutorial accountability mechanism for wrongful cases is mostly discussed from the perspective of judges rather than prosecutorial officials. This paper is an attempt to deal with the questions arising from this accountability mechanism in the current judicial system from the perspective of prosecutorial officials and figure out the ways that might contribute to the improvement of the judicial system in legal practice.

1. DISPUTED PROSECUTORIAL ACCOUNTABILITY MECHANISM

To frame and promote prosecutorial accountability for wrongful cases, China's Supreme People's Procuratorate published *Opinions on Improving the Judicial Accountability System of the People's Procuratorates* (hereinafter referred to as the *Opinions*). Chapter 6 of the *Opinions* has provided clear definitions as to when prosecutors shall assume judicial liability for their mistakes and misconduct in wrongful cases, underpinning the practice of prosecutorial accountability. But some scholars have been questioning and criticizing the idea of prosecutorial accountability for wrongful cases and even proposed the abolishment of the mechanism with the following reasons.

First, there is no theoretical foundation or clear standards to support the defining of prosecutorial mistakes and misconduct in wrongful cases, and there is the absence of a set of universal standards that define the party that leads the examination, the procedure that such

examination needs to go through and the content that needs to be examined. Such accountability mechanism is not strongly grounded. (Wang, 2018) In addition, the current prosecutorial accountability mechanism is based on internal supervision., which might encourage minimizing and denying problems within prosecutorial organs. If so, this goes completely against the purpose of the mechanism. Extreme ideas even show that the mechanism itself represents a lack of confidence in China's current judicial branch. (Liao, 1999)

Second, different from administrative power and judicial power, prosecutorial power is executed to start a legal proceeding for the settlement of a substantial issue. It is, in nature, procedural and does not carry any weight of substantive punishment. (Zhu & Zhang, 2010) Among many, prosecutors' decision not to initiate a public prosecution is the only kind of judicial power that resembles judicial power, while others are practiced to initiate a proceeding instead of giving final judgment on the substantive facts of a case. It is illogical to hold prosecutors, who are no authority of finality of case judgment as judges, accountable for mistakes occurring in cases. Such mechanical transplant of accountability mechanism will damage the sense of honor and mission of all prosecutor officials and might hinder the further betterment of China's judicial system.

Last, public security, prosecutorial organs and courts are all involved in some major wrongful criminal convictions and criminal cases. In these situations, mistakes and misconduct by police, prosecutors and judges all combines to make a wrongful conviction. (Li, 2007) That means the hindrance of mistakes from any of these three branches will work to prevent a wrongful conviction. Judges are responsible for determining the facts and applicable laws of a case, so they are the ones that will be held accountable if their work leads to a wrongful conviction. In this case, liability is easy to tell. Comparatively, it is never clear who is or are responsible for a wrongful case from the perspective of the prosecutorial officials, which include prosecutors, deputy chief prosecutors in charge, chief prosecutors, officials from prosecutorial committees and in certain cases departments responsible for the investigation and supervision of public security organs, public prosecution and the prosecution of prosecutorial organs and even multiple tiers of procuratorates. It is challenging to strike a balance between prosecutorial power and responsibility and the responsibilities between different parties involved. (Li, 2016) Under the current duet model, both arrest and prosecution are dealt with by the same teams. This way of case handling has brought difficulties in accountability identification for individual prosecutors.

As far as we are concerned, these three viewpoints are partially grounded, yet have figured out some of the problems in prosecutorial accountability for wrongful

cases. However, they do not suffice to abolish the prosecutorial accountability mechanism, which is still indispensable in ensuring judicial justice as well as better shaping prosecutorial officials and their behavior.

The first reason is that there are clear, plausible standards to determine prosecutorial mistakes and misconduct in wrongful cases. In practice, case results tend to be misunderstood as the focus, which leads to ambiguity of related conceptions. The fact is it is the prosecutorial misconduct that the mechanism focuses on rather than the case itself. (Wang, 2005) According to Article 32 of the *Opinions*, a prosecutor shall assume judicial liability for the performance of prosecutorial duties and be liable for the quality of case handled for life within the scope of his or her duties. Article 34 and Article 35 also give clear statements about the situations that require judicial liability. Any misconduct falling into these categories will induce judicial liability. Thus, the idea that the standards for determining prosecutorial mistakes and misconduct in judicial cases do not exist is untrue. As evidenced in actual cases, prosecutors are immune from being sued for their mistakes in wrongful cases, but they are normally disciplined for their infringement of rules. This proves that accountability mechanism for prosecutorial mistakes and misconduct is practicable. (Li, 2016)

This accountability mechanism is also in line with China's national reality. Some people propose an emulation of the Anglo-American legal systems where prosecutors are disciplined for their misconduct only and walk away unscathed from the wrongful convictions that they should be responsible for. Others believe that the accountability mechanism should focus much more on prosecutors' misconduct rather than the consequences caused. In our point of view, a complete adoption of the disciplinary mechanism from the Anglo-American legal systems is not plausible based on China's current conditions. On one hand, under the national statute laws, prosecutors shall act in accordance with laws, and the results of the cases they handle are subject to China's legal culture and statute laws that both attach great importance to facts. In this case, the supervision and management of judicial officials especially prosecutors might be diverted away from normal courses or totally absent if prosecutorial misconduct is addressed but case results are not examined, which runs completely against the purpose of statute laws. On the other, it is still a long way ahead for all the judicial officials to become professional and sophisticated, because the relatively undemanding threshold of legal profession has resulted in a group of judicial officials of varying levels. Under the policy of the Four Prosecutions – criminal prosecution, civil prosecution, administrative prosecution and public interest litigation – prosecutorial accountability mechanism underpins prosecutorial development as one

of the disciplinary mechanisms. Moreover, substantive justice is highlighted in legal practice, so it will undoubtedly be incontrovertible and unacceptable at least for the citizens who have faith in the country's legal system if substantive results are not set as a standard for the examination of case results. The immunity that prosecutors enjoy from being sued for their mistakes in wrongful cases will fail to provide emotional comfort for the victims and damage the authority and justice of the procuratorates.

The last is the prosecutorial accountability mechanism is conducive to promoting the sense of responsibility among the prosecutorial officials. Wrongful cases brought by either judicial corruption or judicial injustice will definitely undermine the authority of laws. That's why it is urgent and significant to ensure the quality of judicial outcomes from the system itself. On the bright side, the mechanism will encourage prosecutors to perform their duties in a way that consolidate the legitimacy of investigation and arrest as well as restore personal freedom and reputation of the victims affected by wrongful cases in a shorter period of time.

2. MISUNDERSTANDINGS OF PROSECUTORIAL ACCOUNTABILITY

A workable, effective mechanism of prosecutorial accountability for wrongful cases will be a driving force for judicial system reform. However, the misunderstandings of prosecutorial accountability in legal practice make it challenging for prosecutors to draw a clear line between prosecutorial power and liability.

2.1 Release Without Prosecution

Release without prosecution comes from the situation where a procuratorate, after a series of examination, decides to release a suspect who is arrested during case investigation. Many prosecutorial officials are held accountable for cases that are mistaken as mishandled ones because suspects involved are freed without charges. This actually demonstrates a mix-up of the criteria for arrest and for prosecution where prosecution is mistaken as the measure of the legitimacy of arrests.

In fact, there are obvious differences between the criteria for arrest and that for prosecution. The evidence accumulated in support of the arrest of a suspect does not necessarily suffice for prosecution. Reversely, a decision not to prosecute after examination cannot prove that the prior arrest is groundless. Both releases without prosecution and prosecution without arrest are existent in real cases, especially with the latter in great number. (Qiu & Liu, 2019) Exceptions are false arrests resulted from intentional acts or culpable negligence that prosecutorial officials should be held liable for, even though they do not have follow-up prosecution.

2.2 Not-guilty Verdicts

In reality, most procuratorates are intolerant of not-guilty verdicts. (Zhang & Zhang, 2014) Any case ending up with a not-guilty verdict will be identified as a wrongful one, for which prosecutorial officials involved will have to assume liabilities. Under this circumstance, not-guilty verdicts made by courts are mistaken as the standard to measure the performance of prosecutors in public prosecution. It is another mix-up of criteria, this time, for prosecution and for not-guilty verdicts. The consequence is it might have run against the criteria for not-guilty verdicts or Article 12 of the Criminal Procedure Law of the People's Republic of China, which says no person shall be found guilty without being judged so by a people's court in accordance with the law.

The way that cases with not-guilty verdicts are included as an evaluation of prosecutorial performance has enormously disrupted the independence of prosecutorial power. The reason is this will encourage prior information exchanges between case prosecutors and courts, especially when the courts hint at making a guilty verdict, before an official prosecution is established. By doing so, the ratio of not-guilty verdicts is expected to go down, if possible, to zero.

According to Article 200 of China's Criminal Procedure Law – if the defendant cannot be found guilty for insufficient evidence, the collegial panel shall render an acquittal sentence stating that the charges are denied for insufficient evidence – not-guilty verdicts due to insufficient evidence cannot be deemed as false criminal cases. Otherwise, it will be the adjudication process itself that needs correction, which runs counter to the goal of judicial advancement. (Zhang & Zhang, 2014)

Another point is that dismissed cases are not necessarily wrongful cases. In nature, dismissed cases are categorized into two types. The first type are those with obvious mistakes, such as mixing up the constitutive elements of a crime, such as the amount of money involved. The other are disputed cases with minor errors, whose judgment and liability identification require tremendous prudence.

2.3 State Compensation

State compensation for justice miscarriages is another way of misunderstanding prosecutorial accountability. It is presented in two perspectives. The first is state compensation for citizens wrongfully convicted in judicial cases is mistaken for the standards of wrongful convictions, while the other is prosecutors involved enjoys impunity once the victims have benefitted from the national compensation program.

As far as we are concerned, state compensation and prosecutorial accountability differentiate not only in who is in charge, who is targeted and what is to be delivered, but also their purposes, functions and ways of doing. Specifically, state compensation is aimed to negotiate

a compensational settlement between the state and its aggrieved citizens, while prosecutorial accountability is a means to ensure prosecutors' performance of duties within the procuratorates they serve. As shown from legal practice, the two coincide in certain conditions. For instance, cases involving confessions by torture or death by intentional assault will be determined as wrongful cases, for which prosecutors engaged will be held accountable. Defendants in this kind of cases are entitled to receive compensation from the national government.

2.4 Unclear Accountability

In most cases, major decisions are confirmed in the name of the chief prosecutors after made to the superiors or settled by a team of prosecutorial officials. The problem is individual prosecutors are unwilling to assume liability for a group decision. As such, prosecutors tend to avoid complicated cases, report to superiors and make them all the way to prosecutorial committees for final discussion. With these protective strategies, many prosecutors have fallen into a vicious circle where they fail to advance their capabilities in case handling and will not undertake challenging cases beyond their ability. (Chu & Duan, 2018)

In reality, cases have to go through three tiers of examination respectively by case prosecutors, head of the department and chief prosecutors. All of the prosecutorial officials dealing with the same case will undertake joint liability if the case is determined as a false one. But reality is that usually only the officials responsible for the first tier of examination will be disciplined. It is the superiors including the heads of the department, deputy chief prosecutors or chief prosecutors who make the final decisions. This is apparently a form of justice miscarriages and will not do justice to the mechanism of prosecutorial accountability.

3. PROMOTION OF EFFECTIVE PROSECUTORIAL ACCOUNTABILITY

To encourage prosecutors and give it full play for judicial justice, the mechanism of prosecutorial accountability in wrongful cases should be improved in the following aspects.

3.1 Definition of Wrongful Cases

Wrongful cases are broadly defined in the *Opinions* and its principles are not as workable as expected. Based on legal practice, the following two situations are where prosecutorial officials should be held liable for their misconduct in wrongful cases.

Wrongful arrest. Wrongful arrest includes arrest of a person without proper cause that he/she committed a crime or of the wrong person and arrest without clear facts or sufficient evidence. As for cases where criminal suspects escape arrest for the mistakes of the procuratorates, prosecutors involved will be disciplined

accordingly. This conforms to the standard of "rather release a wrong one than misjudge one", which is also in line with what Mr. Shen Deyong tries to deliver, "innocent until proven guilty." (Shen, 2013)

Not to prosecute and wrongful prosecution. "Not to prosecute" refers to the situations where procuratorates decides not to prosecute criminal suspects who should have been held accountable in accordance with law. And "wrongful prosecution" mainly refers to the cases where criminal suspects are prosecuted before finally acquitted by the court. "Wrongful conviction is more harmful than wrongful release, because it violates the right of presumption of innocence." (Zhang, et al, 1996) And cases where the court decides to change charges or reduce punishment after prosecution should not be deemed as wrongful.

A wrongful case is constituted by four elements – prosecutors involved, intentional misconduct, severe consequences and law infringement. Prosecutors involving in a wrongful case are the ones who should assume liability for their intentional or major misconduct. If such blunders cause great damage to the victims, and have proven to be violation of law, including substantive laws and procedural laws, the cases that they are in charge can therefore be deemed as wrongful cases. In prosecution process, criminal law, criminal procedure law and relevant judicial interpretations and internal provisions of the prosecutorial organs are applicable.

3.2 Clear Accountability

In response to the blurry accountability lines and the leniency not to punish the majority, the principle that those who take charge and make decision will be held accountable for a wrongful case must be put in place.

The responsibility for a wrongful case lies undoubtedly with the individual prosecutor who is independently in charge of the case. And in cases handled by a team of two or more prosecutors, it should be determined according to the rules of procedure and division of functions once the case is deemed as a wrongful one. In cases where case prosecutor makes a decision in the name of the collective, he/she shall bear the responsibility. If it is a majority decision, the majority shall be held accountable for their misjudgment.

In cases that require the three-tier examination, or even discussion from prosecutorial committees, accountability lies clearly with those in charge and those who make decisions. First of all, if a wrongful case results from fraudulent identification of facts and evidence, the prosecutors who handle the case shall bear the responsibility for it. Second, if the head of the department changes the facts or evidence in the examination and verification of the case without authorization or under his/her instruction that results in the wrongful case, he/she shall assume full liability; Finally, if chief prosecutors make changes to the suggestions from the prosecutors in matters submitted

for decision, he/she shall be held accountable. It is unquestionable that chief prosecutors will not be liable for the issuance of a wrong case in respect of a decision made by the prosecutor within the scope of his functions and powers. In addition, if a decision made by a prosecutorial committee is identified as wrong, the committee members shall be held liable on the basis of whether there were intentional or gross errors in their opinions.

3.3 Immunity and Accountability

According to Article 33 of the *Opinions*, prosecutors who have fulfill their responsibility will not be subject to disciplinary system despite minor mistakes in their work. This provision would enable “public officials such as prosecutors to exercise their particular functions and powers without worries and interference in a comprehensive and correct way.” (Chen, 2010) But it is too simple and general to be workable. Based on the combination of legal principle and legal practice, it should be perfected from the following aspects.

Give clear definition of immunity. Prosecutors can enjoy immunity if they fall into the following categories that do not result from any intentional culpable negligence – mistakes due to changes of facts or evidence, amendment to laws or updated judicial interpretation, or not-to-prosecute decision or acquittal caused by disagreement on applicable laws due to the ambiguity of legal provisions. Exceptions are major mistakes resulted from fraudulent statements intentionally by the parties involved.

Define the burden of proof in duty performance. Article 33 of the *Opinions* defines reasonable duty performance as full fulfillment of duty of care without intentional purpose or major faults, while its burden of duty is absent. Prosecutorial officials will enjoy immunity if they can prove their reasonable performance of duty. However, self-proving evidence do not suffice to ensure justice and fairness in prosecution and might easily get the case into a vicious circle of repeated appeals and responses. Under this circumstance, procuratorates shall provide evidence if any of their prosecutors fails in delivering reasonable duty performance, or otherwise announce their immunity from being sued.

REFERENCES

- Chen, Y. L. (2010). On the Compatibility between the impunity system and the rule of law – Also on the establishment and improvement of the immunity system for public officials in China. *Political Science and Law*, (12).
- Chu, G. L., & Duan, J. T. (2018). *Reflections on and reconstruction of prosecutorial accountability in wrongful cases*. Prosecutorial Power Execution in the Context of Deepening Practice of Rule of Law – Essay Collection of the 14th National Senior Prosecutor Forum.
- Li, J. M. (2007). An analysis of prosecutorial procedure in wrongful criminal cases. *China Legal Science*, (3).
- Li, L. C. (2016). Suggestions for prosecutorial accountability. *People's Prosecutorial Semimonthly*, (20).
- Li, L. C. (2016). Suggestions for prosecutorial accountability. *People's Prosecutorial Semimonthly*, (20).
- Liao, Y. G. (1999). A reflection on judicial accountability for wrongful cases. *Jiangsu Social Sciences*, (3).
- Qiu, B. Y., & Liu, K. (2019). Identification of wrongful cases under the current judicial accountability system. *Prosecutorial Investigation and Guidance*, (4).
- Shen, D. Y. (2013). Innocent until proven guilty. *China Legal Science*, (5).
- Wang, L. (2005). Beware of system traps in prosecutorial accountability. *People's Prosecutorial Semimonthly*, (12).
- Wang, L. G. (2018). A Discussion of Prosecutorial Accountability for Wrongful Cases. *Journal of Henan Judicial Police Vocational College*, (2).
- Zhang, B. S., & Zhang, H. R. (2014). The improvement of prosecutorial services appraisal and accountability mechanism for wrongful cases. *Criminal Science*, (4).
- Zhang, B. S., & Zhang, H. R. (2014). The improvement of prosecutorial services appraisal and accountability mechanism for wrongful cases. *Criminal Science*, (4).
- Zhang, W. X., et al. (1996). *Principles of law: A normative analysis* (M. D. Bayles, 1987. Publisher: Springer). Encyclopedia of China Publishing House.
- Zhu, X. Q., & Zhang, Z. H. (2010). *Prosecutorial science* (p.320). China Prosecutorial Press.