

# Forensic Error: Evidential Impacts of China's Strike Hard Policy

Na Jiang

Associate Professor of Law, Beijing Normal University (BNU), China

## Abstract

China's Strike Hard Policy, a radical approach to fighting crime generally in effect from 1983 to 2005, produced significantly more wrongful convictions, including those resulting from forensic error. This conclusion is based on data that were collected from experiments conducted with 394 questionnaires and 100 judges in 4 sample cities, just before and after the SHP was replaced with a balanced policy in late 2005. Surveys to elicit the traits of forensic identification were used, as well as the exogenous imposition of the SHP to identify its evidential impacts, combined with new policy effects. The 2005 reform towards balancing leniency and severity is also essentially inadequate to prevent forensic errors.

**Keywords:** Strike hard policy; Forensic errors; Criminologists; Forensic law and regulations; China

## Introduction

China's Strike Hard Policy (SHP) was intended to bring 'severe and swift' punishment to criminals during 'strike hard' anti-crime campaigns in order to counter an obviously huge crime wave which began in 1983 [1]. The policy led to more wrongful convictions. One of the leading causes of this increase was forensic errors [2]. The increase in wrongful convictions in general led to widespread concern in China about the impact of the SHP on forensic evidence [3] and to the observation that 'severe and swift' punishments tended to be imposed based on unreliable or insufficient forensic evidence. In December 2005, LUO Gan, then the secretary of the Party Central Political-Legal Committee, introduced a new policy of 'balancing leniency and severity' that generally replaced the SHP as the guiding policy of China's justice practice, albeit in 2007 justice organs were urged to 'strike hard' again. This new policy influenced the implementation of the 2005 *Decision on Administration of Forensic Identification*. The concerns over the 2005 reform (in the policy and *Decision*) centers on preventing injustice and forensic disorder in implementing policies.

China's SHP provides criminologists with a chance to test and identify the causal impact of the SHP on forensic errors. Wrongful convictions are believed to result from the SHP as well as the use of illegally obtained evidence. The influence of severe or swift punishment on the use of unreliable evidence has thus been identified as the key reason why the radical SHP may have led to more forensic errors than a balanced policy. For example, the SHP required all law-enforcement officials to work together to ensure 'severe and swift' punishment. More attention to such punishment can, however, come with downsides in terms of high expectations and pressure to meet the needs of efficient anti-crime action at the cost of justice [4]. Forensic errors are often viewed as a result of the SHP which further led to wrongful convictions.

This paper describes how to use techniques from experimental criminology to measure the evidential impacts of the SHP and the policy of balancing leniency and severity on forensic identification. Forensic error in the number games of 'conviction rate' has been widely demonstrated to be correlated with other factors outside the following experimental setting [5]. This research investigated the impact of the SHP on forensic evidence, which should be at the core of preventing wrongful convictions. The SHP was an influential factor contributing to injustice before the 2005 reform [6], but it is not possible to distinguish the effect of the biased use of evidence before the reforms from the effect of the insufficient use of forensic evidence after the reform. In

addition to experimental results, survey questions revealed that further reform is needed to correct forensic error and injustice.

The SHP cannot be thought of as a natural experiment that enables us to separate out the effect of giving harsher or swifter punishment from the effects of a harmonious way on forensic errors. After the end of the SHP, surveys were conducted with participants including investigators, prosecutors, judges, lawyers and forensic experts from Beijing, Shanghai, Qingdao and Hohhot. The SHP was replaced in 2005, so a sample of 325 case files and 394 questionnaires were collected in that year to ensure that State authorities strictly enforced the SHP before it was abolished and that they followed the new policy afterwards. The final sample consisted of 394 participants spread across forensic agencies, police, prosecutors and judiciary that provide, produce or use forensic evidence obtained by the *Decision*. The traits of identification are explored from several aspects to identify the evidential impacts of the SHP.

## Limited Cognition of Current Forensic Law and Regulations

The results of the questionnaire reveal that many authorities were unaware of the new policy. For example, only 67 out of 100 judges, 64 out of 100 prosecutors, 82 out of 125 lawyers, and 33 out of 44 investigators who answered the question, said that they knew of the relevant forensic law and regulation, with the rest being unfamiliar. In percentage terms, the groups familiar with the laws and regulations in questionnaires are, from highest to lowest, 25 forensic experts, of whom 100% knew of the new rules, 75% of investigators, 67% of judges, 65.6% of lawyers and 64% of prosecutors.

In terms of territorial area, 146 law-enforcement officials in Beijing expressed familiarity with the new laws and regulations, accounting for 73% of the total number of such officials from Beijing who were surveyed. From Qingdao, 42 judicial officers, or 70% of the total

**\*Corresponding author:** Na Jiang, Associate Professor of Law, Beijing Normal University (BNU), China, Tel: +86 10 5880 6183; E-mail: [na.jiang@bnu.edu.cn](mailto:na.jiang@bnu.edu.cn)

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number surveyed in Qingdao expressed familiarity. Finally 37 judicial officials, or about 61.67% of all officials surveyed in Hohhot, Inner Mongolia were familiar with the new regulations.

The above statistics illustrate a relatively low level of knowledge of new laws and regulations among non-forensic officials. For example, only 60% to 75% of officials (on average) broadly maintained familiarity with existing forensic law and regulations, not to mention policies. Among the various judicial bodies, the percentage of police investigators who are familiar with the law, reaches 75% and leaves prosecutors as the group with the lowest percentage (only 64% of prosecutors were familiar with the new laws). But as for their daily work of handling cases involving judicial identification, the judges selecting to involve many cases on forensic identification accounted for 82% among all of 100 judges being interviewed, with 82 prosecutors for 82%, 48 lawyers for 38.4%, and 38 investigators for 86.36%. The ratio of individuals who are familiar with forensic legislation and regulations to individuals who are unfamiliar is much higher than the ratio of lawyers who are familiar with the legislation to those who are unfamiliar. This ratio indicates that judicial bodies failed to pay more attention to existing laws and regulations concerned and that some of them did not obey rules in the process, which reflects forensic chaos and judicial shortfalls in practice.

### Poor Implementation of the Identification System

Implementation of the identification system is not satisfying, but, in practice, biased. Of the 100 judges who filled in the questionnaire forms, 67, or 67% of all judges concerned, considered the existing forensic legislation to be well implemented, while 4 judges, or 4% of the total number of judges concerned, thought of implementation to be poor. Out of 100 prosecutors who completed the questionnaire, 43 maintained that existing laws and regulation have been well implemented, accounting for 43% of the total number of prosecutors, whereas 2 prosecutors, or 2% of the 100, viewed the current implementation of the identification system to be poor. Of the 125 lawyers who gave replies to the survey, 54, or 43.2% of the total lawyers who replied, consider implementation of the identification system to be good, with 7 lawyers, or 5.6% of the total, considering it to be poor. Only 3 experts or 12% out of the 25 forensic experts (surveyed) considered the current implementation of forensic laws to be good, and no expert to consider the laws to be poorly implemented. Out of 44 investigators, 27, or 61.36%, considered implementation to be good and 1 person, or 2.27%, viewed it to be poor.

Among all 200 people who filled in the forms of the survey questionnaire in Beijing, 95 people, or 47.5%, thought that the existing forensic legislation had been well implemented in practice, while no-one thought it was poorly implemented. In Qingdao, 32 people out of 60 people, or 46.67%, people considered implementation to be good and only one, or 1.67% of the total, believed it to be poor. In Hohhot, 34 people out of 60 people, or 56.67%, considered implementation to be good, and 20 people, or 33.33%, thought it to be partially satisfied, but believed that improvements would be possible, whereas 6, or 10% out of the total, took the view of that the implementation of the laws and regulations has been poor.

The above statistics demonstrate that only slightly more than half of law-enforcement officials who were surveyed expressed satisfaction with the current implementation of existing legislation on judicial identification, and that nearly half of them were dissatisfied with it. This shows that, in practice, the implementation is not satisfactory and forensic experts, who understand the implementation situation better than other judicial officials, are most dissatisfied with it.

### Abolition of Forensic Agencies Affiliated to the Police

Although the National People's Congress's 2005 *Decision* is intended to solve the problem of the 'appraiser management system', in which the experts who appraise the forensic evidence are not impartial or independent, most of forensic identification is still conducted by forensic agencies inside the police, while social sectors that are funded and administrated by domestic NGOs are involved in very few criminal identification cases. Whether to abolish police forensic sectors or not has been a focus in further reform on the above *Decision* to better implement the new policy of balancing leniency and severity.

Among the total of 25 questionnaires from forensic experts in the three cities, there are 5 experts in Hohhot in favour of maintaining the police forensic sectors and 4 who argue for their abolition, while 5 experts in Qingdao and 8 in Beijing think that they should be retained inside police. Overall, 72% of forensic experts think that such sectors should be retained and 16% argue for their abolition of them to prevent biased identification and forensic error.

In the survey questionnaire, there are 12 investigators in Hohhot, 11 in Qingdao and 9 in Beijing who argue that forensic sectors inside the police should be retained, whereas 1 investigator in Qingdao and 5 in Beijing were in favour of abolishing police forensic sectors. The overall percentages in the three cities are about 72.73% of investigators in favour of retaining forensic sectors inside the police, about 13.64% of them against retaining police forensic sectors and the rest of investigators expressed no opinion.

Even inside the investigating authorities, there are still 12, or about 27.27% of 44, investigators who do not support retaining police forensic sectors, either preferring their abolition or expressing no opinion on the matter. From the Hohhot statistics, experts supporting abolition of such internal sectors account for about 44% of the total number, in a sharp contrast with 90% who do not support their abolition, over which the percentage of Hohhot investigators supporting retention of them exceeds as the highest among the three cities in the survey. Differently, Beijing investigators who support the retention of the institutions account for 50%, while Beijing experts account for more than 88% of experts sampled.

### Initiation of the Identification Procedure

Among the 325 case files collected from various courts, 319 cases, or approximately 98.15% of the total, involve the "identification procedure", (in which the identity of who committed the crime or the identification of whether certain items were involved in the alleged crime or not is determined) initiated by the police during investigation, while the identification procedure was initiated during trial in only 6 cases, including 3 where it was initiated on the initiative of the judges. The imbalanced power to initiate the identification procedure indicates a failure to remedy the bias of forensic identification towards severe punishment.

In both Beijing and Shanghai, the identification procedure for all cases in the survey is started by the police on their initiative at the investigation stage. There is one case where the victims applied for injury identification at trial in 2007 but this application was not admissible in court. In Qingdao, there were 25 cases in 2005 in which the identification procedure was launched by the investigating authorities during investigation, two cases where it was started by the judge at trial, and one more where an application for re-identification was not approved. In 2006 there were 27 cases where the investigating authorities began the identification procedure during investigation, and one case

where the parties submitted and then withdrew the application at trial. In 2007 there were 38 cases in which the identification procedure was initiated by investigating authorities, one case in which it was started by judges at trial and one more in which it was initiated by the application of the parties. In Hohhot, the identification procedures for the vast majority of cases are launched by investigating authorities on their own initiative during investigation, with the only exception being a case in 2007 where judges allowed re-identification upon an application from the parties.

This set of data shows that the identification procedure for the vast majority of cases is initiated by the investigators acting *ex officio* during the investigation stage, with very few chances for judges to initiate or the parties to apply for identification at trial. This further indicates that both parties have a relatively low level of participation in the identification system because prosecutors usually passively accept the conclusions of their police colleagues. Also, many individuals' active applications for forensic investigations have been rejected by courts. The general reluctance of courts to allow for independent investigations creates a vicious cycle that the tendency of judges to accept police advice over the advice of independent experts enhances the reputation and influence of the police, which in turn makes judges even more likely to accept their advice in the future.

### Impacts of Forensic Conclusions on Judges' Verdicts

In Hohhot, 25 out of 30 judges in the survey thought that forensic conclusions had great impacts on their verdicts and these judges took into account such conclusions as the focus of testimony, whereas the other 3 judges considered no special effects of forensic evidence in specific trials. In Qingdao or Shanghai, all of 11 judges surveyed agreed with that forensic conclusions had a great impact on their trial decisions, as did 35 out of the 48 surveyed judges in Beijing. There are 82 judges out of the total of 100 in the survey, or 82%, who expressly stated the great impact which forensic conclusions had on their decisions.

In 73 judgements from the 74 case files collected in Shanghai, judges discussed whether to adopt identification conclusions or not. Among the 96 case files from Qingdao, there are a total of 68 cases in which judges responded to such conclusions in their verdicts, of which 13 cases occurred in 2005, 21 cases in 2006 and 34 cases in 2007. Among 60 case files from Inner Mongolia, judges explained their opinions on whether to adopt the conclusions or not in the verdicts in only 47 cases. In total, judges briefly addressed whether to adopt such conclusions or not in verdicts in about 81.74% of 230 cases in the three areas.

### Handling Multiple Identification Conclusions for the Same Fact

The high impact of that judges' evidentiary conclusions have on their final disposition of the case illustrates the importance of the forensic identification system. When choosing between conflicting conclusions that could be based on the same facts, 22 out of 30 judges involved in the Hohhot survey tend to adopt the conclusions made by forensic sectors at a higher level and 4 judges tend to consider the personal factors of forensic experts and adopt the conclusions of the more authoritative experts. Out of these four, 2 judges tend to admit final conclusions while the other 2 judges think that if there are two or more conclusions then the majority view should be adopted. In Qingdao, 5 out of 11 judges surveyed tend to admit the conclusions made by forensic sectors at a higher administrative level, and 3 judges tend to consider the personal factors of forensic experts with higher ranks or education levels and adopt the conclusions made by more

authoritative experts, with the 2 preferring those from the finally conducted investigation in particular cases and one having no idea. Out of 48 judges in the Beijing survey, 18 tend to admit conclusions made by forensic sectors at a higher level, 12 ones prefer those by more authoritative experts, 7 admit final conclusions, 8 adopt a majority view and 3 ones have no set method of determining which experts to believe.

These data show that judges in the three cities are inclined to admit identification conclusions made by forensic sectors at a higher level, followed with those provided by a more authoritative expert, both of which account for about 71.91% of the total number. In practice, both the level of forensic sectors and authority of forensic experts are the main criteria on which judges make decisions on the final conclusion among repeated forensic investigations. Given that such conclusions are popular with judges as favorable evidence, a large number of cases are flocking to such sectors as at a higher level or with official background, leading to less workload in social or lower-level forensic sectors and their minor role in forensic work. In Hohhot, it is most obvious that judges rely on the level of forensic sectors, whereas in Beijing the percentage of judges who rely on level of an expert is about the same as the percentage who rely on the authority of a forensic expert when making decisions.

### Conclusion

Although findings were obtained from the survey in sample cities, the results are generalizable to other areas of China where the influence of the SHP still exists and the new policy has been implemented in recent 8 years. Previous work suggests there is not much difference between the impact of the abandoned SHP and that of the new policy on forensic errors, which is similar to the evidential impact of new changes in the 2005 *Decision* without substantive progress but fundamental flaws leading to errors. The effect of the SHP on forensic errors long after its introduction may, however, differ from what has been found here, because the balanced new policy calls for reliable forensic evidence in balancing leniency and severity. Against the background of the 2005 *reform*, e.g., the *Decision* and the new policy, It is expected that the SHP's effect would be minimized to reduce and prevent biased identification or forensic error due to number games [7], in detention, prosecutorial or conviction rates. Surveys to elicit the traits of forensic identification have identified the evidential impacts of the SHP, in and after the 2005 *reform*.

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