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## 刑事个案引发的司法变革-

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■ 栏目主持人:陈卫东(中国人民大学法学院教授)

1988年9月,全国人大批准了《联合国反酷刑公约》。1996年和1997年先后进行的刑诉法和刑法的修改也将反酷刑列为修改目的之一。

我国为打击刑讯逼供,防止冤假错案所做的司法努力越来越多。为使我国反酷刑的法律法规进一步完善,本报特别开设“程序正义”栏目,特约我国著名刑诉法专家陈卫东教授作为栏目主持人,就反酷刑相关的问题,组织部分专家学者及实务界权威人士进行探讨,敬请关注。

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2004年以前的荷兰,大部分人都认为处理刑事案件的法律制度是相当稳固的。荷兰的法律制度运行过程中的确会有一些小瑕疵,但出现大的错案却闻所未闻。

斯奇丹是一个邻近鹿特丹的荷兰小镇。2000年6月22日,10岁的Nienke和她11岁的朋友Maikel在镇上的公园玩耍时,一名男子将她们拖入灌木丛并实施了性侵犯。凶手曾命令两个孩子脱掉衣服,并捅了Maikel好几刀。Maikel因装死而活了下来,而Nienke则不幸丧命。这个案子就是著名的斯奇丹公园谋杀案。当Maikel走出灌木丛时,已是全身赤裸且受伤严重,一名骑自行车路过的男子打电话报了警。该男子是Kees Borsboom,一个恋童癖者。随后,他因谋杀罪被判处终身监禁,在监狱和精神病院度过了余生。但事实上,他并没有犯罪。

Kees Borsboom获刑不久后案件就变得明朗起来,案件中提出指控他的证据实在是太多了,而且他也不符合Maikel对犯罪嫌疑人体征的清晰描述。除此之外,凶案发生时他正在工作,有不在场证明,同时他的DNA与犯罪现场提取的DNA并不吻合。整个案件只有他的犯罪供述这一个“令人信服”的证据,但他的供述并不符合其他已知的事实,法院一直以来都忽视了这点。的确,大家知道Borsboom有恋童癖,但在犯罪发生时,附近至少有七个恋童癖者。

真正的行凶者于2004年自首,他的DNA与犯罪现场提取的DNA相符。在此之前,荷兰的律师通常都认为司法不公只会发生在其他国家,例如英国和美国。这个案件震惊了荷兰的法律和政治界,司法部长因此事几乎引咎辞职。为了保住职位,他承诺将对警察的工作程序和荷兰的公诉方式进行重大变革,这些变革也得到了推行。警方对各种各样的程序进行了改造,其中一个重大变革是现在所有针对恶性犯罪进行的警察讯问都需要做笔录;另一个变革是在处理重要案件时,会有独立的警官对侦查工作进行监督。检察官在处理重要案件时,也需要接受类似的独立监督。除此之外,与以前相比,警方现在大部分的工作都需要做笔录。由于斯奇丹公园谋杀案,荷兰警方和公诉方的工作方式发生了重大变革。

一起个案怎么可能引发如此巨大的变革?在回答这个问题之前,让我们看看另一个国家。以英格兰为例,在上世纪七十年代,爱尔兰共和军以强有力的手段试图联合北爱尔兰和爱尔兰共和国对英格兰进行恐吓。因此,英国人有过一段打击恐怖分子的困难时期。在这期间,针对爱尔兰恐怖分子,警察机关的努力有些过分。这场“反恐战争”导致司法机关只需依据很少的证据即可对犯罪嫌疑人侦查、起诉和定罪。现在看来,这种环境下作出的判决很可能导致司法不公。例如,1975年在伯明翰发生的酒吧爆炸案,爆炸造成21人死亡,162人受伤,这起案件也许是爱尔兰共和军存在时最有影响力的判决。六名犯罪嫌疑人被判处终身监禁,在该案中,公诉方主要是以自白证据为基础的。然而,警察是通过暴力获取了这些有罪供述。1991年,这六个人被宣告无罪,重获自由。

由于这些与爱尔兰共和军有关的案件,英国警方的工作方式发生了重大变革。皇家专门调查委员会出具的一份报告促使英国颁布1984年警察与刑事证据法,该法对警察权力的行使作出了严格的限制,并根据需要解决了警方搜查、扣押等方面的笔录问题。对于如何对待被警方拘留和审讯的犯罪嫌疑人,该法令也作出了相应的规定。例如,法令规定警察在讯问和会见被告人时需要录音录像。除此之外,英国还创设了独立的皇家检控署取代警察作为控诉机关。

上世纪九十年代初期,在警察与刑事证据法颁布之后,另一个皇家委员会促使英国颁布1995年刑事上诉法并且创设了刑事案件审查委员会。这一常设委员会拥有特权,可对存在误判嫌疑的案件进行调查,如有必要还可申请再审。

为何荷兰和英格兰的警方和检察当局的工作方式会因某些刑事个案而发生彻底的变革,这是一个有趣的问题。在斯奇丹公园里谋杀两个小女孩,在伯明翰酒吧中进行血腥的杀戮,以至于大家都知道了这些

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骇人听闻的罪行,而当犯罪嫌疑人因杀人被定罪时,所有人都因正义得到了伸张而如释重负,大多数市民都希望凶手落网。令人遗憾的是,结果证明这些被定罪的犯罪嫌疑人是无辜的,这十分具有讽刺意味。在公众的意识里,犯罪分子罪有应得是每个人都希望的结果,然而判决却是错误的。公众又怎么可能知道这些?他们不可能知道判决有误。他们相信警察审查了证据,他们相信控方也相信法院。事实上,这些政府机构辜负了大众寄予他们的信任。他们失信于民众,司法系统的工作方式因此而发生改变。这种变化发生于1989年至1991年的英格兰,数年之后,即2004年至2005年,又发生在荷兰。

现在,中国是否也正经历着相类似的发展过程呢?赵作海案和佘祥林等案的发生,使我们不得不认真思考这个问题。当然,这些案件有助于制定新的证据规则。如禁止使用通过酷刑取得的证据;讯问时必须做笔录、进行同步录像并且讯问时在场的人应当为法庭提供证据;禁止匿名证词等。的确,这些都是很大的改进。同时,改革的时机已经成熟,在这一背景下,一些案件恰好促成了这次改良,这同荷兰和英格兰是一样的。

事实上,在很早以前,人们就知道使用酷刑可以获取供述。人们也知道,虽然犯罪嫌疑人被判有罪,但在很多案件中并不是因为证据有力才被定罪判刑,而是多种因素相结合,对这些案件施加了很大的影响。我认为,刑事个案能够促成司法变革的原因如下:首先,这些案件得到了媒体的广泛报道;其次,案件本身就是一个很好的故事,因而公众对这些案件有很大的兴趣;最后,人们认为相关部门欺骗了他们。事实上,大家都认为这些判决是合理的,但对证据的评估却不得不交由专门机构进行。正如荷兰的斯奇丹公园谋杀案和英格兰的爱尔兰共和军系列案件那样,这些机构都失信于民众。这就是个案如何导致重大分水岭出现的过程,中国、荷兰和英格兰这三个国家的政府正是以相同的方式进行着变革。

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Translation

Single Criminal Cases as Great Divides

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In the Netherlands, most people were of the opinion that the legal system in criminal cases was rather solid. Minor mistakes were indeed made, but great ones were unheard of. Until 2004.

On 22<sup>nd</sup> June 2000 two children were playing in the Beatrix Park in Schiedam, a town adjacent to Rotterdam in the Netherlands. Nienke, 10 years old, and her 11-year-old friend Maikel were grabbed by their necks and walked to bushes. The man doing this sexually assaulted both and then strangled Maikel and Nienke. The killer had ordered the children to undress themselves and had stabbed Maikel several times. Maikel survived by acting dead; Nienke was killed. The case became known as the Schiedam Park Murder.

When Maikel came out of the bushes, naked and badly wounded, a man cycling by phoned the police. This man was Kees Borsboom a paedophile who was subsequently convicted for the murder. He got a life sentence, partly in prison, partly in an asylum. He did not commit the crimes.

In fact, soon after his conviction it became clear, mostly because of a book I published on the case, that the evidence against Kees Borsboom was amazingly slim. Kees Borsboom did not fit the clear description given by Maikel. Moreover, he had an alibi because he was at work at the time of the killing. Neither did his DNA match the DNA found at the scene of the crime. There was one compelling piece of evidence, his confession to the crimes. It had been ignored by the court that the story of the confession did not fit what was otherwise known. It was true that Borsboom was a known paedophile, but there were at least seven paedophiles in the vicinity at the time of the crime.

In 2004 the real perpetrator turned himself in. His DNA fitted the DNA at the scene of the crime. Until then Dutch lawyers typically thought that miscarriages of justice only happen abroad, in countries such as the United Kingdom and the United States. The case caused a shock in the Dutch legal and political world. The Minister of Justice almost resigned. He saved his position by promising drastic changes in police procedures and in the manner in which the Dutch prosecution operates. These changes were indeed implemented. The police adapted all kinds of procedures. One important change is that in major crimes all police interviews are now recorded. Another one is that in important cases independent police officers monitor the work of the investigating team. The same independent oversight is done when prosecutors are handling important cases. Also, the police now have to record much more of their work on paper. So the Schiedam Park Murder caused considerable changes to the

work of the Dutch police and the Dutch prosecution. The Dutch judiciary still has to follow suit.

How is it possible that a single case could cause so much change? Before answering that question, let us turn to another country. Let us consider England in the 1970's. In that decade England was terrorized by the Irish Republican Army (IRA) which tried to unite Northern Ireland and the Irish Republic by forceful means. The English had a hard time combating the terrorists. Their efforts against the Irish terrorists went so far that police forces overstepped the line. This 'war on terrorism' led to a climate in which one was prepared to investigate, to prosecute and to convict suspects on very little evidence. That resulted in convictions that are now considered miscarriages of justice. I mention but three infamous examples.

The Guildford Four were imprisoned in 1975 for bombing pubs in Guildford. The bombings resulted in the deaths of five people and injury to many more. The convicts were freed in 1989 when they were proven to be innocent. The MacGuire Seven were also convicted as terrorists. The group is named after four of them being from the MacGuire family. They were convicted in 1975. Their convictions were overturned in 1991.

Probably the most famous convictions from the IRA-days were the Birmingham Six. These six men were sentenced to life imprisonment, also in 1975, for bombing pubs in Birmingham, killing 21 and injuring 162 people. The case of the prosecution was mainly based on evidence gained through confessions. These confessions, however, were obtained with much police force. The six men were absolved and set free in 1991.

The IRA-cases have led to major changes in the manner of working by the English police. A report by a royal commission resulted in the Police and Criminal Evidence Act (PACE) 1984 in which the exercise of powers by the police was heavily regulated. It also dealt with the need to make records of, for instance, searches and seizures by the police. The act set out requirements for the treatment of people while in police custody and during questioning. For example, it deals with the recording of interrogations and interviews by the police. In addition, an independent Crown Prosecution Service (CPS) was founded, replacing the police as the prosecuting body.

PACE was followed in the beginning of the 1990's with yet another royal commission, that led to the Criminal Appeal Act 1995 and the setting up of the Criminal Case Review Commission. That permanent commission has special powers to investigate cases that are suspected to be miscarriages of justice and can ask for a retrial if necessary.

It is an interesting question why certain criminal cases cause such radical changes in the way the police and prosecution are operating, both in the Netherlands and in England. In both countries, the problems that caused the miscarriages of justice were not new and had been discussed before, although most people thought that they were living in a highly civilized society with a legal system where perhaps small things might go wrong, but miscarriages of justice were virtually impossible. Cases like the

Schiedam Park Murder and the Birmingham Six made the general public aware of the fact that miscarriages of justice are possible, even in their own country.

To the dramatic changes which came about following these miscarriages of justice, the following issues may have contributed. One is that the cases were highly publicized in the media. The murder of Nienke Kleiss in Schiedam Park and the bloody killings in Birmingham pubs were such horrendous crimes that everybody knew about them and everybody felt a great sense of relief, and, ironically, that justice had been done when the suspects were convicted for the killings. Most citizens wanted these convictions. But regrettably, the suspects that were convicted turned out to be innocent. In the public sense the very fate of the convicts was something everybody wanted, but the convictions turned out to be wrong. How could the general public have known? They could not. They trusted the police to scrutinize the evidence, the prosecution, and the court. These government agencies in fact failed the trust bestowed to them by the general public. They betrayed the public. And that sense of betrayal caused the changes in the work of the judicial system. In England that happened in 1989-1991, in the Netherlands some years later, in 2004-2005.

Is China experiencing a comparable development now? Earlier this month, Zhao Zuohai was acquitted after he served 10 years in prison because he allegedly murdered Zhao Zhenshang in Henan Province. The acquittal occurred after Zhao Zhenshang reappeared alive. This follows the case of She Xianglin, a Hubei man who was wrongfully imprisoned for 11 years for killing his wife. She turned up alive in 2005. The conviction of She Xianglin was mainly based on his confessions. He claims that he was tortured into the confession during a 10-day continuous interrogation.

These cases have surely contributed to the new rules of evidence. Evidence obtained through torture is banned. There must be interrogation notes and videotapes of interrogations and the people present at the interrogation must provide evidence. Anonymous testimony is banned. These are great improvements indeed. And again, like the Netherlands and England, these are caused by just a few cases, in a context that was ripe for change. The fact that people were tortured into confessions was known earlier. The fact that there was not sound evidence for a conviction in all cases, although suspects were convicted nevertheless, was also known. It was the combination of a few factors which made the influence of these cases so great. First they were extensively covered in the media. Second they were of great interest to the public; they made a good story. But, most of all, the People felt betrayed by the relevant authorities. Indeed, everybody considered the convictions to be sound, but had to leave the evaluation of the evidence to the authorities. The authorities failed the public, as the authorities failed the public in the Netherlands with the Schiedam Park Murder and failed the public in England with the IRA-cases. That is how single cases can cause a great divide. Am I right when I conclude that in all three countries, China, the Netherlands and England, public change operates in the same manner?