

Masterpieces of Contemporary Jurisprudents in China

Jingkun Liu

The Exclusionary Rule of Illegal Evidence in China

Theory, Case, Application



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The Exclusionary Rule of Illegal Evidence in China

Theory, Case, Application



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Preface

How to Enforce the Exclusionary Rule of Illegal Evidence Strictly?

The exclusionary rule of illegally obtained evidence in China was established and gradually improved by the Supreme People’s Court and other central judicial authorities as an important part of judicial reform. Though originated from abroad, the purpose, structure, and development of the exclusionary rule in China have their own distinctive characteristics.

The establishment and advancement of the exclusionary rule in China played an indispensable role in reforming the criminal justice system, increasing the effectiveness of the trial, and preventing errors of justice. According to the reform strategies laid down during the Third and Fourth Plenary Sessions of the 18th CPC Central Committee, the implementation of the exclusionary rule should be further consolidated and relevant law should be revised, thus creating a trial-centered criminal procedural system and achieving justice for all.

We are really privileged to have taken part in drafting the exclusionary rule and designing relevant legal system in China. We seek to comprehensively present by this book the issues and challenges we faced during the reform process, and the main ideas and visions we held in reconstructing the criminal justice system.

Opportunity and Preparation for the Reform

Evidence is the basis of ascertaining the fact and the key to ensure justice. If the evidence rules were inadequate, the guidelines for evidence collection, scrutiny, and admission were absent, and the illegal methods of collecting evidence such as torture were unchallengeable, the risks of wrongful convictions would be raised to an exceedingly high level and justice could hardly be done. Hence, it is safe to say

there is a general consensus among legal professionals over the reform of criminal evidence system, especially the establishment of the exclusionary rule.

The notion of procedural justice and human rights protection were largely overlooked in traditional China. Blind belief in confession is hard to eliminate in a short time and over reliance on confession will continue to be the main method of solving cases to some extent. Thus, some law enforcement agencies would inevitably hesitate about the idea of introducing the exclusionary rule out of the concern that it might significantly influence the effectiveness of criminal investigation. As a result, the exclusionary rule was not established in the *Criminal Procedural Law 1979* and the *Criminal Procedural Law 1996*, even though it was repeatedly stressed that torture and threat, inducement, deception as well as other illegal methods should be strictly prohibited. Since torture and other illegal methods of collecting evidence were difficult to be eliminated by traditional methods such as special campaigns, voices started to grow among practitioners for introducing the exclusionary rule to get away with torture by institutional and procedural methods.

Reflecting on several high-profile wrongful convictions, the Supreme People's Court started to draft criminal evidence rule in 2005 and actively push forward the reform of criminal evidence system. In 2008, the Central Committee of CPC decided to initiate judicial reform, highlighting the requirements as follows: to improve criminal evidence system, clarify rules of evidence scrutiny and admission as well as standards of proof regarding different procedures; to improve the exclusionary rule, clarify the scope of exclusion, burden of proof, scrutiny procedure and legal remedies. Based on these requirements, the Supreme People's Court, in collaboration with the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice, enacted in 2010 the milestone "Two Evidence Provisions". Accordingly, the 2012 *Criminal Procedural Law* established the exclusionary rule on the legislative level based on the *Two Evidence Provisions*. In the following year, the CPC Central Commission of Political and Legal Affairs issued the *Provisions on Effectively Preventing Miscarriages of Justice*. To implement this important legal document, the Supreme People's Court issued *Opinions on Establishing and Improving the Mechanisms of preventing Miscarriages of Justice in Criminal Cases*, further clarifying the scope of illegal evidence. Later, during the Third Plenary Session of the 18th Central Committee of the CPC, it was stated that torture and maltreatment shall be strictly prohibited and the exclusionary rule shall be strictly implemented. During the Fourth Plenary Session, it was further highlighted that the legal systems for implementing the exclusionary rule shall be strengthened, the judicial supervision on judicial or investigative measures that restrict personal freedom shall be improved, and the prevention mechanism on torture and other illegal methods shall be enhanced. According to these judicial reform strategies, the Supreme People's Court, together with other organizations, enacted the *Provisions on Several Issues Concerning the Strict Exclusion of Illegal Evidence in Criminal Cases* in 2017. It was an important breakthrough of the criminal justice reform in general, and a vital part of the trial-centered procedural reform in particular.

In summary, we can see that the establishment of the exclusionary rule and every step of its development were closely associated with the judicial reform. This reflects the judicial department's commitment to restrain torture and prevent miscarriages of justice. Meanwhile, it also shows that the criminal justice reform could not have achieved expected aims without clear reform strategies since it involves many controversial issues under the current judicial structure. Furthermore, no reform is a short-term project in nature. Only by consolidating the practical considerations, academic researches, and reform consensus in a systematic and long-term manner can the exclusionary rule reform be put forward gradually.

Principles and Methods of the Reform

The success of a reform lies in the perfect balance of ideal and reality. Only stressing on the ideal cannot automatically translate the reform into reality. To be complacent with the status quo is not the rational choice either. The establishment and development of the exclusionary rule reflect that the principles and methods are of great significance for judicial reform.

First of all, judicial reform should integrate the wisdom from home and overseas, and be practice-oriented. It is necessary to conduct systematic research on foreign legal systems, which does not aim to transplant them directly into domestic legislation, but to pool up the knowledge by comparative study so as to strengthen the theoretical framework of judicial reform. The notion of "Grabbism" (Translator's note: It is a term coined by famous Chinese writer Lu Xun to describe unselective taking-in of knowledge) cannot go far and may even bring about negative effects. Meanwhile, field researches should also be carried out in order that advices and suggestions at the local level can be heard and accordingly relevant reform measures can be based upon the reality in China. For evidence system reform, understanding foreign legal systems and research products is the basis for building a solid theoretical foundation. Furthermore, acknowledging judicial realities and practical challenges in China is also the prerequisite for making the reform measures pertinent and feasible. In all, judicial reform is a process of systematically arranging and internalizing previous studies, foreign systems, and Chinese realities.

Second, judicial reform should resolve disputes and reach consensus in order to achieve anticipated aims. Unlike other interior reform within a single department, the exclusionary rule reform is concerned with various stages in the criminal proceeding and key procedural functions including investigation, prosecution, trial, and defense. Certain reform measures may even touch on the fundamental problems of the current judicial system. This reform is also different from reforms in other counties led by special committees or advanced by the Supreme Court through establishing precedents. It involves all relevant judicial authorities, which means the reform will be suspended when there are sharp divisions about the reform plans. The exclusionary rule reform has been, therefore, a process of reaching consensus among judicial authorities through continuous communications and rounds of

negotiations. To facilitate the consensus on the reform plans, the following points are worthy of attention: (A) The reform measures should be necessary and targeted, focusing on the problems and relevant solutions. Generally speaking, the scope of illegal evidence and the exclusionary procedure are core issues of the exclusionary rule, which invoke great controversies in practice and are in urgent need for further clarifications. During the reform process, we paid attention to these critical matters so as to build up a practical and effective evidence system. (B) The reform measures should be legitimate and justice-oriented, adhering to legal principles and rule of law. The exclusionary rule reform was carried out to precisely punish criminals and achieve justice, with the main purpose of enforcing existing legal provisions to restrain torture and prevent miscarriage of justice. This was not only the key factor for gaining support among legal practitioners, but also the main reason for relevant departments to strictly implement the rule. When there were oppositions regarding any legitimate and necessary reform measure, we tried to put forward sound explanations to facilitate consensus. (C) The reform measures should be scientific and reasonable, highlighting legal foundations and practical considerations. It is beneficial to listen to reasonable suggestions during reform process. In the beginning, it may be difficult to make improvement concerning some ambitious reform measures. But as long as relevant reform measures are accepted generally, all relevant departments will actively participate in the reform process and adhere to the requirements of the reform, which is helpful to avoid inconsistency in policy implementation. The journey of the exclusionary rule reform has been bumpy, but it is these difficulties that reflect the importance of the reform.

Finally, judicial reform needs to be carried out one step at a time, and it should be centered on the key issues in practice. In 2010, there were some divergences about the provisions in the “Two Evidence Provisions” among the “Two Supremes and Three Ministries” (The Supreme People’s Court, the Supreme People’s Procuratorate, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice—Translator’s note). Thus, focusing on the big picture, the Two Evidence Provisions made some relatively general provisions (e.g., the exclusionary rule of illegal material evidence) or retain some proposed provisions (e.g., the exclusion of confessions obtained by threat, inducement, or deception and the exclusion of successive confessions). These issues were essential yet set aside before. Further and clearer provisions were called for as the judicial reform moved forward. The *Opinions on Preventing Miscarriages of Justice* 2013 extended the scope of illegal evidence, defining freeze, starve, heat, scorch, and exhausting interrogation as illegal methods of collecting evidence. Subsequently, the Third and Fourth Plenary Sessions of the 18th Central Committee of the CPC called on the reform of strict enforcement of the exclusionary rule, which requires that the scope and standards of illegal evidence should be further clarified and the exclusionary procedure be improved. It should also be noted that the reform still faces up to many challenges, and controversial issues cannot be solved once and for all. However, as we make an effort to push forward the reform, more consensus would be reached and relevant system would be optimized.

Outcomes and Visions of the Reform

The reform on the exclusionary rule has been unfolding steadily since the introduction of the Two Evidence Provisions in 2010. As a result, the evidence-collecting procedure in criminal investigation is gradually standardized. Illegal methods of obtaining evidence such as torture have been brought under control. In addition, institutional mechanisms aiming to prevent wrongful convictions have been gradually perfected as well. The courts pay more attention to the scrutiny of the legality of evidence. Cases were widely reported where the defendants were acquitted based on the principle of presumption of innocence, with illegal evidence being excluded according to law. The idea of due process and protection of human rights becomes broadly recognized. The impacts of the exclusionary rule on the criminal procedure, even the whole judicial system, are indeed deep and profound. But at the same time, it is also truthful that difficulties still exist in proposing for the exclusion of illegal evidence, proving the legality of evidence, as well as identifying and excluding illegal evidence. These challenges need to be resolved through further reforms.

For any institution, there is always room for improvement, not to mention that the exclusionary rule is still a new legal system in China. Looking forward, we will deem following issues as key points of further reform:

- (A) Continue to optimize the exclusionary rule so as to provide clearer provisions for judicial practice. Under the current legislative framework, the identification and exclusion of illegal evidence rely more on the judge's discretion, which increases the trial burden of judges. Detailed and mandatory provisions, by contrast, are undoubtedly easier to apply. Hence, the main idea of improving the exclusionary rule is to clarify the scope, identification criteria, and excluding the procedure of illegal evidence.
- (B) Establish guiding cases of excluding illegal evidence in order to effectively guide the judicial work. Similar to other legal rules, the exclusionary rule allows for detailed judicial interpretations. To unify the application of exclusionary rule, it is necessary to strengthen the referential role of guiding cases and to establish specific rules for decision-making on relevant issues. This book selects many typical cases in China to exemplify common issues in the application of the exclusionary rule. Furthermore, a database as such should be established and gradually expanded, sorting out more cases of general guidance.
- (C) Improve the criminal evidence rule and accurately apply the exclusionary rule for all types of illegal evidence. When the Two Evidence Provisions were originally issued in 2010, some erroneously thought that the exclusionary rules established in the *Provisions on Several Issues Concerning the Examination and Judgment of Evidence in Death Sentence Cases* were all concerned with illegal evidence. However, the exclusionary rule of illegally obtained evidence is merely part of the exclusionary rules. Besides the exclusionary rule for illegal evidence, there are also other kinds of exclusionary rule such as best

evidence rule, witness privilege rule, hearsay evidence rule, and character evidence rule. The evidence excluded under these rules has nothing to do with the legality of evidence. The underdevelopment of evidence theories and legal system may be the main reason why these different kinds of rules are mixed up in practice. Therefore, it is essential to improve the criminal evidence rules systematically, aiming to apply the exclusionary rule of all types of evidence accurately.

- (D) Promote the trial-centered criminal procedural reform and complete the supporting systems for the exclusionary rule. Strictly enforcing the exclusionary rule goes hand in hand with the trial-centered criminal procedural reform. To implement the exclusionary rule strictly is helpful for adhering to the principle of evidence-based adjudication, so that the trial can play a decisive role in ascertaining fact, identifying evidence, protecting rights, and achieving fair judgment. Accordingly, to promote the trial-centered procedural reform and complete the supporting systems for the exclusionary rule, especially standardizing the procedure of evidence collection, will also contribute to the strict implementation of the exclusionary rule.

The exclusionary rule reform has great and lasting impacts on the evidence rule, and even the criminal procedure. This book is written as a summary of the reform undertaken so far and is expected to promote future legislation, judicial reform, and theoretical researches. All suggestions on improvements will be gratefully received.

Beijing, China

Jingkun Liu

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Chapter 1

The Emergence and Development of the Exclusionary Rule



The concepts and theories of illegal evidence, as well as its exclusionary rule in Chinese criminal procedure, are all imported from abroad. The emergence and development of the exclusionary rule in China is closely related to the government's efforts to restrain torture. Along with the introduction of Reform and Open policy in China, as well as the governmental campaign to promote the rule of law, modern legal notions such as human rights protection and procedural justice gain support gradually. There is a growing consensus across the Chinese criminal justice system that torture and other illegal methods of obtaining evidence shall be prohibited. As the touchstone of the criminal justice, the significance of exclusionary rule is widely recognized by both scholars and practitioners. In 2010, the "Two Supremes and Three Ministries" jointly issued the *Provisions on Several Issues Concerning the Examination and Judgment of Evidence in Death Penalty Cases* (Provisions on Evidence in Death Penalty Cases hereafter) and the *Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases* (Provisions on the Exclusion of Illegal Evidence hereafter). This marked the institutionalization of the exclusionary rule and made a profound impact on the evidence system as well as its application. The 2012 revision of the *Criminal Procedural Law* drew from the essence of the Two Evidence Provisions and formalized the exclusionary rule in legislation. The rule was then raised to a higher status during the Third and Fourth Plenary Session of the 18th Central Committee of the CPC where the reform document specifically calls for strict enforcement of the exclusionary rule and improvement of its complementary system. The Supreme People's Court, in cooperation with other ministries, will continue to improve and complete the exclusionary rule, and draw up guidelines for the effective implementation of the rule. The exclusionary rule, as a crucial procedural system, will greatly accelerate the trial-centered criminal procedural reform, and strengthen judicial protection of human rights in the criminal proceeding.

1.1 Inner Impetus and Historical Background of the Exclusionary Rule's Emergence

As to Chinese legislation, the *Criminal Procedural Law* 1979 establishes the basic principle of “take facts as basis, take laws as criteria”¹ and required that all kinds of evidence which can be used to prove whether the defendant is guilty or not and the seriousness of the crime shall be obtained adhering to legal procedure, and torture and threat, inducement, deception as well as other illegal methods of obtaining evidence shall be strictly prohibited. Such provisions showed the legislature’s emphasis on the legal procedure, and opposition to illegal methods of obtaining evidence. But the concept of illegal evidence was not mentioned, let alone relevant exclusionary rule, for the main considerations were banning torture and preventing wrongful convictions. Up until when the *Criminal Procedural Law* 1996 went effective, the judicial explanations of the Two Supremes finally set down primary exclusionary rule of illegal testimonial evidence. However, the provisions were exceedingly general and fell short of detailed procedure, making it hard to apply in practice. In 2010, the Two Supremes and Three Ministries published the two Evidence Provisions as the requirement of judicial reform. Systematic rules were thus formulated for excluding illegal evidence, marking the formal establishment of the exclusionary rule.

1.1.1 Main Methods of Restraining Torture from 1979 to 1996

As early as 1956, Peng Zhen² had already voiced opposition against torture, and called for banning corporal punishment on the National Commissioner Conference of Public Security Department. But due to lack of pertinent legal system, this demand was unable to be fully implemented in practice. To change the situation, Article 136 of the *Criminal Law* 1979 specifically sets up the criminal liability for torture: “Torture is strictly prohibited. Any judicial officer who obtained confessions by torture shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. Whoever causes injury or disability by corporal punishment shall be charged with the injury and sentenced to a heavier punishment.” This was the most powerful weapon to restrain torture on legislative level and had a certain degree of deterrent effect.

But torture remained rampant due to complicated factors including traditional legal notion, flaws in judicial system and pressure of investigation. Some officers had little awareness of the severe consequences of torture. The problem was even worse among local police officers during criminal investigation process. Some cases

¹“Take facts as basis, take laws as criteria” (以事实为根据, 以法律为准绳), is the basic principle of the *Criminal Procedural Law* in China.

²Peng Zhen (October 12, 1902–April 26, 1997) was a leading member of the Communist Party of China, the inaugural head of the CPC Central Political and Legislative Committee.

involved aggravated and brutish forms of torture, which resulted in grave harms. Some suspects were beaten into false confessions, leading to wrongful convictions. Some high-rank officials held the idea that torture was inevitable during investigation and turned a blind eye to such behaviors. The insufficient efforts to investigate and deal with torture cases, the habitual practice of playing down the gravity of such cases, and the misconception that punishing such behaviors may frustrate the police force³ all cancelled out the deterrent effects of the criminalization of torture.

In order to curb this trend, the Ministry of Public Security issued several documents consecutively. In 1992, the Ministry issued the *Decision of the Ministry of Public Security on Firmly Preventing Torture by Public Security Officers*, in which methods were proposed to deal with torture, including highlighting ethic education, improving professionalism of officers, launching campaigns to crackdown torture, and strengthening the responsibility of high-rank officials etc. Police departments at all levels launched specialized campaigns according to the Decision. In 1993, the Supreme People's Procuratorate and the Ministry of Public Security jointly issued the *Notice on Strengthening the Collaboration Between Procuratorate and Public Security Organ in Handling Torture Cases*. They emphasized the principle of "take facts as basis, take laws as criteria" and required police department and procuratorate to perform their own duties and support each other in dealing with torture cases. They also required the department where torture cases took place to actively accept supervision and inspection, not to cover up, reject or hinder the investigation. In 1995, the Ministry of Public Security issued the *Notice on Launching Workshops and Campaigns on Preventing Torture*, which required incorporating preventing torture as a key factor in the performance evaluation of local officials and police officers. It also required the police departments to sign letter of responsibilities for preventing torture in lower division, and to establish sound accountability-checking mechanism for reducing such cases.

Undeniably, the overhauls achieved a certain degree of success and to some extent changed the reliance on torture in criminal investigation. Meanwhile, the procuratorate could also step up their efforts to deal with these cases. It was recorded that from 1979 to 1996, cases where the officers were found guilty of obtaining evidence by torture totaled at 202,⁴ not including cases in which the defendants had not been found guilty. But with all the efforts, torture was still pervasive. This solution, which was called by scholars as "concentrated campaign-based method", had only limited outcome within a certain scope. The method lacked institutional and procedural mechanism, leading to lackluster performance. The problem of torture persisted.⁵

It needs to be pointed out that in 1994, the Supreme People's Court of China issued the *Detailed Provisions on the Criminal Trial Procedure (Effective until 2013)*, Article 45 of which provides that, "Illegal methods of obtaining evidence are not allowed. Any testimony of the witness, statement of the victim, or confession of the defendant,

³See the *Decision of the Ministry of Public Security on Firmly Preventing Torture by Public Security Officers* issued in 1992, Gong Fa [1992] No. 6.

⁴Gangping et al. (1997).

⁵Ruchao (2014).

once proved through investigation to have been collected by illegal methods including torture, threat, inducement or deception, shall not be admitted.” This provision formally denied the legality of illegal evidence for the first time and received positive feedback from scholars. Scholars summarized three virtues of the provision: “First, it helped to restrain illegal methods of obtaining evidence and protect the rights of participants in the proceeding. Second, it helped to improve the performance of police department and the judiciary. Third, it helped to prevent and reduce miscarriages of justice.”⁶ But this provision was not accepted enthusiastically by legal practitioners and consequently did not exert big influence in practice. Nevertheless, it was a valuable first brick for the judiciary to establish the exclusionary rule in China.

1.1.2 Legislative Attempts to Restrain Torture from 1996 to 2010

First of all, the *Criminal Law* 1997 defined the behavior of collecting evidence by violence as a crime in addition to the crime of torture, and intensified the punishment on such acts. Article 247 of the law provides that: “Judicial officer who obtains confession from suspects and defendants by torture or testimony from witness by violence is liable for fixed-term imprisonment of not more than 3 years or criminal detention. Those who cause injury and death of persons shall be punished severely as provided under Article 234 and Article 232 of this law.” It is evident that the legislature took punishment as an important method to restrain torture.

Meanwhile, the *Criminal Procedural Law* 1996 undergone large-scale revisions, which struck a balance between human rights protection and crime control, and strengthened the institutional and procedural protection of the rights of suspects and defendants. For instance, Article 12 embodies the principle of presumption of innocence: “No person shall be found guilty unless being tried by the court according to law.” Article 96 consolidates the defense rights of the suspects: “After the suspect is interrogated by the investigative organ for the first time or from the day on which compulsory method is taken, he may appoint a lawyer to provide legal advice and to file petition or complaint on his behalf.” These new provisions greatly facilitate the improvement of the style, process and regulation of criminal investigation. But *Criminal Procedural Law* 1996 largely follows the provisions of evidence rule in *Criminal Procedural Law* 1979 despite of the appeal from many scholars for establishing the exclusionary rule based on the “principles and exceptions” model during the revision of the law.

However, legality of evidence has gained much attention among scholars in the sphere of criminal procedure. The question of whether legality should be a necessary element of evidence used to be the main dispute in legal research. Some thought evidence has three elements including objectivity, coherence and legality. While others recognized that only the former two should be seen as the elements of evidence.

⁶Guangzhong et al. (1995).

Nowadays it is generally accepted that legality is indeed an element of evidence since the use of evidence in criminal proceeding is subject to the regulation of procedural law. Some scholars just put it: “Claims regarding legality as an element of evidence are indisputable now and will be true in the future.”⁷ The exclusionary rule is predicated on recognizing legality as an element of evidence.

Article 43 of the *Criminal Procedural Law* 1996 reaffirms that torture and threat, inducement, deception as well as other illegal methods of obtaining evidence shall be strictly prohibited. But the provision did not stipulate whether illegal methods of obtaining evidence would affect the legality of evidence, avoiding the tricky questions regarding illegal evidence and its exclusionary principles. Based on judicial experiences, establishing exclusionary rule and improving evidence rule in the context of criminal procedure seemed to be a feasible way of restraining torture, since punishment alone had proved to be ineffective in dealing with the issue while experiences from abroad clearly showed that denying the legality of illegal evidence functioned well in practice.

This vagueness on the legality of illegal evidence in the *Criminal Procedural Law* 1996 led to controversies among legal researchers. There were four main theories: The first theory totally denied the admissibility of illegal evidence. This theory believed illegal evidence should not be admitted as evidence at all. The second opinion recognized the admissibility of illegal evidence if the truthfulness of the evidence could be proved. This theory argued that illegal methods of obtaining evidence and evidence obtained by such methods were two different things. The third theory was in-between. On one hand, it denied the legality of illegal evidence. On the other hand, it didn't insist on excluding illegal evidence completely. It argued that such evidence can be used as a lead and be turned into legal evidence through lawful methods. The fourth theory balanced the benefits of admitting illegal evidence against the harms. To be specific, illegal evidence shall not be admitted in general cases, but it can be admitted in cases where national or public security interests outweighed personal interests.⁸

Since there were some disputes among the academia over the main issues of the exclusionary rule, and the *Criminal Procedural Law* 1996 did not deal with relevant issues, the Two Supremes established a primary exclusionary rule of illegal testimonial evidence through judicial interpretations to address illegal methods of obtaining evidence such as torture in judicial practice.

Article 61 of the *Interpretation of the Supreme People's Court of China on Several Issues on Enforcing the Criminal Procedural Law of PRC* issued in 1998 (the 1998 Supreme People's Court's Interpretation hereafter) provides: “Any testimony of the witness, statement of the victim, or confession of the defendant, once proved through investigation to have been collected by illegal methods including torture, threat, inducement or deception, shall not be admitted.” Article 265 of the *Rules for Criminal Procedure of the People's Procuratorate* issued in 1999 (the 1999 Rules of the People's Procuratorate hereafter) provides: “Any confession of the suspect,

⁷Xinjian (1992).

⁸Guangzhong et al. (2000, pp. 61–62).

statement of the victim or testimony of the witness collected through torture or illegal methods including threat, inducement or deception shall not be used as the basis of prosecution.”⁹ These judicial interpretations made great improvement on institutional level in that they recognized legality as an element of evidence, and denied the admissibility of illegal evidence. Also, as some scholars pointed out, these interpretations showed a tendency to put procedural justice over substantial justice when they are in conflict.¹⁰

At the same time, the People’s Procuratorate, acting as the main department responsible for handling torture cases, also stepped up its scrutiny on the legality of evidence in criminal investigation process. In 1999, the Supreme People’s Procuratorate issued *Provisions on the Criteria for Opening Cases Filed Directly with and Investigated by People’s Procuratorate* (Effective on trial basis), which laid down standards for filing a torture case: “The crime of torture means the act whereby a judicial officer used corporal punishment or alternative corporal punishment to obtain confession from the suspect or the defendant. A case shall be filed for investigation for those who: 1. Adopted brutal methods and caused serious consequences; 2. Caused persons to commit suicide or lose their sanity; 3. Caused miscarriages of justice; 4. Carried out torture for more than three times or on more than three persons; 5. Incited, commanded, or forced others to carry out torture.” It was also provided in Article 265 of the *Rules of the People’s Procuratorate 1999*: “If any investigator was found using illegal methods to obtain confessions of the suspects, statements of the victims, or testimonies of the witnesses during examination process, the prosecution review division of the procuratorate shall give opinion of correction and instruct investigative organ to restart the investigation by other officers. The procuratorate may also conduct investigation on its own if necessary. A case where the investigative organ failed to restart the investigation by other officers may be returned for supplementary investigation.” This provision denied the legal effect of illegal evidence-obtaining behaviors and required re-investigation by other officers in cases where illegal behaviors were carried out. Thus, it helped to remind the investigators to collect evidence according to legal procedure.

The judicial interpretations above initiated the standardization and institutionalization of restraining torture. Dealing with torture became more of a regular task with standard procedures thereafter. But constrained by traditional notions, path dependence and many other factors, the new institutions and provisions still failed to be fully enforced. Serious torture cases still took place in some jurisdictions.

⁹The Rules of People’s Procuratorate on Implementing the Criminal Procedural Law of PRC (Effective on trial basis) issued by the Supreme People’s Procuratorate in 1997 demanded the examination and exclusion of illegal physical evidence in addition to illegal testimonial evidence. Article 233(2) provided: “Any physical evidence or documentary evidence obtained through illegal methods which can prove the facts of the case after examination and verification can serve as the basis of prosecution, except for where the illegal methods for obtaining evidence grossly harm the rights and interests of the suspects and other relevant persons.” Given the judicial environment, it was a progressive step to establish the discretionary exclusionary rule of illegal physical evidence. But the provision was deleted in the Rules of the People’s Procuratorates 1999.

¹⁰Guangzhong et al. (2000, pp. 62–63).

Some procuratorates failed to perform their duty of supervision in the process of arrest approval and prosecution. They admitted the confessions from suspects or defendants collected by torture as the incriminating evidence. As a result, wrongful convictions were made and caused painful repercussions.¹¹ Among which the case of Du Peiwu in Kunming, Yunnan was a typical case. In April 1998, Du Peiwu, a police officer of Drug Addiction Treatment Center of Kunming Municipal Public Security Bureau, was suspected of killing two police officers. He was forced to make up the so-called fact of homicide by torture. The prosecutors of the People's Procuratorate of Kunming, without paying enough attention to Du Peiwu's complaints, made arrest approval and prosecution decision against him. Du Peiwu was sentenced to death in the first instance at the Intermediate People's Court of Kunming in February 1999. His sentence was changed to death penalty with a reprieve of 2 years at the High People's Court of Yunnan Province in October of the same year. He was finally acquitted and released after the real murderer was arrested. The torture in the case was revealed by the press and stirred up strong reaction.¹²

In an effort to eliminate the impact on justice from major miscarriages of justice like Du Peiwu case, and to further restrain torture, the Supreme People's Procuratorate issued the *Notice of the Supreme People's Procuratorate on Prohibiting Using Suspects' Confessions Collected Through Torture as the Incriminating Evidence*, demanding the procuratorate at every level to strictly abide by relevant provisions in law and to clarify the exclusionary rule of illegal evidence. The Notice also stressed that the procuratorates at all levels shall strictly enforce these provisions. Any confession of the suspect, statement of the victim or testimony of the witness shall be excluded if it was obtained by illegal method of the investigators. No room is allowed for torture. At the same time, the procuratorate shall give opinion of correction according to law, demand the investigative organs to re-collect evidence by other officers, or conduct investigation of their own if necessary. The police departments also went ahead with the campaign on restraining torture. Some police departments at local level issued documents requesting the act of torture committed by officers be seriously dealt with.

It was over this period that the procuratorial system began to explore possible solutions to regulate investigative process on institutional level to curb torture. In 2005, the Supreme People's Procuratorate initiated a new mechanism of synchronized videotape recording concerning interrogation process of corruption-related criminal suspects. The practice developed into an elementary set of monitoring system on interrogation process by relevant procedural regulations. It was a positive move towards reforming and the interrogation process.

To put it fairly, after the revision of the *Criminal Procedural Law* 1996, until early 2000s, the intermittent wrongful convictions and the torture phenomena in these cases "rooted in the old-fashioned judicial practices at the end of the last

¹¹Notice of the Supreme People's Procuratorate on Prohibiting Using Confessions from Criminal Suspects Collected Through Torture as the Incriminating Evidence, Gao Jian Fa Su No. [2001] 2.

¹²Guosong and Min (2001).

century. It's not justifiable to blame them all on the current system."¹³ Even so, the phenomenon still existed in some places to a certain degree. And the exclusionary rule of illegal testimonial evidence established in the judicial interpretations did not achieve satisfactory results in practice. Scholars by this time had profound reflections on the exclusionary rule.

Some pointed out that the *Provisions on the Procedures for Handling Criminal Cases by Public Security Organs* issued by the Ministry of Public Security in 1998 failed to establish the exclusionary rule of illegal evidence, resulting in the inconsistent interpretations of the Criminal Procedural Law among the police department, the procuratorate and the court as well as the incoherence of the criteria for evidence examination in the criminal proceeding.¹⁴

Some scholars argued, the exclusionary rule in judicial interpretations was limited to specific types of testimonial evidence. A comparison between different editions of the judicial interpretations may reveal that the reliability of evidence was still the predominant concern rather than procedural justice.¹⁵

There were also scholars suggesting that the judicial interpretations were not impeccably drafted. The criterion for excluding illegal evidence was that the evidence was proven to be illegally obtained, a standard obviously too high to meet. Due to this problem, the exclusionary rule was not fully implemented in judicial practice.¹⁶

In addition, some thought judicial interpretations lacked procedural provisions for excluding illegal evidence, e.g. it is unclear who is responsible for proposing the motion of excluding illegal evidence and when to commence the procedure, and who should make the decision and how to make it. It also lacked provisions concerning issues like the burden of proof, standard of proof, decision-making procedure and following remedial mechanism. So when there was illegal behavior of obtaining evidence in a case, it was usually handled with traditional criminal procedure, namely, handled along with other issues during the prosecution and trial process.¹⁷ Due to absence of special procedural provisions, the procuratorate lacked enough incentive to exclude illegally obtained testimonies and held an ambiguous attitude about the allocation of burden of proving the legality of evidence. Consequentially, the courts were unable to verify and exclude illegally obtained testimony. Plus, the identification

¹³Ruchao (2014).

¹⁴Guangzhong et al. (2000, pp. 62–63). Moreover, since three authorities all published their own interpretational documents of the Criminal Procedural Law, these documents were expected to be applied in three authorities respectively, which meant even though the judicial interpretations published by SPP and SPC had general legal effect, they were only binding in their own field. The Provisions of the Ministry of Public Security were void of the exclusionary rule, which implied the police departments might take it as an excuse to elude relevant provisions in the judicial interpretations made by SPP and SPC. This was the main drawback of the mechanism that the Ministry of Public Security, the Supreme People's Procuratorate and the Supreme People's Court issue their own interpretational documents on the Criminal Procedural Law separately.

¹⁵Hongyao et al. (2010).

¹⁶Guangzhong (2014, p. 5).

¹⁷Jun et al. (2010).

criteria of illegal evidence was highly impracticable, which also made illegal testimonial evidence hard to be excluded.¹⁸

All these issues contributed to the insufficient implementation of the exclusionary rule of illegal testimonial evidence established by judicial interpretations. Cases where illegal evidence was excluded were rare. Meanwhile, torture was not effectively constrained, which gave rise to miscarriages of justice caused by wrongfully admitting testimonies obtained by torture and other illegal methods. This was not only a reflection of how difficult the campaign against torture was, but also a sign calling for improvement of the exclusionary rule itself.

It is noteworthy that in 2007, the Supreme People's Court decided to exercise the power to review death penalty cases exclusively. And the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Justice, and the Ministry of Public Security jointly issued the *Opinions on Strengthening Handling Cases in Strict Accordance with Law and Guaranteeing the Quality of Handling Death Penalty Cases* to ensure the accuracy of fact-finding and legality of evidence throughout the criminal proceeding. This document reiterated the principle of valuing physical evidence and devaluing confession, while emphasized that confessions of the suspects obtained by torture, or victims' statements or witnesses' testimonies obtained by illegal methods like violence and threat cannot be used as the basis of conviction. Article 33 of the Opinions provided specifically: "the courts shall focus on examining the legality of evidence during the trial, particularly for those cases in which there were clues or evidence indicating the possibility of torture or other illegal methods of collecting evidence. The procuratorates must provide relevant evidence within three days at the court's request. The procuratorates must provide explanations to the courts if such materials were not available." These provisions played an important role in ensuring the quality of death penalty cases because they highlighted the responsibility of the courts to examine the legality of evidence and outlined the basic framework for the examining procedure.

1.1.3 The Exclusionary Rule Established by the Two Evidence Provisions 2010

In 2008, the central government spearheaded a new round of judicial system reform, which involved optimizing judicial power allocation and implementing the criminal policy of tempering justice with mercy.¹⁹ This criminal policy demanded: "to complete the evidence rules in criminal procedure and clarify the rules of examining and admitting evidence as well as the standard of proof in different procedures; to complete exclusionary rule of illegal evidence and clarify the scope of illegal evidence, the burden of proof, the examination procedure and the remedial mechanism and so forth."

¹⁸Shenjia et al. (2002).

¹⁹"Tempering justice with mercy" (宽严相济), is the fundamental criminal policy in China.

According to the overall reform plan, this reform was led by the Sub-Committee of Legislative Affairs of the Standing Committee of the National People's Congress, together with the Supreme People's Court and other departments. The SPC then formed a research team in charge of drafting criminal evidence rule. After conducting extensive research work and gathering advice from relevant fields, the Supreme People's Court finally issued the Two Evidence Provisions jointly with the Supreme People Procuratorate, Ministry of Public Security, Ministry of National Security and Ministry of Justice.

The Provisions on Evidence in Death Penalty Cases 2010 includes 41 Articles in three parts: part 1 lists general provisions, which establish the principle of evidence-based adjudication, the principle of statute-based procedure, the principle of evidence examination as well as the standard of proof in death penalty cases. Part 2 deals with classified examination and admission of evidence. It establishes not only the rules of examining and admitting different kinds of evidence, but also the substantive exclusionary rule for the testimony (Article 12) and the confession (Article 13). Part 3 is concerned with the integrated examination and application of evidence, which stipulates the integrated identification of evidence, including how to determine the fact based on circumstantial evidence, how to make remedies for defected evidence and how to scrutinize the evidence concerning sentence in death penalty cases. The Provisions on the Exclusion of Illegal Evidence contains 15 Articles in two themes: First, the substantive rules, which define the concept and connotations of illegal evidence and clarify the exclusionary rule; Second, the procedural rules, which answer the questions of how to deal with illegal evidence under new framework of procedural adjudication in the criminal proceeding.

Compared with the *Criminal Procedural Law* 1996 and relevant judicial interpretations, the *Provisions on the Exclusion of Illegal Evidence* 2010 made major changes in the following perspectives:

First, it clarifies the definition and connotations of illegal testimonial evidence. The concept of illegal evidence covers many aspects. Handling illegal evidence is a complex issue in practice. The Provisions thus focuses on the main disputed issues: (A) The illegal testimonial evidence. Illegal evidence includes illegal testimonial evidence and illegal material evidence. Judicial interpretations of the Criminal Procedural Law 1996 stipulated general provisions on the exclusion of illegal testimonial evidence. But cases involving illegal material evidence are too complicated to allow for general provisions on excluding such evidence in all circumstances. Accordingly, the Provisions primarily pay attention to the procedure of excluding illegal testimonial evidence. (B) The testimonial evidence obtained by torture. Illegal testimonial evidence may violate the law substantively, e.g. confessions obtained by torture; or procedurally, e.g. confessions obtained against the requirements of legal procedure. Whether confessions in the latter case should be excluded, and if so, how to exclude them, remains controversial. But all agree that testimonial evidence obtained through illegal methods like torture shall be excluded. The Provisions state clearly in the first two Articles that confessions of the suspects and defendants obtained by illegal methods such as torture are illegal testimonial evidence and shall be excluded in accordance with the law.

Second, it clarifies the preliminary burden of initiating investigation procedure on the legality of evidence. Article 6 of the Provisions provides that: “Where the defense argues that the pretrial confessions were obtained by illegal methods, the court shall demand the defense to provide relevant clues or evidence, including the personnel, time, location, methods, and details associated with the suspected illegal behavior of obtaining evidence.” Even though the prosecution is responsible for proving the legality of pretrial confessions, the burden of initiating the investigation procedure should be assumed by the defense. This mechanism will be helpful for preventing the investigation procedure on the legality of evidence from being initiated randomly.

Third, it clarifies the burden of proving the legality of pretrial confessions by the prosecution and the standard of proof. In the criminal proceeding, the prosecution bears the burden of proving the accused guilty. Based on the same rationale, the prosecution also bears the burden of proving the legality of pretrial confessions if the defense provides clues or evidence showing that the confessions were obtained by illegal methods. Where the prosecution fails to provide evidence to prove the legality of confessions, or the evidence provided is not accurate or sufficient, the prosecution shall assume the legal responsibility of not using the confessions to prove the alleged fact.

Fourth, it clarifies the procedure of testifying in court by interrogators. It is common that the prosecution and defense stick to their own arguments as to whether torture or other illegal methods exist in a given case. Article 7 of the *Provisions on the Exclusion of Illegal Evidence* 2010 made a significant breakthrough by requiring the interrogators to testify in court. According to the new procedure, interrogators shall testify in court when there is substantial dispute over the legality of evidence and it is necessary for them to make detailed explanations as to the process of investigation, which helps the court to ascertain the legality of evidence effectively and efficiently.

Fifth, it clarifies the rule of excluding illegal physical evidence and documentary evidence. Whether physical evidence or documentary evidence obtained illegally should be excluded is vigorously debated both in China and abroad. And these kinds of evidence were rarely excluded in the past. Hence, it is appropriate for the Provisions to adopt general principles on handling illegal physical evidence or documentary evidence, in order to regulate evidence collection procedure and ensure procedural justice, which is stipulated as: “If the procedure of obtaining physical evidence or documentary evidence obviously breaches the law and may affect the fairness of the trial, it shall be rectified or justified, otherwise relevant physical evidence or documentary evidence can not be used as the basis for conviction.”

The Two Evidence Provisions won high praise among scholars. Some claimed the introduction of these two Provisions “is a landmark in Chinese criminal procedure reform, marking another step towards a democratic criminal justice system featuring the rule of law.”²⁰ Some thought these two provisions “provide a practical approach and a feasible method towards fairness and justice, because they promote the spirit

²⁰Guangzhong (2010).

of procedural justice and emphasize the value of due process.”²¹ The Provisions on the Exclusion of Illegal Evidence, in particular, complemented the provisions on the exclusionary rule in previous judicial interpretations from many aspects. The Provisions regulate the procedure of evidence collection and eliminate the incentive for illegally obtaining evidence like torture, so as to prevent such behaviors from happening. At the same time, they can also motivate the investigative organs to change their investigation mode, encouraging them to adhere to the principle of valuing physical evidence and devaluing confession. Eventually, miscarriages of justice may be prevented effectively and the basic rights of the suspects, whether guilty or not, will be safeguarded by law.²²

1.2 Development of the Exclusionary Rule

The implementation of Two Evidence Provisions helped to improve the integrity of judicial process, unify the code of conduct in law enforcement, and ensure judicial justice. The *Criminal Procedural Law* received systematic revisions in 2012, which drew upon the essence of the Provisions on the Exclusion of Illegal Evidence 2010 and formalized the exclusionary rule on legislative level. Then, the SPC and the SPP issued a series of judicial interpretations to fill in details about the identification criteria and exclusionary procedure of illegal evidence.

1.2.1 *The Exclusionary Rule Established in the Criminal Procedural Law 2012 and Relevant Judicial Interpretations*

1. The institutional design of the law and judicial interpretations

The 2012 revision of the Criminal Procedural Law, based on essence of Two Evidence Provisions, formalized the exclusionary rule on legislative level.

With regard to the scope of illegal evidence, the *Criminal Procedural Law 2012* basically reaffirmed the contents of the *Provisions on the Exclusion of Illegal Evidence 2010*. That is, illegal evidence includes illegal testimonial evidence and illegal material evidence. Unlike the Provisions, which concentrated on the exclusion of illegal testimonial evidence (The Provisions only briefly mentioned illegal physical evidence in Article 14, with the bulk of the provisions devoted to illegal testimonial evidence), the *Criminal Procedural Law 2012* treated the two forms of illegal evidence with equal emphasis and only made a difference in the mode of exclusion. It provided that confessions of the suspects or the defendants collected by illegal

²¹Chongyi (2010).

²²Yinghui (2010).

methods such as torture, and witness's testimonies or victim's statements collected through illegal methods such as violence and threat, shall be excluded in all circumstances. Whereas physical evidence or documentary evidence collected against legal procedure shall be excluded at the court's discretion according to actual situations, which means that it is allowed to rectify or justify certain kinds of breaches (if the purpose is to stop a crime, to seize a suspect, or to prevent evidence from being destroyed). Evidence which cannot be rectified or justified and might seriously affect the fairness of the trial shall be excluded.

With regard to the exclusionary procedure, the *Criminal Procedural Law 2012* reiterated the rules about the burden of proof in *Provisions on the Exclusion of Illegal Evidence 2010*. The defense shall provide relevant clues or materials when proposing for excluding illegal evidence; where the court questions the legality of disputed evidence and initiates the specialized investigation, the procuratorate is responsible for proving the legality of evidence. In addition, the *Criminal Procedural Law 2012* made some new developments on exclusionary procedure as follows:

- (A) It demands that illegal evidence shall be excluded at any stage of the criminal proceeding including investigation, prosecution and trial. This new provision reflects the particularity of Chinese system compared with the foreign ones. In the context of other countries, the exclusionary procedure mainly refers to the procedure at trial stage, especially the process in the court.²³ By contrast, the exclusionary procedure in China covers the whole pretrial process. However, the law only briefly outlines the investigative procedure of the legality of evidence in court. No provisions can be found concerning such investigative procedure at pretrial stage. At investigation or prosecution stage, the law provides that the procuratorate shall investigate, verify and respond upon receiving filing, accusation, or report about illegally evidence-obtaining behaviors of investigators.
- (B) The law provides that if the court, after investigation, confirms or cannot rule out that disputed evidence has been obtained by illegal methods, then relevant evidence shall be excluded accordingly. Compared to what's provided in the *Provisions on the Exclusion of Illegal Evidence 2010*—"The prosecutor shall provide accurate and sufficient evidence to prove the legality of evidence", the requirement of "confirms or cannot rule out that disputed evidence has been obtained by illegal methods" appears to have two levels of standards,²⁴ but cases in which the court "cannot rule out that disputed evidence has been obtained by illegal methods" are more common in practice. Thus, this standard in essence is

²³The concept of "trial" is broader in the Chinese context than in English. A "trial" in the Chinese context includes the preparing work before the formal trial (庭前程序), and the actual "trial" in a court (庭审程序). The author mentioned both the broader concept (审判) and the narrower concept (庭审) here. The word "trial" hereafter refers to the broader concept (审判) if not specified otherwise.

²⁴Some scholars have pointed out that the legislative work in China is flawed when it comes to the exclusionary rule. Whether it's in China or in other jurisdictions, the legislation shall only provide one standard of proof for one subject. See Guangzhong (2014, p. 27).

consistent with the requirement of proving the legality of evidence with accurate and sufficient evidence.

Along with the revision of the *Criminal Procedural Law* in 2012, a series of judicial interpretations and documents made further provisions on the exclusionary rule. They are *The Supreme People's Court's Interpretation on the Application of the Criminal Procedural Law of PRC* (The Supreme People's Court's Interpretation 2012 hereafter), *Rules for Criminal Procedure of the People's Procuratorates* (Effective on trial basis, The Rules of the People's Procuratorates 2012 hereafter), *Provisions on the Procedures for Handling Criminal Cases by Public Security Organs* (The Provisions of Public Security Organs 2012 hereafter). The *Supreme People's Court's Interpretation 2012* dedicates a section (Section 8) under Chapter 4, which is on evidence, to the exclusionary rule of illegal evidence. It lies down detailed provisions regarding the boundaries of "torture and relevant illegal methods", the identification criteria of illegal material evidence, the requirements for proposing exclusion of illegal evidence at pretrial stage, the investigative procedure on the legality of evidence at trial stage, as well as the examination of the legality of evidence and the handling of illegal evidence on appeal etc. The *Rules of the People's Procuratorates 2012* defines illegal evidence as the *Supreme People's Court's Interpretation 2012* does. It also gives provisions on the examination and verification procedure of the legality of evidence at arrest review and prosecution stage. In addition, it deals with how to handle cases after illegal evidence has been excluded, in terms of the supervision of investigative activities and the monitoring of the case review. The *Provisions of Public Security Organs 2012* further clarifies the standard procedure of investigation and evidence collection, and sets down principles on how to exclude illegal evidence by investigative organs.

The police department, the procuratorate and the court have extended the provisions on the exclusionary rule established in the *Criminal Procedural Law 2012* through normative documents in light of their own legal functions. Provisions as such have enriched and developed the exclusionary rule and made the legal institution more readily operative.

2. The effects of the exclusionary rule and issues ahead

Based on the *Provisions on the Exclusion of Illegal Evidence* introduced in 2010, the exclusionary rule established on legislative level in the *Criminal Procedural Law 2012*, and the supporting judicial interpretations published consecutively, the law and legal documents formalized a systematical exclusionary rule system, which impacted the judicial practice profoundly.²⁵

Firstly, it furthered the rule of law in the field of investigation and evidence collection. The criminal justice system in China traditionally relied heavily on confessions, which were regarded as the main basis to solve the case and achieve conviction. Even though it was stated clearly in the *Criminal Procedural Law* that torture and other illegal methods are strictly prohibited, these methods remained convenient if not the last resort for obtaining confessions, especially when investigators faced up to intense

²⁵Changlin (2014).