



## China Perspectives

2019-1 | 2019

Touching the Proverbial Elephant: The Multiple Shapes  
of Chinese Law

---

# Torture and Exclusion of Evidence in China

Zhiyuan Guo

---



### Electronic version

URL: <http://journals.openedition.org/chinaperspectives/8742>

DOI: [10.4000/chinaperspectives.8742](https://doi.org/10.4000/chinaperspectives.8742)

ISSN: 1996-4617

### Publisher

Centre d'étude français sur la Chine contemporaine

### Printed version

Date of publication: 20 March 2019

Number of pages: 45-53

ISSN: 2070-3449

### Electronic reference

Zhiyuan Guo, « Torture and Exclusion of Evidence in China », *China Perspectives* [Online], 2019-1 | 2019, Online since 19 March 2019, connection on 23 March 2020. URL : <http://journals.openedition.org/chinaperspectives/8742> ; DOI : <https://doi.org/10.4000/chinaperspectives.8742>

---

# Torture and Exclusion of Evidence in China

ZHIYUAN GUO

**ABSTRACT:** Criminal justice has always been a focus of China's legal reform, and a serious problem in China's criminal justice system is police torture and coercive confessions. Almost all of the wrongful convictions that China has identified involve torture of some sort and involuntary confessions. To prevent wrongful convictions, China has implemented exclusionary rules against illegally obtained evidence since 2010, among other mechanisms. Part I of this article provides a historical overview of the problem of torture and anti-torture efforts in China. Part II traces the evolution of exclusionary rules in China and discusses various factors leading to their evolution. Part III evaluates the degree to which exclusionary rules have been implemented in practice based on empirical findings, and analyses the impact of such implementation on both judicial authorities and defence lawyers. Part IV introduces and comments on a series of legislative efforts to address difficulties in implementing the exclusionary rules, including the recently released implementing guideline. Part V puts forward some proposals for further reforms for stricter implementation of exclusionary rules.

**KEYWORDS:** Torture, coercive confession, wrongful conviction, exclusionary rules.

## *Torture and the anti-torture movement in China*

As a barometer of a country's rule of law status, criminal justice reform is the most important part of China's recent legal reforms. The most serious problem with China's criminal justice system is torture and coercive confessions, as amply reflected in wrongful conviction cases (He 2016). As Cui Min (Cui 2003) points out, "[a]lthough confessions elicited by torture are not always false, wrongful convictions, with no exception, are all because of torture." Because almost all of the wrongful convictions identified so far involved torture and coerced false confessions,<sup>(1)</sup> China is determined to root out torture from police interrogations and has taken a series of measures to prevent torture in the criminal process.<sup>(2)</sup>

Torture was a prevalent practice in the criminal processes of many countries until recently. As Langbein (1977) points out, in both East and West, in all ancient autocratic regimes, torture was part of ordinary criminal procedure and was regularly employed to investigate and prosecute routine crimes before the ordinary courts. In Chinese history, from the Zhou dynasty (1066-256 BC) to the Qing dynasty (1644-1912), torture was permitted to be employed against suspects to investigate and prosecute crimes before the courts (Yan 2004). Furthermore, torture was legalised, well-regulated, and had to be conducted according to the scope, frequency, and tools explicitly provided for in ancient Chinese codes.<sup>(3)</sup> Torture was regarded as a lawful means of evidence collection in ancient China, and that notion has lingered in China's legal culture (Guo 2017a: 39; Guo 2017b: 61).

Modern criminal procedure law has abandoned torture as a lawful means of evidence collection because it is contrary to the principles of due process and judicial civilisation. Prevention of torture has been a focus of law reforms in China for years. The first Criminal Procedure Law (hereinafter CPL), enacted in 1979, contained a black letter rule against torture, which states: "The use of torture or extortion to obtain a confession and the use of

threats, inducement, deception, or other illegal means to collect evidence is strictly prohibited (...)," and this rule has been retained in three rounds of substantial revisions to the CPL.<sup>(4)</sup> Since at least 1997, China has officially acknowledged that coerced confessions are a problem faced by China's judicial process,<sup>(5)</sup> and the authorities have announced a series of measures attempting to address it. In particular, following the 1996 CPL, both the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP) have issued interpretations to provide concrete circumstances under which illegally obtained oral evidence, including confessions, should be excluded as incriminating evidence. The exclusionary rule, the hallmark of the rule of law against torture in particular and involuntary confessions in general in liberal democracies, has been firmly established in these judicial interpretations (Lewis 2011; Yi 2015).<sup>(6)</sup>

Notwithstanding the trumpeted changes in legal rules, however, there seems to have been little progress in practice until the exposure of a series of wrongful convictions resulting from torture, which put immense pressure

1. There are no national statistics on this matter, but all reported wrongful convictions were caused by extraction of confessions by torture, and there is a consensus among legal academics that torture and coerced false confessions are among the major causes of wrongful convictions in China.
2. Anti-torture was one of the focuses in the 2012 Criminal Procedure Law Revision. A series of reforms were adopted, including the privilege against self-incrimination, an exclusionary rule against illegally-obtained evidence, procedural rules to avoid torture outside of detention centres, etc. China's determination to root out torture can be seen from all these attempts.
3. 唐律疏议·断狱律之六·八·九·十·十四·十五·二十七 (Tanglü shuyi, Duanyulü zhi liu, ba, jiu, shi, shisi, shiwu, ershiqi, The Law of the Tang Dynasty, 6, 8, 9, 10, 14, 15, 27).
4. Art. 43 1996 CPL; Art. 50 2012 CPL; Art. 52 2018 CPL.
5. The Government's willingness to acknowledge the pervasiveness of torture was confirmed when the Supreme People's Procuratorate (SPP) published "刑讯逼供罪" (Xingxun bigong zui, The Crime of Tortured Confession) in late 1997, which included China's first public official statistics on criminal cases of tortured confession. It reported an average of 364 cases per year between 1979 and 1989, and upward of 400 cases per year for most years in the 1990s, and included the admission that 241 persons had been tortured to death over the two-year period 1993-94.
6. Art. 61 SPC Judicial Interpretation (1998) (1998 nian zuigao renmin fayuan sifa jieshi, 1998年最高人民法院司法解释); Art. 256 SPP Judicial Interpretation (1999) (1999 nian zuigao renmin jianchayuan sifa jieshi, 1999年最高人民检察院司法解释).

on the Chinese legislature to continue striving to accomplish this mission (He 2016). Of the previous anti-torture mechanisms, neither prohibitive legal rules against torture nor exclusion principles could prevent interrogational torture: in the former case, legal prohibitions were ineffective when few or no workable sanctions were attached to their violation (Lewis 2011: 670); while in the latter case, the exclusionary principles were not supported by clear legal rules, and were not otherwise concretised or made operational by supporting procedures and rules of evidence (Lewis 2011: 667). An effective anti-torture mechanism is still needed, and in China's case, exclusionary rules might be an answer.

## The establishment of exclusionary rules in contemporary China

### Background

While exclusionary rules may be the most effective instrument to reduce or prevent the practice of torture in police investigations, it took China more than two decades to adopt such rules.<sup>(7)</sup> China signed the 1984 Convention against Torture on 12 December 1986 and ratified it on 4 October 1988. Although Chinese scholars started to discuss the possibility of adopting exclusionary rules after that, it was not until the twenty-first century that exclusionary rules were put on the legislative agenda. The 1996 amendments to the Criminal Procedure Law included very few changes to the evidence chapter. After the 1996 CPL became effective, quite a few Chinese scholars embarked on drafting proposals for a separate evidence code. One of the core evidentiary rules in these proposals is an exclusionary rule against illegally obtained evidence (Chen 2004). Efforts to codify the evidence rules in China were still premature, as a result of which the project was abandoned. For a legal system with few evidence rules in law and legal practice, it may have been too great a departure from mainstream practice to feasibly impose an entire evidence law on legal institutions at that time. However, a consensus did emerge from the ashes of the evidence law project that China should adopt more evidentiary rules in an incremental, step-by-step manner. Considering the prevalence of torture and resulting wrongful convictions in China, a new evidence law could be developed to govern the criminal process. A key agreement is that the exclusion of illegally obtained evidence is obviously the most needed evidentiary rule for China, considering the prevalence of torture and the resulting wrongful convictions. The Legislative Affairs Commission of the Standing Committee of the National People's Congress (NPC) entrusted the Third Criminal Court of the SPC to draft exclusionary rules, but it was not until 2010 that exclusionary rules took shape in China.

### The catalyst

Due to divided opinions on how the Chinese exclusionary rules should be drafted, the SPC delayed enacting the rules until compelled to act when a series of wrongful conviction cases came to light in 2010. In that sense, the passing of the exclusionary rules, like China's criminal justice reform in general, has been largely scandal-driven. In May 2010, Zhao Zuohai, a villager from Henan Province, was exonerated after serving 11 years in prison. He had been convicted of murdering his fellow villager, Zhao Zhenxiang (not related), and had been sentenced to death in 1999 with a two-year suspension. Police suspected Zhao Zuohai of murdering Zhao Zhenxiang because the two Zhaos had been seen quarrelling shortly before Zhao

Zhenxiang's disappearance. When a headless body was found shortly thereafter, the police arrested Zhao Zuohai and subjected him to physical and mental abuse for weeks until he finally confessed to the "murder."<sup>(8)</sup> But after more than a decade's absence, the alleged murder victim, Zhao Zhenxiang, returned to their home village to claim social welfare benefits.

Media coverage of the Zhao Zuohai case aroused great public anger at police interrogational torture because Zhao Zuohai's story was not the first wrongful conviction in which "the dead came back to life."<sup>(9)</sup> A series of such high-profile cases, widely reported in the media and universally condemned, revealed the state of affairs in China's criminal justice system and the interrogation process. To pacify public anger and restore public confidence in the justice system, on 25 June 2010, China's Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security, and Ministry of Justice jointly<sup>(10)</sup> established "Rules Concerning Questions About Examining and Judging Evidence in Death Penalty Cases" and "Rules Concerning Questions About Exclusion of Illegal Evidence in Handling Criminal Cases" (hereinafter the 2010 Exclusionary Rules).

### Incorporation into the 2010 CPL

China further revised its Criminal Procedure Law in 2012. The 2012 CPL not only incorporated the exclusionary rules, but also brought in some new anti-torture mechanisms. First, China's criminal procedure law accepts the privilege against self-incrimination (Lewis 2011: 642), a doctrine that has been commonly accepted in mature legal systems. While it is undoubtedly a significant improvement in legally prohibiting the police from forcing suspects to incriminate themselves, it represents a compromise between the police, who are hostile to granting further rights to suspects, and defence lawyers and the larger legal community. The compromise is that, while the privilege against self-incrimination is accepted as part of the Chinese criminal procedure law, suspects continue to be denied the right to remain silent during police interrogation. Chinese legal academics and, to a lesser degree, legal reformers, have struggled for the right to remain silent for years (Ahl 2016: 143; Lewis 2011: 687), but the police strongly object to this reform due to concerns that the right to silence will make clear confession impossible, leading to a significant weakening of police effectiveness in criminal investigation and crime prevention. For the same reason, the Chinese criminal procedure law obliges suspects to answer questions truthfully<sup>(11)</sup> (Lewis 2011: 687-8), which contradicts the privilege against self-incrimination.

7. "全国人大常委会批准"禁止酷刑和其他残忍、不人道或有损人格的待遇或处罚公约"的决定" (Quanguo renda changweihui guanyu pizhun "Jinzhixi kuxing he qita canren, bu rendao huoyou ru renge de daiyu huo chufa gongyue" de jue ding, Decision of the Standing Committee of the National People's Congress on the approval of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), 5 September 1988. The PRC voiced reservations concerning Art. 20 and Art. 30(1) of the Convention against Torture.

8. See Ji Beibei, "Innocent man spent 11 years in jail," *Global Times*, 10 May 2010, <http://www.globaltimes.cn/content/529982.shtml> (accessed on 6 February 2019).

9. In another case, She Xianglin was convicted of murdering his wife. However, his wife had simply run away with another man to a different village and returned ten years later. Like Zhao Zuohai, She Xianglin was tortured by police to confess a murder that never occurred. See "湖北杀妻冤案" (Hubei shaqi yuan'an, The wife killing wrongful conviction case in Hubei Province), <http://news.sina.com.cn/z/hbshaqi/> (accessed on 5 February 2019); and Liu Li, "Wrongly Jailed Man Freed after 11 Years," *China Daily*, 14 April 2005, [http://www.chinadaily.com.cn/english/doc/2005-04/14/content\\_434020.htm](http://www.chinadaily.com.cn/english/doc/2005-04/14/content_434020.htm) (accessed on 5 February 2019). For academic studies of wrongful convictions in China, see He (2016).

10. It's common practice in China for these five organisations to jointly issue legal documents when implementing certain new reforms involving multiple sectors, because each organisation has influence on its own subordinate organisations, and legal documents issued by a single organisation are usually ignored by other organisations.

11. Art. 120 2018 CPL.

Second, to compensate for the absence of the right to silence during interrogation, China adopted a monitoring mechanism, i.e., audio or video recording of interrogations (Chen 2011: 720). The 2012 CPL makes audio or video recording mandatory for crimes punishable by death or life imprisonment or other major crimes, and optional in other cases,<sup>(12)</sup> depending mostly on the availability of recording devices. Some economically developed provinces have made it a mandatory rule to record all criminal interrogations. Other less developed provinces are still struggling to implement the mandatory requirements. Since the beginning of the twenty-first century, a series of pilot projects, often supported by foreign donor organisations such as the Ford Foundation, have explored feasible ways to ensure the legality and integrity of the interrogation process under China's specific political and legal circumstances. Other options, such as the presence of lawyers during interrogation, have been tested for their effectiveness and feasibility across China (Fan and Gu 2007). Many in the system have found it premature<sup>(13)</sup> to allow a lawyer to be present during police interrogations, but have accepted the alternative of audio or video recording of interrogations.<sup>(14)</sup>

Third, the 2012 CPL also adopted some procedural requirements to reduce the possibility of torture and coercive confessions (Ahl 2016: 149). For example, the law requires a prompt transfer of criminal suspects to detention centres after detention, because most incidents are carried out in a police station (*paichusuo* 派出所) by police officers or even by security guards (*zhi'an lianfangyuan* 治安联防员)<sup>(15)</sup>. The 2012 CPL now provides that interrogation should be conducted within a detention centre once the suspect has been formally detained.<sup>(16)</sup> Clear rules and strict supervision over detention centres have made it more difficult to torture suspects in detention. As such, these procedural rules have played an important role in preventing torture before detention or outside of detention centres. In practice, however, some suspects have not been promptly delivered to the detention centre after arrest, and other suspects have not been interrogated within the detention centre but rather in the police station or in unlawful detention venues.<sup>(17)</sup> Another violation of these rules occurs when police officers remove the suspect from the detention centre for interrogation on the pretext of identifying the crime scene.

### Highlights of the exclusionary rules

China's exclusionary rules against illegally obtained evidence were drafted by referring to common law confession rules and American exclusionary rules against illegally obtained physical evidence. The drafting teams extensively studied common practices and carefully considered foreign rules and procedures in the drafting process. While most of the contents are in line with the exclusionary rules of common law jurisdictions, the Chinese rules also have some unique characteristics of their own.

First, the rules define the scope of both illegally obtained oral evidence and illegally obtained physical evidence, and demand a compulsory exclusion model for oral evidence, but merely demand a discretionary exclusion model for physical evidence.<sup>(18)</sup> The broad scope of illegally obtained evidence suggests China's commitment<sup>(19)</sup> to fighting torture and other illegal means of evidence collection. But at the same time, emphasis is placed on the exclusion of oral rather than physical evidence, reflecting a strong police objection to a substantive exclusionary rule and the legislature's aim to pursue substantial justice over procedural justice<sup>(20)</sup> (Lewis 2011: 664).

Second, the rules impose the burden of proof on the prosecution and require the police to give oral testimony in court when necessary to prove the legality of the evidence collection process.<sup>(21)</sup> In contrast, the defence is only required to undertake the evidential burden of raising the issue of the illegality of a piece of evidence when they move for its suppression.<sup>(22)</sup> The allocation of the burden of proof for suppression hearings is in line with international practice.

Third, it implies a standard of proof "beyond a reasonable doubt" for suppression hearings by providing that evidence should be suppressed when doubts that the evidence was obtained unlawfully cannot be excluded.<sup>(23)</sup> This standard of proof is as strict as that for a guilty verdict and suggests the determination of the Chinese government to protect defendants from being put in a disadvantageous position because of evidence obtained by torture and other illegal means. The stricter the standard of proof, the more difficult it is for the prosecution to prove the legality of evidence collection, and the more protection the accused will enjoy. In setting the standard of proof for excluding illegally obtained evidence, Chinese legislators knew that

12. Art. 121 2012 CPL; Art. 123 2018 CPL.
13. Resistance came mainly from the police because of concerns that lawyers on site would interfere with the interrogation and advise suspects not to cooperate with police.
14. In November 2005, the SPP issued the "Regulation on Whole-process Audio-recording and Video-recording during People's Procuratorate Interrogation of Suspects in Corruption Cases (Trial Implementation)," and subsequently issued another three regulations applying to it in terms of technical norms, technical working processes, and system construction norms. These indicate that the procuratorate has begun to accept the supervision of audio and video recording. The 2012 CPL extends audio-recording and video-recording to all major crime cases, including capital cases and cases punishable by life imprisonment. This means that audio-recording and video-recording have been made compulsory for police action in major cases.
15. This was confirmed by all interviewees during empirical surveys.
16. A new paragraph was inserted as Paragraph 2 of Article 116: "Where investigators interrogate a criminal suspect after s/he has been delivered into a detention facility, they should do so within the detention facility."
17. These data were obtained from interviews conducted in Beijing, Heilongjiang, Jilin, Yunnan, Jiangxi, Guangdong, Shandong, and Zhejiang in 2013.
18. Article 54 of the 2012 CPL reads: "Confessions by a suspect or a defendant obtained through torture and extortion or other illegal means and witness testimonies and victim statements obtained through the use of violence, threats, or other illegal means should be excluded. Where physical or documentary evidence is collected in ways violating legal procedures and severely affecting judicial justice, corrections should be made or justifications provided. Where no correction or justification is provided, such evidence should be excluded."
19. There were neither exclusionary rules of illegally obtained oral evidence nor exclusionary rules of illegally obtained physical evidence before the 2010 Exclusionary Rules and 2012 CPL established exclusionary rules of evidence covering both oral and physical evidence. Compared to common law confession rules, the exclusion of oral evidence in China applies not only to confession, as common law evidence rules do, but also to other oral evidence such as witness testimonies and victim statements. All demonstrate the Chinese legislature's determination to rule out illegally obtained evidence of any kind.
20. The reason Chinese legislators attached more importance to the exclusion of illegally obtained confessions is that such confessions may lead to wrongful convictions that affect substantial justice, but physical evidence, even if illegally obtained, won't affect substantial justice. In China, although academics have tried to promote the value of procedural justice, substantial justice always prevails over procedural justice.
21. Article 57 reads: "During a court enquiry into the legality of the evidence collection process, the people's prosecutor's office should prove the legality of the collection process. Where available evidentiary materials are not able to prove the legality of evidence collection, the people's prosecutor's office may request the people's court to notify relevant investigators or other persons to make an explanation before the court; the people's court may also, at its own initiative, notify relevant investigators or other persons to make an explanation before the court. The relevant investigators or other persons may themselves request to appear to make an explanation. Relevant persons should appear upon the court's notification."
22. Article 56 reads: "Where, in a court hearing, an adjudicator is of the opinion that illegally obtained evidence under Article 54 may exist, a court enquiry should be conducted into the legality of such evidence. A party and his defender or an agent ad litem has the right to apply to the people's court to exclude evidence obtained illegally. Where exclusion of illegally obtained evidence is applied for, relevant information or materials about the illegal practice should be furnished."
23. Article 58 reads: "Where by means of a court hearing, evidence is determined to have been obtained illegally or where situations of collecting evidence using illegal means provided under Article 54 cannot be excluded, such evidence should be excluded."

proof beyond a reasonable doubt was not a mandatory requirement, but still adopted this standard to strictly implement the exclusionary rules.<sup>(24)</sup>

Finally, a unique feature of China's exclusionary rules is that they apply to various actors in the criminal process. Police, prosecutors, and judges all have the authority, and duty, for that matter, to exclude illegally obtained evidence.<sup>(25)</sup> This feature seems absurd at first glance, but it is not surprising considering the specific situation in China. China's procuratorate has the authority to exclude illegally obtained evidence because it is consistent with its combined functions as both a prosecutorial agency and a legal supervisory organ (Lewis 2011: 652). For the police, excluding illegally obtained evidence serves a self-disciplinary, self-correcting function, reflecting in part their superior political power in China, but the nature of the power is different from that of the procuratorate or courts. According to those involved in drafting the exclusionary rules, any legislative process encounters unavoidable bartering of power as representatives of various organisations fight for their own best interests. When the police representative saw the courts and procuratorates gain the power to exclude illegally obtained evidence collected by the police, they felt it necessary to ask for the same power in order to avoid being inferior or losing face.

## The implementation of exclusionary rules in China

### General findings

Since the official establishment of the exclusionary rule, the initial reform fervour has given way to the hard slog of changing actual practice. Empirical studies and sporadic media reports indicate that the implementation of exclusionary rules has encountered significant challenges due to various reasons (see Li 2013; Sun and Biao 2014; Yang and Xu 2014; Wu 2014; Zuo 2015; Yi 2016; Guo 2017b). This part will share some general findings of empirical research conducted by the author.

The empirical survey was conducted by the Centre for Criminal Law and Justice (the Centre) at the China University of Political Science and Law (CUPL) from October 2012 through December 2013. The Centre convened 17 workshops or symposiums in ten cities of seven provinces across China.<sup>(26)</sup> More than 500 criminal judges, prosecutors, police officers, defence lawyers, officials from judicial bureaus, and administrators from lawyer associations at all levels participated in our survey.<sup>(27)</sup> Since most of the information we gathered from field research was about implementation of the exclusionary rules in courtrooms, the Centre also conducted a large-scale questionnaire survey among prosecutors in the National Academy of Prosecutors and two selected provinces as a supplementary resource to learn how the exclusionary rules were implemented at the prosecution stage.<sup>(28)</sup> The Centre also collected some relevant statistics,<sup>(29)</sup> around 50 typical cases, and several local implementing guidelines by means of field research and literature reviews. According to our empirical surveys, the main focus of China's exclusionary rules is the exclusion of illegally obtained confessions. Up until 2013, almost all cases involving the exclusion of illegally obtained evidence were related to confession statements. The exclusion of witness testimonies or victim statements was rare; and the exclusion of physical evidence was non-existent (Guo 2017b). This finding was expected, because China takes a tougher stance on exclusion of oral evidence than of physical evidence, indicating that the dominant concern of the criminal justice system is the reliability rather than the legality of the evidence.

Second, it is usually difficult for judges to accept claims of torture in judicial proceedings, to obtain genuine investigations by the procuratorate on the claims, and finally to have illegally obtained evidence excluded in court. The reasons are complicated. In some cases, judges were reluctant to exclude illegally obtained evidence for fear that such a decision would adversely affect their relationship with prosecutors or the police (Lewis 2011: 683). The Chinese criminal justice system includes a rigid performance evaluation system, according to which both the procuratorate and the police will be negatively evaluated if a defendant is acquitted due to the exclusion of illegally obtained evidence. Even if there is no acquittal resulting from the exclusion of illegally obtained evidence, police and/or prosecutors would still be embarrassed and blame the court for their embarrassment. In other cases, defendants failed to move for suppression because they did not have defence lawyers, or their defence lawyers failed to do their job with diligence. But the primary reason, according to the survey, is the vague and often confusing legislation. Other reasons did exist, but they were not prevalent. Instead, complaints about vague legislation were heard everywhere. To be specific, the current legislation does not provide clear and readily applicable guidance for practitioners to implement the new rules. Confusion or difficulties in implementing the exclusionary rules were regarded as the primary reasons for the lack of effectiveness of the exclusionary rules.

Third, the exclusion of illegally obtained confessions has no impact on conviction rates. In those rare cases that actually resulted in the exclusion of illegally obtained evidence, very few such exclusions have resulted in the acquittal of a defendant due to the issue of multiple confession statements. Neither the 2010 Exclusionary Rule nor the 2012 CPL addresses the admissibility of multiple or repeated confession statements. When a court excludes one or a portion of illegally obtained confessions, it can still rely on the rest of the confession statements to find the defendant guilty. Without excluding repeated confession statements that were contaminated by the illegal statement, suppressing illegally obtained confessions becomes a meaningless ritual, because there are usually multiple confession statements in Chinese criminal cases due to repeated interrogations with varying degrees of credibility and legality.

Last but not least, the exclusionary rules have had an important influence on interrogators' mindset, despite the fact that it is difficult to initiate a suppression hearing, few exclusions have taken place, and exclusions have had little impact on the conviction rate. In response to the new legal regime, interrogators<sup>(30)</sup> have started paying attention to the legality of their work and are avoiding interrogation methods that could potentially be illegal and subject to exclusionary rules when a case goes to trial. In the sense that the

24. Interview with scholars who were involved in the drafting of 2010 Exclusionary Rules, Beijing, December 2013.

25. Art. 55 2012 CPL.

26. The surveyed sites include Beijing, Shaoxing City and Wenzhou City in Zhejiang Province, Nanchang City and Wuzhou City in Jiangxi Province, Changchun City in Jilin Province, Zigong City in Sichuan Province, Shenzhen City in Guangdong Province, and Kunming City and the Chuxiong Yi Autonomous Prefecture in Yunnan Province.

27. We did not calculate the exact number of participants, but among them, police officers were less represented because Chinese police are either too busy or reluctant to participate in academic activities.

28. Surveyed sites included the National Academy of Prosecutors, which is a national training institute for prosecutors, as well as the procuratorates of Shandong and Heilongjiang provinces.

29. By the time of our survey, there were very limited statistics regarding implementation of the exclusionary rules, because no official statistics were available, and some local statistics were useless due to lack of proper understanding of the rules.

30. We detected the change in their mindset through the questions they raised and our interactions with them during the empirical surveys.

exclusionary rules may deter police from behaving improperly, the rules have functioned well. However, like judges and prosecutors, the police are also confused about the rules and the parameters of permissible interrogation tactics.

### **Problems with the implementation of the exclusionary rules**

Research in China has shown three legal challenges in implementing the exclusionary rules. They are the scope of illegally obtained confessions (Lewis 2011: 654); burden of proof and standard of proof in suppression hearings; and the procedural rules for the hearings.

#### **The scope of illegally obtained confessions**

In most cases, failure to suppress an allegedly illegally obtained confession results primarily from a misunderstanding as to what constitutes an illegally obtained confession. Practitioners often run into difficulties in judging whether a certain confession constitutes an illegally obtained confession because neither the exclusionary rules nor the supporting judicial interpretations give a clear definition or a full list of illegal means demanding exclusion. Under the 2012 CPL, confessions by a suspect or a defendant obtained through torture or other illegal means should be excluded.<sup>(31)</sup> But it's not clear what "other illegal means" are. Judicial interpretations by the SPC and SPP have tried to give clearer guidance on "torture or other illegal means" by referring to the definition of "torture" in the UN Convention against Torture (UNCAT).<sup>(32)</sup> However, the definition offered by the UNCAT is not precise, so making reference to it may even complicate the matter by bringing in new concepts that also need to be defined. For example, the SPC Interpretation provides:

[T]he use of corporal punishment or disguised corporal punishment, or any other methods inflicting severe pain or suffering, physically or mentally, on the defendant so as to force him/her to make confessions against his or her will, shall be deemed "illegal means such as extortion of confessions by torture" as set out in Article 54 of the CPL.

Without a clear definition and listings, it is hard for practitioners to understand what "disguised corporal punishment" refers to, not to mention the obscure and subjective standards for "other methods inflicting severe pain or suffering" on defendants.

After extensive debates in China, Chinese academics and practitioners reached a consensus on the following points: corporal punishment is used interchangeably with the extortion of confessions by torture according to empirical findings. But since the implementation of the 2010 Exclusionary Rules, corporal punishment and torture have rarely been observed, if still in existence. Rather, it is disguised corporal punishment that has been frequently employed in response to a strict prohibition of corporal punishment. Thus, determining what constitutes disguised corporal punishment and suppressing confessions obtained by such means has become the most challenging task. Many agree that any methods inflicting severe physical pain on the defendant should fall under the umbrella of disguised corporal punishment, such as sleep deprivation, hunger, heat, cold, or stress positions during interrogations, because these measures challenge suspects' limits,

cause physical and psychological suffering, and can be used to extract confessions from suspects even more readily than corporal punishment. The 2013 SPC Opinion on Preventing Wrongful Convictions echoes that consensus by explicitly providing in Article 8 that confessions obtained by torture or other illegal means including cold, hunger, heat, and sleep deprivation should be excluded.<sup>(33)</sup> Another difficulty relates to defining prolonged interrogation. Although there is no denying that confessions obtained by prolonged interrogation should be excluded as illegally obtained evidence, no uniform guidance exists to guide practitioners in determining how many hours constitute "prolonged" or under what circumstances an interrogation can be regarded as "prolonged."

It is even more challenging to define disguised corporal punishments inflicting mental suffering, which usually refers to threats, inducements, or deception in the context of China. Although threats, inducements, and deception have been strictly forbidden together with the extortion of confessions by torture in criminal interrogations since the very first CPL, Chinese academics and practitioners have clashed over whether confessions obtained by threats, inducements, or deception should be excluded. Threats can take any form, including the use of violence or embarrassing revelations, the use of compulsory measures or sanctions upon the spouse or children of the accused, the refusal to provide medicine for accused with chronic diseases, etc. Threats amount to torture according to UNCAT's definition,<sup>(34)</sup> and since it generates mental suffering, confessions obtained by threats should be a category for exclusion as a matter of principle. The problem is whether any exception should be allowed when the threat is only minor and constitutes weak evidence instead of illegally obtained evidence (Guo 2017a: 36; Guo 2017b: 58).

Inducement and deception are different from threats. On the one hand, neither is explicitly included in the definition of torture in UNCAT. On the other hand, it is not easy to distinguish blameworthy inducement or deception from regular interrogation tactics in practice (Guo 2017a: 37; Guo 2017b: 58). It is still premature for China to provide a categorical exclusion for all confessions obtained by inducement or deception. Again, it could be hard to draw a line between blameworthy inducement/deception and those permissible as interrogation strategies.

Another challenge in defining illegally obtained confessions involves confessions obtained in violation of procedural rules. Many agree that it is not necessary to exclude all the confessions in violation of any procedural rules (Lewis 2011: 662). Instead, only those confessions obtained in violation of procedural rules concerning human rights should be excluded (Guo 2017a: 38; Guo 2017b: 60). For example, as the SPC Opinion on Preventing Wrongful Convictions provides, except in emergency cases where an interrogation has to be conducted on site at detention facilities, confessions obtained outside the places provided by law, confessions obtained without being

31. Art. 54 2012 CPL.

32. Art. 95 SPC Judicial Interpretation; Art. 65 SPP Judicial Interpretation.

33. See "最高人民法院关于建立健全防范刑事冤假错案工作机制的意见" (Zuigao renmin fayuan guanyu jianli jianquan fangfan xingshi yuanjia cuo'an gongzuo jizhi de yijian, The SPC opinion on preventing wrongful convictions), 9 October 2013, [http://www.law-lib.com/law/law\\_view.asp?id=436610](http://www.law-lib.com/law/law_view.asp?id=436610) (accessed on 5 February 2019).

34. According to the definition of torture in UNCAT, "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as (...) intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Intimidating or coercing means threats in this context. China has ratified the UNCAT and should adopt the whole concept of torture into domestic law.

audio or video-recorded in accordance with law, and confessions that may have been obtained by illegal means should all be excluded. The procedural rules on the permissible location of interrogation and the requirement for audio-taping or video-taping interrogations are important because they share the purpose of protecting suspects from being tortured outside a lawful interrogation venue or off tape.

The last challenge is the admissibility of multiple confessions. As mentioned earlier, there will be no point in excluding illegally obtained confessions if contaminated repeat confessions are still admissible. To solve this problem, the Chinese legislature has to adopt the “fruit of the poisonous tree” doctrine and address the admissibility of multiple confessions (Guo 2017a: 39; Guo 2017b: 62).

### Burden of proof and standard of proof

It is a globally common practice to invert the burden of proof in establishing whether certain evidence is illegally obtained. China has adopted this international practice in the 2010 Exclusionary Rules and 2012 CPL. Under Article 57 of the 2012 CPL, the burden is on the prosecution to prove the lawfulness of a confession if the defendant’s motion to suppress has aroused suspicion in the mind of the judge. Meanwhile, China’s exclusionary rules also impose a minimal onus on the defence to provide “supporting leads or materials” on the “person(s), time, place, manner, and content” of alleged illegal means to avoid groundless motions for suppression. However, the empirical survey revealed that many practitioners mistakenly believed that the defence must prove the illegality of the challenged confessions. On the other hand, in cases where practitioners correctly understood the allocation of burden of proof for suppression hearings, prosecutors complained of encountering enormous difficulties in proving the lawfulness of interrogation procedures due to the scarcity of relevant evidence.

There is also a lot of misunderstanding concerning the standard of proof for suppression hearings (Lewis 2011: 654). Under Article 58 of the 2012 CPL, after a hearing, if the court confirms that the evidence was secured illegally or cannot rule out that possibility, the court should suppress the evidence. Its complex and confusing wording has led to diverse interpretations of this clause. According to our empirical survey, most practitioners paid more attention to the first part of this provision and concluded that evidence should be suppressed only when the court confirms it was seized illegally. Academics read this provision in different ways. One representative understanding is that the clause has two alternative limbs: one is “confirming the existence of illegal evidence,” while the other is “cannot eliminate the possibility of illegally obtaining evidence” (Chen and Guo 2014). According to the questionnaire survey, a potential problem with the “confirming” standard was that it risked shifting the burden of proof from the prosecution to the defence or even to the court. Under the second limb, the prosecution must establish beyond reasonable doubt that confessions were lawfully obtained. This unrealistically strict standard of proof, even if it could be satisfied in some exceptional cases, has had trouble gaining a foothold in practice. All in all, “confirmed” by the court or otherwise, there should be only one standard of proof: that is proof beyond reasonable doubt by the prosecution. Although some scholars have suggested lowering this standard to a preponderance of the evidence, my concern is that the less strict standard of proof would make it easier for the prosecution to prove the legality of evidence collection procedures and more difficult for the defence to successfully move for suppression.

### Procedures for suppression

Compared with the exclusionary principle adopted by judicial interpretations for the 1996 CPL, the 2010 Exclusionary Rules and the 2012 CPL provisions on exclusionary rules provide more procedural specificities for suppression hearings. However, this legislation is not sufficient to guide practice on several procedural issues (Guo 2017a: 34; Guo 2017b: 54). For example, should a pre-trial conference be considered an important occasion to seriously consider the admissibility of confessions, or is it merely an occasion for the court to hear evidence and submissions from both parties? Must a motion for suppression be filed during the pre-trial conference? Should defendants be required to participate in the pre-trial conference? Should the pre-trial conference be open to the public? <sup>(35)</sup> What kind of model should China adopt: separate hearing, trial-within-trial, or out-of-court investigation? Should court rulings on suppression hearings be included in the final court judgments? Exclusionary rules are a sophisticated tool that judges use to ensure the fairness of the criminal process and maintain the integrity of the criminal justice system. That system has evolved over a long historical period in Western countries to reach its maturity. China imported the system from the outside world and started from scratch. It needs practice, incubation, and sometimes experience for the system to grow and to become meaningful. To pass legislation in response to a crisis is easy, but the hard task is to implement it.

It is noteworthy that the 2018 Supervision Law <sup>(36)</sup> clearly states in its Article 33 that supervisory commissions should meet the requirements and standards of a criminal trial when they collect, preserve, examine, and use evidence. Evidence obtained by illegal means should be excluded and cannot be used as the basis of case disposal. It’s clear that the exclusionary rules apply to supervisory commissions’ investigation of corruption crimes, but it’s not clear if they apply to supervisory commissions’ investigation of Party discipline violations or administrative violations.

### Further reforms to strictly implement exclusionary rules

It is publicly acknowledged that the exclusionary rules have not been strictly implemented. There are multiple reasons why exclusionary rules are not working in China. First, traditional mindsets still dominate among practitioners (Guo 2017a: 50; Guo 2017b: 75; Lewis 2011: 696), and the protection of human rights remains a marginal concern in the Chinese criminal process.

Second, practical obstacles exist to prevent the exclusionary rules from being strictly implemented (Guo 2017a: 50; Guo 2017b: 75). The soaring number of motions for suppression filed by defence lawyers and the accused since the 2010 Exclusionary Rules were enacted has placed criminal justice agencies under tremendous pressure. A motion to exclude illegally obtained evidence necessarily means defendants withdrawing interrogation confessions, the allegation of torture or other illegal means to obtain the confession, and the failure of the prosecution to supervise investigations. It is well known that the police, prosecutors, and courts would be on the alert for

35. These questions were all raised by practitioners through our empirical surveys.

36. The Supervision Law was adopted in March 2018. The new law integrates supervisory power that was formerly divided among three agencies – the Party disciplinary agencies, administrative supervisory agencies, and procuratorates, and forms a centralised, unified, and efficient state supervisory system.

the filing of a motion for suppression and would even work together to overturn the motion. They therefore collaborate rather than check each other in solving the case (Lewis 2011: 689-90). Many failures of legal reform can be traced to this abnormal institutional relationship, and a serious debate is ongoing over how to readjust the relationship among the police, prosecutors, and courts (Wang and Sun 2010).

Third, the lack of effective – or any – defence by lawyers contributes to the deteriorating implementation of the exclusionary rules (Guo 2017b: 76). Recent national statistics on defence lawyers indicate that criminal defendants were represented by lawyers in only 20.2% of all cases in 2015.<sup>(37)</sup> The empirical survey also found that many defence lawyers lack training and therefore fail to perform their duty when they raise the issue on their clients' behalf and try to have the evidence in question suppressed.

Last but not least, there are some loopholes in the current legislation (Guo 2017b: 76). The 2010 Exclusionary Rule and CPL merely provide a general framework for the rules. They should be supplemented by more detailed and concrete procedures or guidance to make the rules more operable. For example, the law should make clear what constitutes "illegal means" so that the police know what they can and cannot do during interrogation. China should also adopt the "fruit of the poisonous tree" doctrine and exclude tainted derivative evidence (Ahl 2016: 52, 146). Otherwise, the exclusion of illegally obtained evidence is meaningless.

Besides the reasons mentioned above, China's legislative model makes it difficult to implement and improve this rule. Unlike common law jurisdictions, China does not have a case law tradition. As a statutory law state, China confronts a paradox: legislation should predate implementation, but the need for legislation will not emerge until it is implemented. The exclusionary rules reflect the tension between the evolution of the law and China's tradition of a rigid, hysteretic statutory law. A possible solution could be issuing guidance piece by piece. The SPC Opinion on Preventing Wrongful Convictions (9 October 2013) sets a good example for this approach. As mentioned earlier, the SPC Opinion on Preventing Wrongful Convictions has absorbed some agreed understandings on exclusionary rules. It lists some common disguised corporal punishments such as cold, hunger, heat, and sleep deprivation, and makes it clear that confessions obtained outside of places provided by law, and confessions obtained without being audio- or video-recorded in accordance with law, etc., shall all be excluded.

Realising that more detailed, clear, and readily applicable guidance is needed to flesh out the exclusionary rules, the third Criminal Tribunal of the SPC in 2014 started drafting implementing guidelines on excluding illegally obtained evidence. The guidelines did not come out until June 2017. On 27 June 2017, 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 jointly released "Provisions on Several Issues Regarding the Strict Exclusion of Illegal Evidence in Handling Criminal Cases" (hereinafter the Provisions), which are the national implementation guidelines.

### **Pros and cons of the Provisions**

Changes made by the Provisions are generally positive, but there is still room for further improvement. The Provisions provide a clearer definition of illegally obtained evidence, adopt "the fruit of the poisonous tree" doctrine, add removal registry and medical inspection records as the prosecu-

tion's means of proof, reiterate the requirement of interrogation recordings, and clarify the procedure for suppression hearings. However, the Provisions have not solved the problem of the defence lawyer's capacity to request suppression, which existed in the previous rules.

First, in response to the criticism of the vagueness of the definition, the Provisions spare a couple of articles trying to clarify what are illegally obtained confessions. Article 2 seems to set up three criteria for illegally obtained confessions. The first criterion is the use of illegal means, i.e., violent methods and disguised corporal punishment. Violent methods include hitting and the unlawful use of restraints.<sup>(38)</sup> The Provisions do not provide a full list of disguised corporal punishments, but read together with Article 3, disguised corporal punishments should include threats.<sup>(39)</sup> According to Article 3, threats could include the threat of using violence, or of seriously harming the lawful rights and interests of the person or their families. These provisions accept the academic consensus on the admissibility of confessions acquired by threats. They do not mention inducement and deception, echoing the divided opinions on the admissibility of confessions obtained by such measures. The second criterion is unbearable suffering. Although it's a subjective test and difficult to measure in practice, this is a threshold for the use of violence or disguised corporal punishment and will help practitioners distinguish illegal means from merely improper practice. The third criterion is voluntariness. Both Article 2 and 3 mention "against their own will," and this seems to adopt voluntariness as a criterion to determine whether a certain confession should be excluded. Article 4 makes it clear that any illegal restriction of physical liberty, especially unlawful confinement, constitutes illegal means deserving suppression.<sup>(40)</sup> Unlawful restriction of physical liberty constitutes illegal means because the accused may not confess voluntarily when his/her liberty is illegally restricted, and he is under tremendous psychological pressure. Confessions obtained in such cases should also be excluded because that violates procedural rules. In a word, confessions obtained through violence or disguised corporal punishments such as threats should be suppressed if the illegal means cause unbearable suffering and cause suspects or defendants to confess against their own will.

Second, in response to the issue of multiple confessions, the Provisions adopt a restricted version of the "fruit of the poisonous tree" doctrine. As discussed earlier, admitting repeated confessions would make the exclusion of illegally obtained confessions meaningless. Therefore, Article 5 states:

Where extortion of confessions by torture is used to make criminal suspects or defendants confess, and the criminal suspect makes subsequent repeat confessions similar to that confession because of the influence of that [prior] use of torture to extract confessions, they shall all be excluded together, with the following exceptions:

37. Wang Lüsheng 王禄生, "刑事诉讼法实施效果评估: 基于350万份刑事判决书的大数据分析" (Xingshi susongfa shishi xiaoguo pinggu: jiyu 350 wan fen xingshi panjueshu de da shuju fenxi, Evaluation of the effect of implementation of the Criminal Procedure Law: A big data analysis of 3,500,000 criminal verdicts), unpublished paper presented at the Junior Scholar Workshop on Criminal Justice Empirical Research Methodology, Macau, September 2016.
38. Statements shall be excluded where made by criminal suspects or defendants against their own will due to unbearable suffering caused by the employment of the egregious tactic of using violent methods such as hitting, the unlawful use of restraints, or disguised corporal punishment.
39. Art. 3: "Statements shall be excluded where made by criminal suspects or defendants against their own will due to unbearable suffering caused by methods of threats of using violence, or carrying out threats through means such as seriously harming the lawful rights and interests of the person or their families."
40. Art. 4: "Statements of criminal suspects or defendants gathered by the use of unlawful confinement or other illegal restrictions of physical liberty shall be excluded."



(1) Where, during the investigation period, the investigating organs confirm, or cannot rule out, that evidence was gathered by illegal means, and they therefore change investigators; and when other investigators again conduct interrogation, give information on the procedural rights and on the legal consequences of admitting guilt, and the criminal suspect voluntarily confesses.

(2) Where, during the periods of review for arrest, review for prosecution, and trial, prosecutors or adjudicators give information on procedural rights and the legal consequences of admitting guilt when conducting interrogations, and the criminal suspect or defendant voluntarily confesses.

It is a great leap to adopt the “fruit of the poisonous tree” doctrine, but there is a lot of concern about the first exception. Many worry that the influence will still exist even after the replacement of interrogators.

Third, in response to the scarcity of proof for the prosecution, the Provisions bring in additional means of proof: the removal registry for interrogation<sup>(41)</sup> and medical inspection records.<sup>(42)</sup> The prosecution could present the removal registry and medical inspection records to prove that no illegal means were employed during the interrogations at issue. For those existing means of proof, Article 11 emphasises, where an audio-visual recording is made of the interrogation process, it shall be without interruptions and with its integrity preserved. Also, it must not be selectively recorded and must not be spliced or edited.

Lastly, the Provisions flesh out the procedural rules for suppression hearings. Based on experience in practice, a notification procedure is required during either the review for arrest, the review for prosecution, or before trial.<sup>(43)</sup> The accused should be informed of the right to apply for the exclusion of illegally obtained evidence. This is especially significant to those without the assistance of a defence lawyer.

To clarify the confusion over whether suppression should occur in the pre-trial conference or in the main hearing, the Provisions make it clear that the court shall not suppress illegally obtained evidence until the main hearing.<sup>(44)</sup> However, if the prosecution and the defence can reach an agreement on the admissibility of alleged illegally obtained evidence, this issue could be solved in the pre-trial conference.<sup>(45)</sup>

The Provisions also make trial-within-trial the primary model for suppression hearings. According to Article 30, when during the trial period the court decides to conduct an investigation of the legality of evidence gathering, it shall first conduct an investigation in court. However, in order to prevent excessive delay of the trial, the court may also conduct the investigation before the end of the court session. Out-of-court investigation is obviously not allowed anymore.

In conclusion, the Provisions respond to many issues raised in the practice of implementing the exclusionary rules since 2010, and make some progress by absorbing matured opinions. They provide a more detailed and readily applicable guidance for practitioners to strictly implement exclusionary rules. But there are still some problems with the Provisions, the most striking of which is defence lawyers’ incapacity to suppress illegally obtained confessions. According to Article 22, it’s the decision of state authorities whether to collect relevant evidence that can prove the illegality of evidence collection, and defence lawyers have no access to the evidence without the approval of the state authorities.<sup>(46)</sup> This will make it difficult for the defence to either initiate a suppression hearing or have the illegally obtained evidence excluded.

Another problem is that judges’ opinions can be tainted by excluded confessions because Article 17 mistakenly provides that “illegal evidence that has been excluded shall be transferred with the case and be specified as illegal evidence excluded in accordance with law.” This provision is in conflict with another provision in the same guidance. Section 2 of Article 33 provides that the evidence in question cannot be presented and confronted before the court makes the final decision on whether suppression should be granted. The purpose of Section 2 of Article 33 is to avoid the contamination of a judge’s conviction by evidence excluded thereafter.

## Conclusion

As a complex legal institution concerning substantive law, procedural law, and evidence law, exclusionary rules are the most controversial rules in all of criminal law (Goodpaster 1982: 1082). Therefore, it is not easy to make the rules, especially in a country without a case law tradition. It is even harder to implement exclusionary rules due to resistance from traditional culture and mindset, practical obstacles, and insufficient legislation. However, China has been making efforts to put these rules into practice since 2010. Although it is necessary to continue improving the rules, the most important task for the moment is to strictly implement the exclusionary rules. Further training should be provided to help practitioners nationwide to correctly understand the exclusionary rules. Suppression hearings should be initiated whenever the defence moves for suppression and fulfils his obligation of presenting necessary information. The prosecution should use all relevant means to prove the legality of evidence collection “beyond rea-

41. Detention centres shall make a registry of persons being taken to interrogation, specifying the unit, personnel, matter, and start and stop times, as well as the criminal suspect’s name and other such information.
42. Detention centres receiving criminal suspects into custody shall conduct physical inspections. When making inspections, the people’s procuratorate’s procurators who are based in the detention centres may be present. Where the inspection discover that the criminal suspect has injuries or physical abnormalities, the detention centres shall take photographs or recordings and have the personnel bringing them for detainment, and the criminal suspect, explain the reasons separately, have this clearly written in the physical inspection record, and have it signed and verified by the personnel delivering the detainees, the person receiving them into custody, and the criminal suspects.
43. Article 16 provides: “Criminal suspects interrogated during the review for arrest and review for prosecution periods shall be informed that they have the right to apply for the exclusion of illegal evidence and be informed of their procedural rights and the legal consequences of admitting guilt.” Art. 23: “When people’s courts deliver a copy of the indictment to defendants and their defenders, they shall inform them of the right to apply for the exclusion of illegal evidence.”
44. Article 26 states: “Where the public prosecutor, defendant, and his defender fail to reach a consensus on the legality of evidence gathering during the pretrial conference, and the people’s court has doubts about the legality of the evidence gathering, it shall conduct an investigation during trial; (...)”
45. Art. 25: “Where defendants and their defenders apply for the exclusion of illegal evidence before the court opens for trial, and provide leads or materials in accordance with the relevant legal provisions, the people’s courts shall convene a pretrial conference. People’s procuratorates shall make focused explanations of the legality of evidence gathering through means such as the presentation of relevant evidentiary materials. The people’s courts may verify the circumstances and hear comments. – The people’s procuratorate may decide to withdraw the relevant evidence; and evidence that is withdrawn must not be presented in court absent new reasoning. – Defendants and their defenders may withdraw applications for the exclusion of illegal evidence. After the withdrawal of the application, they must not again submit an application for the exclusion of the relevant evidence, absent new leads or materials.”
46. Where criminal suspects or defendants, as well their defenders, apply to the people’s courts or people’s procuratorates to collect audio-visual interrogation recordings, physical inspection records, or other evidentiary materials that the public security organs, state security organs, or people’s procuratorates gathered but have not handed over, and, upon review, the people’s court or people’s procuratorate finds that the evidence that the criminal suspect or defendant or their defenders applied for collection of is related to proving the legality of evidence gathering, they shall collect it; where they find it is not related to proving the legality of evidence gathering, they shall decide not to collect it, and explain the reasons to the criminal suspect or defendant and their defender.

sonable doubt." The courts should exclude illegally obtained evidence, whether exclusion will lead to acquittal or not. Not until all of the above goals are met can the exclusionary rules play their role in both preventing wrongful convictions and protecting the human rights of the accused.

■ Zhiyuan Guo is Professor of Law at China University of Political Science and Law (guozhiyuan@hotmail.com).

Manuscript received on 2 October 2018. Accepted on 29 January 2019.

## References

- AHL, Björn. 2017. "Interaction of National Law-Making and International Treaties," In Yun Zhao and Michael Ng (eds.), *Chinese Legal Reform and the Global Legal Order: Adoption and Adaptation*. Cambridge: Cambridge University Press. 136-55.
- BIAN, Jianlin 卞建林, and SUN Yue 孙锐. 2010. "诉审关系论辩: 兼论对诉审关系异化的程序性抑制" (Sushen guanxi lunbian: jianlun dui sushen guanxi yihua de chengxuxing yizhi, Debates on relations between prosecution and trial: A procedural control against irrational prosecution-trial relations). 法制网 (Fazhiwang), 5 November 2010, <http://m.aisixiang.com/data/49542.html> (accessed on 11 February 2019).
- CUI, Min. 2003. "Holding Back Interrogational Torture." *Journal of Zhejiang Police College: Public Security Science Journal* 76: 24-9.
- CHEN, Guangzhong. 2004. 中华人民共和国刑事证据法专家拟制稿: 条文·释义与论证 (Zhonghua renmin gongheguo xingshi zhengjufa zhuanjia nizhigao: tiaowen, shiyi yu lunzheng, Expert drafted criminal evidence act of the PRC: Provisions, annotation and argumentation). Beijing: China Legal System Publishing House.
- CHEN, Guangzhong, and Zhiyuan GUO. 2014. "Some Issues on the Implementation of Exclusionary Rule of Illegally obtained Evidence: An Empirical Perspective." *Jurisprudence Journal* 9: 1-16.
- CHAN, Yu-Jie. 2011. "One Problem, Two Paths: A Taiwanese Perspective on the Exclusionary Rule in China." *International Law and Politics* 43: 713-28.
- FAN, Chongyi 樊崇义, and GU Yongzhong 顾永忠. 2007. 刑事讯问程序改革实证研究: 侦查讯问中律师在场, 录音, 录像制度试验 (Xingshi xunwen chengxu gaige shizheng yanjiu: zhencha xunwen zhong lushi zaichang, luyin, luxiang zhidu shiyan, Empirical research on interrogation procedure: Experimenting with lawyer-on-site, audio-recording and video-recording). Beijing: China University of People's Public Security Press.
- GOODPASTER, Gary S. 1982. "An Essay on Ending the Exclusionary Rule." *Hastings Law Journal* 33: 1065-108.
- GUO, Zhiyuan. 2017a. "Exclusion of illegally obtained confessions in China: An empirical perspective." *The International Journal of Evidence & Proof* 21(1-2): 30-51.
- GUO, Zhiyuan. 2017b. "The First Step of the Long March: Implementing the Exclusionary Rules in China." *Asia Pacific Law Review* 25(1): 48-76.
- HE, Jiahong. 2016. *Back from the Dead: Wrongful Convictions and Criminal Justice in China*. Honolulu: University of Hawaii Press.
- LANGBEIN, John H. 1977. *Torture and the Law of Proof: Europe and England in the Ancient Regime*. Chicago: University of Chicago Press.
- LEWIS, Margaret K. 2011. "Controlling Abuse to Maintain Control: The Exclusionary Rule in China." *New York University Journal of International Law and Politics* 43: 629-39.
- LI, Hailiang 李海良. 2013. "非法证据排除规则适用情况之实证研究—以东南地区某法院为例" (Feifa zhengju paichu guize shiyong qingkuang zhi shizheng yanjiu—yi dongnan diqu mou fayuan wei li, An empirical study of the implementation of exclusionary rules: Taking a court in south-eastern China as an example). *中国刑事法杂志* (Zhongguo xingshi fa zazhi, Chinese Journal of Criminal Justice) 11: 103.
- SUN, Changyong 孙长永, and WANG Biao 王彪. 2014. "审判阶段非法证据排除问题实证考察" (Shenpan jieduan feifa zhengju paichu wenti shizheng kaocha, An empirical survey of excluding illegally obtained evidence during trial). *现代法学* (Xiandai faxue, Modern Law Science) 1: 72.
- WU, Hongyao 吴宏耀. 2014. "非法证据排除的规则与实效—兼论我国非法证据排除规则的完善进路" (Feifa zhengju paichu de guize yu shixiao—jianlun woguo feifa zhengju paichu guize de wanshan jinlu, Rules and effects of the exclusionary rules, and the way to improve China's exclusionary rules). *现代法学* (Xiandai faxue, Modern Law Science) 4: 121.
- YAN, Xiaodong. 2004. "The historical change and reasons of extorting confessions by torture." *Journal of Xiangtan University (Philosophy and Social Science)* 3(122): 129-31.
- YANG, Yuguan 杨宇冠, and GUO Xu 郭旭. 2014. "非法证据排除规则实施考察报告—以J省检察机关为视角" (Feifa zhengju paichu guize shishi kaocha baogao—yi J sheng jiancha jiguan wei shijiao, Survey Report on the implementation of exclusionary rules: From a procuratorate's perspective in J Province). *证据科学* (Zhengju kexue, Evidence Science) 1: 5.
- YI, Yanyou. 2015 "Exclusionary Rules in China." *Columbia Journal of Asian Law* 29(1): 1-69.
- YI, Yanyou 易延友. 2016. "非法证据排除规则的中国范式: 基于1459个刑事案例的分析" (Feifa zhengju paichu guize de Zhongguo fanshi: jiyu 1459 ge xingshi anli de fenxi, The Chinese model of exclusionary rules: An analysis of 1,459 criminal cases). *中国社会科学* (Zhongguo shehui kexue, Chinese Social Science) 1: 140.
- ZUO, Weimin 左卫民. 2015. "'热'与'冷': 非法证据排除规则适用的实证研究" ("Re" yu "leng": feifa zhengju paichu guize shiyong de shizheng yanjiu, "Popularity" and "ignorance": An empirical study of the implementation of exclusionary rules). *法商研究* (Fa shang yanjiu, Law and Commerce Study) 3: 151-160.