

Definitions of the right to remain silent in China

Abstract

In China, there is no statutory rule or constitutional rule on the right to remain silent, but are statutory rules on privilege against self-incrimination only. The question is whether or not China needs to enshrine the right in its legislation, and if so, how to define it in future reforms, in order to better protect human rights in practice. This paper will examine the need from diverse perspectives of domestic law, international law, practice and public debates, as well as definitions, on the above right, as follows

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Legal conflicts weakening the right to silence

As a major part of Chinese domestic legislation, the 2012 CPL still imposes the legal duty to objectively and fully provide evidence on those involving in or having information of a case. Accordingly, such citizens or suspects might be required to assist investigation, even by any means in their interrogations of the criminal process. But unfortunately, the duty to tell the truth is against the right to silence in legislation. Furthermore, some regulations also constitute the framework of the duty to tell the truth that may weaken the right to silence. For example, the Supreme People's Court's 2013 *Notice on Establishing and Improving Working Mechanisms for the Prevention of Miscarriages of Justice in Criminal Cases* simply excludes confessions obtained through torture or other illegal methods. Thus, Chinese courts should not convict the accused based on confessions alone, but exclude the use of confessions collected by the means of torture or other illegal methods, i.e., cold, hunger, bright light, heat or fatigue of the accused. Except in cases of emergency when on-site interrogation must be adopted, courts should exclude the use of confessions, made outside the required place, confessions, not wholly recorded by law or confessions, obtained by measures without total exclusion of illegal methods during interrogations.

Both Chinese legislation and regulations address special procedures for screening investigations conducted by torture or other illegal means. Among them, the 2012 CPL stipulates the obligation of the PPs, courts and the police to exclude illegally obtained evidence, along with the procedure of investigation for its exclusion in court hearings. In the trial process, the relevant PPs shall prove at trial or in appeal that all evidence was collected legally. Courts will be able to command investigators or other personnel to appear in court and explain how they collected evidence in interrogation. By the law, upon notice, investigators will also have to appear in court to justify their methods. Indeed, some investigators are already proactively demonstrating the legality of the evidence that they have collected before it is challenged. Moreover, the SPP mentions the special procedures in its *Notice on Issuing the Guiding Opinions of the SPP on the Application of the Provisions on Several Issues concerning the Examination and Judgment of Evidence in Death Penalty Cases and the Provisions on Several Issues on the Exclusion of Illegally Obtained Evidence in Criminal Cases*. Art. 7 of the *Notice* requires procuratorial organs to strictly implement the synchronized recording system in the whole process of interrogation of duty-related criminal suspects. Art. 7 further states the accountability system that when "any adverse consequence is caused due to any failure to strictly implement

the relevant provisions or falsehood in the implementation, the major liable persons shall be investigated and punished according to the relevant provisions".¹

Discretionary audio or video recording of interrogations, i.e., in cases without involving the punishment of life imprisonment or the death penalty, as an essential adjunct to transcripts of interrogations in procedure can be found in more regulations. For example, the Supreme People's Court, the Supreme People's Procuratorate (SPP), the Ministry of Public Security (MOPS), the Ministry of State Security (MOSS), the Ministry of Justice (MOJ), and the LAC (the Legislative Affairs Commission of the Standing Committee of the National People's Congress) jointly issued their *Provisions of Several Issues on the Implementation of the Criminal Procedure Law* following the adoption of the 2012 CPL. The *Provisions* explicitly include the procedural requirement, such that "where investigators keep an audio or visual record of the interrogation process, it shall be indicated in interrogation transcripts".² Similarly, the MOPS' 2014 *Notice on Working Rules of Public Security Organs on Audio-visual Recording of Interrogation of Suspects* requires mandatory recording of interrogations applicable to several kinds of serious criminal cases in Art. 4. They are potentially capital cases, cases of "serious injury or death, serious harm to public safety or serious violation of civil rights", or involving organised crime, serious drug crimes, and of "other intentional crimes that can be sentenced to ten years in prison by law".³

The MOPS' 2014 *Notice* also specify special procedures for and the mandatory scope of interrogation recordings in Art. 3. Accordingly, they "shall include the whole process of each interrogation and be uninterrupted, to maintain the integrity and shall not be selectively

¹*Notice of the SPP on Issuing the Guiding Opinions of the SPP on the Application of the Provisions on Several Issues concerning the Examination and Judgment of Evidence in Death Penalty Cases and the Provisions on Several Issues concerning the Exclusion of Illegally Obtained Evidence in Criminal Cases*, No.13 [2010] (30 December 2010), available online at<<http://www.lawinfochina.com/display.aspx?lib=law&id=8745&CGid=>>, accessed 26 March 2018.

²Para. 19 of the Provisions of the SPC, the SPP, the MOPS, the MOSS, the MOJ, and the LAC on Several Issues concerning the Implementation of the Criminal Procedure Law, (26 December 2012), available online at<<http://www.lawinfochina.com/display.aspx?lib=law&id=13295&CGid=>>, accessed 26 March 2018

³Notice of the MOPS on the publication of Working Rules of Public Security Organs on Audio-visual Recording of Interrogation of Suspects, (2014) 3 (5 September 2014), available online at<<http://www.mps.gov.cn/n16/n1996048/n1996090/n1996180/4627066.html>>, accessed 26 March 2018

recorded, edited or deleted". In this context, "interrogation" broadly involves interrogating the accused in law enforcement facilities, at detention houses or at suspects' homes when they are not detained. The mandatory scope of such recordings is even expanded to "on the scene" questioning in an emergency. In addition, Art. 16 of the above *Notice* also provides that individuals other than interrogators are responsible for maintaining custody of the recordings. The *Notice* also details pre-recording checks of the equipment, when recording should start, the frame coverage and camera angle, in Art. 9, and the identification on the record of evidence in Art. 11. It further requires such details as "time, place, modus operandi, tool of criminal purpose, state of victim(s), subjective state of mind and other key facts involved with the crime" be transcribed exactly as showed in the confession recording, in its Art. 13.

Moreover, the above exclusion rules are mandatory in principle as indicated in Arts. 50, 54-57 of the 2012 *CPL*, but appear to be discretionary in the cases of collecting material or document evidence by illegal means as exceptions in Art. 54 of the law. Specifically, Art. 50(2) of the law requires strictly prohibiting investigators from extorting confessions by torture and from collecting evidence by threat, enticement, deceit or other unlawful means. The provision implies that any form of evidence collected by the illegal means should be excluded from use in principle. Art. 54(1) of the law further states that "[C]onfessions of the criminal suspect or defendant extorted by torture or other illegal means, testimonies of the witness and statements of the victim collected by violence, threat or other illegal methods shall be excluded." So, the above rules are mandatory in principle, particularly in the case of such confession. Art. 54(1) of the 2012 *CPL* also states that "[W]here the material evidence or documentary evidence is obtained against the legally prescribed procedure, which may severely impair the judicial impartiality or justice, supplements and corrections, or reasonable explanations shall be made; if the above-mentioned measures cannot be taken, the said evidence shall be excluded." Thus, not all of material evidence or documentary evidence collected by illegal means like torture can be excluded by law. Only if such evidence may severely impair justice and also no supplement, correction or reasonable explanation on its illegal means is available, the mandatory scope of the exclusionary rules should include the evidence. Otherwise, exclusion is discretionary. The above legal loopholes of exclusionary rules cannot help strengthen the right to silence, but hamper the total exclusion of illegally obtained evidence from use in conviction or sentencing in law or practice. This would further influence the due protection of the accused's right to silence in the criminal process, and lead the public to tolerate the use of torture or other forms of illegal means during interrogations.

International law requiring the right to silence

The International Convention on Civil and Political Rights (*ICCPR*) addresses both the right to remain silent and privilege against self-incrimination, as a major international human rights treaty that China has signed but not yet a State party. China signed the treaty two decades ago and should undertake the duty to ensure the accused's right to be silence or privilege against self-incrimination. Each of the both is clearly against the legal duty to tell the truth as required by Article 14 of the *ICCPR*. Thus, it is necessary for China to make some new changes in order to better protect human rights of the accused to be silent concerned in its criminal justice practice.

Practice

In practice, Chinese courts recognize a general "exclusionary rule" in the cases of possible torture, in order to safeguard human rights or seek for justice. Particularly given unreliability of a confession or other statement, many courts have begun to initiate the procedure for excluding illegally obtained evidence by law in recent years. Also, the courts often read the duty to find the truth into a specific rule, in order to overrule any explicit or implied exclusionary rules in China's justice practice. According to Art. 118 of the 2012 *CPL*, the accused should "answer investigators' questions truthfully" and also they should inform him or her that confessing truthfully may be treated mercifully, so that confession is encouraged to find the truth in law. On the one hand, the difficulty of changing the traditional idea of "confession first", leaving facts and evidence as the second against both law and justice, partly results from the usual policy of leniency for those who confess his or her guilt. As early as in the *SPP's 2010 Notice*, the SPP urges courts to make wholesale changes on confession in their traditional judicial attitude. Courts "shall attach great importance to evidence and investigation and research, practically change the idea of 'confessions first'", and "to the examination and use of physical evidence. If there is no other evidence except for the accused's confession, no defendant can be found guilty".⁴

On the other hand, the 2012 *CPL* allows interrogators to remind suspects of their legal duty to "answer investigators' questions truthfully" and of the benefit from their truthful confession in order to seek the truth at the cost of justice and human rights. Only with the legal duty as an incentive to find the truth, Chinese courts and judges would usually exercise their discretion to overrule the exclusionary rules in practice in order to control crime and maintain social stability in the name of substantive justice.

Public debates

The 2012 *CPL* have once again made the use of illegally obtained evidence a point of controversy amongst domestic and foreign legal experts. Supporters of the new law claim that it is a revolutionary step towards the elimination of the use of illegally obtained evidence,⁵ while critics of the law argue that it will not lead to any substantial change but could even make the situation worse.⁶ Almost daily, some pundit decries the high human cost of wrongful convictions while another pundit intones about the dangers of allowing dangerous criminals to go free due to evidentiary technicalities. Both sides impugn the wisdom of the legislature, alternatively excoriating its harshness and its leniency. The resulting law is a complex mosaic of political compromises.

Under pressure from commentators on both sides, the Standing Committee of the National People's Congress created the law that

⁴Notice of the SPP on Issuing the Guiding Opinions of the SPP on the Application of the Provisions on Several Issues concerning the Examination and Judgment of Evidence in Death Penalty Cases and the Provisions on Several Issues concerning the Exclusion of Illegal Evidence in Criminal Cases, (30 December 2010), available online at <<http://www.lawinfochina.com/display.aspx?lib=law&id=8745&CGid=>>, accessed 26 March 2018.

⁵See Time, Victoria M., 'Evidence Gathering: The Exclusionary Rule in China', (2012) 1 International Law Research, at 144.

⁶See Joshua Rosenzweig, Flora Sapio, Jiang Jue, Teng Biao and Eva Pils, "The 2012 Revision of the Chinese Criminal Procedure Law: (Mostly) Old Wine in New Bottles", CRJ Occasional Paper (17 May 2012), <http://www.law.cuhk.edu.hk/research/crj/download/papers/CRJ%20Occasional%20Paper%20on%20CPL%20revision%20120517.pdf>

leaves the courts with much discretion. Based on its text alone, it seems that the law redistributes power from the police to the people's procuratorate and the judiciary. If the law is ultimately interpreted accordingly, many high-profile issues, such as the presumption of innocence in China and the use of torture will depend on whether the people's procuratorate and the judiciary can resist their normal urge to co-operate with the police. Unless judges and prosecutors can act as an effective check on police misconduct, the 2012 CPL will collapse under the weight of their own contradictions. Thus, the exclusionary rules as a part of human rights progress in law might not contribute to substantive changes on traditional dependence on torture. Only if the duty to tell the truth remains, the right to silence cannot be ensured by law in practice.

Conclusion

Art. 118 of the 2012 *Criminal Procedure Law (CPL)* retains the provisions that require suspects to truthfully answer investigators' questions, implying that suspects have no right to remain silent when being questioned. These provisions are especially important to prosecutors, given investigators' dependence on confessions. But since legislators have retained these provisions in the systemic context of the 2012 CPL, it is necessary to adopt an interpretation that preserves the right to silence. One possible interpretation is that the law allows the accused to remain silent but requires them to tell the truth if they waive that right. In other words, in the 2012 CPL there might be the right to silence, but no right to lie. The institutions of the Chinese justice system do not yet recognize the right to silence and this deficiency needs to be rectified. It is worthy of note that no article in the 2012 CPL explicitly articulates criminal suspects' right to silence, including the closest Art. 50, and thus many legal scholars in China do not consider this right to be fully established. Even if Chinese law has already established an implied right to silence, there

is still a long way to go before the ideal system is transformed into a real one. Progress should be made step by step.

Firstly, the legislature and judiciary should clarify the right of suspects and the accused to remain silent under interrogation when they implement the interpretative regulations of the 2012 CPL. Secondly, any later amendment to the CPL should remove the requirement that suspects and the accused should truthfully answer police questions. While proper interpretation can reconcile Art. 118 with the presumption of innocence, it is still too open to misinterpretation. Art. 118 should be revised by removing the provision that suspects should truthfully answer questions from investigators, so as to fully embody the principle of the presumption of innocence and the right to silence or privilege against self-incrimination as required by the ICCPR.

In this case, the current CPL could be modified as follows: "[A]ny person should be presumed innocent before proved guilty by the People's Court in accordance with the law". These few words would clarify a principle that is already essentially embodied in the 2012 CPL and would immediately improve China's international image and status. If the words are faithfully followed to counteract institutional obstacles, they would constitute one of the greatest advances in the promotion of justice and in the adoption of the rule of law in China's history. Given Chinese huge population and global influence, they would also constitute a significant advance in the struggle for international human rights recognition of its justice progress in future.

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Conflicts of interest

The author declares that there is no conflict of interest.