

Comments on legal framework for evidence taking in China

Abstract

In order to better respond wrongful convictions in capital cases, Chinese authorities are still exploring into whether or not its rule likely conforms to all of international human rights rules, and if not, how to change it for better justice and human rights protection in criminal cases. From the perspective of the significance and impact of international human rights law in the Chinese context, China need to reform evidence rule and bring the “fruit of the poisonous tree” doctrine in future revisions of the 2012 CPL. It will be the core of justice reforms in China, contributing to better justice and human rights protection in criminal cases.

Keywords: legal framework, evidence taking in China, the “fruit of the poisonous tree” doctrine

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Introduction

With the revelation of more and more wrongful convictions, Chinese authorities have responded to criminal injustices by means of new justice reforms in the recent decade. The public and media at home or abroad are curious about the core of justice reforms in China like the rule of evidence taking or exclusion. Clearly, Chinese evidence rules used in handling criminal cases including capital cases cannot meet the minimum standard of human rights or criminal justice in many aspects, particularly in the context of international standards concerned. Chinese authorities are still exploring into whether or not its rule conforms to international human rights rules, and if not, how to change it for better justice and human rights protection in criminal cases. This paper will start from a general description of legal framework and its context on the books. Next, it will proceed with the development and reforms of Chinese rules on evidence exclusion. Further, it will examine the Impact of Exclusionary Rules on the actors within criminal proceedings. Also, both the justification of exclusionary rules in paper law and their limitations will be analysed and commented as well. Particularly, it will specify the mandatory or discretionary feature of exclusionary rules and clarify the flaw of no acknowledgment of the “fruit of the poisonous tree” doctrine. Finally, it will suggest substantive reform proposals from the perspective of the significance and impact of international human rights law in the Chinese context.

Legal framework and its context on the books

Within the legal framework for evidence taking in China, the relevant evidence rules in the *Criminal Procedure Law of the PRC*, the *Constitution of the PRC*, the *Convention against Torture*, and judicial interpretations contribute to regulating the use of evidence. In the *Constitution of the PRC*, Art. 37 provides that Chinese citizens’ personal freedom is inviolable. Also, Art. 39 requires that their home is inviolable, and Art. 40 provide that their freedom and privacy are protected by law. Among the above framework, the 2012 *Criminal Procedure Law of the PRC (CPL)* is a main source of evidence rules in the criminal process. Concerning judicial interpretations, the Supreme People’s Court’s *Interpretation on Several Issues regarding Enforcement* provides in Art. 61 that “it shall be prohibited to collect evidence by illegal means” and that “no witness testimony, victims’ statements or confessions of the accused that are verified to be obtained by the use of torture or threat, enticement, cheating

and other illegal methods, can be used as the basis for deciding cases”. Similarly, the SPP’s Criminal Procedure Rules of People’s Procuratorates which bind both people and special procuratorates, also stipulate exclusionary rules, as showed in more articles. First, Art. 140 tell that “... it shall be prohibited to obtain confessions by using torture and threats, enticement, deceit or taking other unlawful methods”. Next, Art. 160 states that “..... it shall be prohibited to obtain testimony by the means of custody, torture, threats, enticement, deceit or other illegal methods.” Then, Art. 265 states that it shall be prohibited to obtain evidence by illegal means and that no suspects’ confessions, victims’ statements or witness testimony that had been collected by torture or threat, enticement or other illegal methods can be used as the basis of bringing a charge. The historical contexts of that law in its changes and reforms are as follows: The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* that China joined in September 1988 provides in Art. 12 that “[E]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction”. Accordingly, any Party State to the above *Convention*, including China that has ratified it, must promptly investigate any allegation of torture. In the 1996 CPL, there was an article on evidence, which also stated that it shall be strictly forbidden to collect evidence by the means of tortured confessions, threat, enticement, cheating or by other unlawful means. Since this article was too general without a supporting system, it is just a principled regulation without practical functions. The SPC’s 1998 *Interpretation on Several Issues in Enforcing the Criminal Procedure Law of the PRC* also provided in Art. 61 that it shall be strictly prohibited to collect evidence by illegal means and that no witness testimony, victims’ statement or defendants’ statements that had been actually verified to use tortured confession or take threat, enticement, deceit or other unlawful means can be used as the basis for deciding cases. The *People’s Procuratorate’s Criminal Procedure Rules* also regulated that it should be strictly prohibited to collect evidence by illegal means. The above two judicial interpretations had make more progress than the 1996 CPL of the PRC, but did not mention how to and when to exclude illegally obtained evidence. As above demonstrated, the Chinese criminal legislation on the effect of illegally obtained evidence was very simple then. There was no provision on illegally obtained material evidence, and regulations on illegally obtained oral evidence were also diverse among the police, national security organs,

the People's Procuratorates and courts. Thus, the legislative situation brought law enforcement departments many problems, and in the actual operation process of nowhere, with too much discretionary power, led to the departure from each department. In recent years, confessions extorted through torture have led to frequent occurrences of wrongful convictions, detrimental to public confidence with the justice system. In order to prevent tortured confessions and curb torture as serious injustices in justice practice, the Supreme People's Court (SPC), the Supreme People's Procuratorate (SPP), the Ministry of Public Security (MOPS), the Ministry of State Security (MOSS) and the Ministry of Justice (MOJ) promulgated the *Regulation on Several Problems of Excluding Illegally Obtained Evidence in Handling Criminal Cases* on June 13, 2010. Its main contents focus on detailed provisions of the illegally obtained evidence, in order to establish exclusionary rules. The 2012 CPL has established legal rules on the exclusion of illegally obtained evidence, as the first act excluding the evidence. The act includes the scope of excluding the evidence, court examination and legal supervision. Later, relevant judicial interpretations on the Law further define the meaning of tortured confession. The SPC's 2013 *Opinions on Establishing Sound Working Mechanisms for Preventing Wrongful Convictions* also specify detailed circumstances where to exclude the evidence. Thus, China's criminal evidence system on preventing tortured confessions has basically taken in shape.

The development and reforms of Chinese rules on evidence exclusion

In the set-up of rules excluding evidence in Chinese criminal justice system, such rules were first introduced as a principled article of the SPC's 1998 *Interpretation on Several Issues in Enforcing the Criminal Procedure Law of the PRC*. Since then, such rules have been subject to further reforms again and again. The 2010 *Regulation on Several Issues of Excluding Illegally Obtained Evidence in Handling Criminal Cases* delineates the exclusion of the illegally obtained evidence, so as to establish exclusionary rules. Also, the 2012 CPL further improves the rules, both in the form of legislation and for the first time.

The impact of exclusionary rules on the actors within criminal proceedings

When first introduced in Art. 61 of the SPC's 1998 *Interpretation on Several Issues in Enforcing the Criminal Procedure Law of the PRC*, the exclusionary rule had no actual impact on actors in the criminal process. Art. 61 defined the meaning of illegally obtained evidence, clarified its scope and legal consequences, but did not mention specific procedures for excluding it. In practice, Art. 61 cannot be applied as expected, but actually became "law in the paper". When introduced as an explicit rule in the 2010 *Regulation on Several Issues of Excluding Illegally Obtained Evidence in Handling Criminal Cases*, the rule details procedures for excluding it, the burden of proof and investigators' presence in court. It signals that the exclusionary rule has been officially established. More importantly than that, the rule can be used by the relevant justice authorities as legal bases in practice. For instance, it imposed the police, prosecutor and courts duties to examine and to exclude illegally obtained evidence at diverse stages of the criminal process. Also, the accused and defence can exercise the right to produce that confession was illegally obtained. Many points on evidence exclusion introduced in the *Evidence Rules of 2010* as departmental regulations are later used in the 2012 CPL as a basic law of all criminal procedures and the accused's rights. When

introduced as a legal rule in the first time, the exclusionary rule in the 2012 CPL further recognizes the People's Procuratorates' burden of proof to prove the legitimacy of evidence collection in principle. This rule also establishes the prosecution's standard of proof, such that facts are clear and evidence is reliable and sufficient. Also, the rule includes more actors in the process of applying for excluding illegally obtained evidence. Thus, the party and their defenders or litigation representatives can enjoy the legal right to apply to courts for its exclusion. Such legal improvements on its exclusion have promoted the procedural judgement system' gradual formation, with more actors involved in initiating modes, preliminary examination, formal investigation, burden or standard of proof, and remedy means.

The justification of exclusionary rules in paper law

According to the law on the books, justifications of exclusionary rules mainly involve restraints on state power, protection on human rights and procedural justice. The main objectives of the 2012 CPL are to punish criminals and to respect and protect human rights. Rights remedy can effectively curb power abuses. The legal duties of the police, prosecutors and courts to exclude illegally obtained evidence at their respective stage of the criminal process can help find errors sooner, in order to improve the quality of solved cases and to protect suspects' legal rights.¹ In law, the three institutions should check and restrict each other in the process for the purpose of properly enforcing laws, while cooperating to punish or control crime. In this sense, mutual restraints can promote them to well exclude the evidence from use. Similarly, procedures for the second instance aim to correct errors in the first instance procedures and procedures for the death penalty review aim to mend the flaw made by the former procedures. If the justice system works well, the evidence can be excluded.

The mandatory or discretionary feature of exclusionary rules

There are three kinds of exclusionary rules in China's criminal evidence system. They are respectively mandatory exclusionary rule applicable to illegally obtained oral evidence, discretionary exclusionary rule used for excluding illegally obtained material evidence and correctable exclusionary rule used for tainted evidence as well.

No acknowledgment of the "fruit of the poisonous tree" doctrine

There is no acknowledgment of the "fruit of the poisonous tree" doctrine in China's criminal justice system. One dangerous use of an illegally extracted confession would be to legally allow police to gather leads in finding additional admissible evidence, witnesses, or suspects. The failure to ban derivative evidence can contribute to wrongful convictions. For example, after learning that an accused counterfeiter "may have been beaten before confessing" during his detention, "one Jiangsu prosecutor investigated and decided that the evidence should be excluded" but that a later confession could be used in the trial.² Without "inquiry into the independent voluntariness of a second confession", "there is little to stop further interrogation from becoming a backdoor for admitting illegal confessions".³ Those who confess once under torture may likely make subsequent false confessions and these confessions will be admitted on the basis that they were not obtained through torture.^{1,2}

¹LANG Sheng, Editor. 2012 at 11.

²Daum, 2011.

³Ibid.

The significance of international human rights law in the Chinese context

Notably, international human right law is of significance to human rights progress and justice practice in the Chinese context. As an international citizen, China should abide by all of treaty obligations that it has accepted, i.e., preventing torture or excluding tortured confessions as a party to the *Convention against Torture*. The prohibition of torture and degrading punishment is also customary. Such obligations universally bind all States, including China that is not a persistent objector. It is obliged not to engage in patterns of gross and flagrant violations of human rights. But many of rights safeguards are seriously abused in China. They include the right to presumption of innocence, to defence, to legal aid, to a fair trial, to humane treatment, to equality before the law and the principle of *ne bis in idem*. In practice, the right to a public, independent, and impartial trial, or to appeal is often abused.

Conclusion

Although the international community has recognized Chinese evidence rules cannot meet the minimum standard of human rights in many aspects, it will take China more time to finally figure out what rules deviate from international rules. From the perspective of the significance and impact of international human rights law in the Chinese context, China need to reform evidence rule and bring the “fruit of the poisonous tree” doctrine in future revisions of the 2012 CPL. It will be the core of justice reforms in China, contributing to better justice and human rights protection in criminal cases. At the very least, China need to apply the above doctrine to Articles 54 and 57 in order to effectively exclude all forms of illegally obtained evidence and discourage the police to collect evidence by force. Specifically, similar to confessions of the accused extorted by torture or other illegal means, testimonies of the witness and statements of the victim collected by violence, threat or other illegal methods, it is necessary for China to exclude any material evidence or documentary

evidence which is obtained against legal procedures and may severely impair the judicial impartiality. Thus, Article 54 (1) of the 2012 CPL should be revised as follows: “Confessions 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. Where the material evidence or documentary evidence is obtained against the legally prescribed procedure, which may severely impair the judicial impartiality”, shall also be excluded.

Also, given that the relevant persons hardly appear in court to explain the validity of the evidence collection even upon notice of the people’s court, it is essential for China to explicitly state to exclude the police evidence of guilt if investigators cannot testify in court upon notice in future revisions of Article 57(2) of the 2012 CPL. Hence, it could be revised as follows: “If the validity of the evidence collection cannot be proved by the evidence materials in existence, the people’s procuratorate” should “apply to the people’s court for notifying the relevant investigators or other persons to appear in court and make statements; the people’s court” should “approve the application” and the relevant persons shall appear in court upon the court’s notice. Otherwise, the police evidence should be totally excluded.

Acknowledgments

None.

Conflicts of interest

The author declares that there are no conflicts of interest.

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