

**UNIVERSITY OF TIMISOARA
FACULTY OF LAW**

**UNIVERSITY OF PÉCS
FACULTY OF LAW**

**JOURNAL OF EASTERN-EUROPEAN CRIMINAL LAW
No. 2/2015**

**Edited biannually by courtesy of the Criminal Law
Departments within the Law Faculties of the West University
of Timisoara and the University of Pécs**



A discussion on the provisions of the exclusionary rule against illegally obtained evidence in China's criminal procedure law

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Abstract:

On March 14, 2012, the exclusionary rule against illegally obtained evidence was incorporated for the first time into the Criminal Procedure Law of the People's Republic of China, marking the establishment of an important criminal evidence rule in the Chinese legal system that guarantees judicial impartiality and respects human rights. However, the practical effect of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Case coming into force in 2010 has exhorted us to reconsider this evidence rule in a more rational and scientific way. Through clarifying and analyzing the current legislation in this regard in China, this article discusses the relationships among the prosecution, the defense and the judge under the exclusionary rule from the perspective of the distribution of rights and obligations. In addition, it proposes that the transformation of the exclusionary rule from "the law in books" to "the law with life" requires further development and improvement with respect to local adaptation, supporting measures, provisions refinement, and ultimate goals.

Keywords: *Exclusion of Illegally Obtained Evidence; Current Legislation on the Exclusionary Rule; Obligation of Legal Exclusion*

As the "centerpiece" of a criminal trial, evidence provides the basis for proving and confirming a criminal fact and determines the capacity for justice in law. The exclusionary rule prohibiting the use of illegally obtained evidence (hereinafter referred to as "the exclusionary rule") is one of the most basic evidentiary rules commonly adopted in modern countries with adequate legal systems, serving as a benchmark for the level of democracy, justice and rationality in the criminal law system of a nation, as well as a touchstone for the nation's status in human rights protection and the adequacy of its legal system. The provisions on evidence contained within the current *Criminal Procedure Law* of China are too much of a general and theoretical nature and lacking in the systematic and comprehensive evidence rules necessary in juridical practice. In particular, a large number of coerced confessions and misjudged cases have been uncovered in the criminal judicial system in China and have been reported on by the media, seriously undermining the authority and credibility of the Chinese rule of law, and leading, in a converse effect, to accelerated progress in constructing and improving the exclusionary rule in China. In response, 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 of the People's Republic of China jointly promulgated, on May 30, 2010, the *Provisions on Several Issues Concerning the Exclusion of Illegally Obtained Evidence in Criminal Cases* (hereinafter referred to as "the *Illegal Evidence Provisions*").

As compared to previous legal and judicial interpretation in this area, the *Illegal Evidence Provisions* more clearly define, from the varied perspectives of relevant entities and procedures, the connotation and denotation and specific operating procedures for excluding illegally obtained evidence applicable to public security and judicial authorities when handling criminal cases,¹ preliminarily strengthening the exclusionary rule in China. On March 14, 2012, the 5th Session of the 11th National People's Congress (NPC) adopted the *Decision of the National People's Congress on Amending the Criminal Procedure Law of the People's Republic of China* (hereinafter referred to as "the new *Criminal Procedure Law*"), which added five provisions directly addressing the exclusionary rule, marking the first exclusionary rule with Chinese characteristics established through NPC legislation. However, as Oliver Wendell Holmes, Jr., Acting Chief Justice of the United States, put it: "The life of the law has not been logic; it has been experience." Since the exclusionary rule established by the new *Criminal Procedure Law* is only "the law in books", whether it can be given "life" in juridical practice depends on how rational and complete it is, how it conforms to the Chinese judicial practice now and in the foreseeable future, and whether it can achieve the desired legal effect in juridical practice. This is currently the most pressing issue that needs to be urgently addressed by the Chinese legal community and judicial practice departments.

I. Current Legislation on the Exclusionary Rule in China

(i) Definition of Illegal Evidence

Illegal evidence is defined in the new *Criminal Procedure Law* as "confessions of a criminal suspect or defendant extorted by torture or other illegal means, testimonies of witnesses and statements of the victim collected by violence, threat or other illegal methods" and "physical evidence or documentary evidence obtained in violation of legally prescribed procedures, which may severely impair judicial impartiality". Therefore, the scope of illegally obtained evidence identified in Chinese legislation includes confessions of the criminal suspect or defendant, testimonies of witnesses, statements of the victim, physical evidence and documentary evidence.

First, it is a distinctive approach to incorporate witness testimonies and victim statements within the scope of illegal evidence. In the relevant provisions of the United Nations criminal judicial conventions and in the legal systems of other countries, illegal evidence generally refers to evidence collected by an investigation institution by any means that are in violation of the rights of the person subject to criminal prosecution.² For example, Article 15 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* stipulates that "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." But it is a realistic and rational approach for China to extend the scope of illegal evidence to include witness testimonies and victim statements, because testimonies of a witness or victim coerced by violence, threat or

¹ Ye Qing, Reflections About Illegal Evidence Exclusion Procedures, *Political Science and Law* 6 (2011).

² Yang Yuguan, Amendment of China's Criminal Procedure Law Highlights Human Rights Protection: on the Privilege Against Self-Incrimination and the Exclusionary Rule, *Law Science Journal* 5 (2012).

other illegal methods do unfortunately exist in Chinese juridical practice. The evidence collected by such methods can hardly ensure its authenticity and objectivity, easily leading to misjudged cases and that is why the new *Criminal Procedure Law* includes testimonies of witnesses and statements of the victim collected by violence, threat or other illegal methods within the scope of illegal evidence. However, the procedure for excluding illegal evidence in a foreign country is normally initiated by the criminal suspect or the defendant rather than the witness or the victim. According to some scholars, since evidence illegally obtained from a witness or victim usually does not violate the rights of the suspect or the defendant, the defendant is not entitled to seek the exclusion of relevant evidence so obtained.³ The author believes, however, that the underlying purpose for establishing the exclusionary rule is to deter violations of the law, i.e., to deter law enforcement officers from engaging in unlawful acts by eliminating any improper benefit they might gain from their illegal activity, and is, therefore, prophylactic in nature. In a criminal proceeding, the defendant, as the only party confronting the prosecution, shall be entitled to cast doubt on and cross-examine the evidence presented by the prosecution. To question the validity of the prosecution's evidence, the defendant can either seek application of the exclusionary rule or exercise his/her rights of cross-examination against the credibility of all the evidence. In the context that witness testimonies and victim statements have been incorporated as illegal evidence in the new *Criminal Procedure Law*, a defendant's application to invoke the exclusionary rule against illegally obtained witness testimonies and victim statements conforms to the deterrent purpose of the exclusionary rule and is in line with the reality that the present Chinese system of criminal procedure is structured on the confrontation between the defense and the prosecution, which makes it necessary and possible for the defendant to request exclusion of illegally obtained evidence. In particular, the newly added Articles 187 and 188 in the new *Criminal Procedure Law* contain the procedures for compulsory witness testimony, including, conditions for compelling a witness to attest in court, sanctions for refusal to testify in court and relevant remedies. These rules ensure that the judge is better able to evaluate witness testimonies under the illegally obtained evidence exclusion procedure.

Second, the rule authorizing relative exclusion of illegally obtained physical and documentary evidence is defined. The inclusion of physical and documentary evidence within the definition of illegal evidence is a historically significant step forward, breaking away from the previous legal or judicial interpretation in China of illegal evidence as referring only to illegally obtained oral evidence. The new *Criminal Procedure Law* provides in Article 54 that, "where any physical or documentary evidence is obtained contrary to the legally prescribed procedure, which may severely impair judicial impartiality, corrective actions shall be duly taken or reasonable justification provided, otherwise such physical or documentary evidence shall be excluded", thus setting forth three prerequisites for application of the relative exclusionary rule: 1) failure to follow established legal procedures in collecting physical or documentary evidence; 2) the possibility of material damage to judicial justice; and, 3) failure to take corrective actions or provide reasonable justification. Only when the aforementioned three prerequisites are fully met, shall the judge be legally authorized to decide at his/her sole discretion whether to exclude the physical or documentary evidence in question. In practice,

³ *Ibid.* Supra note 2.

however, despite the allowance for the judge's sole discretion, the provision is too much of a general principle to apply to specific cases, leaving the judge little room to contest the validity of the corrections or justification provided by the prosecution, thus making it virtually impossible to exclude illegally obtained physical evidence.⁴ Furthermore, in order to curb unlawful seizure of evidence by investigation authorities, illegal evidence once excluded is in principle no longer admissible despite any corrective actions or reasonable justification. The relative exclusionary rule against illegally obtained physical evidence, as a legislative creation in the new *Criminal Procedure Law*, is in fact a trade-off choice made by Chinese lawmakers between crime control and human rights protection, with the latter appearing as a more important consideration in the determination of the competency and weight of evidence. On one hand, the stability and reliability of physical evidence add to the weight of evidence to prove the *factum probandum*, thus contributing to the establishment of substantive truth; on the other hand, due to inadequacies in the relevant provisions of law, the investigation authorities in China enjoy considerably more discretion in the collection and preservation of physical evidence than their foreign counterparts governed under the writ system, making only a small extent of physical evidence identifiable as illegally obtained. Moreover, established against the background of alarmingly increasing occurrences of coerced confessions and misjudged cases in current judicial practice in China,⁵ the exclusionary rule against illegal evidence is primarily aimed at controlling the illegal collection of oral evidence by the use of torture. However, the absolute exclusionary rule is not applicable to physical evidence due to the absence of public acceptability of an exclusionary rule which may let the "criminal go free because the constable has blundered" and the social demand for substantive truth. The rule authorizing relative exclusion of illegal physical or documentary evidence at the sole discretion of the judge is, therefore, a remarkable creation that aptly handles practical concerns. The only inadequacy derives from the overly abstract criteria for exclusion which leave too much discretionary power in the hands of the judge and may easily lead to relative "non-exclusion" of illegal physical evidence in China's litigation structure, which is not trial-centered. Therefore, a more detailed judicial interpretation of the relative exclusionary rule is needed to enhance its applicability.

(ii) Implementation of the Exclusionary Rule

According to the applicable provisions in the new *Criminal Procedure Law*, the exclusion of illegal evidence shall be implemented in either of two ways, as described below.

1. Implementation by execution of authorized powers, which includes the following three situations: 1) at the end of the investigation stage, the investigation institution shall, upon discovery of evidence eligible for exclusion, exclude such evidence in accordance with applicable legal provisions. In such case, the evidence in question shall not be used as the basis for recommending prosecution; 2) in the stage of review and prosecution, the prosecution institution shall exclude the illegally obtained oral evidence in accordance with applicable legal provisions and shall not use such evidence

⁴ *Ibid.* Supra note 1.

⁵ Chen Guangzhong, A Research on Several Theoretical and Practical Issues of Criminal Evidential System Reform, *China Legal Science* 6 (2010).

as the basis for a public prosecution; and 3) during the court trial, the judge, upon discovery of possible illegal evidence, shall initiate a court investigation concerning the legality of said evidence.

2. Implementation upon request for exclusion of illegally obtained evidence, including a request made by: 1) the criminal suspect prior to the closure of investigation; 2) the criminal suspect at the stage of review and prosecution; and 3) the defendant during court trial.

However, with regards to both of the first two circumstances of implementation by execution of authorized powers and of implementation upon request, no specific methods, prerequisites and procedures for the implementation of the exclusionary rule are explicitly provided in the new *Criminal Procedure Law*. In addition, the new *Criminal Procedure Law* follows the provision of Article 5 in the *Illegal Evidence Provisions* that designates the court trial stage as the period open for application by the defendant for illegal evidence exclusion, which means the defendant and his/her defender are entitled to such application from the beginning of the trial stage till the closure of court debate.⁶ Such provision is of great practical significance against the background that under the new *Criminal Procedure Law*, the defense lawyer is not allowed to access, extract and copy any material stating the facts of the crime provided by the prosecution until acceptance of the case by the court, which leaves the defense insufficient time to prepare its trial strategy and arguments and to apply for exclusion of illegal evidence. To prevent such occurrence, the *Illegal Evidence Provisions* stipulates that the defense is allowed to request exclusion of illegal evidence starting from the beginning of the trial stage until the closure of final arguments. As a step further, the new *Criminal Procedure Law* provides in Article 38 that the defense lawyer is allowed to access, extract and copy any case material as of the date of the beginning of the examination and prosecution stage, while Article 37 explicitly recognizes the right of the defense lawyer to meet with the criminal suspect or the defendant by presenting three types of legally required licenses, thus providing the defense with reasonable opportunities to access the information necessary for determining the legality of the evidence provided by the prosecution prior to trial. However, the extension of the period allowed for application by the defense for illegal evidence exclusion until the closure of court debate, despite its effectiveness in protecting the lawful rights of the defense, may disturb the normal substantive trial procedure, and still fail to resolve the problem that the judge's free evaluation of the case through inner conviction may have already been tainted by illegal evidence. Moreover, the focus of the court debate is on identifying the legal provisions applicable to the case in question, rather than the legality of evidence and the fact finding procedures. Even during the court investigation dedicated to fact finding, an application for illegal evidence exclusion made by the defense may disturb the substantive trial proceeding as well because the prosecution may require adjournment of the trial to allow for sufficient time to gather relevant evidence, thus leading to a prolonged, inefficient litigation process. The new *Criminal Procedure Law* stipulates in Paragraph 2, Article 182 that, "prior to the court session, the judge may convene the public prosecutor, the litigants and their defenders or representatives to solicit opinions on trial-related issues, such as the recusal list and the list of witnesses to attend court as well as exclusion of illegal evidence." This provision, in the author's opinion, has set up a

⁶ The Office for Criminal Law under the Legislative Affairs Commission of NPC Standing Committee. *Interpretation of and Guidelines for Action under the Criminal Procedure Law of the People's Republic of China*. Press of Chinese Democratic Legal System, 2012, p.140.

preliminary procedure for pre-trial evidence disclosure during criminal proceedings in China, which allows for the exclusion of illegal evidence at the most opportune time for improving litigation efficiency, and stands as the best solution under the current unitary trial system to ensure the free evaluation of the case by the judge through inner conviction without interference by illegal evidence (therefore, the judge can concentrate on the continuous trial proceeding after the beginning of the court session, ensuring the consistency and integrity of the judgment under minimized impact of the illegal evidence found in the pre-trial stage). However, in case the defense discovers any new evidence or fails to request pre-trial exclusion of illegal evidence due to reasons not attributable to the defense, they shall have the right to apply for exclusion during the court trial. After all, the establishment of an effective pre-trial evidence disclosure system is by no means an overnight process, but requires step-by-step improvement in various aspects, such as increasing the number of qualified criminal defense lawyers and ensuring sufficient disclosure by the court of the right of application for illegal evidence exclusion.

(iii) Bearer of the Burden of Proof

According to Paragraph 2 of Article 56 in the new *Criminal Procedure Law*, which provides that “[w]here exclusion of illegally obtained evidence is applied for, relevant information or materials about the illegal practice shall be furnished” and Article 57, which further provides that “[i]n the court inquisition on the validity of evidence collection, the people’s procuratorate shall bear the burden of proof that the evidence collection was legal”, there is no question that the burden of proof in a hearing to determine allegations of illegally obtained evidence rests upon the prosecutor. However, perceptions differ in academia regarding the nature of relevant information or materials provided by the defendant. Some scholars hold that by initiating the statements, the defendant is exercising his/her right of defense as an important procedural right, which should not be confused with the burden of proof, or anything like the inversion of burden of proof.⁷ Other scholars believe that the burden of proof should be on the defendant, with the use of “shall” rather than “may” in the provisions indicating that this practice is obligatory.⁸ In the author’s view, the initial burden of proof should be on the defense in providing relevant information or materials, because the defendant as witness to illegally obtained evidence at least remembers the scene (of torture or extortion particularly) and his/her own confessions therein. If the defendant and his/her lawyer claim only in general terms that “he/she had been tortured” without providing detailed information concerning the specifics of the torture, the judge is not able to make a judgment on whether the torture did likely occur, nor initiate further investigation.⁹ Moreover, in the absence of the defense providing specific information and materials related to the illegally obtained evidence, even if the judge were to start the exclusion procedure, the prosecutor would not be able to determine for which particular evidence obtained it needs to provide proof of legality, thus making it impossible for the exclusion proceeding to go forward. It also helps to prevent the abuse of procedural rights on the defense’s part if the defense carries the burden of proof in providing relevant information or materials.

⁷ Fan Chongyi, No Substantive Impartiality Without Procedural Impartiality, *Law Science Journal* 7 (2010).

⁸ *Ibid.* Supra note 6.

⁹ *Ibid.* Supra note 6.

(iv) Legal Standards for Burden of Proof

As specified in Paragraph 1 of Article 56 in the new *Criminal Procedure Law*, “[i]f, during a trial, the judge deems that a circumstance of collecting evidence by illegal means as prescribed in Article 54 of this Law exists, a court inquisition on the validity of the evidence collection shall be conducted”, the defense’s initial burden of proof is fulfilled only when the judge believes there is the possibility of illegally obtained evidence, or in a case of reasonable doubt. Reasonable doubt is within the judge’s own discretion, and cannot be quantified in numbers or ratios. The defendant is at an obvious disadvantage during the investigation, with no right to identify or preserve the evidence. Furthermore, the lawyer’s right to be present during an interrogation has not been incorporated in Chinese law. Therefore, the judge may not impose unduly high requirements on proof of relevant information or materials – information associated with evidence verification is acceptable even if no materials can be produced by the defendant.¹⁰ As long as the information provided by the defendant is reasonable to some extent, the judge shall immediately start the exclusion procedure to determine claims of illegally obtained evidence.

Article 58 of the new *Criminal Procedure Law* stipulates that “[w]here, after the court hearing, the illegal collection of evidence as specified in Article 54 hereof is confirmed or cannot be ruled out, the evidence concerned shall be excluded.” Compared with the “authentic” and “sufficient” criteria set forth in the *Illegal Evidence Provisions*, this article obviously provides for a lower standard than the burden of proof borne by the prosecutor, only requiring a showing of reasonable doubt concerning the evidence allegedly collected by illegal means in order for such evidence to be excluded. The pilot studies on the exclusionary rule indicate, however, that proving the legality of the evidence is a challenging task for not only the defendant but also the prosecutor,¹¹ for the following reasons: 1) the prosecutor is not directly involved in the collection of the evidence, which is primarily conducted by the police as the investigation agency;¹² 2) the investigation process is always kept confidential without on-site participation of anyone other than the investigators; 3) the case materials submitted to the prosecution are all prepared by the investigation agency itself and therefore by no means would they contain any information regarding illegal methods of evidence collection; 4) notwithstanding the mandatory requirement for audio or video recording of the entire interrogation process concerning a serious crime that may lead to a death sentence, or life imprisonment, or of other nature as specified in Article 121 in the new *Criminal Procedure Law*, such recording is not mandated in all cases in China, thus making it difficult to obtain a truthful representation of an evidence collection process that was not recorded in audio or video form; 5) even if the investigator agrees to testify in court, he/she is generally not willing to confess participation in the illegal collection of evidence, leading to a standoff between the defense and the prosecution; and, 6) from a logical point of view, it is always far more difficult to prove a negative fact (*i.e.*, the evidence was not obtained illegally) than a positive fact (*i.e.*, the evidence was obtained illegally).

¹⁰ *Ibid.* Supra note 7, p. 141.

¹¹ Xu Qingyu, Practical Obstacles to the Implementation of the Exclusion of Illegal Evidence and the Solutions: Reflections on the Illegal Evidence Exclusion Pilot Programs, *Political Science and Law* 6 (2011).

¹² *Ibid.* Supra note 1.

(v) Remedies for the Exclusionary Rule

In the chapter on rules of evidence, the new *Criminal Procedure Law* does not prescribe special remedies to be used for the illegal evidence exclusion procedure, nor does it specify the type of adjudication a judge shall adopt in deciding whether to dismiss the application for initiating the exclusion procedure or to exclude/not exclude the illegally-obtained evidence. Compared to Article 12 of the *Illegal Evidence Provisions*, which specifies that,

“If the first-instance people’s court fails to examine the opinions submitted by the defendant and his/her defender alleging that the pre-trial statements of the defendant were illegally obtained, and such pre-trial statements of the defendant are used as a basis for deciding the case, the second-instance people’s court shall examine the legality of the means by which such pre-trial statements of the defendant were obtained. Where the procurator fails to provide evidence proving the legality of the statements, or the evidence provided is not reliable or sufficient, said statements of the defendant cannot serve as a basis for deciding the case.

The new *Criminal Procedure Law* has left much room for argument on both the type of adjudication for conducting an illegal evidence exclusion procedure and whether to establish special remedies.

A well-known legal proverb states that, “a right without a remedy is no right at all”. If the illegal evidence exclusion procedure fails to safeguard the rights of the defendant, especially when the extortion of a confession by torture severely harms the defendant’s health, personal freedom and other constitutional rights, will offering the defendant special remedies serve to provide a more reliable means of protecting the defendant’s rights? Or is it appropriate to address a claim of illegally obtained evidence and provide a remedy together with the remedies available in an appeal of the substantive trial results? Just like with the two-tier trial system utilized in China, in designing a system, not only the full guarantee and remedy of rights but also the cost and efficiency of the system should be taken into account. Just as the exclusion procedure itself results from the balancing of two concepts - crime prevention and human rights protection - the necessity of providing remedies for violations of rights and the efficiency of proceedings should both be taken into account in designing the approach to remedies for the exclusion procedure. China’s illegal evidence exclusion procedure mainly targets confessions of the criminal suspect or statements of the defendant obtained through extortion by torture or other illegal means. Due to the viciousness of the improper and illegal methods adopted, the importance of the rights infringed, and the difficulty of offsetting the consequences, establishing remedies for the exclusion procedure is of great urgency and necessity. Moreover, the exclusion procedure is a separate procedure independent from the substantive trial procedure. As mentioned above, it would be preferable for the exclusion procedure to take place during the pre-trial evidence disclosure period. In addition, the exclusion procedure should also have precedence over the substantive trial and the results of the exclusion procedure be a prerequisite for initiating the substantive trial procedure. That is why the author thinks it inappropriate to combine the remedy for the illegal evidence exclusion procedure with the remedy for the substantive trial, and even more inappropriate to address the two kinds of remedies together after the substantive trial. In other words, special remedies should be built into the exclusion procedure, and the initiation of the procedure should have the effect of stopping the substantive trial so as to prevent situations where the remedies resulting from the exclusion procedure make waste of the substantive trial. The deadline should

also be clearly defined in order to encourage the beneficiary of the remedy to decide as soon as possible after learning the result of the exclusion procedure whether to apply for the remedy so as not to impede the normal process of trial.

II. Distribution of Rights and Obligations in the Exclusionary Rule in China

To clarify the distribution of rights and obligations in the exclusionary rule in China, the respective rights and obligations of the prosecution, the defense, and the judge stipulated by the Chinese exclusionary rule should be sorted out first. Such clarification will enable us to clearly identify the relationships among the three parties in the illegal evidence exclusion procedure adopted by the current Chinese legal system, and better understand what needs to be improved in the current exclusionary rule.

Distribution of Rights and Obligations of the Prosecution, the Defense and the Judge in the Trial Stage		
Defense	Judge	Prosecution
Initiation of the right to apply for the exclusion procedure	The obligation to examine the defense's application	
Initial burden of proof	The obligation to examine related information or materials	Disprove the defense's application right
Special remedy right	The obligation to initiate/dismiss the defense's application for the exclusion procedure	
The rights of cross-examination and debate on the evidence provided by the prosecution	The obligation to examine the evidence provided by the prosecution in court	Burden of proof
The right of cross-examining the investigator or other parties concerned	The right to notify the investigator or other parties concerned to testify in court	The right to request the court to notify the investigator or other parties concerned to testify in court
No special remedy right	Responsibility to decide on exclusion or non-exclusion of such evidence	No remedy right

The above table clearly shows that the rights of the defense and the prosecution at two specific points in the procedure are inexplicit. First, the new *Criminal Procedure Law* doesn't clarify what remedial measures the defendant can pursue when the judge rejects the defendant's application for the exclusion procedure, or what types of adjudication the judge shall adopt to dismiss the application. Second, the new *Criminal Procedure Law* doesn't clarify what remedial measures the defense and the prosecution can take when the judge makes a decision on whether to exclude the evidence, or what types of adjudication the judge shall adopt.

Since the new *Criminal Procedure Law* doesn't design remedial approaches specially for the illegal evidence exclusion procedure, according to the conventional unitary trial system of substantive hearing in China the results concerning the credibility of illegal evidence and whether such evidence can serve as a basis for adjudicating the case are usually not reflected by a specific adjudication type, but elaborated in the adjudicative document following the substantive trial. Based on this adjudicative document, the defense and the prosecution can institute an appeal or protest in accordance with provisions on the second instance procedure in the new *Criminal Procedure Law*. As the basis for determination of the facts of a case, the evidence, and any decision to exclude it or not, will significantly affect the determination of facts and hence the conviction and sentencing. As a result, if the defense and the prosecution hold different opinions, a second instance procedure will certainly be initiated even though a judgment is made, resulting in the waste of judicial resources. Therefore, some scholars advise setting up an intermediate appeal procedure to allow the defense and the prosecution to institute an appeal against the adjudication made during the proceedings.¹³ The author believes that it is both necessary and practicable to set up special remedies for the illegal evidence exclusion procedure for the following reasons. First, the importance of the rights infringed due to illegally obtained evidence and the viciousness of the means adopted in coerced confessions make it pressing to regulate judicial acts and protect human rights. When the illegal evidence exclusion procedure fails to achieve a remedial effect, the party concerned shall be entitled to appeal to the court at the next higher level to seek a remedy. Second, the procedural priority and independence of the illegal evidence exclusion procedure serve to separate the exclusion procedure from the substantive trial procedure, while the former is logically prior to the latter, i.e., the initiation of the substantive trial procedure of a case depends on the results of the exclusion procedure, which is also the basis for determination of the case facts. The two procedures should not be combined. Therefore, the remedies for the exclusion procedure shall precede the substantive trial procedure and may effectively stop the latter. Third, if a concerned party is not satisfied with the results of the exclusion procedure, a second instance procedure will certainly be initiated and the case will be sent back for retrial, which will waste the judicial resources previously expended in the first substantive trial. Finally, the Chinese *Criminal Procedure Law* stipulates three types of adjudication – decision, ruling, and judgment. The decision is not appealable, which means it cannot be remedied judicially or even administratively;¹⁴ the judgment is the result of the substantive trial; and the ruling is the only adjudication type that can both deal with procedural and substantive problems, and can be remedied through appeal or protest. In conclusion, the author believes that it is appropriate to adopt the ruling approach as the result of the exclusion procedure, allowing the defense and the prosecution to institute an appeal or protest regarding the ruling.

In addition to the trial stage, the new *Criminal Procedure Law* also generally sets out in its two Articles the obligations of illegal evidence exclusion in the investigation stage and the stage of review and prosecution: Paragraph 2 of Article 54 states that, “[a]ny evidence which is found eligible for exclusion in the stages of investigation, review and prosecution, and trial shall be duly excluded in accordance with applicable legal

¹³ Yang Yuguan, and Yang Ke, A Research on the Remaining Problems of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases, *Political Science and Law* 6 (2011).

¹⁴ Xu Mingmin, From Decision to Ruling: on the Development of Procedural Remedies after the First Instance in China, *Chinese Criminal Science* 8 (2012).

provisions and shall not be used as the basis for any proposal for prosecution, prosecution decision, or judgment”; and Article 55 prescribes that “[i]n case of receipt of any complaint, claim, or charge against or discovery of illegal collection of evidence by any investigator, the people’s procuratorate shall make proper investigation to verify such complaint, claim, charge, or discovery. Where the illegal collection of evidence is confirmed, the people’s procuratorate shall require proper implementation of corrective actions. Should such illegal conduct constitute a crime, legal proceedings shall be initiated to determine possible criminal responsibility.”

Rights of the Defense and Obligations of the Investigation Institution in the Investigation Stage	
Defense	Investigation Institution
Defense lawyer’s right to state opinions (Article 159)	Obligation to hear and document the opinions (Article 159)
Remedy right undefined	Obligation to exclude illegal evidence (Article 54)

By establishing an obligation for the investigation institution to exclude illegal evidence and prohibiting the use of such evidence as a basis for proposal for prosecution, the new *Criminal Procedure Law* aims to: 1) enhance self-supervision of the investigation institution to ensure early exclusion of illegal evidence from the proceedings and thereby minimize waste of litigation resources; and, 2) strengthen the awareness and recognition by the investigation institution of the importance of lawful collection of evidence.

Distribution of Rights and Obligations of the Defense, Prosecution Institution, and Investigation Institution in the Stage of Review and Prosecution		
Defense	Prosecution Institution	Investigation Institution
Right to claim illegal collection of evidence during investigation	Obligation to investigate the claim	Obligation to assist in investigation and to be subject to supervision
Remedy right undefined	Responsibility to decide on exclusion or non-exclusion of such evidence	Right of remedy undefined

The legislative creation of the obligation of illegal evidence exclusion by the prosecution institution in the stage of review and prosecution is grounded on the constitutional positioning of the investigation institution as a supervisory body in China and its diversified functional roles. The prosecution institution has its important role to play in illegal evidence exclusion in the following three aspects: first and most directly, review of and decision on the legality of evidence in the stage of review and prosecution and exclusion of evidence obtained by illegal means including torture and extortion; second, effective prevention of illegal evidence collection through full execution of its diverse functions to address the root causes of such conduct; third and lastly, addressing the problem that the court’s motion might be affected by illegal evidence due to the structure of trial in China, through effective execution of the prosecution in the

prevention and exclusion of illegal evidence.¹⁵ Furthermore, the full execution of the roles of the prosecution institution in illegal evidence exclusion is also compliant with the current criminal litigation structure in China, which features separated powers and duties for the investigation, prosecution, and adjudication institutions and less powerful mutual constraints compared to the judicial review system in Western countries. The empowerment of the prosecution institution with such defined roles in the stage of review and prosecution to increase its confrontation with the plaintiff is of great significance for increasing litigant participation in the proceedings and improving China's litigation structure. However, the relevant provisions in the new *Criminal Procedure Law* are quite general and broad in nature without specific provisions on the implementation of the exclusionary rule, burden of proof, legal standards for the burden of proof, and the exclusion procedure, which all require further explicit judicial interpretation.

III. Reflections on How to Improve the Exclusionary Rule

Two years after the *Illegal Evidence Provisions* were implemented, the exclusionary rule was established in the new *Criminal Procedure Law* for the first time in China in the form of NPC legislature, marking a definite milestone in Chinese rule of criminal law and demonstrating Chinese lawmakers' determination in regulating public rights and safeguarding human rights. However, the *Illegal Evidence Provisions* were far less effectively enforced than what the public had expected when they were first promulgated – very few typical cases were found applicable to the exclusion of illegally obtained evidence nationwide.¹⁶ The gap between the juridical practice and the legislation has commanded the attention of the legal community and justice departments and, as Roscoe Pound says “The life of the law lies in its enforcement”, the primary enforcement issue they need to address is how to legally exclude illegally obtained evidence.

Firstly, the Chinese exclusionary rule should be improved by taking into consideration the Chinese national conditions and making full use of China's own resources. Relying on its own resources, the Chinese rule of law must be enforced in line with the traditional legacy of Chinese legal culture and the social reality.¹⁷ While the United States has undergone a process of shifting from exclusion of physical evidence to that of verbal evidence in its development of the exclusionary rule, China will perhaps go the opposite way, starting with containing verbal evidence produced by torture or extortion to protect the defendant's basic human rights of health and wellbeing and, along with the development of society, rule of law, economy and culture, leading to the full protection of individual property, privacy and other civil rights. Furthermore, the exclusionary rule in the United States was enforced first for the purpose of judicial regulation and later for deterring law violations, while the rationality and purpose of the Chinese exclusionary rule seem to lay more emphasis on the guarantee of the substantive justice of a lawsuit. This is evident in that an absolute exclusionary rule applies only to false verbal evidence that may be easily obtained through torture while a

¹⁵ Bian Jianlin, and Li Jing, Criteria for Illegal Evidence Exclusion by the Prosecution Institution from the Perspectives of Prevention and Exclusion, *Political Science and Law* 6 (2011).

¹⁶ *Ibid.* Supra note 16.

¹⁷ Su Li, *Rule of Law and its Local Resources*, China University of Political Science and Law Press, 2004, p. 6.

relative exclusionary rule applies to true and reliable physical evidence, allowing corrections to be made or justifications provided by the prosecutor. The ambiguous and less enforceable exclusion criteria reflect how Chinese laws had relied on the physical truth and tolerated its being overrun by procedures. Therefore, the author proposes that the judicial interpretation of the exclusionary rule established by the new *Criminal Procedure Law* should be further refined and improved by taking into account the specific Chinese national conditions and real situations, including the Chinese tradition of law enforcement, the public's psychological expectations, the actual criminal occurrences, and available technologies in criminal investigation, to make the exclusionary rule more practical and easier to enforce rather than simply copying the provisions of laws in other countries.¹⁸

Secondly, provisions on supporting measures of the exclusionary rule should be refined to enhance its operability and feasibility. In no country is the exclusionary rule established groundlessly – its formulation and development would have been unattainable, like a castle in the air, without the collaboration of supporting measures. The new *Criminal Procedure Law* explicitly specifies that the investigator is obligated to testify in court, which is of historical significance in terms of enhancing confrontation in a court trial and protecting the defense's right of cross-examination. However, to what extent this provision can achieve the fact-finding purpose is still questionable. In judicial practices, even if being present at court, investigators tend not to admit that they have extorted confessions by torture in order to obtain evidence, while the defendant, being in a vulnerable position, is hardly able to preserve the evidence in a closed interrogation space. Thus an embarrassing scenario is very likely to occur in which the investigator and the defendant each stick to his/her own argument, making it hard to tell what actually occurred during the interrogation. At the very root of this is the inadequacy of supporting measures in China at present. For instance, it is still difficult for audio and video recording of the interrogation process to be widely adopted. In the meantime, the defense lawyer doesn't have the right to be present at the interrogation, and the place of custody is still under the control of the public security authorities. Additionally, while the legislators hope to curb the illegal obtaining of verbal evidence by investigators through the establishment of the exclusionary rule, under the current circumstances in China, where the equipment and investigative skills of the police are inadequate and the investigative model still remains "from confession to evidence", establishing and refining supporting measures is still indispensable for effectively curbing the unlawful obtaining of evidence, such as by the use of torture.

Thirdly, the specific provisions of the exclusionary rule need to be more detailed and should gradually evolve from the present "extensive" model to an "intensive" model.¹⁹ To begin with, the definition of illegal evidence still lacks clarity. The questions have yet to be answered as to how to define the phrase "other illegal means" in "extorted by torture or other illegal means" and the extent to which violence and threats would constitute obtaining evidence illegally, and how to differentiate it from appropriate measures and skills adopted in actual investigation practice. Moreover, in the new *Criminal Procedure Law*, regulations giving investigators compulsory powers to obtain physical and documentary evidence and other tangible evidence are relatively primitive. Searching, sealing-up evidence or crime scenes, and detaining suspects can be

¹⁸ *Ibid.* Supra note 1.

¹⁹ *Ibid.* Supra note 1.

carried out by self-empowered investigation authorities, who are given much flexibility when executing actual investigations. Therefore, how to determine whether the investigation is illegal is still subject to more detailed provisions on relevant investigative measures. Another problem is that, if the evidence provided by the prosecution is identified as unlawful in the trial, there are no specific words in the provisions defining how the court should rule. Aside from the aforementioned issues, quite a few provisions in the exclusionary rule in China need to be more detailed because an explicit exclusionary rule is essentially necessary, especially in the Chinese judicial context where statutory law is a historic tradition and law-related professions are not broadly recognized.²⁰

Last but not least, the success of the exclusionary rule lies in its declining application in judicial practices, instead of the exclusion of an increasing amount of illegal evidence. As a procedural sanction measure, the acknowledged executorial purpose of the exclusionary rule is to deter investigators from unlawful seizure of evidence through depriving them of the benefits they may gain from such action, while at the same time functioning as a remedy for violations of the rights of defendants.

Nevertheless, just as former Chief Justice Benjamin Nathan Cardozo remarked, the exclusionary rule contains its own deficiency in terms of protecting the benefits of society and the victim, as it would often “let the criminal go free because the constable has blundered”. Even in the United States where the rule originated, doubts and disputes about the exclusionary rule have never fully died down over the past century. In the Chinese judicial system, in order to give full play to the major function of the exclusionary rule, which should be to curb the illegal obtaining of evidence, including extorting evidence by torture, the judicial authorities need to strictly implement regulations related to the rule, so that the rule can fully play its role of deterring investigation authorities, who would in this way better understand the legality of the appropriate means for obtaining evidence and, eventually, the illegal obtaining of evidence by investigation authorities can be prevented in general.

²⁰ *Ibid.* Supra note 1.