

Statistics on the Implementation of Exclusionary Rules in China

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Abstract

The media report that the rate of the actual implementation of exclusionary rules is very low in China, even lower than many of other countries in the world. This paper will start from Chinese academic findings on their current implementation. Further, it will proceed with Chinese official data on the actual implementation of exclusionary rules. Then, it will conclude with the common problems of such statistics that need to be mended in future reforms, in order to ensure better justice in China.

Keywords: Statistics, Implementation, Exclusionary Rules, China

1. Introduction

The media often report that the rate of the actual implementation of exclusionary rules is very low in any countries of the world. It happens not only in European countries and North American countries, but also in all jurisdictions of China. After a series of justice reforms have been taken for the past decade in Mainland China, the public frequently challenges the current implementation of exclusionary rules. Both Chinese academic research and official data are main sources of their implementation, albeit with diverse ideas and common points from different perspectives. The both can reveal some of major problems on the use of such rules in China's justice practice.

Based on the *2010 Evidence Rules*, the PRC adopted the *2012 Criminal Procedure Law (CPL)* as a basic law, suggesting valuable rules to exclude illegally obtained evidence. The *2012 CPL* has significantly expanded its formal requirements for the rules. These provisions can be mainly found in the *2012 CPL*, *2010 Evidence Rules*, the *SPC's explanations*, the *MPS' Working Rules* and *2017 Regulation on Some Issues of Strictly Excluding Illegally Obtained Evidence in Handling Criminal Cases*. The *2012 CPL* prohibits such evidence by many means. For instance, Article 50 of the *2012 CPL* explicitly bars extorting confessions by torture or gathering evidence by threat, enticement, deceit or other illegal means.

There are many public debates on exclusionary rules in China. For example, some critics hold that while coerced oral statements cannot be used at trials, physical and documentary evidence derived from such statements can be used as evidence.¹ This paper will start from Chinese academic findings on their current implementation. Further, it will proceed with Chinese official data on the actual implementation of exclusionary rules. Then, it will conclude with the common problems of such statistics that need to be mended in future criminal justice reforms, in order to ensure better justice in contemporary China.

2. Chinese Academic Findings on the Current Implementation

There are limited statistics on the implementation of exclusionary rules available in Mainland China. They include

¹ See CHEN Ruchao, "The Chinese Rectification of Inquisition by Torture", *Gansu ZhengzhiXueyuanXuebao*, 2015-1, 1; "The Focus of 'First Case of Excluding Illegal Evidence in China': Whether Fatigue in Investigation is Torture or not", *China Youth* (3 September 2011), available online at http://news.xinhuanet.com/legal/2011-09/03/c_121958850.htm; Na Jiang, "Problems and Prospects: China's Response to Wrongful Convictions", *International Journal of Law, Crime and Justice*, 2015/1

official data on new progress in implementation of exclusionary rules and academic findings on problems in the actual implementation.

Among of the both, academic research based on data cannot show significant progress after evidence reforms. For instance, the Criminal Procedure Law Institution of China University of Political Science and Law developed a pilot project on exclusionary rules in 2009 at three Basic Peoples' Courts (BPCs) out of nine BPCs in Yancheng City of Jiangsu Province. The three ones received 34 cases involving the application for illegally obtained evidence for a period of six months, from May 28 to November 28, 2010. The rate of applications was 5.2% in the three, higher than 0.6% as the rate in other six BPCs located in the same City during the same period of time. Also, the rate of cases with lawyers involved was 47.8% in the three pilots during the above period, higher than 33.9% as the rate in other six BPCs during the same period, and 30.7% as the rate in the three pilots during six months before the pilot period.² With more lawyers to help apply for excluding the evidence, defendants' expectation from lawyers was increasing, but their initiative application was reported to be rare.³

Another example is an academic survey on the actual implementation of the *2010 Evidence Regulations* among judges responsible for criminal trials in a court located in Guangzhou City of Guangdong Province.⁴ In about 25 % of cases that interviewed judges here, the defence argued that pre-trial confessions were illegally obtained before the implementation, whereas after that the defence did so in about 30 % of the cases. Although the defence can provide clues or evidence sources in 55% of the 30 % part, courts only identify 5 % of the 55 % as cases involving illegally obtained evidence.

Also, the cases involving torture was found to be about 10 % of all cases in the survey and only 1% of those involving torture had been officially identified as those with tortured confession. About 10% of the cases were found to include technical flaws, of which 85% can be used as the basis of deciding cases after "corrections or reasonable explanations". Although about 5% of interrogation transcripts were not checked, confirmed, signed or fingerprinted by suspects, almost all or exactly about 90% of the flawed were still used for deciding cases. In the surveyed cases, about 50% of material or documentary evidence was from suspects' confession or identification. Among the half, about 5% of it involves tortured confession and another 10% or so involves threats, enticement and deceit. Even so, about 80% of the flawed half was still used as the basis of deciding cases. Among the material or documentary evidence that the police provided to the court, approximately 15% involves technical flaws, of which about 80% have been "corrected or reasonably explained" for being used as the bases of deciding cases. Before the implementation, in cases involving requests of proving the course of collecting evidence to be legal, about 85% of all cases involve the approach of official seals in explanatory materials, whereas 80% of the cases after the implementation.⁵ There is no significant change on the new reforms in practice.

Furthermore, some scholars investigated the implementation of the new law from 10 December 2012 to 9 December 2013 in the Higher People's Court (HPC), an Intermediate People's Court (IPC) and two BPCs of S Province. After interviewing 52 judges, handing out 80 copies of questionnaires and collecting 51 valid questionnaires, no case was found to exclude illegally obtained evidence with courts to initiatively start the application procedure for excluding the evidence.⁶ Also in the same survey, only 104 cases involved the application for excluding it among 3,832 cases in total, accounting for 2.7%. In a strict sense, the low rate of cases involving such application cannot necessarily suggest the poor implementation of the *2012 CPL*.⁷ Even among the limited cases, such courts only investigated the legality of the collected evidence in 48.1 % of the cases involving the applications.⁸

3. Chinese Official Data on the Actual Implementation of Exclusionary Rules

Differently, official data pay more attention to achievements than to shortfalls. According to statistics as of the end of 2011, the Ministry of Public Security (MOPS) finished transforming 70% of all working places in the public security

²GUO Xinyang, 2012.

³GUO Xinyang, 2012.

⁴HE Jiahong, 2013.

⁵Art. 7(3) of Exclusionary Rules states that explanation documents provided by prosecutors with stamps on, cannot be admitted as evidence to prove the legitimacy of collecting evidence, unless the relevant investigators signed their names on or annexed their seals to the documents.

⁶See ZUO Weimin, 2015 at 152.

⁷GUO Xinyang, 2012.

⁸GUO Xinyang, 2012.

organs.⁹ According to the MOPS' statistics, Chinese cases of tortured confession occurred in 2012 decreased to 87% of the average number of such cases in the past years.¹⁰ Until June 2013, the transformation of functional areas has been done in 90% of all police stations in order to implement the audio and video recording of interrogating suspects in the entire course of interrogations.¹¹ Such efforts are important to safeguard the legitimacy of police interrogation. In 2013 and 2014, procuratorial organs are reported to exclude the use of illegally obtained evidence in 1,285 cases before deciding to arrest or prosecute suspects, corrected 3,797 investigators' illegal means by which to collect evidence, and also requested 16,000 persons to make corrections on such evidence.¹²

Another empirical study of the early implementation of the new *CPL* also showed problems in implementation.¹³ A survey of recording practices by prosecutors in Fujian Province from January to October 2013 has shown some prosecutors or leaders cannot fully recognise the important role of synchronised recording in preventing torture and excluding tortured confession.¹⁴ Also, local people's Procuratorates' investment in recording technology was far from insufficient to meet the actual needs of providing dedicated interrogation rooms and other recording equipments.¹⁵ This survey found that among the 96 Procuratorial agencies in the same province, two thirds (67%) only had one employee to record interrogations, and 61% of such agencies merely have part-time employees to do so. The serious lack of recording employees reveals the fact that interrogators often or at least sometimes conduct recordings. Clearly, this practice fails to separate sections in conducting recording from those in interrogating suspects during investigation, detrimental to justice.¹⁶

In fact, prosecutors showed no interest in recording requirements or concern about allegations of torture in interrogations before or after the implementation of the *2012 CPL*. Another survey was conducted among 642 participants as prosecutors, judges, police officers or lawyers of a Chinese province, in order to examine their attitudes towards torture during investigation.¹⁷ The finding is that 79.7% of lawyers reported that prosecutors had no response to the allegation of torture in interrogations, and that 45.7% of the prosecutors agreed that they would not address the allegation.¹⁸

4. Conclusion

As main sources of examining the actual implementation of exclusionary rules, Chinese academic research and official data present their findings or comments on the implementation. Their focuses differ, but the implementation rate still remains low. Although the use of such rules has been widespread in China, behind new progress a series of problems remain, detrimental to justice as usual. Hence, further reforms are needed to improve both the rate and effect of their implementation in China's practice.

By domestic legislation, there is no way to exclude all of tortured confessions without a definition on torture. It is necessary for the PRC to define it in a much broader sense than its current scope in future reforms.¹⁹ At the very least, anyone acting in a public capacity should be responsible for the crimes of torture in the *1997 CL*, albeit with several crimes like the crimes of extracting confession or testimony by force and of torturing detainees included. Also, both

⁹SU Haiping, The Standardization of Law Enforcement by Police Pans out; 70% of the Case Processing Locations have Improved (gong'an zhifa guifan hua qude chengxiao), (CHINANEWS, 14 November 2011), available online at <<http://www.chinanews.com/fz/2011/11-14/3458312.shtml>>, accessed 26 March 2017.

¹⁰See SONG Shijing, The Cases of Inquisition by Torture decreased by 81 % in the Last Year, available online at <http://epaper.bjnews.com.cn/html/2013-06/27/content_443457.htm?div=-1>, (The Beijing News, 27 June 2013)

¹¹See GUO Xinyang, 2012.

¹²See SUN Qian, Several Speculations on the Enforcement of the Modified Criminal Procedure Law, JianchaRibao, 09 April 2015), available online at <http://newspaper.jcrb.com/html/2015-04/09/content_183681.htm>

¹³LI Mingrong//TENG Zhong/Zhang Min, 2014 at 40.

¹⁴LI Mingrong//TENG Zhong/Zhang Min, 2014 at 40

¹⁵LI Mingrong//TENG Zhong/Zhang Min, 2014 at 40.

¹⁶LI Mingrong//TENG Zhong/Zhang Min, 2014 at 41.

¹⁷LIANG Bin /HENi Phil /LU Hong, 2014 at 591.

¹⁸LIANG Bin /HENi Phil /LU Hong, 2014 at 594.

¹⁹See YANG Yuguan, On the rule of excluding illegal evidence under the rule of law, *Zhengju Kexue*, 2015-4, 389; CHEN Ruihua, On the Rules about the Confession of the Accused, *Faxue Zazhi*, 2012-6, 46; DU Yusu, The Dilemma of the Trial Process about the Exclusionary Rule and its Improvement, *Falv Kexue*, 2013-6, 184.

public officials and private citizens who commit acts of torture should equally become offenders of such crimes in PRC law.

Also, it is worthy of note that some articles conflict with the prohibition of torture and even tolerate some forms of torture in a sense. For example, Article 118 of the 2012 CPL requires criminal suspects to truthfully answer investigators' questions, which excludes the right to silence or privilege against self-incrimination and suggests that investigators may pressure suspects to confess. But mental or physical torture cannot be permitted. In order to prevent and exclude all forms of illegally obtained evidence, China needs to enshrine the accused a legal right to silence in the criminal process in future.

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