

CHINA'S NEW EXCLUSIONARY RULE: AN INTRODUCTION

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I. STATEMENT OF THE PROBLEM

As early as 1998, China's Supreme People's Court ("the SPC") set forth in one of its Judicial Interpretations a rule reflecting the principle of the "exclusionary rule": that illegally obtained evidence should be excluded from consideration in criminal trials.¹ According to this Judicial Interpretation, oral evidence obtained by investigating personnel by torture, threat, false promise, fraud, and other illegal means cannot be used by a court as the basis for a criminal conviction. But over ten years of judicial practice have made it clear that this principle has not been effectively realized.² In June 2010, the SPC, Supreme People's Procuratorate ("the SPP"), Ministry of Public Security, Ministry of State Security, and Ministry of Justice jointly promulgated the Regulations on the Exclusion of Illegally Obtained Evidence in Criminal Cases ("the Exclusionary Regulations")³ and Regulations on the Examination and Evaluation of Evidence in Capital Cases ("the Capital Case Regulations").⁴ The Exclusionary Regulations establish a system of rules for the exclusion of illegally obtained evidence; the Capital Case Regulations consist mainly of provisions addressing evidentiary rulings in death penalty cases, but several provisions address the exclusion of illegally obtained evidence in particular. The promulgation and implementation of these two documents (collectively, "the Evidence Regulations"), which have the legal force of SPC Judicial Interpretations,⁵ form a preliminary framework for the exclusionary rule in China.

¹ 最高人民法院关于执行《中华人民共和国刑事诉讼法》若干问题的解释 [Supreme People's Court Interpretation on Certain Questions Concerning the Implementation of the People's Republic of China Criminal Procedure Law] art. 61 (promulgated by the Sup. People's Ct., June 29, 1998, effective Sept. 8, 1998), SUP. PEOPLE'S CT. GAZ. (P.R.C.).

² For an overview of the implementation of the exclusionary rule in China and relevant case studies, see 陈瑞华 [CHEN RUIHUA], 程序性制裁理论 [A THEORY OF PROCEDURAL SANCTIONS] 177-85, 190-99, 238-49 (2d ed. 2010), and sources cited therein.

³ 关于办理刑事案件排除非法证据若干问题的规定 [Regulations on the Exclusion of Illegally Obtained Evidence in Criminal Cases] (promulgated by the Sup. People's Ct., Sup. People's Proc., Ministry of Public Security, Ministry of State Security & Ministry of Justice, June 13, 2010, effective July 1, 2010), SUP. PEOPLE'S PROC. GAZ. (P.R.C.) [hereinafter Exclusionary Regulations].

⁴ 关于办理死刑案件审查判断证据若干问题的规定 [Regulations on the Examination and Evaluation of Evidence in Capital Cases] (promulgated by the Sup. People's Ct., Sup. People's Proc., Ministry of Public Security, Ministry of State Security & Ministry of Justice, June 13, 2010, effective July 1, 2010), SUP. PEOPLE'S PROC. GAZ. (P.R.C.) [hereinafter Capital Case Regulations].

⁵ The Chinese Judicial Interpretation is a type of normative document (规范性文件) (*guifanxing wenjian*) with legal effect and is one of the formal sources of law. The SPC and SPP are supreme judicial bodies with authority to issue Judicial Interpretations. The Evidence Regulations discussed in this Article are normative documents issued by the SPC and Supreme People's Procuratorate with the other entities listed above, and thus have legal effect as Judicial Interpretations.

In drafting the Evidence Regulations, reformers not only attended to the substantive side of the exclusionary rule, but also set forth a system of procedural protections. With respect to the substantive construction of the exclusionary rule, the two regulations divide illegally obtained evidence into the categories of "illegal oral evidence" and "illegal physical evidence,"⁶ establish rules of "mandatory exclusion" and "discretionary exclusion,"⁷ and provide for "curable exclusion" in cases of involving minor procedural violations.⁸ Neither of the two regulations, however, provides for the further exclusion of all evidence obtained with the aid of illegally obtained evidence, the oft-mentioned "fruit of the poisonous tree."

As to the procedural side, the two Evidence Regulations establish a hybrid inquisitorial and party-driven mechanism. Before trial, procurators have the power to unilaterally exclude illegal oral evidence in the process of approving formal arrest (逮捕) (*daibu*) or initiating prosecution (起诉) (*qisu*).⁹ At trial, the court may initiate a procedure to exclude a defendant's illegally obtained confession only on application by the defense.¹⁰ The Evidence Regulations establish a principle of "procedural review first" as to confessions—that is, upon application by the defense to exclude evidence, the court must cease substantive adjudication of criminal responsibility until it has determined the legality of challenged actions taken during the investigation of the case.¹¹ Once the defense offers proof that evidence has been illegally obtained, the court conducts a preliminary investigation, and where the legality of methods used by investigators to obtain evidence is in doubt, the burden is on the prosecution to disprove the procedural violation.¹²

The Evidence Regulations establish a burden-reversing rule with respect to the legality of confessions, but as to the legality of written testimony from absent witnesses, the burden is on the supporter of the evidence.¹³ Under the Exclusionary Regulations, the prosecution bears the burden of proving the procedural legality of criminal investigations by a standard of "clear facts and reliable, sufficient evidence" (事实清楚、证据确实充分) (*shishi qingchu, zhengju queshi, chongfen*)—the highest standard in Chinese criminal

⁶ Exclusionary Regulations, *supra* note 3, arts. 1–13 (on oral evidence), 14 (on physical and documentary evidence); Capital Case Regulations arts. 6–10 (rules specific to physical and documentary evidence), 11–17 (rules specific to witness testimony), 18–22 (rules specific to defendants' statements).

⁷ See *infra* Part II.

⁸ Capital Case Regulations arts. 9, 14 (listing procedural errors that can be cured to admit physical or documentary, or witness testimony, based on sufficient rectification or explanation).

⁹ Exclusionary Regulations, *supra* note 3, art. 3.

¹⁰ *Id.* art. 5.

¹¹ *Id.*

¹² *Id.* art. 7.

¹³ *Id.* art. 13.

procedure.¹⁴ Not only this, but in cases where the court of first instance declines to review the procedural legality of the investigation as to a confession, the defense may raise the issue on appeal, and appellate courts are authorized to review and adjudicate procedural questions.¹⁵

Of course, promulgation of law is not the same as implementation. Now that the Evidence Regulations are in effect, the value systems, legal reasoning, and professional training of criminal court judges, as well as the judicial environment they face, may all affect the advancement of the exclusionary rule. All “book rules” must face a series of difficulties and challenges in the process of implementation; through the interplay of institutional and other pressures, conflicts, and exchanges, in some form they finally become “real rules.” What these will entail is an unknown. To the extent of the exclusionary rule’s status as an “import” transplanted from the West, legal theory in China has been deeply influenced by Western theories of evidence. But the realities of criminal justice in China also involve unique problems. Whether the new regulations will in fact be effective in addressing these problems is a difficult question whose answer remains unclear.

In the discussion below, this article first introduces the two types of exclusionary rule established by the new Evidence Regulations—“mandatory” and “discretionary”—then analyzes their new system of “curable exclusion.” The Evidence Regulations establish, through these rules, a substantive structure for the exclusion of illegally obtained evidence. This article’s main discussion focuses on the “procedural review first” principle and the shifting of the burden of proof in determinations of the admissibility of evidence. Through these features, the new Evidence Regulations attend to the procedural implementation of the exclusionary rule. Of course, “laws alone do not implement themselves.” The promulgation of codified law is only a beginning; whether such law can be effectively carried out is a separate question deserving of further exploration.

II. MANDATORY EXCLUSION AND DISCRETIONARY EXCLUSION

China’s new Evidence Regulations establish an exclusionary rule by combining concepts of “mandatory exclusion” and “discretionary exclusion.” Under the Exclusionary Regulations, defendant confessions or victim or other witness testimony obtained by investigators must be excluded if a court confirms that they constitute “illegal oral evidence”; that is, that they have

¹⁴ Criminal Procedure Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., July 7, 1979, effective Jan. 1, 1980, amended Mar. 17, 1996), STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (P.R.C.), *translated at* <http://www.cecc.gov/pages/newLaws/criminalProcedureENG.php> [hereinafter Criminal Procedure Law], art. 162(1).

¹⁵ Exclusionary Regulations, *supra* note 3, art. 12.

been collected by illegal means.¹⁶ In cases of physical or documentary evidence obtained by investigators by means "in clear violation of legal provisions," which "may affect the fairness of the judgment," the court must order the prosecution to correct the violation or provide a reasonable explanation. If the prosecution fails to do so, the evidence is to be excluded.¹⁷

Where the Exclusionary Regulations effectively establish different exclusionary rules for illegally obtained oral and physical evidence, the Capital Case Regulations establish new rules of mandatory exclusion for *both* illegally obtained oral and physical evidence. For example, physical and documentary evidence obtained by means of inspection, search, seizure, or confiscation is inadmissible if investigating personnel do not document its origin by submitting relevant records.¹⁸ Mandatory exclusion also applies to witness statements when investigators question multiple witnesses at a time or when the witness does not review and sign the witness statement;¹⁹ to defendant confessions when a defendant does not review and sign the interrogation record;²⁰ to expert opinions when the individual or entity giving the opinion does not have the legally required qualifications or gives opinions outside the appropriate scope;²¹ to identifications made other than at the behest of investigators, or when investigators clearly direct an identifying witness to a specific outcome.²²

Why define a separate "mandatory exclusion" and "discretionary exclusion" for different types of illegally obtained evidence? The main consideration here is that some illegally obtained evidence is obtained by means of serious violations of the law, whether because important interests of the defendant are infringed; because explicit legal prohibitions are disregarded; or because of the seriousness of the likely consequences. Only the strictest procedural sanction—a blanket rule of inadmissibility—is commensurate to such blatant violations of legal process, and thus able to effectively restrain them. For example, when investigators coerce defendants to confess by means of torture, they obviously violate provisions of the Criminal Procedure Law and international treaties prohibiting torture,²³ as

¹⁶ *Id.* art. 2; see also Capital Case Regulations arts. 12–13 (listing testimony elicited by violence, threat, and other illegal means, and other inadmissible evidence).

¹⁷ Exclusionary Regulations, *supra* note 3, art. 14.

¹⁸ Capital Case Regulations, *supra* note 4, art. 9.

¹⁹ *Id.* art. 13.

²⁰ *Id.* art. 20.

²¹ *Id.* art. 24(1).

²² *Id.* art. 30(5).

²³ For instance, under the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "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." United Nations Convention Against

well as trespassing on the defendant's bodily autonomy and personal dignity. Such investigatory practices damage the humanity and fairness of the criminal justice system, and the most severe procedural sanction of "mandatory exclusion" should be used against investigators who engage in them.

For less serious violations of procedure, which infringe less important rights and interests, and result in less serious harm, a blanket rule of inadmissibility may be excessively strict. Such a rule may depart from the principle of congruence between procedural violation and procedural penalty, thus potentially causing valuable evidence to be held inadmissible due solely to a minor violation of the law, making the facts of a case more difficult to discover, and hindering the necessary prosecution of crime.

This is of particular concern in cases of minor "procedural blemish": technical legal violations commonly occur in the order and method of criminal procedure, the location and time of interrogations, missing signatures on documentation, and other aspects of the investigative process, though no fundamental legal principles are violated, no party's interests are infringed, and the violation does not result in admission of false evidence or the prosecution of the innocent.²⁴ In such "blemish" cases, if a court resorts not to a bright-line rule but to a broader consideration of all relevant factors, balancing the rights and interests involved, it may then "choose the lesser of two evils" and decline to hold evidence inadmissible when the benefit to be gained by admitting it exceeds that of excluding it. At the same time, in investigating illegally obtained evidence of this type, courts can also consider whether "procedural blemishes" can be appropriately "cured." For example, if through a required investigation by the prosecution and re-collection of illegally obtained evidence by investigators, a procedural defect can be corrected or a reasonable explanation can be given for the procedural violation, then such evidence can be "re-discovered" and the blemish in the investigation procedure does not affect its admission. It might be a wise decision, then, to admit this curable type of illegally obtained evidence.

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 15, adopted Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

²⁴ The new Evidence Regulations do not clearly define the term "procedural blemish." The examples of "procedural blemishes" given in the Evidence Regulations, however, suggest that most "procedural blemishes" are minor technical violations of the law in the course of an investigation. Under Article 9 of the Capital Case Regulations, physical or documentary evidence can be admitted at trial if a cure or reasonable explanation is made for "blemishes" including missing signatures or insufficiently detailed descriptions of collected evidence on various investigation records. Article 14 lists "blemishes" in the collection of witness statements, including failure to note the name of the questioner or recorder, or the start and end time of questioning.

III. CURABLE EXCLUSION

Unlike "mandatory exclusion," "curable exclusion" in the new Evidence Regulations addresses only "procedural blemishes" resulting from relatively minor procedural violations in the collection of evidence. Again, such technical procedural illegalities have not violated important legal principles, infringed on important rights, defied the express mandate of law, or caused serious harm, and so a rule of "mandatory exclusion" is unnecessary, and the prosecution should be given an opportunity to cure the error.

For example, under Article 14 of the Capital Case Regulations, where investigators question a witness in a capital case, but the record "does not provide the name of the questioner, recorder, or legal representative or the start and stop time or place of the interview," or "the location where the witness was interviewed does not comply with regulations," the court is authorized to treat such errors as "procedural blemishes" and employ a rule of "curable exclusion." Article 21 provides that a court may do the same where investigators have questioned a defendant but not signed the record or indicated on the record that they have informed the defendant of his or her procedural rights. Similar rules appear elsewhere in the Capital Case Regulations concerning physical and documentary evidence in Article 9, records of on-site investigation (勘验) (*kanyan*) and inspection (检查) (*jiancha*) in Article 26, and identifications in Article 30. Article 14 of the Exclusionary Regulations provides that when physical or documentary evidence is gathered in a manner that "clearly violates the law," and this "may affect the fairness of the trial," the evidence must be excluded unless the violation is rectified or a reasonable explanation made. Trial judges have broad discretion to determine when the law is "clearly" violated, and when the fairness of trial "may be affected"; thus Article 14 provides for discretionary exclusion. At the same time, because the court may order rectification or explanation of the procedural violation, Article 14 is also of the character of a curable exclusion rule.

When a court finds that investigators have obtained evidence by illegal means and orders the prosecution to rectify the violation, how is this to be done? The Evidence Regulations suggest that there are two ways the prosecution can cure procedural defects: first, by obtaining the evidence a second time, as may be possible for the questioning of a defendant, witnesses, or experts; on-site investigations; searches; seizures; and identifications. If the prosecution can obtain the same evidence by legal means, such evidence can be presented to the court; evidence obtainable only by illegal means cannot.

Second, where gathering the evidence a second time is impossible due to the passage of time, the prosecution may be allowed to cure by providing a reasonable explanation for the violation.²⁵ The prosecution may order investigators to explain that the procedural violation was not intentional and constitutes a mere technical error; or that it does not constitute fabrication of evidence or create a danger that false evidence will be admitted. The

²⁵ See *supra* note 24.

prosecution's explanation is intended to convince the court that the authenticity and reliability of the evidence are not affected by the error in the methods in which the evidence has been obtained.

IV. THE PRINCIPLE OF "PROCEDURAL REVIEW FIRST"

For an exclusionary rule to be effectively put into practice, it is necessary to establish an appropriately adversarial judicial procedure, and allow the prosecution and defense to participate in procedural adjudication. This means the procuratorate cannot possibly have too great a role in excluding illegal evidence: it plays a greater role representing police and other official investigators in criminal litigation, and stands in an adversarial relationship to the defendant applying to exclude evidence. Review of the legality of investigations and the application of the exclusionary rule should primarily be the responsibility of courts. The procedure for procedural review of investigations and the exclusion of evidence can also only be established during trial of a case by the court.²⁶

The new Evidence Regulations affirm the principle of "procedural review first"—this is a major step in the development of a procedure for implementing the exclusionary rule. The defense may apply to exclude evidence as illegally obtained, either before or during trial; the court is to "first conduct an in-court investigation."²⁷ After reviewing evidence and other information provided by the defendant, the court may shift the burden to the prosecution to defend any evidence whose legality is in doubt. The court then hears argument from prosecution and defense as to whether the evidence was legally obtained and whether it should be excluded, based on the proof of its legality or illegality.²⁸ Under certain circumstances—for example, if it is necessary to gather new evidence or subpoena new witnesses—the court may also adjourn to review the evidence.²⁹ After sufficient courtroom review, if the court determines no evidence has been illegally obtained, or that the conditions are not met for exclusion of illegally obtained evidence, it may deny defendant's application and find the evidence admissible. The court can otherwise exclude the evidence from consideration at trial.

Clearly, the Evidence Regulations place the inquiry into the legality of the investigation first; once the defense initiates the procedure for ruling on exclusion of evidence, the court must immediately investigate, conducting an

²⁶ See 张军、姜伟、田文昌 [ZHANG JUN, JIANG WEI & TIAN WENCHANG], 刑事诉讼：控辩审三人谈 [CRIMINAL PROCEDURE: A CONVERSATION BETWEEN PROSECUTION, DEFENSE, AND COURT] 168 (2001) (arguing that as more criminal defendants recant confessions on grounds of torture, criminal investigations have become more difficult for courts to review because the prosecution controls the investigation of any claim of abuse).

²⁷ Exclusionary Regulations, *supra* note 3, art. 5.

²⁸ *Id.* art. 7.

²⁹ *Id.* art. 8; Capital Case Regulations, *supra* note 4, art. 38.

evidentiary hearing if the defense casts doubt on the legality of the evidence.³⁰ That is, the procedure for procedural review effectively cuts off the procedure for decision of substantive questions, and the court's adjudication of the defendant's criminal responsibility is temporarily halted. Only when the court has decided whether the investigative actions at issue violated the law, and whether the resulting evidence should be excluded, can it return to substantive adjudication of the case. In determining the legality of investigative actions, the court decides a "case within a case," and this adjudication's objectives, procedure, and resulting rulings are independent of those of the substantive adjudication. Such rulings on the legality of investigations are not only first in time relative to substantive adjudication, but also impact the court's substantive fact-finding by limiting the evidence it may consider.

The establishment of a "procedural review first" system places questions concerning the legality of criminal investigations into a specialized procedure. This provides a procedural protection for the implementation of the exclusionary rule. But as an independent judicial procedure, a procedural adjudication delays resolution of substantive questions and necessarily postpones final resolution of the case. Given that the court must respond to a defendant's application to exclude evidence by initiating special procedures, there is also an incentive for defendants to hinder the judicial process in cases where there is no basis for excluding evidence, and thus a corresponding danger of abuse of procedure.

In light of this, the new Evidence Regulations establish separate procedures for what might be called preliminary and full review. After a court's preliminary review of the legality of investigative actions, a full review and procedural judgment are initiated only under certain conditions. Otherwise, the court may reject the defendant's application without halting the substantive adjudication of the case.³¹

V. ALLOCATING THE BURDEN OF PROOF

China's new Evidence Regulations draw on Anglo-American evidence law as their foundation, but also establish a unique system for the allocation of the burden of proof. Different allocations apply to different forms of illegally obtained evidence. First, for written testimony of victims and other witnesses who do not appear in court, both prosecution and defense may object that such evidence has been collected by illegal means. The burden of proof is on the party supporting admission of the evidence.³² Thus, in the case of written

³⁰ Exclusionary Regulations, *supra* note 3, arts. 5, 7.

³¹ It has been argued that one reason for the failure of previous regulations establishing an exclusionary rule was their lack of clarity as to the burden of proof. 刑事证据规则理解与适用 [THE UNDERSTANDING AND APPLICATION OF RULES OF CRIMINAL EVIDENCE] 320 (张军 [Zhang Jun] ed., 2010).

³² Exclusionary Regulations, *supra* note 3, art. 13.

testimony presented as prosecution evidence, the prosecution bears the burden of proving that the testimony was obtained by legal means, against a challenge and application to exclude by the defense. Conversely, the defense must defend the legality of written testimony that it presents. In such cases, then, the new regulations do not adopt the rule of Anglo-American evidence law, in which "the burden is on the movant," including a party *challenging* the legality of evidence.³³ This institutional innovation places the burden on the nonmovant, enabling stricter review of evidence and allowing the exclusionary rule to support the accuracy of judicial fact-finding.³⁴

Second, for defendant confessions obtained by investigators through illegal means, the Evidence Regulations establish a "two-step rule" for the allocation of the burden of proof. This rule corresponds to the initial and full review procedures to be conducted by a court upon application to exclude evidence. At the initial review stage, the judge must decide whether to accept the defendant's application to exclude evidence: that is, whether to accept the case (立案) (*li'an*) for purposes of procedural adjudication. The defense must present evidence and information relating to "the persons involved, time, location, means, content, etc, of the suspected illegal collection of evidence."³⁵ In other words, the defense bears the burden of convincing the court to make an initial judgment accepting its application. If the defense cannot present any relevant evidence or information, for example, and the court is not otherwise in doubt as to the legality of the means used to elicit a confession, the court may reject the defense's application, declining not only to exclude evidence, but also to initiate proceedings for formal adjudication of the procedural

³³ Section 78 of the United Kingdom's 1984 Police and Criminal Evidence Act effectively establishes a rule of "burden on the movant": a defendant challenging prosecution evidence as unfair bears the burden of proving that such evidence was improperly collected. The court has discretion to find that admitting the evidence would have such an adverse effect on the proceedings that the evidence should be excluded. Police and Criminal Evidence Act, 1984, c. 60, § 78. Under U.S. case law, if the prosecution attempts to show the legality of a search by reason of a defendant's consent, it bears the burden of proving that the defendant freely and voluntarily agreed to the search. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). The prosecution also bears the burden of proving by clear and convincing evidence that an in-court identification of the defendant originates not in a prior identification of the same defendant at an uncounseled line-up, but in an independent source. *United States v. Wade*, 388 U.S. 218, 240 (1967).

³⁴ In theory, any party affected by a procedural dispute may apply to the court for resolution of such procedural dispute. As a mechanism of relief for violations of rights, "procedural adjudication" is in theory only invoked by a party whose rights have been violated. But considering that one function of a rule excluding illegally obtained oral evidence is to improve the general accuracy of fact-finding by the court, the prosecution may also challenge victim and other witness testimony if it believes such evidence has been obtained illegally, and require the proponent of the evidence to prove otherwise. Zhang ed., *THE UNDERSTANDING AND APPLICATION OF RULES OF CRIMINAL EVIDENCE*, *supra* note 31, at 340.

³⁵ Exclusionary Regulations, *supra* note 3, art. 6.

question. The Evidence Regulations impose the initial burden on the defense primarily in order to avoid baseless exclusion applications, with the resulting unnecessary delay of adjudication and waste of judicial resources. At the same time, the rule may encourage timely investigation and evidence gathering by the defense to support an application to exclude and ensure the effective exercise of the defendant's rights. Of course, in order to avoid unfair treatment of defendants, the Evidence Regulations also establish a low standard at this stage: for the court to accept the defense's application, the defense need only present evidence or information sufficient to show that "there is doubt" as to whether a defendant's confession was illegally obtained.³⁶

Once doubt is established as to the legality of a defendant's confession, the court is to initiate the process of procedural adjudication: an exclusion hearing. The mark of this initiation is the court's order that the prosecution prove the confession was obtained legally. If the prosecution presents insufficient evidence to this effect, the court must without exception exclude the confession.³⁷ The Evidence Regulations thus establish a conditional rule of "burden reversal": only on a sufficient initial showing by the defense, and initiation of procedural review by the court, does the prosecution bear the burden of proving the legality of evidence. Further, this proof must meet the same standard of "clear facts and reliable, sufficient evidence"—the highest evidentiary standard in Chinese criminal procedure, and the same standard that the government must meet in order to convict a criminal defendant.³⁸ If the prosecution cannot or will not meet this burden, the court must impose the sanction of exclusion.

According to the Exclusionary Regulations, the prosecution's primary means of meeting its burden of proof is to provide evidence in the form of materials or testimony by persons involved.

First, the prosecution can show the legality of the investigation by providing interrogation records made by investigating personnel, or original audio or video recordings of the interrogation.³⁹ The former refers to the investigators' complete record of the interrogation, including defendant confessions of guilt and expressions of innocence. The court may provide this record to the defense for review, and can read the material aloud in court if necessary. The latter includes all audio and video recordings of interrogation by investigating personnel; the court may play this material in court. By submitting these materials, the prosecution presents evidence as to the entirety of the interrogation process, and can confirm that the interrogation does not rise to the level of torture or otherwise illegal action. For this reason, interrogation records submitted to the court by the prosecution must be complete and not edited, and recordings original rather than copied.

³⁶ *Id.* art. 7.

³⁷ *Id.* art. 11.

³⁸ *Id.*; Criminal Procedure Law, *supra* note 14, art. 162(1).

³⁹ Exclusionary Regulations, *supra* note 3, art. 6.

Second, the prosecution can show the legality of an investigation by presenting courtroom testimony from three sources: “other persons” present during questioning, other witnesses, and “interrogating personnel” themselves.⁴⁰ “Other persons present during questioning” refers to participants in questioning other than interrogating personnel, including persons responsible for recording and persons in charge of the premises. “Other witnesses” refers primarily to persons held in custody at the same time and place as the defendant. Finally, “interrogating personnel” refers to investigating personnel in charge of questioning a defendant, who not only participate in the entire process of interrogation but keep the interrogation record and may also be responsible for audio and video recording.

The establishment of a system for courtroom testimony by investigating personnel is another important institutional innovation in the new Evidence Regulations. The refusal of police and other investigators to testify in court has long been a serious problem in the Chinese criminal justice system. Neither the Criminal Procedure Law nor related Judicial Interpretations had previously addressed this problem, with the result that courts either refused to adjudicate defendants’ claims of unlawful behavior by investigators and requests for exclusion of resulting evidence,⁴¹ or simply ordered prosecutors to investigate such claims. The typical prosecution response was no more than to provide a statement of “explanation” from investigating bodies. Courts relied on these statements as a superficial justification for the refusal to examine claims of illegally obtained evidence.⁴² Under the Exclusionary Regulations, if the prosecution provides a complete interrogation record and original interrogation recordings, but “cannot eliminate suspicion of torture,” the prosecution must request that the court call investigating personnel to testify as to the legality of the relevant confession.⁴³ When the defense requests that the court call investigating personnel or other witnesses to testify, the court may grant a continuance when necessary.⁴⁴

⁴⁰ *Id.* art. 7.

⁴¹ ZHANG ET AL., CRIMINAL PROCEDURE, *supra* note 26, at 169–71 (on some judges’ refusal even to hear claims that a confession has been coerced by force); 王达人、曾粤兴 [WANG DAREN & ZENG YUEXING], 正义的诉求——美国辛普森案和中国杜培武案的比较 [DEMANDS OF JUSTICE: A COMPARISON OF AMERICA’S SIMPSON CASE AND CHINA’S DU PEIWU CASE] 207 (2003) (excerpt from Du Peiwu’s account of the trial court’s refusal to investigate his claims of illegal interrogation even after he displayed the bloodied clothing he had worn during questioning).

⁴² CHEN, A THEORY OF PROCEDURAL SANCTIONS, *supra* note 2, at 238–42 (describing the use at trial of certified “explanation” statements from investigatory bodies, with discussion of the Yang Zhijie (杨志杰) case).

⁴³ Exclusionary Regulations, *supra* note 3, art. 7.

⁴⁴ *Id.* arts. 7, 8. It is common for investigating personnel not to appear in court and for the prosecution to offer as proof of the legality of challenged investigative practices only a written statement from such personnel. The promulgation of the Exclusionary Regulations represents the first time a Judicial Interpretation has required that under

VI. CONCLUSION: LAWS ALONE DO NOT IMPLEMENT THEMSELVES

The life of the law is not in its promulgation but in its effective implementation. As these unique rules of evidence take effect, whether they can indeed be implemented, and in particular whether they can realize the goals of legal reformers—whether they can help resolve the problems of torture, unlawful gathering of evidence, the reduction of criminal procedure to mere formality, the refusal of investigating personnel to testify at trial—are all questions awaiting empirical inquiry and theoretical reflection. Considering, though, that China has long been without a rule excluding illegally obtained evidence, and that the principles passed in 1998 have never been more than a dead letter, past experience suggests that implementation of the new exclusionary rule will involve difficulties of many kinds. In practice, innovative rules may be intentionally or unintentionally ignored or even purposefully resisted. The last part of this article, then, reviews some of the problems that the exclusionary rule will face in practice, in the hopes that policy reformers might take notice.

In the two new Evidence Regulations, “mandatory exclusion” can apply not only to illegally obtained oral evidence, but also to illegally obtained physical and documentary evidence, expert evaluations, and identifications. But what exactly is the scope of this most severe procedural sanction? “Illegal oral evidence” is the main subject of mandatory exclusion, but what exactly does “illegal oral evidence” mean? What, after all, is the definition of “torture,” and how is the meaning of terms such as “violence” and “threat” to be determined? As to these questions, there has not been thorough discussion in either legal academia or the judicial sphere. Nor do the Evidence Regulations give a clear answer. Only the SPC has authority to issue Judicial Interpretations and define the legal scope of these terms; lower courts have no power to interpret them. Yet criminal court judges will be unable to avoid facing these questions sooner or later. The vagueness of the statutory language may result in disparity between different courts’ understandings of “illegal oral evidence,” “threat,” and “violence,” thus hindering the uniform application of the law.⁴⁵

In the Evidence Regulations, “discretionary exclusion” is applied primarily to illegally obtained physical and documentary evidence. But when courts are deciding whether to exclude such evidence, what factors are they to consider? To how high a level must illegal investigative action rise for a court to rule that evidence is excluded? How is a court to decide whether admitting such evidence will “affect the fairness of the trial” (影响公正审判)?

specified circumstances, investigating personnel must testify in court to assist the prosecution in proving that evidence has been legally obtained.

⁴⁵ This problem is rooted in the bounded nature of code-based law: there is no way to interpret the law and develop legal rules by means of judicial precedent, thus clarifying in individual cases concepts such as “mandatory exclusion,” “illegal oral evidence,” and “violence,” continuously enriching and adjusting their content.

These questions must eventually materialize in judicial practice and become issues of dispute between prosecution and defense. They are also questions that judges cannot avoid answering. Of course, the most unfortunate answer may be that, under pressure from many sides to convicts, courts may simply interpret “discretionary exclusion” into “discretionary non-exclusion.” Any presiding judge who exercises discretion to exclude key evidence, with the result that the case against a defendant does not reach the standard of proof necessary for a conviction and the defendant must be found not guilty, may bring on unofficial pressure from procurators, who often develop close professional and personal relationships with judges as members of the same local official community.⁴⁶ Such pressure can be directed at not only a presiding judge but also the leadership of the presiding court. Because a judgment of not guilty represents a failure in the handling of the case by the prosecutor, the prosecution can also be expected to exercise its formal right to appeal the case (抗诉) (*kangsu*) for the sake of avoiding penalties under the official performance evaluation system—penalties which apply again not only to individual procurators but to the local procuratorate itself.⁴⁷ Any victims involved in the case will likely also express their dissatisfaction; they may pressure the court by formal protest (申诉) (*shensu*), petitioning, and other means.⁴⁸ Given these circumstances and the extremely high conviction rate in Chinese criminal courts, therefore, the judicial system also has incentives to exercise strict internal controls on not-guilty verdicts, favoring instead alternatives such as sentence reduction for defendants whose guilt is in doubt due to questionable evidence.⁴⁹ A judge excluding prosecution evidence central to a criminal case will necessarily face both internal and external pressures. These amount to pressures to employ a less-than-good-faith reading of the rules.

⁴⁶ 陈瑞华 [CHEN RUIHUA], 刑事诉讼的中国模式 [THE CHINESE MODEL OF CRIMINAL PROCEDURE] 315 (2010).

⁴⁷ CHEN, THE CHINESE MODEL OF CRIMINAL PROCEDURE, *supra* note 46, at 310–11, 314 (discussing the incentive structure created by case handling performance evaluations and describing an example from a Basic Level People’s Court in Jiangsu Province). Procurators may thus be required by the procuratorate to prepare reports explaining why a suspect has not been charged or why a defendant has not been convicted. *Id.* at 314–15; see also 王新环 [Wang Xinhuan], 定罪率与绩效考核 [Conviction Rates and Performance Evaluations], 2003 人民检察 [PEOPLE’S PROCURATOR], no. 9, at 49 (arguing against the use of conviction rates in evaluation of procuratorial performance. Procurators may appeal a first-instance acquittal under Article 181 of the Criminal Procedure Law).

⁴⁸ For a victim’s right to protest a judgment of acquittal, see Criminal Procedure Law, *supra* note 14, art. 182. The threat of crime victim petitioning has also been cited as pressuring law enforcement authorities to formally arrest suspects. 李昌盛 [Li Changsheng], 走出“逮捕中心主义” [Getting Out of “Arrest-Centrism”], 检察日报 [PROCURATORIAL DAILY], Sept. 23, 2010, at 3, available at http://newspaper.jcrb.com/html/2010-09/23/content_54239.htm (last visited Aug. 23, 2011).

⁴⁹ CHEN, THE CHINESE MODEL OF CRIMINAL PROCEDURE, *supra* note 46, at 316.

The rule of "curable exclusion" will be even more difficult to grasp. Some kind of curable exclusion rule applies to the record of a defendant's confession, written testimony from witnesses, records of on-site investigation and inspection, identifications, and physical and material evidence. But do the procedural violations addressed by these provisions really all constitute mere "blemishes"?⁵⁰ If investigators conduct a necessary "cure," can there be an actual "recovery" from the violation?⁵¹ And when the prosecution has no way to undertake a "cure" of any kind, can a court ignore the "illegality" of evidence and admit it as normal simply because investigators have given an "explanation" for their unlawful investigative practices? Supposing most illegal evidence can escape exclusion through "cure," does this amount to tolerance for illegal evidence-gathering? These questions have no clear answer in the new Evidence Regulations, and they too will sooner or later need to be confronted by courts. The Evidence Regulations provide for no clear limits on the means by which a procedural violation can be rectified, or the time allowed the prosecution to make such rectification. Without clear standards for what constitutes a "reasonable explanation" for a procedural violation, the truthfulness, relevance, and rationality of such an explanation cannot be assured. If no rational method of resolving such questions can be established, so-called "curable exclusion" may also simply amount to "non-exclusion by cure." Such a resolution comes out of problems that arise in practice. Only by promulgating additional operating regulations based on observation of the problems of implementing the Evidence Regulations, can the SPC give further guidance as to the application of "curable exclusion."

Without relief, there are no rights. In the implementation of the exclusionary rule, effective judicial relief becomes an unavoidable institutional problem. According to the Exclusionary Regulations, if a first trial court does not review a defendant's application to exclude illegally obtained evidence, and adopts the evidence as the basis for its judgment, the appellate court may review the application and apply the exclusionary rule.⁵² But is such a review considered a first-instance adjudication or a second-instance (and final) appellate review? If the former, can the defendant appeal the appellate court's decision to the next highest court? If the latter, why do the Exclusionary Regulations not establish a mechanism for appeals of procedural questions, and allow defendants to appeal the first trial court's decision? Further, if the first trial court unreasonably refuses to review an application to exclude illegally obtained evidence, why is such a refusal not considered an "unlawful

⁵⁰ For example, Article 14 of the Capital Case Regulations refers to cases in which "the interrogation record shows that during the same period of time, a single questioner has questioned multiple witnesses. Scholars and others may of course differ frequently as to whether such a problem constitutes a 'procedural blemish.'"

⁵¹ Under the circumstances described *supra* note 50, there will necessarily exist no more than one accurate interrogation record; the other record cannot possibly have been made at the time indicated. Even if investigating personnel undertake to rectify the procedural violation, there may be no way to "recover" from this falsification.

⁵² Exclusionary Regulations, *supra* note 3, art. 12.

legal procedure that impacts the fairness of the judgment” under Article 191 of the Criminal Procedure Law, thus enabling an appellate court to enter a decision vacating the first trial court’s decision and remanding the case for retrial?

Whether courts will be able to conduct good-faith initial reviews of defendants’ applications to exclude evidence, and implement the mechanism for procedural adjudication, will be an extreme test of the intelligence and will of judges. As the promulgation of the Administrative Litigation Law in 1989 signaled the beginning of judicial review of the legality of administrative actions, the promulgation of the 2010 Exclusionary Regulations gives courts their first formal authority to review the legality of criminal investigations, and take procedural measures against unlawful investigations. This is a revolutionary development in the history of China’s system of judicial review. But given that the implementation of the Administrative Litigation Law has been fraught with difficulty,⁵³ can a new mechanism of judicial review in China’s criminal procedure really do any better? In the author’s view, in light of the current authority of Chinese courts, the political importance of public security and its related official bodies, the “supervisory” role of procuratorates, and even the values and incentive systems affecting China’s criminal court judges, the adjudication of procedural “cases within cases” cannot avoid a series of difficult problems. Public security bureaus enjoy great political influence as opposed to courts; procuratorates, too, can exercise their power to supervise the legal system under the Constitution to oversee the judgments of courts.⁵⁴ A judge’s decision to exclude or not to exclude evidence, then, must necessarily be limited by both public security bureau and procuratorate. In particular, a court excluding key evidence which may lead to an acquittal will face increased pressure from public security officials and procurators, for whom an acquittal means negative consequences in their performance

⁵³ Since the Administrative Litigation Law took effect on October 1, 1990, Chinese courts have accepted over a million administrative cases for first-instance trial. But compared to the number of civil and criminal cases, the number of administrative litigation cases is miniscule. The limited number of cases reflects the indifference and apprehension with which the public largely views administrative litigation. 唐京 [Tang Jing], 从我国行政诉讼 20 年运行状况探其改革方向 [From the Administrative Litigation Law’s Twenty Years of Implementation, Exploring Directions for Reform], 2010 中共四川省委省级机关党校学报 [J. PROVINCIAL LEVEL PARTY SCHOOL CHINESE COMMUNIST PARTY SICHUAN PROVINCE COMMITTEE], no. 4, at 30. For empirical data on administrative litigation in two northern Chinese cities and discussion of the effects of official emphasis on social harmony on the mediation of administrative litigation cases, see 应星、徐胤 [Ying Xing & Xu Yin], “立案政治学”与行政诉讼率的徘徊——华北两市基层法院的对比研究 [“The Political Science of Case Acceptance” and the Fluctuation of the Administrative Litigation Rate: A Comparative Study of Basic Level Courts in Two Northern Chinese Cities], 2009 政法论坛 [TRIB. POL. SCI. & L.], no. 6, at 111.

⁵⁴ See 中华人民共和国宪法 [Constitution (P.R.C.)] art. 129 (2004) (“The People’s Procuratorates of the People’s Republic of China are State organs for legal supervision.”).

evaluations.⁵⁵ To these factors constraining judicial authority may be added the dependence of criminal trials on case records (rather than in-court testimony), resulting in "trials on paper"; and internal court review of acquittals. Judges, then, have limited motivation and incentive to exclude evidence.

Supposing a smooth implementation of the exclusionary rule is actually achieved at the level of law, Chinese courts will still face a dilemma: once a court excludes illegally obtained evidence (a key oral statement, for instance) from consideration at trial, thus weakening the prosecution's case such that the standard of "clear facts and sufficient evidence" is not met, will the court be able to return a verdict of not guilty? Even putting aside factors such as outside interference,⁵⁶ public opinion pressures, the threat of petitioning by crime victims and their families, and official performance evaluation systems applicable to judicial officials, and considering only the values and legal reasoning of individual judges,⁵⁷ consider a case in which the evidence is sufficient to show a defendant's actions constitute a crime. Will judges really have the courage to "sever the poisoned hand" and return a judgment of not guilty, decisively and without regard for the consequences, solely because illegal means have been used to gather the evidence?

Of course, to raise these questions is not to doubt the feasibility of implementing the exclusionary rule. Nor is it to "sing a dirge" for the positive significance of the new Judicial Interpretations. There is an ancient Chinese saying: "Laws alone do not implement themselves" (徒法不足以自行) (*tufa bu zuyi zixing*).⁵⁸ Now that the two new Evidence Regulations have taken effect, we must diligently treat the problems of their implementation. Reformers must give full consideration to the difficulties in the implementation of the exclusionary rule; encourage judges to explore the creation of institutions that will allow beneficial cooperation between investigators, prosecution, defense, and the courts in the implementation of the new rule; and respond to the obstacles to implementation through policy rather than simply allowing

⁵⁵ See CHEN, *THE CHINESE MODEL OF CRIMINAL PROCEDURE*, *supra* note 46.

⁵⁶ Outside interference can come not only from public security institutions and procuratorates, but also from state disciplinary and supervisory institutions.

⁵⁷ Due to the high rate of conviction in Chinese criminal trials, judges follow the logic of a "presumption of guilt" in the process of criminal adjudication. A "files-and-records" trial centered on the presentation of witness statements and other documents by the prosecution, followed by their post hoc review by the judge for the purposes of issuing a judgment, can only add to such a presumption. Judges face the possibility of reversal on appeal by the prosecution or by victims, as well as internal review by court leadership. These factors all weigh against a decision to declare a defendant not guilty. Li, *Getting Out of "Arrest-Centrism"*, *supra* note 48.

⁵⁸ MENCIUS, MENCIUS 73 (Philip J. Ivanhoe ed., Irene Bloom trans., Columbia Univ. Press 2009).

official bodies to ignore legal rules, and “unspoken rules” to control once again.⁵⁹

Now that the Evidence Regulations have advanced to the key stage of national-level judicial reform, and as the new reforms face the inevitable difficulties of implementation, reformers and policymakers should also continue to create a beneficial institutional environment for implementation through further reform of the judicial system. In this sense, the significance of the exclusionary rule is as the first step in such reform. We look forward to the arrival of a series of further judicial reforms, for which the exclusionary rule is the catalyst, and of which it is only the start.

⁵⁹ China's 1996 reforms to the criminal trial procedure serve as an example. The original goal of these reforms was to establish a system of adversarial trial in China, but in practice reform was to a great extent nullified by conflict with many entrenched practices and attitudes, as well as a lack of the necessary judicial resources, resulting in a major crisis of enforcement upon implementation of the new Criminal Procedure Law. For further discussion and analysis, see CHEN, *THE CHINESE MODEL OF CRIMINAL PROCEDURE*, *supra* note 46, at 304–07.