



WWJMRD 2023; 10(01): 25-31
www.wwjmr.com
International Journal
Peer Reviewed Journal
Refereed Journal
Indexed Journal
Impact Factor SJIF 2017:
5.182 2018: 5.51, (ISI) 2020-
2021: 1.361
E-ISSN: 2454-6615

Feng Xuze

A Postdoctoral Researcher at
the Party School of the Central
Committee of Communist
Party of China.

Wang Chao

A Professor of the College for
Criminal Law Science of
Beijing Normal University,
China.

Correspondence:

Wang Chao

A Professor of the College for
Criminal Law Science of
Beijing Normal University,
China.

Main Characteristics of China's Exclusionary Rule

Feng Xuze, Wang Chao

Abstract

Against the backdrop of the frequent occurrence of confessions extracted by torture, China has carried out a reform of the exclusionary rule on the basis of summarizing the lessons learned from judicial practice, drawing on the successful experience of the West. In particular, the Criminal Procedure Law, which was successively amended by the National People's Congress in 2012 and 2018, has made more explicit provisions on the rules for excluding illegally obtained evidence at the legislative level. With the deepening of the criminal justice reform, the Supreme People's Court and the Supreme People's Procuratorate, in response to the various problems of the exclusionary rule in judicial practice, have made more comprehensive and systematic provisions on the exclusionary rule through new judicial interpretations. Although China has systematically stipulated the exclusionary rule on the basis of the theory and practice of the exclusionary rule of western countries, based on China's special national conditions, China has not copied the exclusionary rule of western countries. Compared with the exclusionary rule of Western countries, China's exclusionary rule is unique in many aspects, such as exclusionary time, exclusionary subjects, exclusionary results, exclusionary scopes, exclusionary methods, exclusionary procedure and so on.

Keywords: the exclusionary rule; revised Criminal Procedure Law; Chinese characteristics.

1. Introduction

Although the exclusionary rule originated in common-law countries, it has gradually developed into a rule of criminal evidence that is generally recognized and implemented in modern countries governed by the rule of law. It has even become an important part of the United Nations Criminal Justice Guidelines or many international human rights conventions. To a certain extent, whether or not to establish and how to construct the rule of excluding illegally obtained evidence reflects the scientific level and civilization of a country's criminal justice system.

For a long time, although China's Criminal Procedure Law (CPL) has always prohibited the extortion of confessions by torture and other illegal evidence-gathering behaviors, China has been slow to establish the exclusionary rule based on legislative techniques, theoretical research, and litigation concepts. Chinese scholars generally believe that the absence of the exclusionary rule is an important reason for the frequent use of torture to extort confessions in judicial practice. Against this background, marked by the Provisions on Several Issues concerning the Exclusion of Illegal Evidence in Criminal Cases, issued jointly by 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 on June 13, 2010, China began to carry out reforms of the exclusionary rule with great fanfare on the basis of summarizing the lessons learned from judicial practice, drawing on the successful experience of the West, and drawing on the results of theoretical research. The Decision on Amending the Criminal Procedure Law of the People's Republic of China, adopted at the Fifth Session of the Eleventh National People's Congress on March 14, 2012, for the first time made relatively clear provisions on the exclusionary rule at the legislative level, on the basis of the Provisions on Several Issues concerning the Exclusion of Illegal Evidence in Criminal Cases, which have been fully absorbed and informed by the Decision.

With the deepening of criminal justice reform, the Supreme People's Court and the Supreme People's Procuratorate, in response to the various problems that existed in judicial practice

with regard to the exclusionary rule, made more comprehensive and systematic provisions on the exclusionary rule through new judicial interpretations. The Provisions on Several Issues Concerning the Strict Exclusion of Illegal Evidence in Handling Criminal Cases, jointly issued by 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 on June 20, 2017. The Protocol on the Exclusion of Illegal Evidence in Handling Criminal Cases by the People's Courts (for Trial Implementation) issued by the Supreme People's Court on November 27, 2017. Although the National People's Congress amended the CPL again in 2018, no further changes were made to the exclusionary rule.

Although China has systematically stipulated the exclusionary rule on the basis of the theory and practice of the exclusionary rule of western countries, based on China's special national conditions, China has not copied the exclusionary rule of western countries. Compared with the exclusionary rule of Western countries, China's exclusionary rule is unique in many aspects, such as exclusionary time, exclusionary subjects, exclusionary results, exclusionary scopes, exclusionary methods, exclusion procedure and so on. In order to deeply understand China's exclusionary rule, and to compare the differences between China's and the West's exclusionary rules, this article systematically analyzes the main features of China's exclusionary rule.

2. Exclusionary Time: Staged Approach

In western countries, although the investigating authorities and prosecuting authorities may also consciously make some changes to the evidence submitted to the court according to the exclusionary rule in the process of prosecution, the purpose of the investigating authorities and prosecuting authorities is mainly based on the consideration of the quality of the prosecution, or in order to avoid the trouble of the prosecution activities because of the court to exclude the illegal evidence, not to fulfill the legal obligation to exclude the illegally obtained evidence. Further, despite the harmfulness of illegal evidence collection, but in the implementation of trial-centeredness, the exclusionary rule of western countries do not explicitly require investigative organs and procuratorial organs to exclude the illegally obtained evidence in accordance with the requirements of the exclusionary rule in the pre-trial procedure, and the court is the legal subject of deciding whether to exclude the illegally obtained evidence. Unlike in Western countries, according to article 54, paragraph 2, of the Chinese CPL as amended in 2012, and article 56, paragraph 2, of the Chinese CPL as amended in 2018, judicial organs shall apply the exclusionary rule, whether at the trial stage or at the investigation and prosecution stages, and promptly discover and legally exclude any illegally obtained evidence that meets the conditions for exclusion. In accordance with the interpretation of the Legal Affairs Commission of the National People's Congress, the amended CPL stipulates that the authorities responsible for handling cases at each stage of criminal proceedings are obliged to exclude illegally obtained evidence, which is conducive to the early discovery and exclusion of illegally obtained evidence, the improvement of the quality of the handling of cases, and the safeguarding of the lawful rights of the participants in the proceedings. Obviously, this

legislative spirit is not unreasonable in the context of China's public security organs, procuratorial organs and courts, which still follow the principles of division of responsibility, mutual cooperation and mutual restraint. Just as the mainstream view and the decision-making level envisioned in the past, investigation, prosecution and trial are three separate and interconnected stages of the criminal process, giving the public security organs, procuratorates and courts the obligation to exclude unlawful evidence, and to carry out layer upon layer of gate-keeping and layer upon layer of screening in the three stages of the criminal process, gradually filtering out evidence obtained through illegal means of obtaining confessions through torture and ensuring that the procuratorial authorities in the During the trial process, evidence collected in accordance with the law is submitted to the court as far as possible, thereby improving the quality of the public prosecution and the trial. In the criminal pre-trial procedure, if the investigating authorities and procuratorial authorities are able to exclude evidence obtained by illegal means such as extorting confessions through torture in accordance with the law, then they will be able to better judge in advance the likelihood of success of the criminal charges, and then take appropriate treatment of the case as early as possible. In particular, if the exclusion of unlawful evidence makes it unlikely that a criminal charge will be successful, the prosecuting authorities can make a timely decision to dismiss the case or not to prosecute, thus ensuring that the suspect is freed from the pains of criminal proceedings as soon as possible and returns to a normal life.

Moreover, in the absence of a radical change in the assembly-line style of the criminal procedure structure in China, the doctrine of exclusionary rule is also of some practical significance. In the assembly-line style of the criminal procedure structure, the criminal trial is often in a state of formality. In this case, the people's court in strict accordance with the requirements of the criminal procedure law to exclude the prosecution's illegal evidence will face a variety of pressures. Relative to the criminal trial process, if the investigative organs and procuratorial organs can really do justice, then by the prosecution in the criminal pre-trial procedures in advance to exclude eligible illegal evidence, has a strong operability. After all, in the criminal pre-trial procedures, the conflict between the prosecution and the defense is not as intense as in the criminal trial process, the prosecuting authority in the case of realizing the serious consequences of illegally obtained evidence can be relatively decent or in the state of relatively little resistance in accordance with the requirements of the criminal procedure law to exclude illegally obtained evidence. Particularly in cases where the procuratorial authorities have legal supervision powers and where the investigative work of the investigating authorities is subject to the control of the procuratorial authorities, the procuratorial authorities can, by virtue of their dominant position in criminal pre-trial proceedings, exclude with relative ease the unlawful evidence referred to them by the investigating authorities, or, by virtue of their power to authorize the arrest of a person and their power to examine and prosecute him, order the investigating authorities to rectify the unlawful evidence. It is also in this sense that, in the assembly-line style of the criminal procedure structure, which is centered on pre-trial procedures, it may be more

feasible for the procuratorial authorities to exclude illegal evidence than for the people's courts to do so.

3. Exclusionary Subjects: Diversification

Perhaps because of the whole society's abhorrence of illegal evidence-taking, or the urgent need to curb the use of torture to extort confessions and prevent wrongful convictions, all sectors of Chinese society have formed a public opinion atmosphere like a common enemy against illegal evidence-taking such as torture to extort confessions. Against this backdrop, the Chinese legislature has shown a radical attitude toward illegal evidence collection that surpasses that of Western countries. This is because, according to Article 54(2) of the 2012 amended Chinese CPL and Article 56(2) of the 2018 amended Chinese CPL, China's rules on the exclusion of illegally obtained evidence not only require that people's courts should exclude qualified illegal evidence in trials in accordance with the law, but also require that investigative and procuratorial organs should also exclude those evidences that should be excluded in pre-trial procedures in accordance with the Rules on the Strict Exclusion of Illegal Evidence in Criminal Cases. The Provisions on Several Issues Concerning the Strict Exclusion of Illegal Evidence in Handling Criminal Cases contain further provisions on how the public security organs, people's procuratorates and people's courts should apply the rules on the exclusion of illegal evidence and exclude illegal evidence.

Moreover, in China's criminal proceedings, the public security organs, people's procuratorates and people's courts are not only obliged to exclude illegally obtained evidence, but they should also take the initiative in fulfilling that obligation. Further, in accordance with articles 15, 17 and 23 of the Provisions on Several Issues Concerning the Strict Exclusion of Illegal Evidence in Criminal Cases, the obligation of the public security organs, procuratorates and courts to take the initiative to exclude illegally obtained evidence is manifested in four main areas. First, in cases where investigations have been completed, the investigating authorities shall comprehensively examine the evidentiary materials proving the legality of the collection of evidence and exclude illegally obtained evidence in accordance with the law. Where there is insufficient evidence after the exclusion of illegally obtained evidence, the case shall not be transferred for examination and prosecution. Second, the people's procuratorate and the people's court shall, in the course of handling the case, inform the suspect or defendant of his or her right to apply for the exclusion of illegally obtained evidence. Thirdly, the people's procuratorate shall exclude any illegally obtained evidence that it determines in its examination, and shall not use it as a basis for approving or deciding on arrest or instituting public prosecution. Finally, in the course of court hearings, if the adjudicator believes that there may have been illegal methods of collecting evidence as provided for by law, he or she shall conduct a court investigation into the legality of the collection of evidence. Judging from the interpretation of the legislature, the main reason why China's CPL stipulates that the investigating, procuratorial and judicial organs should all be obliged to apply the exclusionary rule and to exclude unlawful evidence is that it is intended to allow case handlers to discover and exclude unlawful evidence as early as possible, to improve the quality of cases and to safeguard the legitimate rights of litigants. According to the previous

analysis of phased exclusion, in China, the public security organs, the people's procuratorates and the people's courts are still practicing the criminal justice system of division of responsibility, mutual cooperation and mutual control, the implementation of diversified exclusion subjects does have certain legal basis and practical significance. For the people's procuratorates, in particular, the legal supervisory functions provided for in the Constitution and the CPL can provide a certain legal basis for them to exclude unlawful evidence collected by the investigating authorities. Moreover, in accordance with China's guiding principle of seeking truth from facts, and the objective obligation of the CPL for investigative and procuratorial organs to collect evidence in a comprehensive manner and to respect the truth, investigative and procuratorial organs should consciously follow the requirements of the exclusionary rule in order to exclude unlawful evidence that may affect the determination of facts. Judging from judicial practice, the people's procuratorates have achieved initial success in excluding illegally obtained evidence in the process of reviewing and approving arrests and prosecutions.

Although there is a certain legal basis and practical significance for the obligation to exclude unlawful evidence in China's criminal proceedings to be assumed by the investigative and procuratorial organs, there are still inherent limitations to the investigative and procuratorial organs' role as the subjects of exclusion of unlawful evidence on the basis of their responsibility to prosecute crimes. On the one hand, based on the influence of the factors of avoiding harm, coupled with the current law does not provide for the investigating authorities and procuratorial organs in the non-performance of the obligation to exclude the unfavorable legal consequences that should be borne, it is difficult to expect that the investigating authorities and procuratorial organs to take the initiative to exclude illegally obtained evidence that meets the conditions of the accusation of a crime out of the door. On the other hand, as far as the conflict of roles is concerned, the investigating and procuratorial organs are unlikely to have enough motivation to exclude the so-called unlawful evidence which is difficult and may play an important role in proving the facts of the crime. After all, the investigating and prosecuting authorities, as the prosecuting authorities, their core task is to collect evidence and investigate the crime. How to bring the suspects to trial and then hold the criminals criminally liable is the primary issue to be considered by the investigating and prosecuting authorities. Under these circumstances, it is difficult for us to demand that the investigating and prosecuting authorities exclude in advance in the pre-trial proceedings evidence that is illegal but can indeed play a crucial role in proving the facts of the crime.

4. Exclusionary Results: Variegation

In the criminal proceedings of western countries, since the stage and subject of exclusion of illegally obtained evidence is relatively single, the consequences of exclusion of illegally obtained evidence are usually relatively simple. As far as civil law countries are concerned, the legal consequences of the exclusion of illegally obtained evidence is generally not to be used as a basis for the judge to decide the case. And in the common law system countries, the legal consequences of excluding illegally obtained evidence is not only to prohibit the prosecution

will be submitted to the court so as to become the prosecution and defense to be the object of questioning and debate, but also in the evidence because of the loss of access to the court's access to the qualifications of the final cannot become the fact adjudicator to determine the facts of the case according to the basis. Compared to Western countries, the legal consequences of excluding illegally obtained evidence are much more complex in China, where the exclusionary rule is practiced in its entirety. According to Article 54(2) of the CPL as amended in 2012 and Article 56(2) of the CPL as amended in 2018, illegally obtained evidence excluded by the public security organs, people's procuratorates and people's courts in accordance with the law can neither be used as the basis for prosecution opinions, prosecution decisions nor the basis for judgments. And the Supreme People's Court and the Supreme People's Procuratorate, among others, have further expanded the legal consequences of the exclusion of illegally obtained evidence in their interpretations of the exclusionary rule.

To summarize, the legal consequences of the exclusion of illegal evidence in China's criminal proceedings include four aspects. First, in accordance with article 14, paragraph 2, of the Provisions on Several Issues Concerning the Strict Exclusion of Illegal Evidence in Criminal Cases, article 65, paragraph 1, of the Rules of Criminal Procedure for the People's Procuratorates (for Trial Implementation), and article 67, paragraph 3, of the Provisions on Procedures for Handling Criminal Cases by Public Security Organs, illegally obtained evidence that is determined by the investigative authorities in their examination and excluded in accordance with the law shall not be used as a basis for requesting the approval of an arrest or for the referral of an investigation and prosecution. Secondly, in accordance with article 17, paragraph 3, of the Provisions on Several Issues Concerning the Strict Exclusion of Illegal Evidence in Handling Criminal Cases, and article 65, paragraph 1, of the Rules of Criminal Procedure for the People's Procuratorates (for Trial Implementation), illegal evidence that has been identified by the people's procuratorates and excluded by them in accordance with the law shall not be used as a basis for approving or deciding on an arrest. Thirdly, in accordance with article 17, paragraph 3, of the Provisions on Several Issues Concerning the Strict Exclusion of Illegal Evidence in Handling Criminal Cases, and article 65, paragraph 1, of the Rules of Criminal Procedure for the People's Procuratorates (for Trial Implementation), the people's procuratorates may not use illegal evidence that has been identified and excluded by examination and in accordance with the law as the basis for instituting public proceedings. Finally, in accordance with article 34 of the Provisions on Certain Issues Concerning the Strict Exclusion of Illegal Evidence in Criminal Cases and article 4 of the Regulations on the Exclusion of Illegal Evidence in Criminal Cases Handled by the People's Courts (for Trial Implementation), evidence excluded in accordance with the law shall not be read out or questioned in court hearings, and shall not be used as the basis for a judgement.

5. Exclusionary Scopes: Hierarchy

Although the exclusionary rule has a solid theoretical foundation and an important value base, from the historical development of the exclusionary rule in western countries, not all illegally obtained evidence should be excluded, but

handled in accordance with differentiated methods. For example, the western countries according to different illegal nature to determine different exclusion rules, that is, for the violation of the defendant's constitutional rights of illegally obtained evidence, in principle, should be excluded, for the violation of the defendant's general litigation rights of illegally obtained evidence, by the judge according to the specific circumstances of the implementation of the discretionary exclusion, and for the purely technical violations of the evidence, in principle, should not be excluded. Another example, the western countries according to different exclusion object to implement different exclusion mode, that is, for illegal confession tends to implement mandatory exclusion, and for illegal physical evidence tends to implement discretionary exclusion. In order to adapt to the complexity of the objective needs of the criminal justice practice, to better ensure that the exclusionary rule can be implemented, China's criminal procedure legislation and justice in the formulation of the exclusionary rule in the process of drawing on the successful experience of the western countries to differentiate between, and according to the special situation of China's criminal justice for the different illegal forensic behavior constructed three different levels of the exclusionary rule.

The first is the rule on the exclusion of illegal verbal evidence, which was established in response to serious procedural violations. According to articles 1 and 2 of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Handling Criminal Cases, confessions of criminal suspects and defendants obtained by illegal means such as extorting confessions through torture and witness testimonies and statements of victims obtained by unlawful means such as violence and threats are illegal verbal evidence; illegal verbal evidence confirmed in accordance with the law shall be excluded and cannot be used as the basis for a verdict. Article 54 of the CPL as amended in 2012 and Article 56 of the CPL as amended in 2018 basically reiterated the above. In interpreting "and other unlawful methods" as stipulated in article 54 of the 2012 CPL, the Legal Affairs Committee of the National People's Congress, the Supreme People's Court and the Supreme People's Procuratorate did not expand this concept to cover procedural violations in general, but rather defined them as procedural violations whose degree of unlawfulness is comparable to that of extorting confessions through torture.

The second is the rule on the exclusion of illegal physical evidence, which was established in response to more serious procedural flaws. According to Article 14 of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Handling Criminal Cases, if the acquisition of physical or documentary evidence obviously violates the provisions of the law and may affect a fair trial, it shall be corrected or a reasonable explanation shall be given, otherwise, the physical or documentary evidence cannot be used as the basis for deciding the case. Article 56 of the amended CPL in 2012 and Article 56 of the amended CPL in 2018 further limit the conditions for the application of the rule of exclusion of unlawful physical and documentary evidence to "the collection of physical and documentary evidence does not comply with the legal procedures, which may seriously affect the fairness of the justice" and "shall be corrected or a reasonable explanation

shall be given", while "cannot be corrected or reasonably explained".

Finally, there is the exclusionary rule for more minor procedural flaws. Although the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in the Handling of Criminal Cases, as well as Article 54 of the CPL as amended in 2012, and Article 56 of the CPL as amended in 2018, limit the application of the exclusionary rule to more serious procedural violations, there are many provisions in the Provisions on Several Issues Concerning the Examination of and Judgment of Evidence for Handling Death Penalty Cases, and in the Provisions of the Supreme People's Court on the Interpretation of the Application of the Criminal Procedure Law of the People's Republic of China, many illegal evidence exclusion rules based on minor procedural flaws are implied. For example, according to article 9, paragraph 2 and paragraph 3 of the Provisions on Several Issues Concerning the Examination and Judgment of Evidence in Death Penalty Cases, if there are any of the following defects in the procedures and manner of collection of physical evidence or documentary evidence, and the relevant case officer is unable to rectify the defects or provide a reasonable explanation, the physical evidence or documentary evidence cannot be used as the basis for a conviction: the collection of the collected and retrieved physical evidence or documentary evidence is not included in the examination and inspection transcripts, the search transcripts, the extraction transcripts, the seizure list, or the seizure list, or the seizure list, or the seizure list. Record, seizure list on the investigator, the goods holder, witnesses, or the characteristics of the goods, quantity, quality, name, etc. is not specified; collection and retrieval of physical evidence photos, videos or reproductions, copies of documentary evidence, copies are not indicated with the original check, no copy of the time, without the collection, retrieval of the person's (unit) signature (seal); physical evidence photos, videos or reproductions, copies of the documentary evidence, copies without the producer's instructions on the production process and where the originals or originals are stored or without signatures in the instructions; and there are other defects in the collection procedures and methods of physical and documentary evidence. Again, Article 13 of the Provisions on Several Issues Concerning the Examination and Judgment of Evidence in Death Penalty Cases stipulates that witness testimony in one of the following circumstances cannot be used as a basis for determining a case: testimony obtained by questioning witnesses without conducting individual interviews; written testimony that has not been verified by the witnesses and confirmed with their signatures (stamps) and fingerprints; and questioning of deaf and mute persons or persons of ethnic minorities who do not know the local common language or script, Foreigners who should have provided an interpreter but did not do so.

6. Exclusionary Methods: Combination of Mandatory and Discretionary Exclusion

Considering the positive and negative effects of the exclusionary rule, western countries are increasingly adopting a combination of mandatory exclusion and discretionary exclusion in formulating the exclusionary rule. Generally speaking, for the more serious illegal evidence collection behavior, or for illegal verbal evidence, tend to use mandatory exclusionism, while for relatively

minor illegal evidence collection behavior, or for illegal physical evidence, tend to use discretionary exclusionism. Before June 13, 2010, due to the judicial interpretation of the exclusionary rule is too coarse, it can be said that the old exclusionary rule completely implements discretionary exclusionism. However, the past judicial practice has fully proved that in the judicial organs enjoy unrestricted discretionary power, the exclusionary rule is basically in name only. In order to enhance the operability and pertinence of the rule on the exclusion of unlawful evidence, the Chinese legislature and judiciary, in the course of reforming the rule on the exclusion of unlawful evidence, have, in accordance with different circumstances, provided for a combination of mandatory exclusion and discretionary exclusion that is not identical to that of Western countries.

On the one hand, different exclusionary methods have been implemented according to different types of evidence. According to Article 2 of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases and Article 54 of the CPL as amended in 2012 and Article 56 of the CPL as amended in 2018, China's exclusionary rule clearly pay more attention to the exclusion of illegal verbal evidence, i.e., for the confessions of suspects and defendants that have been obtained through illegal methods such as extorting confessions by torture, and for the confessions of suspects and defendants obtained through illegal methods such as extortion of confessions by torture, and for the testimonies of witnesses or statements of victims obtained through illegal methods such as violence, compulsory exclusionism is adopted, and the personnel handling the case do not enjoy the discretion of whether or not to exclude such testimonies. For illegal physical evidence or documentary evidence, the implementation of discretionary exclusionism, that is, the case officer on the illegal methods of obtaining physical evidence or documentary evidence whether to seriously affect the fairness of justice to be weighed. If the case officer believes that the illegal physical or documentary evidence does not reach the level of seriously affecting the fairness of justice, then he or she can use his or her discretion not to exclude the illegal physical or documentary evidence. In addition, it is worth noting that according to Article 14 of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases and Article 54 of the 2012 CPL and Article 56 of the 2018 amended CPL, the exclusion rule for illegal physical or documentary evidence also contains the element of mandatory exclusion. Furthermore, in the event of violation of the legal procedures and the relevant case officer's failure to provide a reasonable explanation or to make corrections, once it can be recognized that illegally obtained evidence collection seriously affects the administration of justice, the criminal justice organ no longer enjoys discretionary power and may not use it as the basis for prosecution opinions, prosecution decisions or judgments.

On the other hand, according to the rules of examination and judgment or the rules of examination and determination stipulated in the Provisions on Several Issues Concerning the Examination and Judgment of Evidence in Handling Death Penalty Cases and the Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China, for the

exclusion of flawed evidence, the people's court should also adopt a combination of mandatory exclusion and discretionary exclusion, i.e., for the flawed evidence with a relatively heavy degree of violation of the law, the people's court does not enjoy discretion, shall not be used as the basis for the case, and for the relatively minor degree of defective evidence, the people's court enjoys a certain degree of discretion, only in the case of the case officer cannot make amends or cannot make a reasonable explanation, the people's court shall not be used as the basis for the case.

For example, according to article 89 of the Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China, enacted in 2021, the people's court shall apply the doctrine of mandatory exclusion, and shall not use it as a basis for determining a case if the witness testimony is in one of the following circumstances: (1) the interview of witnesses is not individually conducted; (2) written testimony has not been checked and recognized by the witnesses; (3) persons familiar with the sign language for hearing- and speech-impaired persons who should have been provided were not provided in the interview of any deaf or muted person; and (4) Interpreters who should have been provided were not provided in the interview of any witness who is not familiar with the commonly used local language or script. However, according to article 90 of the above Interpretation, if there are any of the following defects in the procedure and manner of collection of witness testimony, the people's court shall exclude them at its discretion, depending on whether the procuratorial authorities are able to provide corrections or reasonable explanations, i.e., if corrections are made or reasonable explanations are provided, they may be used, whereas those that are not may not be used as a basis for the determination of the case. These defects include: (1) the transcripts have not been filled with the names of the interviewer, transcriber and the legal representative, or the time of start, the time of conclusion and the locality of interview; (2) the locality of interview does not meet the relevant provisions; (3) the transcripts of interview do not have any record of having notified the witnesses of their relevant rights, obligations and legal responsibilities; (4) the transcripts of interview show that the same interviewer interviewed different witnesses in a same period of time; and (5) at the time of interview of juveniles, their legal representatives or appropriate persons of full age are not present.

7. Exclusionary Procedure: Combination of Ex Officio and Procedural Exclusion

Although the exclusionary rule is a procedural issue in criminal proceedings and does not directly involve the substantive rights of criminal suspects and defendants, in order to fully safeguard the rights of the defence to apply for the exclusionary rule and to reflect the fairness of criminal proceedings, foreign countries have generally adopted a litigation approach to the exclusion of illegally obtained evidence, such as the pre-trial motions model in the United States and the trial within the trial model in the United Kingdom. Further, whether it is before the court trial to solve the problem of exclusion of illegally obtained evidence or solve the problem of excluding illegally obtained evidence in the process of the court trial, the court will solve the problem of excluding illegally obtained

evidence will hold a special investigation hearing procedure, so as to form the procedural adjudication procedure of litigation. First of all, the procedural adjudication process has a relatively independent trial object, the use of special procedural rules and rules of evidence, not dependent on the substantive adjudication process and independent existence. Secondly, in the procedural adjudication process, although the prosecution's pursuit of the lawfulness of the issue, but the procedure is neither how to pursue the corresponding responsibility of the relevant personnel for the purpose, nor to solve the defendant's conviction and sentencing of matters directly related to the substantive issues, but only to solve the problem of whether illegally obtained evidence has the ability to evidence or admissibility. Again, although the procedural adjudication process also takes the form of a trial, but the prosecution and defense of the evidence, questioning and debate activities are not as strict as the substantive adjudication process. Even the defendant can be tried in absentia. Finally, the court's ruling on the evidential capacity or admissibility of illegal evidence can be used as a separate ground for appeal by both the prosecution and the defense.

Obviously, the implementation of the exclusionary rule is greatly facilitated by procedural adjudication through litigation. First of all, if the investigators obtain evidence against the defendant through illegal evidence-gathering behavior, then the defendant can seek corresponding judicial remedies from the court through procedural right of action, thus requesting the court to exclude illegal prosecution evidence. Secondly, after the defendant's request for the exclusion of illegally obtained evidence, i.e., the initiation of the procedural adjudication process, the court may, through a special investigation hearing procedure, include the procedural violations of the investigators in the judicial review. After examination and debate between the prosecution and the defense, once the court finds that the investigators have major procedural violations, it can declare the evidence invalid, that is, deprive the investigators of the expected benefits derived from the violation of law, prompting the investigators to comply with the legal procedures in future investigative activities. Lastly, if the defendant's request for the exclusion of unlawful evidence is rejected by a court decision, or if the court, after an investigative hearing, rules on the admission of unlawful evidence, the defendant may seek further judicial relief on this issue by way of an appeal to a higher court on an individual basis.

Although litigation-based procedural adjudication procedures help to implement the rules on the exclusion of illegally obtained evidence, safeguard the lawful rights and interests of the accused, and maintain a fair trial, China, in drawing on the experience of foreign countries with regard to the rules on the exclusion of illegally obtained evidence, has not adopted a fully litigated procedural adjudication procedure, but rather has adopted a combination of litigation-based exclusion and exclusion on the basis of competence. Further, although the acceptance and investigation of applications for exclusion of illegally obtained evidence by the people's courts during the trial process has certain litigation characteristics, the public security organs and procuratorial organs have adopted an administrative rather than litigation approach to the question of whether or not to exclude illegally obtained

evidence, i.e., at the stage of criminal investigation or the stage of examination and prosecution, the investigating organ or the people's procuratorate shall, by virtue of its powers and functions and without the full participation of the defense, exclude illegally obtained evidence by means of an exclusion procedure that combines litigation exclusion and exclusion. Lack of full participation of the defense through internal investigation and review of their own way to review and determine and exclude illegal evidence that meets the conditions in accordance with the law.

For example, under the paragraphs 3 of the article 71 of the Provisions on Procedures for Handling Criminal Cases by Public Security Organs, if the public security organ discovers evidence that should be excluded during the investigative stage, it shall, with the approval of the person in charge of the public security organ at or above the county level, exclude it in accordance with the law, and it shall not be used as a basis for requesting approval for arrest or for referral to the People's Procuratorate for examination and prosecution.

As another example, in accordance with the article 72 of the Rules of Criminal Procedure of the People's Procuratorates, in the process of examination of arrest and examination for prosecution by a people's procuratorate, where a people's procuratorate discovers that an investigator collects evidence by illegal means, it shall conduct an investigation and verification in a timely manner. According to the article 74 of the Rules of Criminal Procedure of the People's Procuratorates, where a people's procuratorate deems that there may be circumstances of collecting evidence by extraction of a confession under torture or any other illegal means, it may require the supervisory authority or the public security authority in writing to give an explanation on the legality of evidence collection. The explanation shall be sealed by the supervisory authority or the public security authority and signed by the investigator or investigators. In accordance with the article 70 of the Rules of Criminal Procedure of the People's Procuratorates, where physical evidence or documentary evidence is collected in such a manner nonconforming to the statutory procedures as may seriously affect judicial justice, the people's procuratorate shall promptly request the public security authority to make supplements and corrections or a written explanation. The people's procuratorate shall examine the supplements and corrections or an explanation made by the public security authority. If the making of supplements and corrections or a written explanation is impossible, the evidence shall be excluded.

8. Conclusion

Although the exclusionary rule has become a universally recognized rule of criminal evidence, countries around the world do not have the same theoretical basis or focus when establishing the exclusionary rule, based on differences in cultural traditions, values, legal concepts, and litigation modes. Since 2010, in order to curb the recurring phenomenon of extorting confessions by torture, China has reformed the exclusionary rule on the basis of the successful experience of the West. Through comparative study, it is not difficult to find that, influenced by the criminal procedure structure of assembly line operation and the criminal justice system of division of labor, mutual

cooperation and mutual control, compared with the exclusionary rule of western countries, China's exclusionary rule is almost always branded with Chinese characteristics, such as the time of exclusion, subjects of exclusion, results of exclusion, scopes of exclusion, methods of exclusion, exclusionary procedure and so on.

References

1. Sheng Lang (Ed.), *Interpretation of the Criminal Procedure Law of the People's Republic of China* (revised version), Beijing: Law Press, 2012.
2. Tracey Maclin, *The Supreme Court and the Fourth Amendment's Exclusionary Rule*, Oxford University Press, 2013.
3. Stephen C. Thaman (ed.), *Exclusionary Rules in Comparative Law*, Springer, 2013.
4. Kuo-hsing Hsieh, *The Exclusionary Rule of Evidence: Comparative Analysis and Proposals for Reform*, Ashgate, 2014.
5. Wang Chao, *the Utopia of Excluding Illegally Obtained Evidence*, Beijing: Law Press, 2014.
6. Bian Jianlin and Yang Yuguan (eds.), *Theory and Practice of Illegal Evidence Exclusion Rules*, China University of Political Science and Law Press, 2015.
7. Sabine Gless and Thomas Richter (eds.), *Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules*, Springer, 2019.