

ONE PROBLEM, TWO PATHS: A TAIWANESE PERSPECTIVE ON THE EXCLUSIONARY RULE IN CHINA

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I.	INTRODUCTION	713
II.	TAIWAN'S INITIAL EFFORTS TO CURB TORTURE AND WRONGFUL CONVICTION	715
III.	TAIWAN'S EXCLUSIONARY RULES	719
	A. <i>Background to Taiwan's Reform of Exclusionary Rules</i>	719
	B. <i>Changes Regarding Coerced Confessions</i>	721
	C. <i>Changes Regarding Illegally Obtained Physical Evidence</i>	723
IV.	TAIWAN'S HOLISTIC APPROACH AND CONTINUING PROGRESS	724
V.	RELEVANCE OF TAIWAN'S EXPERIENCE TO CHINA ..	725
	A. <i>Exclusionary Rule</i>	725
	B. <i>Reform Push</i>	726

I. INTRODUCTION

Professor Margaret Lewis's outstanding article¹ adds a pioneering, valuable chapter to the growing comparative scholarship on exclusionary rules. Along the way, she tackles the fundamental questions that should be asked regarding all China's recent criminal justice reforms: Why does an authoritarian regime make legal changes that seemingly restrain its power? What are the challenges that are hindering implementation? What reforms are needed to improve actual practice?

Lewis carefully unravels the forces that moved the government of the People's Republic of China, tasked with managing an increasingly sophisticated population of 1.4 billion and an increasingly complex criminal justice system, to announce two

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1. Margaret K. Lewis, *Controlling Abuse to Maintain Control: The Exclusionary Rule in China*, 43 N.Y.U. J. INT'L. & POL. 629 (2011).

sets of evidence rules in May 2010² (the “Evidence Rules”). The rules deal with a wide range of evidentiary issues in criminal cases and, in particular, set forth procedures to handle evidence allegedly obtained through illegal means. She concludes that the major motivation for the government to swiftly pass the Evidence Rules following the highly publicized wrongful conviction of Zhao Zuohai³ was to contain the public’s growing discontent with rampant injustice and police abuses, which apparently had threatened the regime’s legitimacy. Although the Evidence Rules are touted as a major step forward, Lewis points out many challenges that are likely to stand in the way of their meaningful implementation. Her analysis is a road map, leading to other changes necessary to address the major problem in China’s criminal justice system: the growing gap between the law on the books and the law in action.

Lewis discusses why other jurisdictions incorporate exclusionary rules into their criminal justice systems. This highlights the Chinese authoritarian regime’s distinct motivation to bolster its legitimacy by adopting the Evidence Rules. Among the jurisdictions examined, the Republic of China on Taiwan (ROC or Taiwan) is closest to China in cultural ties, language, features of a continental European system, and a legal tradition of inquisitorial criminal justice. Yet, compared with China, Taiwan has made tremendous strides toward the rule of law in recent decades. It therefore deserves close attention because its experience may serve as a useful reference for China’s future.⁴

2. “Guanyu Banli Sixing Anjian Shencha Panduan Zhengju ruogan Wenti de Guiding” he “Guanyu Banli Xingshi Anjian Paichu Feifa Zhengju ruogan Wenti de Guiding” de Tongzhi (《关于办理死刑案件审查判断证据若干问题的规定》和《关于办理刑事案件排除非法证据若干问题的规定》的通知) [Notice Regarding the Issue of “Rules on Certain Issues Relating to Examining and Judging Evidence in Death Penalty Cases” and “Rules on Certain Issues Relating to the Exclusion of Illegal Evidence in Criminal Cases”] (promulgated by the Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security, Ministry of State Security, and Ministry of Justice, June 13, 2010), *available at* <http://www.spp.gov.cn/site2006/2010-06-25/0005428115.html>.

3. For an introduction to the Zhao Zuohai case, *see* Lewis, *supra* note 1, at 630-31.

4. *See generally* Jerome A. Cohen, *Keynote Essay*, 3 TAIWAN IN COMP. PERSPECTIVE 5 (2011).

Taiwan's example should certainly shed some light on the questions raised in Lewis's article. Taiwan too has confronted the challenges of grappling with police abuses and wrongful convictions amid institutional constraints similar to China's, but it has made considerably greater progress. This comment thus aims to call special attention to Taiwan's experience. It will first examine Taiwan's initial efforts to deal with these problems and then discusses the island's subsequent adoption and implementation of the exclusionary rule.⁵ The comment will conclude with some reflections on what Taiwan's experience can tell us about China and might contribute to China.

II. TAIWAN'S INITIAL EFFORTS TO CURB TORTURE AND WRONGFUL CONVICTION

The ROC's Criminal Procedure Code, which became applicable to Taiwan in 1945,⁶ has long prohibited the use of force, threats, inducements, deception, or other illegitimate means in interrogations of defendants.⁷ It further stipulated that the defendant's confession may be used as evidence only if (1) it is not extracted through force, threats, inducements, deception, or other illegitimate means and (2) it corresponds with the facts.⁸

Theoretically, this provision rendered illegally obtained confessions inadmissible at trial. But reality was much more

5. "Exclusion of evidence" (Zhengju paichu) and "prohibition of use of evidence" (Zhengju shiyong jinzhi) are both common phrasings in Taiwan to refer to prohibitions against the court's use of evidence as basis of conviction. Broadly speaking, the scope of the exclusionary rule in Taiwan covers exclusion of illegally obtained confessions and physical evidence.

6. When in October 1945 the Republic of China's Nationalist government (Kuomintang or KMT) took control of Taiwan after World War II, Japanese colonial rule was replaced by the ROC's legal system. Four years later, after defeat in the civil war against China's Communist Party, the KMT central government retreated to Taiwan and imposed on this island the longest period of martial law (1949-1987) in modern world history. See generally Tay-sheng Wang (王泰升), *Taiwan de falu jishou jingyan ji qi qishi* (台灣的法律繼受經驗及其啓示) [*Taiwan's experience with legal transplants and its lessons*], 1 ZHONGYANYUAN FAXUE QIKAN 111 (中研院法學期刊) [ACADEMIA SINICA L.J.], at 115 (2007).

7. Zhonghua Minguo xing shi su song fa (中華民國刑事訴訟法) [Republic of China Criminal Procedure Code] art. 98 (Jan. 1, 1935; prior to the amendment of Jan. 28, 1967).

8. *Id.* art. 270 (Jan. 1, 1935; prior to the amendment of Jan. 28, 1967).

gruesome. A defendant's confession was viewed as the "king of evidence" in practice.⁹ Coerced confessions were rarely excluded during the martial law era (1949-1987) maintained by the Nationalist Party (Kuomintang or KMT), because proving police coercion was a formidable task for the defendant.¹⁰ The judiciary, including Taiwan's special constitutional court—the Council of Grand Justices—was in the firm grip of the KMT's authoritarian government and rarely issued pro-human rights decisions that challenged the regime.

The very first reform that addressed police coercion and wrongful convictions was prompted in 1982 by the highly publicized Wang Ying-Xian case.¹¹ It grasped public attention the way China's Zhao Zuohai case more recently did. Wang, accused of committing the first bank robbery in Taiwan's history, killed himself after confessing during police interrogations. However, Wang had not committed the crime. The real robber was captured soon after Wang's death. The media then revealed that Wang had been tortured to confess and tragically ended his life out of desperation to prove his innocence. Like the later sensational Zhao Zuohai story on the Mainland, Wang's case fueled public anger and propelled the then-authoritarian KMT government to adopt an unprecedented reform.¹²

However, the reform did not relate to the exclusion of illegally obtained evidence, but to enabling defense lawyers to monitor police/prosecutorial behavior during interrogations. In response to public criticisms and the pleas of the Taiwan Bar Association and local bar associations,¹³ the Legislature

9. Even in the late 1990s, judicial practice still held onto this view. See Tze-Lung Chen, (陳志龍), *Zhengju faze zhi xiuzheng fangxiang* (證據法則之修正方向) [*The direction of the revisions of evidence rules*], 52 YUEDAN FAXUE ZAZHI 60 (月旦法學雜誌) [TAIWAN L. REV.], at 74 (1999).

10. See generally Ming-Woei Chang, *The Exclusionary Rule in Taiwan: Lessons from the United States*, 8 AUSTL. J. ASIAN L. 68 (2006).

11. See TUN-MING TSAI (蔡墩銘), SHEHUI YU FALU (社會與法律) [SOCIETY AND LAW] 352-53 (2001).

12. See Feng-Jeng Lin (林峰正), *Dujue xingqiu san bu qu* (杜絕刑求三部曲) [*Trilogy to end torture to extract confessions*], JUD. REFORM FOUND. NEWSLETTER, July 14, 2007, available at <http://www.jrf.org.tw/newjrf/epaper/files/381-0713b.htm> (introducing the Wang Ying-Xian case, as well as Taiwan's efforts to tackle torture in 1982 and later reforms).

13. See Legis. Yuan, 1st Term, 69th Sess., Judicial Comm., Meeting Rec., 71 LEGIS YUAN GAZ. 28-37 (May 18, 1982), available at <http://lis.ly.gov.tw/>

adopted an amendment to the Criminal Procedure Code that allowed the defendant, for the first time, to retain counsel before trial, including police and prosecutorial interrogations at the investigation stage.¹⁴

Although this 1982 reform was considered significant, it turned out to be largely symbolic at that time. To circumvent the defendant's right to counsel, the police would write on the interrogation transcript a false statement that the defendant did not want to retain a lawyer, and sometimes the prosecutor would initially summon the eventual defendant to be questioned as a "witness" and therefore not entitled to retain counsel at that time.¹⁵ In addition, lawyers were a rare commodity.¹⁶ It is unlikely that many defendants retained counsel during interrogations.¹⁷ The government also had no obligation to provide counsel during the investigation stage if the defendant could not retain one. Moreover, even for those who were represented, the legal profession was a weak institution that suffered many constraints that prevented lawyers from providing a vigorous defense for their clients.¹⁸

Police torture remained an insoluble problem throughout the 1980s and '90s. Although the Supreme Court occa-

ttscgi/lgimg?@71694000;0028;0037; Legis. Yuan, 1st Term, 69th Sess., Legis. Yuan, Meeting Rec., 71 LEGIS. YUAN GAZ., 2 (June 15, 1982), available at <http://lis.ly.gov.tw/ttscgi/lgimg?@71694800;0002;0002>.

14. Xing shi su song fa (刑事訴訟法) [Republic of China Criminal Procedure Code] art. 27 (Aug. 4, 1982).

15. You-Chen Su, (蘇友辰), *Cong Chien-Ho an kan Taiwan sifa de qushi* (從蘇建和案看臺灣司法的缺失) [*Looking at the flaws of Taiwan's judiciary from the perspective of the Su Chien-Ho case*], 208 LUSHI ZAZHI 62 (律師雜誌) [TAIPEI BAR J.], at 63 (1991).

16. From 1950 to 1988, 782 people passed the bar exam. Taiwan's population was about 20 million in 1988. See Shu-Huan Shyuu (許士宦), *Taiwan lushi zhidu - yi xin lushi fa zhi zhidu biange wei zhongxin* (台灣律師制度—以新律師法之制度變革為中心) [*Taiwan's lawyers: centering around the reforms of the new Lawyers Law*], 10 ZHI GEN ZA ZHI 401 (植根雜誌) [ZHIGEN J.], at 407 (1994).

17. Although there are no statistics available on legal representation in the 1980s, more recent statistics are telling. For example, a Judicial Yuan report states that, in 2007, only 14.50 percent of all defendants were represented in court. Margaret K. Lewis, *Taiwan's New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 VA. J. INT'L L. 651, 683 (2009). The rate of legal representation during investigation in the 1980s can only have been much lower.

18. See generally Shyuu, *supra* note 16.

sionally passed judgments during this period that required the lower court to investigate the defendant's allegations about coerced confession, and some judgments specifically ordered the lower court to summon the investigating police¹⁹ and look into evidence in addition to police testimony,²⁰ this small body of judgments apparently was not enough to deter police use of violence. Appalling cases involving torture persisted, but only occasionally attracted public attention. Leading examples included the famous Chiu Ho-Shun case in 1987²¹ and the Su Chien-Ho case in 1991,²² both of which are still pending today because of endless appeals! A survey conducted among legal professionals and police in Taiwan as late as 1995 showed that torture and violence were still a common police interrogation practice.²³ The Chiang Kuo-Ching case of 1996 was only recently revealed to have resulted in wrongful execution, with Taiwan President Ma Ying-Jeou confirming the sad news.²⁴

19. See *e.g.*, Case No. Taifu 21, 1994 (Taiwan Sup. Ct. Feb. 3, 1994); Case No. 5107, 1997 (Taiwan Sup. Ct. Aug. 28, 1997).

20. See *e.g.*, Case No. 2420, 1996 (Taiwan Sup. Ct., May 17, 1996); Case No. 1456, 2000 (Taiwan Sup. Ct. Mar. 17, 2000).

21. Chiu Ho-Shun was charged with kidnapping and murdering a child in 1987. He was sentenced to death in the first trial and the following eleven retrials, and has been detained since 1988, making his detention the longest "pre-trial" detention in Taiwan. Audio tapes of the interrogations proved that some of his confessions were extracted through torture, and several police were subsequently convicted. See <http://chiouhoshun.blogspot.com/> (website set up by Taiwan's leading NGO on legal reforms, the Judicial Reform Foundation).

22. For introduction to the Su Chien-Ho case, see Su, *supra* note 15.

23. Dun-Ming Tsai & Jaw-Perng Wang, *Jianmo quan de shizheng yanjiu* (緘默權的實證研究) [*Empirical Studies of the right to silence*], in JAW-PERNG WANG, XINGSHI BEIGAO DE XIANFA QUANLI (刑事被告的憲法權利) [CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHTS] (2004). The survey showed that 76 percent of the interviewees (thirty-five people out of forty-six) thought that the police still use torture in the interrogations. Those surveyed consisted of ten judges, eleven prosecutors, four public defendants, ten lawyers, and eleven police officers.

24. *Probe into wrongful execution intensifies*, CHINA POST, Jan. 31, 2011, available at <http://www.chinapost.com.tw/taiwan/national/nationalnews/2011/01/31/289728/Probe-into.htm>.

III. TAIWAN'S EXCLUSIONARY RULES

A. *Background to Taiwan's Reform of Exclusionary Rules*

More meaningful criminal justice reforms controlling torture in particular, and offering procedural protections in general, did not occur until the latter half of the 1990s, a decade after the end of martial law. Among those changes, Taiwan's new exclusionary rule stands out as an external measure to control police conduct, and it constitutes an unusual example of the ordinary judiciary moving ahead of legislative reform. While the Supreme Court continued to make judgments requiring lower courts to investigate defense allegations of police violence during interrogations, it took an extraordinary initiative in 1998 to go further, tackling the harder problem of what to do about illegally obtained physical evidence. The 1998 case authorized the courts to exclude even physical evidence when they believe that using such evidence at trial would impair fairness and justice.²⁵

Such an initiative is not often seen in Taiwan's regular court system, which, in criminal justice, normally refrains from creating new rules.²⁶ But the Supreme Court's decision to spearhead the reform by inventing a rule to exclude physical evidence may be understood as the ambition of an increasingly confident regular judiciary to expand its power to control police behavior, and to gain legitimacy by jumping on what was becoming a bandwagon for upholding human rights.

Indeed, by the turn of the century, the courts in Taiwan had generally rid themselves of political and police influences and were claiming judicial independence in a new democracy.²⁷ There seemed to be ferment about human rights protections in the air, nurtured by Taiwan's special constitutional

25. Case No. 4025, 1998 (Taiwan Sup. Ct., Nov. 26, 1998). In fact, scholars began to advocate the exclusion of illegal physical evidence as early as 1982. More systematic academic analysis abounded starting in 1996, which contributed to the court's 1998 decision on physical evidence. See Cheng-te Ku, (顧正德), *Zhengju paichu faze zhi lilun yu shiwu* (證據排除法則之理論與實務) [Theory and Practice of the Exclusionary Rule], at 23 (2005) (unpublished master's thesis, Soochow University).

26. JAW-PERNG WANG (王兆鵬), *DANGSHIREN JINXING ZHUYI ZHI XINGSHI SUSONG* (當事人進行主義之刑事訴訟) [CRIMINAL TRIAL UNDER THE ADVERSARIAL SYSTEM] 16 (2004).

27. See generally Feng-Jeng Lin, (林峰正), *Kuayue jiancha gaige de anying zheng shi qi shi* (跨越檢察改革的暗影正是其時) [Time to break the shadows of

court, the Council of Grand Justices. In 1995, the council had made a groundbreaking decision requiring due process in the handling of hooligans by police and courts.²⁸ In the same year, it had decided to require judicial approval for defendant's pre-trial detention.²⁹ Reflecting this ferment, in 1997 and 1998, the Legislature sprang to life and embraced a slew of criminal justice reforms. It revised the Criminal Procedure Code to recognize the defendant's right to silence, to require *Miranda*-type warnings, to prohibit exhausting and nighttime interrogations of suspects, and to demand audio or visual recordings of all police and prosecutorial interrogations in their entirety.³⁰

Following the Supreme Court's 1998 initiative, the Legislature finally began to enact provisions concerning exclusion of evidence, amending the Criminal Procedure Code from 2001 to 2003. The general background for this move was a continuing transformation of criminal justice from an inquisitorial system to a "reformed adversarial system," which had been called for by the landmark 1999 national judicial conference. It had sought to address the inequality of arms between prosecution and defense, with the court often siding with the former. The new exclusionary rules in the Criminal Procedure Code confirmed the court's power to suppress physical evidence and coerced confessions, and they provided additional rules as to both. Unlike China's 2010 Evidence Rules, Taiwan's legislative enactment of exclusionary rules was one of the many products of an overall remolding of the criminal justice system, adopted along with other improvements in a package that, among other reforms, confirmed the principle of presumption of innocence, provided government-sponsored lawyers for indigent defendants at trial, and required the opportunity for cross-examination at trial.

prosecutorial reforms], 3 Jiancha xinlun 98 (檢察新論) [TAIWAN PROSECUTOR REV.] (2008).

28. Si fa yuan da fa guan hui yi [Council of Grand Justices], Interpretation No. 384, (Jul. 28 1995), *available at* http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=384.

29. Si fa yuan da fa guan hui yi [Council of Grand Justices], Interpretation No. 392, (Dec. 22, 1995), *available at* http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=392.

30. Xing shi su song fa (刑事訴訟法) [Criminal Procedure Code] arts. 95, 98, 100-2, 100-1 (Dec. 19, 1997), 100-1 (Jan. 21, 1998).

B. *Changes Regarding Coerced Confessions*

Under the Criminal Procedure Code revised by the Legislature from 2001-03, “exhausting interrogation” was listed along with “force, threats, inducements, deception, illegal detention³¹ and other illegitimate means” that render confession inadmissible, regardless whether the confession comports with the facts as otherwise known.

The reforms also specified other new grounds for the exclusion of a defendant’s confession—such as police failure to administer *Miranda*-style warnings about the defendant’s right to remain silent or her right to retain counsel, as well as violations of a number of prohibitions against interrogating the defendant during a certain time, including when the defendant is waiting for her counsel to arrive—unless the prosecution can prove that the violation did not stem from malice and that the confession was voluntary.³²

Moreover, a new provision confirmed past judicial practice, in which the evidentiary issue of whether the confession was extracted through illegitimate means must be investigated prior to other matters at trial. Perhaps the most important innovation is the burden-shifting provision—the prosecution now bears the burden of proving the voluntariness of the confession.³³

Today in practice, when the defense argues that the confession was extracted by police through illegitimate means, the prosecutors, in determining whether to prosecute or not, will first investigate whether the confession is voluntary. At trial, when the defense raises such arguments, it is the prosecutors who need to introduce evidence proving the voluntariness of the confession; otherwise the confession cannot be admitted. The prosecutor usually will ask the court to summon the investigating police to testify and to examine the interrogation re-

31. “Illegal detention” was added to the list of the illegitimate means of extracting confessions when the Criminal Procedure Code was revised in 1967.

32. Xing shi su song fa (刑事訴訟法) [Criminal Procedure Code] art. 158-2 (Feb. 6, 2003).

33. Xing shi su song fa (刑事訴訟法) [Criminal Procedure Code] art. 156 (Feb. 6, 2003).

cordings and records of medical examinations.³⁴ The courts need to elucidate in their judgments the reasons why such confession should or should not be admitted. Moreover, the defendant's confession, even if proved voluntary, cannot be the sole basis for conviction. The prosecution must introduce evidence other than confessions to prove the defendant's guilt. This requirement greatly reduces risks of wrongful convictions.

Recently, as previously mentioned, wrongly decided torture cases have been exposed and reexamined, which signifies Taiwan's major progress in dealing with the exclusion of coerced confessions. In November 2010, in the Su Chien-Ho case—one of the most publicized murder cases, which has been tried and appealed since 1991—the Taiwan High Court handed down a second acquittal. The court, for the first time in this case, recognized that the confessions of one of the defendants had been extracted through torture and thus are not admissible.³⁵ Although the verdict was later invalidated by the Supreme Court, which asked the lower court to re-examine conflicting evidence surrounding police torture and the expert witness' report, it reflected an improvement of the implementation of this exclusionary rule.

Another case, where Air Force officer Chiang Kuo-Ching was wrongfully executed for raping and murdering a child in 1996, was reinvestigated by Taiwan's Control Yuan (National Ombudsman) last year. Following the Control Yuan's report, which revealed that the defendant had been tortured to confess during a thirty-seven-hour, non-stop interrogation, the prosecutors reopened the case and detained another suspect whose DNA matched the evidence at the crime scene. This horrendous tragedy hit the headlines of every newspaper and triggered a series of government actions, including issuance of a government apology, and the President's public pledge to continue judicial reforms.³⁶

34. It is a standard practice to give the defendants a physical check-up when they first arrive at the detention center.

35. See Chia-Wen Li (李佳玟), *Cong gean dao tongan de zhengyi zhanglu* (從個案到通案的正義長路) [A long road to justice: from isolated cases to general cases], *Sifa gaige zazhi* (司法改革雜誌) [JUD. REFORM MAG.], 2010, available at http://jrftaiwan.blogspot.com/2010/12/blog-post_08.html.

36. *Supra* note 24.

The courts have excluded not only confessions extracted by violence but also those extracted by threats, inducements, deceptions, and other illegal means.³⁷ Of late, arguments about actual police violence during interrogation are not often heard in trials, but claims persist that police,³⁸ and sometimes even prosecutors,³⁹ continue to use other illegal tactics. How widespread these practices are, and whether the exclusionary rule has any deterrent effect on them, deserve exploration through empirical studies.

C. *Changes Regarding Illegally Obtained Physical Evidence*

In addition to the Supreme Court's 1998 decision, which authorized a court to suppress illegally obtained physical evidence on the basis of justice and fairness, the Legislature in 2001 and 2002 passed amendments that accord the courts discretion to exclude physical evidence seized in a search that later proves to be unauthorized.⁴⁰ Taking a further step forward, the Legislature adopted a catch-all clause in the Criminal Procedure Code in 2003 to allow the courts to exclude any illegally obtained evidence based on considerations of human rights protections and public interest.⁴¹ In 2007, the revisions

37. Jaw-Perng Wang, *Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial*, paper prepared for the XVIIIth International Congress of Comparative Law (July 25-August 1, 2010) (on file with author).

38. See Zhongguo renquan xiehui (中國人權協會) [Chinese Association for Human Rights], 2009 Taiwan sifa renquan zhibiao diaocha baogao (2009 台灣司法人權指標調查報告) [2009 Report of indexes of human rights in administration of justice in Taiwan], available at http://www.tsc.nccu.edu.tw/doc/2009_2.pdf.

39. See Greg Yo (尤伯祥), *Zhencha quzheng chengxu zhi jian du* (偵查取證程序之監督) [*Supervision of procedures of collecting evidence during investigation*], 7 *Jiancha xinlun*158 (檢察新論) [TAIWAN PROSECUTOR REV.], at 158 (2010).

40. Xing shi su song fa (刑事訴訟法) [Criminal Procedure Code] art. 416 (Jan. 12, 2001) and art. 131 (Feb. 8, 2002).

41. Xing shi su song fa (刑事訴訟法) [Criminal Procedure Code] art. 158-4 (Feb. 6, 2003). Although the Supreme Court has subsequently tried to clarify the factors to be balanced in concrete cases, this catch-all clause inevitably leaves the courts a wide discretion. See Hsun-lung Wu (吳巡龍), *Wo guo yu meiguo zhengju paichu shiwu yunzuo zhi bijiao—jian ping zuigao fayuan xiangguan panjue* (我國與美國證據排除實務運作之比較—兼評最高法院相關判決) [*Comparison of the practice of the exclusionary rule in Taiwan and the US, including evaluation of relevant Supreme Court judgments*], 141 *Taiwan Faxue Zazhi* 94 (臺灣法學雜誌) [TAIWAN L.J.], at 106 (2009).

of the Communication Security and Surveillance Act mandated that the evidence obtained through illegal wiretapping under certain circumstances, and evidence derived therefrom, cannot be used as evidence during investigation, trial, and any other procedures.⁴²

Despite the Supreme Court's efforts and progress in legislation, trial courts in Taiwan have continued to demonstrate great reluctance to exclude physical evidence and struggled to fulfill their newly acquired responsibilities.⁴³ This is especially true in the trial of serious offenses.⁴⁴ Scholars observe that, although Taiwan in recent years has adopted a "reformed adversarial system," it is still influenced by traditional legal culture and the inquisitorial system's insistence that a judge's role is to seek truth.⁴⁵ Concerns for substantive justice often trump concerns for procedural protections when it comes to exclusion of physical evidence. Moreover, judges are also sensitive to public demands for punishment and find it difficult to isolate themselves from such pressure in serious cases.

IV. TAIWAN'S HOLISTIC APPROACH AND CONTINUING PROGRESS

Overall, the problems of torture and wrongful convictions, which had once created a crisis of public confidence in Taiwan's government, have become more manageable in recent years. The exclusionary rule has made a great contribution to this progress, but it cannot function in isolation. Progress requires the presence of many positive elements, including, in Taiwan's case: an independent judiciary that is willing to apply the rules; a strong legal profession that can take on the issue; fair-minded prosecutors; police better trained in investigative techniques; media that are free to expose illegal government practices; robust civic groups that raise public awareness; and a public that supports procedural protections.

42. *Tongxun baozhang ji jiancha fa* (通訊保障及監察法) [Republic of China Communication Security and Surveillance Act] arts. 5, 6, and 7 (July 11, 2007).

43. For a review of the court judgments, see MU-CHIN SHIH (石木欽), *GAILIANG SHI DANGSHIREN JINXING ZHUYI ZHI ZHENGJU FAZE* (改良式當事人進行主義之證據法則) [RULES OF EVIDENCE IN THE MODIFIED ADVERSARY SYSTEM] (2008).

44. Wang, *supra* note 37.

45. *Id.*

Other reforms over the years, such as the illegality of convictions based only on confessions, judicial approval of the decision to detain a suspect, audio/videotaping of all interrogations, respect for the right to remain silent, and establishment of the right to counsel during interrogations have all made improvements possible.

Of course, there are still lingering problems in Taiwan. As noted, illegal interrogation, apart from violence, seem to persist. Also, exclusion of illegally obtained physical evidence generally remains a theory, rather than reality, and is unlikely to produce a noticeable deterrent effect.

However, Taiwan's progress has not halted. Proposals that strengthen rights protections and fairness are constantly under discussion, thanks to growing sophistication about, and expectations of, law, an active civil society, and a democratic electorate. For example, the Legislature adopted an amendment to the Criminal Procedure Code in June 2010 that entitles the arrestee to meet with her defense lawyer for an hour anytime within twenty-four hours of being placed in custody.⁴⁶ Civic groups and lawyers associations continue to advocate for further reforms, such as one that would require a government-sponsored defense lawyer to be present during detention hearings for indigent defendants if they do not retain their own counsel. Such reforms will continue and will further reduce police and prosecutorial abuses and enhance prospects for the exclusionary rule's effective application.

V. RELEVANCE OF TAIWAN'S EXPERIENCE TO CHINA

A. *Exclusionary Rule*

Although the two sides of the Taiwan Strait differ in political system, progress toward the rule of law, and size, their similarities make Taiwan a testing ground for observers to understand the prospects for, and possible obstacles to, China's similar reforms. In many ways, Taiwan shares the challenges that are confronting China: the same legal culture that favors substantive justice over procedural justice, that traditionally relies on confession, and that sees the judge's role to be that of an active "truth finder" instead of a passive adjudicator. All these

46. Xing shi su song fa (刑事訴訟法) [Criminal Procedure Code] art. 34 (June 23, 2010).

factors complicate the implementation of the exclusionary rule.

The exclusion of illegally obtained physical evidence is thorny in both places since their shared legal culture favors substantive justice. Chinese courts, like their Taiwanese counterparts, are likely to continue to be reluctant to exclude such physical evidence, even though they now have a clear basis to do so under the new evidence rules.⁴⁷ Their reluctance is further entrenched by the fact that Chinese police do not need to obtain approval of search warrants from a court as their counterparts in Taiwan do.

On the other hand, Taiwan's experience suggests that cultural preference for substantive justice should prove less of a problem when it comes to exclusion of coerced confession in China. The traditional view that confession is the "king of evidence," which China shares, has gradually lost ground in Taiwan because of ongoing reforms that have recognized the unreliability of confessions and have greatly reduced their weight at trial.

B. *Reform Push*

Will China take the next steps to put the Evidence Rules into practice and undertake other reforms that Taiwan has adopted to beef up the implementation of the exclusionary rule? To answer this question, one needs to identify the reform push in both places. Both Taiwan's past and China's current situation indicate that there is a role for public opinion to advance legal reforms even in an authoritarian regime. In both places, public outcry over police misconduct and miscarriage of justice, often reflected by the media and, more recently, the Internet, proved to be useful in galvanizing the authoritarian regime into action.

Indeed, the push for reforms in China has come lately from the media and the Internet, which, to the extent they are permitted, disseminate information and present public opinion. Despite strict constraints on what can and cannot be reported, some Chinese media have managed to be relatively outspoken about unjust convictions, corruption, and social is-

47. Rules on Certain Issues Relating to the Exclusion of Illegal Evidence in Criminal Cases, *supra* note 2, art. 14.

sues. The Internet, with more than 400 million Chinese users, has proved its increasing influence by spreading “sensitive” news and exposing cover-ups, notwithstanding controls. Without independent, empowered legal and electoral institutions, public demands for government accountability will likely continue to be expressed largely via the media and the Internet.

Yet, the increasingly rigid censorship and government repression against dissenters make public pressure an unsteady source of changes. China, even while taking occasional progressive measures, has continued to impose repressive measures in the name of “social stability.” Thus, reforms have been slow to come, modest in scope, and limited in implementation.

Without steady pushes that can sustain continuous reforms, an isolated change on the books can hardly bring about substantial improvements. China’s decision to begin a new round of reform efforts with the Evidence Rules, which mainly address what happens in the courtroom and prosecutor’s office, underscores the difficulty of imposing direct, meaningful supervision over police in the current, increasingly conservative political climate. The exclusionary rule may be an entry point to control police behavior, but it can only achieve a limited amount without other changes. An analogous example is Taiwan’s 1982 legislative amendment to allow the defendant to retain counsel at the pre-trial stage, including police and prosecutorial interrogations, which did not see meaningful results until much later reforms, including the new exclusionary rule. Those reforms, it should be noted, were launched in a young democracy, by a recently independent judiciary that was belatedly trying to live up to people’s expectations, and by a Legislature that had become democratically accountable to the public.

The fact that China lacks such institutions to keep up the momentum for progress casts a gloomy light on the potential effectiveness of the Evidence Rules. It also brings us to a basic difference between Taiwan and China: their political systems. Systematic judicial reforms did not occur in Taiwan until after the political space was opened up. Will significant further rule of law reforms in China depend on major political reforms? This question will need to be answered by comparative and empirical scholarship focused on the two places as well as elsewhere.

To be sure, no one will argue that legal reform efforts should not continue while political reforms stagnate. Yet, as suggested by Taiwan's example, to satisfy the public demand for justice, any specific reform requires a holistic approach that includes other more fundamental legal changes. It took Taiwan a long time to see substantial tangible results despite dramatic political transformation and continuous vigorous reforms. Implementation of China's exclusionary rules too will require ongoing complementary reforms that empower the lawyers, ensure the independence of the courts, and impose meaningful checks on prosecutorial and police power. As Lewis's article and this Issue are dedicated to honoring Professor Jerome A. Cohen for his profound contributions to legal scholarship about China, Chinese law reform efforts, and U.S.-China relations, it is appropriate to end this discussion of the exclusionary rule on a positive note by quoting one of his favorite Chinese sayings: "everything requires a process" ("xuyao yige guocheng").