

TORTUOUS PROGRESS: EARLY CASES UNDER CHINA'S NEW PROCEDURES FOR EXCLUDING EVIDENCE IN CRIMINAL CASES

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I. INTRODUCTION

Only six months after the new 'Rules on Certain Issues Relating to the Exclusion of Illegal Evidence in Criminal Cases' (Rules)¹ took effect, Zhang Jun, Vice President of China's Supreme People's Court (SPC), announced that China's exclusionary rule "has not been strictly implemented."

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1. See "Guanyu banli xingshi anjian paichu feifa zhengju ruogan wenti de guiding" de Tongzhi (《关于办理刑事案件排除非法证据若干问题的规定》的通知) ["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; effective July 1, 2010), *available at* <http://www.spp.gov.cn/site2006/2010-06-25/0005428115.html> [hereinafter the Rules].

The Rules were released together with another regulation, Guanyu Banli Sixing Anjian Shencha Panduan Zhengju ruogan Wenti de Guiding (《关于办理死刑案件审查判断证据若干问题的规定》和) ["Rules on Certain Issues Relating to Examining and Judging Evidence in Death Penalty Cases"], which provides more extensive evidence rules for capital cases, including the foundation for a best evidence rule, a hearsay rule, and additional evidence exclusion. This comment focuses almost exclusively on the Rules.

Speaking to the Criminal Law Committee of the All China Lawyers Association (ACLA), Zhang conceded that while forced confessions, the main target of the Rules, clearly occur, and lie at the heart of almost all known wrongful convictions, no case has yet emerged where the evidence before the court was sufficient both to affirm such an abuse and to exclude a confession.²

The Rules, which detail procedures for challenging the admissibility of evidence, were hailed as a major victory for China's developing legal system when released. They promised to revitalize China's largely dormant exclusionary rule by stating for the first time when and how allegations of illegal evidence-gathering should be raised, who must prove such abuses, the standard of proof required, and the possibility of in-court witness testimony by law enforcement. Their release by five government offices, including the SPC, the Supreme People's Procuratorate (SPP), the Ministry of Justice, and the nation's top law enforcement agencies, demonstrated unified support for the reforms from all government players in the criminal process. Less than a year later, however, scholars who warmly received the new Rules have begun to criticize their shortcomings, and defense attorneys have found that in practice there are still enormous obstacles to convincing courts to exclude evidence. Inartful drafting and a complicated power imbalance among China's criminal law branches create a real risk that, like earlier criminal procedure advances, the Rules will quickly lose all but symbolic value.

It is, of course still far too early to know the Rules' ultimate effect. The lack of transparency in Chinese courts makes it difficult to gather data on even their initial impact, and given the lack of time and resources to conduct an empirical study, it is not yet possible to present a comprehensive picture of how the Rules are playing out in practice. Still, by reviewing media reports of relevant cases and following the evolving commentary of vocal experts, a limited understanding of current conditions begins to emerge. This brief comment aims to

2. Sun Ying (孙莹), *Zuigaofa: Feifa zhengju paichu yuanze wei yange zhixing* (最高法：非法证据排除原则未严格执行) [Supreme People's Court: The Principle of Evidence Exclusion Has Not Been Strictly Implemented], *ZHONGGUO GUANGBO WANG* (中国广播网) [CNR], Jan. 10, 2011, http://www.cnr.cn/china/newszh/yaowen/201101/t20110110_507564061.html.

provide readers with such a keyhole view of some of the challenges China will face in keeping the Rules vital.

II. LAWYERS IGNORED

In his comments to the ACLA, Zhang Jun urged criminal lawyers to be more aggressive in questioning the validity of evidence, and emphasized that procedural arguments should be at the center of their defense strategies. He chided his audience by telling them that the SPC had uncovered more than a few cases where improper procedures led to exclusion of DNA evidence, but that lawyers had not yet found a single such case.

In a stirring published response,³ Tian Wenchang, director of the ACLA Criminal Law Committee, accepted this criticism, saying that years of practice in a system emphasizing substantive over procedural justice has led lawyers to focus predominately on factual arguments. Directives from the SPC and SPP previously forbade the use of illegal evidence as a basis for conviction or indictment, but there was no explicit role for lawyers in challenging the admissibility of evidence. The Rules provide lawyers a new foundation for launching procedural attacks by making exclusion the subject of in-court trial proceedings. Tian sees this as an opportunity to change the direction of criminal defense practice and strengthen the profession, saying that “if the arrival of the Rules establishes the principle of excluding evidence, only through the efforts of lawyers can the principle be fully expressed.” He further explained, “procedural defense is not merely necessary for a successful defense, but is an obligation performed by lawyers to protect judicial fairness.”⁴

The inertia of China’s beleaguered defense bar is only one of many reasons the Rules have stumbled. In a recent survey of fifty defense attorneys, only about 20 percent had attempted to invoke them.⁵ Those who had, however, univer-

3. Tian Wenchang (田文昌), *Xingshi bianhu buneng fangzong feifa zhengju* (刑事辩护不能放纵非法证据) [Criminal Defense Cannot Abide Illegal Evidence], *FAZHI ZHOUMO* (法治周末) [LEGAL WEEKLY], Jan. 11, 2011, available at <http://www.legalweekly.cn/content.jsp?id=165554&lm=%E6%A0%B8%E5%BF%83%E6%8A%A5%E9%81%93>.

4. *Id.*

5. Yang Ming (杨明) & Zhang Hailin (张海林), “*Feifa zhengju paichu*” *panshan qibu* (《非法证据排除》蹒跚起步) [“Evidence Exclusion” off to a Shaky Start], *LIAOWANG DONGFANG ZHOUKAN* (瞭望东方周刊) [ORIENTAL

sally reported that the effect was muted. In one extreme example, lawyer Xu Lanting, said that when he requested that the court examine allegations of illegal evidence, the judges simply ignored him without further comment. This is clearly contrary to the Rules' article 5 requirement that courts initiate an inquiry following receipt of the defense's written motion.⁶ In Jiangxi province and Beijing, lawyers arguing that their client's confessions were coerced did have the opportunity to debate the issue in court, a welcome improvement, but the judges never put forth any conclusions or comments.⁷ Faced with such lackluster responses, lawyers will likely soon lose confidence in the Rules and devote their limited resources elsewhere.

More disheartening still is the SPC's handling of the Fan Qihang case. Fan, an entrepreneur swept up in Chongqing's massive crackdown against organized crime, was sentenced to death for murder and other offenses despite repeated protestations at his trial and appeal that his confession was false and extracted by torture.⁸ The Rules became effective only as the SPC was performing its final review of the death sentence. As the review proceeded behind closed doors, Fan's daring lawyer, Zhu Mingyong, publically released and submitted to the court clandestine videotapes of Fan discussing his treatment and displaying scars on his arms. Still, the SPC never even contacted Zhu nor allowed him to participate in the review process, straight through to Fan's execution.⁹

Prominent human rights lawyer Teng Biao passionately articulated the reaction of China's criminal defense community: "Fan's execution tells everyone that these regulations are

OUTLOOK], Nov. 29, 2010, *available at* <http://www.lwdf.cn/wwwroot/dfzk/current/249852.shtml>.

6. *Id.*

7. *Id.*

8. *Supreme People's Court Approves Fan Qihang Execution Despite Allegations of Torture*, CONGRESSIONAL EXECUTIVE COMMISSION ON CHINA (Dec. 10, 2010), <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=146224&PHPSESSID=F8a2ece69120f1e6c8bc4a2ef5c1936a>.

9. The Rules do not specifically address their invocation at the SPC final review of death penalty cases phase, but even prior to the Rules, the court should not have allowed a forced confession to serve as the basis of conviction.

useless.”¹⁰ “What we can’t accept,” adds lawyer Wang Xing, “is that in the SPC’s ruling, there is not even a word regarding torture or the defense’s opinions.”¹¹ The SPC, however, has remained entirely silent as to why it let this perfect opportunity to model the Rules pass by. Instead, we have only the laughable protestations of an unnamed SPC official that the allegations of torture “weren’t ignored and were mentioned in the [internal] investigative and deliberation reports, but that the ruling form has no space for defense opinions.”¹²

The truth that Zhang Jun ignores and Tian Wenchang diplomatically alludes to is that Chinese defense lawyers are no strangers to this type of treatment. They are often viewed as agitators who intentionally obstruct justice to defend the guilty, rather than as defenders essential for ensuring fairness at trial. Reforms to the Law on Lawyers in 2007 introduced procedures to improve defense attorneys’ ability to protect their client’s rights, but public security officials and prosecutors have had little trouble finding new ways to obstruct lawyers’ access to case files, private investigations, and client meetings. Lawyers attempting vigorous criminal defense have faced threats, disbarment, prosecution, and even violent reprisals for their work, such that criminal defense is now openly referred to as a high-risk profession, which few new lawyers are willing to undertake.¹³ A dark joke among criminal law professors is that more of their students will end up as criminal defendants than as defense attorneys.

Yet, if lawyers cannot successfully be heard under the rules, what of the vast majority of defendants who remain unrepresented in China? Chinese law only requires appointment of counsel for criminal defendants who are blind, deaf, mute,

10. Paul Mooney, *Chongqing Execution Raises Political Spectre*, S. CHINA MORNING POST, Oct 3, 2010, available at http://www.pjmooney.com/en/Most_Recent_Articles/Entries/2010/10/3_Chongqing_execution_raises_political_spectre.html.

11. Yang & Zhang, *supra* note 4.

12. *Id.*

13. Sun Jibin (孙继斌), *Xingshi bianhu “san nan” weihe bian “shinan”* (刑事辩护《三难》为何变《十难》) [How Criminal Defense’s “Three Difficulties” became “Ten Difficulties”], FAZHI ZHOUMO (法治周末) [LEGAL WEEKLY], Jan. 18, 2011, available at <http://www.legalweekly.cn/content1.jsp?id=165663>.

minors, or facing the death penalty.¹⁴ Defendants in remote areas may have difficulty even hiring counsel, as over 200 counties still lack even a single attorney. Without the guidance of capable counsel, defendants are unlikely to know of, let alone successfully invoke, the procedurally sophisticated Rules, and there is no incentive for the court, police, or prosecution to inform them of their rights. Tellingly, all reported cases invoking the Rules to date have involved represented defendants.

III. LIFTING THE BURDEN OF PROOF

Articles 6 and 10 of the Rules require defendants alleging police misconduct in obtaining a confession to substantiate their claim by providing “leads,” such as the time, place, and nature of the violation, and the names of persons involved. Beyond this initial showing, the burden is on the prosecution, under articles 10(3) and 11, to present credible and sufficient proof that eliminates suspicion that the alleged conduct occurred. Defendant’s burden of production is intended to limit baseless claims of coercion, but because a victim of abuse is in a poor position to gather evidence from his tormentors, he cannot be expected to offer much detail.¹⁵ The Rules are silent, however, on what level of proof the defendant must offer, and this oversight might prove a substantial barrier in practice.

In the case of Song Liguang, a county-level official accused of accepting bribes, the defense encountered just such a problem. Song disavowed earlier confessions, alleging that they were made only after he was kept from his lawyer, transferred repeatedly, exposed to freezing temperatures with minimal clothing, suspended by his arms, kept from sleeping, struck with an electric prod, told his family would be punished, and once interrogated continuously for five days. During a dramatic hearing on the evidence, Song was able to identify the detention center where the conduct occurred. When

14. *Zhonghua Renmin Gongheguo xing shi su song fa* [PRC Criminal Procedure Law] article 34 (promulgated by the Nat’l People’s Cong., Jul. 1, 1979, amended Mar. 17, 1996, effective Jan. 1, 1997) (China) [hereinafter CPL];

15. *Xingshi Zhengju Guize Lijie Yu Shiyong* (刑事证据规则理解与使用)[Criminal Evidence Rules: Understanding and Implmentation] 318-29, (Zhang Jun (张军) et al. eds., 2010).

confronted with written statements by three investigators refuting his claims, he confirmed that two of them had not tortured him, that one had threatened him, and then named nine other offenders—only to be told that they were away on business and unavailable to comment. Despite this high level of specificity, the court said that Song had provided only “conceptual materials” but not “concrete leads” as required by the Rules.¹⁶

Yet the court did not immediately admit the confessions into evidence, as article 10 allows it to do when the defense fails to provide leads, or when the court has no question as to the legality of the challenged evidence. Instead, the court adjourned for further investigation. When Song’s lawyer then requested a court order to assist in gathering further evidence from investigators and prison officials, the court refused, saying that the defense has the right to conduct its own investigation and only in situations where it is truly impossible for the defense to obtain evidence can it apply to the court for assistance. Putting aside questions of the legitimacy of Song’s claims,¹⁷ the court’s statements betray a deep misunderstanding of the Rules. Its emphasis on the “leads requirement” and defendant’s own investigation makes clear that the court expected Song to prove that misconduct occurred, which is of course, not the burden he bears.

If this was the judges’ thinking, they are not alone. Professor Chen Weidong of Renmin University tells of another judge who approached him asking for advice on handling a similar case.¹⁸ The suspect in that case moved to exclude his confession, showing injuries suffered while in a detention

16. Liu Mengyue (刘梦月) & Du Xiao (杜晓), *Lezhi yuan jiaotongjuzhang shouhui “danao” gongtang* (乐至原交通局长受贿《大闹》公堂) [Former Lezhi County Head of Transportation Ministry, Accused of Accepting Bribes, Creates Spectacle in Court], FAZHI RIBAO (法制日报) [LEGAL DAILY], Jan. 20, 2011, available at http://www.legaldaily.com.cn/legal_case/content/2011-01/20/content_2450197.htm?node=21135.

17. Song was convicted and sentenced to eleven years after a second hearing three months later, at which the prosecution presented ten additional pieces of evidence. It is unclear what these were from media reports, or whether numerous questions surrounding the prosecution’s initial evidence were ever resolved. *Id.*

18. Li Enshu (李恩树) & Zheng Xiaoqiong (郑小琼), *Chengxuxing bianhu yuanhe quewei* (程序性辩护缘何缺位) [How Procedural Defense Became Omitted], FAZHI ZHOUMO (法治周末) [LEGAL WEEKLY], Jan. 18, 2011, availa-

center and claiming they resulted from torture. The prosecution denied any misconduct and presented interrogation records that showed no trace of abuse. The judge, not understanding that the burden is on the prosecution to provide proof of the confession's admissibility sufficient to dispel any doubts, was unsure how to proceed. To Chen, the answer was obvious, "those prosecuting the case must demonstrate how the wounds occurred, if they can't explain, the questionably obtained evidence cannot be used."¹⁹

Part of the challenge may simply be a lack of judicial familiarity with handling the new Rules. Qian Lieyang, head of the Beijing Lawyers Association Criminal Procedure Committee, optimistically stressed that judges require time to digest the Rules before they can be successfully implemented.²⁰ Previously, judges have deferred to the prosecution, as the office with the authority to supervise investigations, in identifying coerced confessions, but they must now learn to take a more active role. "In the past they were accustomed to eating with chopsticks, switching to a knife and fork will take time."²¹

Others, like Chen Weidong, are more cynical, and question whether judges are independent enough to ever rule against the prosecution and police. Chen says that many judges, at some level, still consider police, prosecutors, and courts to be allies in a struggle against crime, and view defendants as the enemy camp.²² Chinese law emphasizes cooperation among these three government offices rather than checks and balances, and it will be difficult for the courts to both monitor and cooperate with prosecutors. Further, courts are reluctant to make an enemy of public security forces whose chiefs generally hold a prominent political position in the lo-

ble at <http://www.legalweekly.cn/content.jsp?id=165676&lm=%E6%97%B6%E6%94%BF>.

19. *Id.*

20. Yang & Zhang, *supra* note 4. It's interesting that Qian, a proponent of the Rules, still identifies the exclusionary rules as a foreign implement.

21. *Id.*

22. Chen Weidong (陈卫东), *Zhongguo xingshi zhengjufa de xin fazhan: ping liangge zhengju guiding* (中国刑事证据法的新发展: 评两个证据规定) [New Developments in China's Criminal Evidence Law: Comments on the Two Evidence Rules], 5 FAXUE JIA (法学家) [JURISTS REVIEW] at 27 (2010), available at <http://www.zwjkey.com/oneas.asp?Id=6737>.

cal party committees that control their funding and personnel decisions.

These attitudes have not only caused judges to demand too much evidence of defendants, but have also led them to ask too little of prosecutors. Article 7 suggests interrogation records and audio or video recordings as specific means of proof that a prosecutor might offer to demonstrate a confession's legality, and requires that she ask the court to call non-investigative personnel present at the interrogation or other witnesses to testify. Written explanations of the circumstances may be submitted if they are signed or sealed by investigators as well as the prosecution. Only if the court still has doubts must the actual investigators be called to testify in court.

The danger of explicitly listing means of proof is that judges may assume that providing such evidence is automatically sufficient to discharge the prosecutors' burden and establish that confessions were acquired legally. Xinjiang lawyer Cao Hong tells of a case, where the court consistently appeared ready to exclude a confession, but, after prosecutors issued a document with an official seal saying that there was no torture, simply proceeded as if the issue was resolved.²³

The case of Zhang Guo, the former head of a county grain management office in Gansu, shows how article 7 might actually make it more difficult to exclude evidence. Zhang was accused of falsifying overtime records and stealing hundreds of thousands of Renminbi.²⁴ At trial, he was found guilty, but on appeal alleged that his earlier confession was the product of torture, and the intermediate court returned the case for a rehearing at which Zhang was exonerated. All this was before the release of the new Rules and predicated solely on the existing requirement that coerced confessions not be the basis of conviction. The prosecution then appealed, and the intermediate court, now following the new Rules, heard testimony from the investigators. The court quickly found that the confession was legal and sentenced Zhang to ten years. It is possi-

23. Yang & Zhang, *supra* note 4.

24. Li Yujun (李郁军), Song Xuequan (宋学权) & Gao Youzheng (高佑政), *Gansu baiyin yunyong paichu feifa zhengju guiding kangsu yi anjian* (甘肃白银运用排除非法证据规定抗诉一案件) [A Case of Prosecutorial Appeal Using the Exclusionary Rules in Baiyin City, Gansu Province], *JIANCHA RIBAO* (检察日报) [*PROCURATORIAL DAILY*], Apr. 15, 2010, available at http://news.jcrb.com/jxsw/201009/t20100915_444727.html.

ble that the testimony denying coercion was truly persuasive, but one wonders what the police might have said that had not already been raised at the earlier hearings. More likely, the court simply felt that prosecutors had satisfied their burden by complying with article 7.

Chen Weidong, mentions a similar case where, before the release of the Rules, a judge found a defendant innocent because the key confession was forced. Following the release of the Rules, the prosecution appealed, and offered a signed statement saying that there had been no torture. The confession was immediately admitted. Chen says that because of such cases he “is very concerned that the new rules might become an obstacle to the exclusion of evidence.”²⁵ This danger is even more apparent when considering the exclusion of documentary and physical evidence. Article 14 requires that such evidence be excluded only when it was illegally acquired, might seriously impact trial fairness, and there have been no remedial measures taken or explanations given for the illegal conduct. Prior to the rules, illegal evidence of all kinds would, in theory, have been unconditionally excluded from being the basis of indictment or conviction.

It would be unfair not to mention that the use of any in-court testimony in criminal cases is a major advance for China. More promising still, reports from Gansu, Sichuan, Zhejiang, and Jiangsu all indicate that investigators have actually appeared at trial and endured questioning on the legality of confessions. In-court witnesses, at least, can be cross-examined and challenged, but what about written records, explanations, or recordings? Moreover, all of the evidence supporting the admissibility of confessions is developed entirely by those seeking conviction, and it is not such a stretch to imagine that those willing to employ torture to break a case would be just as willing to lie or falsify records. Lawyers are not allowed to attend their clients’ interrogations, and the detention centers are under police control, so any foul play can be conducted and concealed behind firmly closed doors. Even when witnesses appear, it is likely that a ruling on an allegation of torture will ultimately hinge on a simple decision as to who is more credible, the police or the accused, and Chinese judges have everything to gain by siding with police.

25. Yang & Zhang, *supra* note 4.

IV. EXCLUDED BUT NOT FORGOTTEN

The most glaring problems with the Rules' design relate to what evidence must be excluded and what exclusion actually means. Although the Rules mention "exclusion of evidence" in their full title, in the actual text, the term "exclude" is only applied to testimony, while other evidence "cannot be the basis of conviction." Illegal testimony is defined as "statements by a criminal suspect or defendant obtained through illegal means such as forced confessions, as well as witness testimony or victim statements obtained through illegal means such as the use of violence or threats."

This definition immediately raises a number of concerns. First, the Criminal Procedure Law defines illegal evidence-gathering more broadly by forbidding forced confessions and evidence collected by threat, enticement, deceit, or other unlawful means.²⁶ The Rules seem to have entirely omitted the latter two methods. It remains unclear whether or not the "such as" is meant to encompass enticement and deceit, or if the Rules intentionally limit the scope of evidence to be excluded. Debate also continues as to whether "soft torture," such as denying food, sleep, comfort, or water, would be considered a forced confession.²⁷

A second problem involves the effects of exclusion. The Rules clearly state that excluded oral evidence cannot be the basis of conviction, approving arrest or indictment, but it remains unclear whether it can be used for other purposes, such as impeachment or as a factor at sentencing. The Rules have no mention of a "fruits of the poisonous tree doctrine," so one dangerous, but clearly permissible, use of an illegally extracted confession would be to gather leads in finding additional admissible evidence, witnesses, or suspects.

The failure to ban derivative evidence becomes particularly treacherous when related to multiple confessions by the

26. Criminal Procedure Law article 43.

27. Yang Ming 杨明 & Li Zhulin (李竹林), *Zhuanjia cheng feifa zhengju paichu xingui xuanshi yiyi dayu shiji zuoyong* (专家称非法证据排除新规宣示意义大于实际作用) [Experts Say that the Symbolic Value of the Exclusionary Rules Is Greater than Their Practical Effects], *LIAOWANG DONGFANG ZHOUKAN* (瞭望东方周刊) [ORIENTAL OUTLOOK], June 7, 2010, available at <http://news.sina.com.cn/c/sd/2010-06-07/172320428551.shtml>.

same suspect. After learning that an accused seller of counterfeit bills may have been beaten before confessing during his arrest, one Jiangsu prosecutor investigated and decided that the evidence should be excluded. To make sure he didn't lose the case on account of the violation, however, he interrogated the suspect again, recording the entire process, to supplement the evidence. When he appeared in court to indict, he proudly handed the court and police a notice saying that "defendant Gao's confession made before he entered the detention center has been excluded and doesn't serve as the basis for this indictment." The later confession, of course, was another story. If there is no inquiry into the independent voluntariness of a second confession, there is little to stop further interrogation from becoming a backdoor for admitting all illegal confessions. A suspect who has confessed once under torture is unlikely to understand that subsequent confessions might have a different legal significance or that torture won't resume if his story changes.²⁸

Finally, illegal testimony is defined to include both defendant's confessions and statements by witnesses or victims, but the Rules inexplicably treat these categories quite differently.²⁹ All the procedures discussed above expressly apply only to the accused's pre-trial confessions. Under article 13, the legality of witness and victim testimony may be challenged by either party, but only when the witness does not appear in court. The party submitting this evidence has the burden of proving that

28. For a discussion of multiple confessions under the Rules, see Wang Zhenfeng (王振峰) & Qin Jinsong (戚进松), "*Zhenju guiding*" you guan zhengju paichu guize de lijie he shiyong (《证据规定》有关证据排除规则的理解和适用) [On the Understanding and Application of the Exclusionary Rules found in the "Evidence Regulations"], 6 GUOJIA JIANGHAGUAN XUEYUAN XUEBAO (国家检察官学院学报) [JOURNAL OF NATIONAL PROCURATORS' COLLEGE] (2010), available at http://www.jcgxy.org/llpt/201012/t20101215_479486.shtml.

U.S. precedent has recognized that once a suspect has confessed once, he is more likely to do so again, but the law does not categorically exclude later confessions following an original inadmissible confession. *United States v. Bayer*, 331 U.S. 532 (1947). Instead, courts consider the voluntariness of the second confession.

29. Some U.S. courts distinguish between confessions of the defendant and witness statements as well, but this is rooted in Fifth Amendment protections, which provides specific protection against *self*-incriminating statements. The Chinese Criminal Procedure Law treats all methods of illegal evidence gathering equally, in a common article.

it was legally acquired, but no specific standards of proof for demonstrating legality are identified. The introduction of prosecutorial challenges implies for the first time that evidence may become illegal not only through police misconduct, but also through the improper evidence-gathering of the defense or third parties. If such challenges are abused by the prosecution, they could become a real barrier to the use of defense witnesses.

V. CONCLUSION

The Rules, even if strictly implemented, will not end the torture of Chinese criminal defendants. They represent a series of half-measures, likely the result of compromise among the drafting agencies; they make grand gestures towards procedural fairness, only to stop short of demanding it. The threat of lost convictions resulting from excluded confessions, for example, provides some incentive for police to reform their conduct, but allowing them to rely on evidence derived from illegal interrogations leaves ample utility in continued torture. Lawyers are allowed to directly challenge evidence and even cross-examine investigators, but are still not empowered to attend interrogations, where even their silent presence might deter police misconduct. Audio and visual recordings of interrogations are strongly encouraged, but there is no requirement that unrecorded confessions be excluded.

These issues are likely to remain academic. Those lawyers not cowed into avoiding the confrontation required to raise the issue of coerced confessions, find themselves in an uneven battle to make their case. Courts, predisposed to side with the police, demand proof of torture that lawyers are systematically prevented from gathering, while “public security and prosecutors may collect and tailor evidence according to their own needs, with almost no restrictions.”³⁰ Even when torture is exposed, police may face only a reprimand³¹ and are rarely

30. *Gongquanli zuo weizheng: wuren zhuijiu, wufa zhuijiu* (公权力作伪证：无人追究，无法追究) [State Power Perjury: No One to Investigate, No Way to Investigate], NANFANG ZHOUMO (南方周末) [SOUTHERN WEEKEND], Jan. 28, 2011, available at http://nf.nfdaily.cn/nfzm/content/2011-01/28/content_19689941.htm (quoting Criminal Procedure Prof. Zhou Xin of the China Public Security University).

31. *Id.*

prosecuted. Truly eliminating torture will require a transformation in legal culture, such that all tainted evidence is excluded, and torturers are prosecuted to the fullest extent.