

THE EXCLUSIONARY RULE IN CHINA AND A CLOSER LOOK AT THE DYNAMICS OF REFORM

BY HYEON-JU RHO*

Margaret K. Lewis's article provides a compelling analysis of the unique set of factors and motivating concerns underlying the PRC Government's adoption of China's first set of detailed, concrete procedures on the handling of evidence allegedly obtained through illegal means. Whereas analogous processes in other jurisdictions were motivated by "a change in government, a judiciary that is asserting the rule based on constitutional principles, or some combination thereof,"¹ Lewis insightfully notes that an overarching motivation behind the PRC Government's promulgation of the 2010 Evidence Rules was a desire to bolster its legitimacy in the face of public distrust of the government, thereby enhancing political stability and control. Looking forward, Professor Lewis poses a series of important and provocative questions about the impact of the exclusionary rule provisions of the 2010 Evidence Rules. Will they be "a mere symbolic integrity-enhancing device or, alternatively, actually gain traction and be applied widely in criminal cases?"² Will the 2010 Evidence Rules lead to a noticeable adjustment in the balance of power between actors in the criminal justice system and a "discernible deterrent effect?"³ And ultimately, will the 2010 Evidence Rules in fact bolster public confidence in the government and enhance government legitimacy or, alternatively, undermine it?

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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 L. & POL. 629, 639 (2011).

2. *Id.* at 644.

3. *Id.* at 679.

At the time of the writing of this Comment in February 2011, more than seven months have passed since the 2010 Evidence Rules went into effect. Although it is certainly too soon to draw any conclusions, reflections on implementation efforts to-date provide some indication of the Rules' potential impact, and illuminate the underlying dynamics of reform that are likely to affect implementation moving forward. This Comment suggests that in considering the possible impact of the 2010 Evidence Rules, we are not limited to assessing whether they are systematically implemented in individual cases or whether they serve as a symbolic expression of governmental integrity. Rather, by taking a broader view of the potential impact of the Rules, we can identify more nuanced ways in which the Rules are interacting with related, ongoing reform processes. In particular, initial developments since the Rules became effective indicate that the Rules have the potential to play an enabling role for internal administrative reforms within China's criminal investigative apparatus; to enhance the legitimacy of ongoing calls for greater criminal defense involvement in the criminal trial process; and to create new risks for government legitimacy stemming from non-implementation.

If we define impact solely in terms of the extent to which the new exclusionary rule procedures articulated in the 2010 Evidence Rules are being widely applied and used in individual cases, the initial signs are not encouraging. China Supreme People's Court (SPC) vice president Zhang Jun recently publicly acknowledged that the Evidence Exclusion Rules have not been "strictly implemented."⁴ Interviews with fifty members of the All China Lawyers Association Criminal Affairs Committee approximately four months after the Evidence Exclusion Rules went into effect found that overall, the defense attorneys found the Rules to be of little use.⁵ Many cited examples in which the courts simply ignored and declined to address attorney arguments that confessions had been illegally obtained.⁶ There have been some promising im-

4. 最高法：非法证据排除原则未严格执行，中广网，Jan. 10, 2011, http://www.yangtse.com/news/gn/201101/t20110110_782319.htm.

5. 非法证据排除规则施行4月律师称新规作用有限，望东周刊，Nov. 29, 2009, <http://www.hinews.cn/news/system/2010/11/29/011572352.shtml>.

6. *Id.*

plementation-related developments in a pilot project in Yancheng City in Jiangsu Province.⁷ For example, as of January 2011, the Yancheng courts had held three exclusionary rule-related evidentiary hearings in which the investigating police officers appeared and were subject to in-court questioning. These developments in Yancheng demonstrate, at minimum, that these kinds of evidentiary hearings, including the in-court questioning of investigating police officers, are feasible in China. However, the conditions under which the Yancheng courts are implementing the exclusionary rule procedures, including proactive efforts as a part of the pilot project to reach out to local police authorities and the active support and coordination of the local Party Political and Legal Committee, are not representative of local conditions elsewhere in China.

This is not to say that there are no prospects for broader implementation in the more distant future. However, the lack of implementation illustrates that it is not realistic to expect any one, discrete reform to fundamentally alter the underlying dynamics of the current criminal justice system that undermine implementation not only of the 2010 Evidence Rules, but also of earlier reforms included in the 2007 revisions to China's Lawyers Law and the 1996 revisions to China's Criminal Procedure Law (CPL).⁸ Lewis lists many challenges facing reform efforts: the institutional weakness of the courts vis-à-vis the police and procuratorate; a justice system culture that emphasizes close coordination and cooperation between the tripartite of the courts, police, and procuratorate rather than a system of mutual checks; the absence of counsel in the vast majority of criminal cases; defense counsels' limited access to clients and case-related materials; and disincentives for defense counsel to conduct independent investigations of case

7. This pilot project is being supported by the China University of Political Science and Law and the American Bar Association Rule of Law Initiative, with funding from the United States Agency for International Development.

8. See Lewis, *supra* note 1, at 652 ("It has proven difficult to graft reforms on to a system that bore strong resemblance to an inquisitorial model, combined with decades of socialist law or even the stark absence of formal law. At present, the situation is more like an inquisitorial system in adversarial clothing than one where the reforms have truly altered the everyday workings of the criminal justice system.").

facts. Exacerbating these challenges in the context of the Evidence Exclusion Rules is a long-standing reluctance of Chinese courts to make factual findings based solely on conflicting testimony, which would be necessary in the many cases without physical evidence of torture.

In considering the potential impact of the 2010 Evidence Rules, however, the analysis should not end merely at assessing the extent to which they are being implemented in individual cases. Following Lewis's suggestion to "ask how we judge if the rules are a success,"⁹ thinking more expansively about the potential impacts of the 2010 Evidence Rules may disclose additional layers of the reform process that move us beyond a dichotomy where the analytical choices are limited to mere symbolism versus wide application.

First, there are indications that the 2010 Evidence Rules are part of a broader series of largely administrative reforms within the criminal justice system establishing greater supervision over, and stricter standards for, the collection of evidence. As part of this larger reform context, the Rules express the central government's policy priorities and thus can contribute to generating a more enabling environment for related reforms. For example, a recent article in *The Legal Daily*, China's official media outlet for reporting on legal affairs, frames the 2010 Evidence Rules as a leading component of a series of government efforts to reform evidence in criminal cases toward the goal of preventing wrongful convictions, stating that "in the last two years, in particular after the issuance of the two evidence rules, various government departments have comprehensively promoted reform of the evidence system in criminal litigation."¹⁰ Among other reforms, the article highlights a July 16, 2010, Notice issued by the Ministry of Public Security (MPS) requiring public security departments to promote audio-visual systems for recording interrogations of suspects, and to prevent investigative personnel from using illegal means to collect evidence.¹¹ At the local level, the Jiangsu Provincial Public Security Bureau (PSB) announced at the end of July 2010 that all detention centers in Jiangsu Prov-

9. *Id.* at 48.

10. See 政法机关推进刑事诉讼证据制度改革力遏冤错案, 法制日报, Feb. 14, 2011, <http://www.wzrb.com.cn/article171089show.html>.

11. *Id.*

ince would be required to record interrogations of suspects in serious cases involving a sentence of ten or more years, life imprisonment, or the death penalty.¹² As part of this new policy, the Jiangsu PSB also developed standards for the management and construction of interrogation rooms, which require, among other things, that different individuals be involved in conducting and recording a given interrogation.¹³ Apart from internal guidelines requiring recording of interrogations, media reports cite new measures jointly adopted by the Liaoning Provincial Procuratorate and PSB to standardize the evidence collection practices of investigative personnel more generally.¹⁴

It remains to be seen how widespread these types of internal policy reforms within the public security apparatus and procuratorate¹⁵ will be, and whether they will actually result in a decrease in illegal investigative practices. However, the issuance of these new internal administrative standards following the promulgation of the 2010 Evidence Rules indicates that even as the new exclusionary rule procedure is framed in a language consistent with court-led protection of defendants' rights and greater judicial independence familiar to western legal systems, the Rules may simultaneously be part of a largely administrative reform process more consistent with current Chinese governance and reform practices. In other words, impact on criminal investigative practices may not necessarily be solely through application of the Rules in individual cases, against which the realities of the current Chinese criminal justice system pose considerable barriers, but rather through translation of the larger policy message behind the Rules into internal administrative standards within the public security and procuratorate systems—an avenue that does not depend on fundamental shifts in the relationship between the courts, police, and procuratorate. In this sense, the symbolism of the 2010 Evidence Rules has significance beyond being an “integ-

12. 江苏公安讯问室同步录音录像施行录制与讯问人员分离, 法制网, Jul. 30, 2010, <http://news.163.com/10/0730/09/6CR39BUL00014AEE.html>.

13. *Id.*

14. See 政府机关推进刑事诉讼证据制度改革力遏冤错案, *supra* note 10.

15. China's procuratorate, in addition to acting as the public prosecutor in all criminal cases, also takes on the investigative function in cases involving official corruption. Thus, “investigative personnel” in an official corruption case would refer to staff from the procuratorate, and not to the police.

rity-enhancing device”¹⁶ aimed toward the Chinese public. The Rules, issued by all of the key central government justice system bodies, can also be a tool to signal a policy imperative within the government itself, contributing to a more favorable environment for the issuance of related internal management reforms geared toward reducing the number of wrongful convictions.

Second, while the 2010 Evidence Rules are unlikely to fundamentally shift the balance of power among actors in the criminal justice system (in particular between judges and the procuratorate, and between judges and the police), the Rules, along with other recent criminal justice reforms, provide additional ammunition to ongoing calls for greater involvement of defense counsel in China’s criminal trial process. Although there are no official statistics on the percentage of criminal cases in China in which defendants do not have legal representation, a commonly cited statistic is that more than 70 percent of criminal defendants are tried without the benefit of an attorney.¹⁷ In addition, as Lewis notes, even in cases in which defendants are represented by counsel, defense lawyers are routinely denied access to their clients and to case documents, and information obtained through independent investigation that contradicts the prosecution’s evidence can trigger criminal prosecution for falsifying evidence.

Recent central government reforms, however—in particular the 2010 Evidence Rules and the Trial Opinion on Several Issues Regarding Standardizing Sentencing Procedure, which became effective on October 1, 2010, and was also issued jointly by the SPC, SPP, MPS, Ministry of State Security, and Ministry of Justice—have lent additional legitimacy to arguments that increased rates of representation and a more empowered criminal defense bar are essential to successful implementation of the PRC Government’s own criminal justice reform priorities. With regard to the 2010 Evidence Rules, for

16. Lewis, *supra* note 1, at 687.

17. See, e.g., 全国律协会长首谈“不作为”称自己并非傀儡, 新华网, Mar. 25, 2010, <http://news.qq.com/a/20100325/002278.htm> (featuring an interview with the president of the All China Lawyers Association, in which he estimates that the representation rate in criminal cases does not exceed 30%); 刑事案件律师辩护率不足一成, 北京日, <http://news.sina.com.cn/s/2005-08-29/11526808615s.shtml>, Aug. 29, 2005 (estimating that the national rate of representation in criminal cases is only 30 percent).

example, defense lawyers have rightly been identified as necessary to activate and operationalize the rule.¹⁸ With regard to China's recent sentencing reform,¹⁹ commentators have noted that without the active participation of defense counsel to gather and effectively present sentencing-related evidence, the reform only has the outside appearance of change, without any substantive difference from past practices.²⁰ While the 2010 Evidence Rules and the sentencing procedure reforms will not, in and of themselves, guarantee greater space for China's criminal defense lawyers to play a real and not merely decorative role in the criminal trial process, they are important additional pieces of a system that China is building—at least on paper—that increasingly requires an empowered criminal defense bar in order to function effectively. In this sense, these recent reforms enable reformers to align promotion of a more empowered criminal defense with PRC Government policy priorities, a useful opening in the face of an overall trend of increased scrutiny of lawyers' work.²¹

Third, the 2010 Evidence Rules increase public expectations of the justice system, even as they respond to public concerns about government integrity. These heightened expectations in turn create new risks for government legitimacy and social stability. Lewis highlights the symbolic value of the 2010 Evidence Rules in enhancing public perceptions of government integrity and legitimacy. She frames potential risk to the PRC Government in terms of negative public perceptions if the Rules are enforced too vigorously, resulting in letting guilty people go free by prioritizing technical violations over

18. 最高法：非法证据排除原则未严格执行 *supra* note 4.

19. The sentencing reform aims to increase transparency and fairness in sentencing in part by providing the prosecution and defense with an opportunity to present sentencing-related evidence and argument separate from the rest of the criminal trial.

20. See, e.g., 学者主张确立律师辩护最低标准, 人民法院报, Dec. 9, 2010, <http://www.acla.org.cn/pages/2010-12-9/s59031.html>; 中国社科院法学所熊秋红: 律师参与才能使量刑辩论实质化, 中国法学网, Oct. 17, 2010, <http://www.iolaw.org.cn/showNews.asp?id=24464>.

21. See, e.g., Ng Tze-wei, *Lawyers Count Their Bruises After a Year of Living Dangerously*, SOUTH CHINA MORNING POST, Dec. 30, 2010, <http://www.scmp.com/portal/site/SCMP/menuitem.2af62ecb329d3d7733492d9253a0a0a0/?vgnextoid=396995fed623d210VgnVCM100000360a0a0aRCRD&ss=China&s=News>.

substantive justice,²² or revealing too many flaws in the criminal justice system.²³ However, another kind of risk has already emerged in the seven relatively short months since the 2010 Evidence Rules became effective: the risk of non-implementation.

The case of alleged Chongqing crime boss Fan Qihang illustrated this risk most dramatically. Fan was tried and sentenced to death in February 2010 as part of a sweeping anti-crime campaign in the western Chinese city of Chongqing.²⁴ The sentence was upheld in May 2010 and subsequently sent up to the SPC for final review, as is required for all death penalty sentences in China. In July 2010, while the case was still being reviewed by the SPC, Fan's lawyer, Zhu Mingyong, submitted a videotape to the SPC in which Fan described torture he had endured while in detention and showed wounds on his wrists allegedly from being shackled with his hands behind his back and hung by his wrists from an iron window grille. On August 23, 2010, more than 100 prominent Chinese lawyers, writers, and activists released open letters to the SPC and Supreme People's Procuratorate (SPP), calling for both bodies to investigate the allegations of torture in Fan's case and in the Chongqing crime sweep.²⁵ On or around September 26, the SPC approved Fan's death sentence, and he was executed. Notably, the SPC's decision in the case did not address the supplemental evidence that Fan's confessions had been obtained through the use of torture.

22. "If the Chinese public comes to view the exclusionary rule as letting 'guilty' people go free due to technicalities, the rule could actually undermine public confidence rather than bolster it." *Id.* at 43.

23. "[V]igorous use of the new rules may be seen by the public as revealing the system to be so flawed that the whole orchard of law enforcement is infected, which could backfire and undermine the government's power." *Id.* at 48.

24. *See generally 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>.

25. An English translation of the open letter to the SPC is available at <http://chrndnet.org/2010/08/23/open-letter-requesting-supreme-people%E2%80%99s-court-immediately-to-open-an-investigation-into-the-use-of-torture-in-the-chongqing-anti-mafia-campaign/>, and the original Chinese version of the open letter to the SPP is available at <http://gb.hrichina.org/public/contents/20669>.

Fan's execution, and in particular the SPC's failure to address the allegations of torture, led to a public outcry. The most outspoken of the public statements against the SPC's response was an online posting by Yang Jianzhu, a criminal defense lawyer in Hunan Province. In his post, he publicly called for SPC President Wang Shengjun to resign and pointedly asked, "Do you know that the water that supports the boat can also topple it over?"²⁶ Yang's was perhaps the most dramatic response, but more mainstream voices expressed the same sentiment. At a forum in November 2010 held at Renmin University in Beijing and including participants from the criminal defense bar as well as from the SPC, a lawyer from Beijing directed a comment to the SPC participant that was representative of widespread sentiment at the time, stating "What we can't accept is that the SPC's ruling did not include a single word regarding the lawyer's arguments regarding the use of coercion to extract confessions."²⁷

The 2010 Evidence Rules, if not implemented, add to a larger tension in China's social and rule of law development, caused by the increasingly volatile gap between rights on paper and the reality of what the PRC government makes available in practice, potentially generating momentum for more fundamental reforms. Lewis notes, "The highest levels of government have voiced awareness and sensitivity to the potentially destabilizing effects of public dissatisfaction with the government and the role that law can play in countering this sentiment."²⁸ The initial reactions to non-implementation of the 2010 Evidence Rules, however, illustrate that law as a stabilizing tool carries unique risks, and that symbolic gestures to bolster government integrity through legal reforms can undermine that very integrity if the reforms are shown to be mere empty symbolism.

The ultimate impacts of the 2010 Evidence Rules remain to be seen, and reformers within the criminal justice system continue the important work of "mov[ing] the rule from the

26. The original Chinese post is available at <http://yjz560922.fyfc.cn/art/739880.htm>, and an English translation at <http://www.hrichina.org/public/contents/press?revision%5fid=190251&item%5fid=189880>.

27. 非法证据排除规则施行4月律师陈新规作用有限, *supra* note 5.

28. Lewis, *supra* note 1, at 685.

realm of gloss to substance.”²⁹ At the same time, taking a more expansive view of the potential impacts of the Rules opens up additional possibilities for understanding how the Rules may be contributing to broader, ongoing reform processes, even as the prospects for their implementation remain in question.

29. *Id.* at 636.