

PROOF IN MODERN LITIGATION

Evidence Law &
Forensic Science Perspectives



Edited by David Caruso
and Zhuhao Wang

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Selected proceedings

5TH INTERNATIONAL CONFERENCE ON EVIDENCE LAW
AND FORENSIC SCIENCE (ICELFS 2015)

Adelaide, South Australia, 20-23 July 2015



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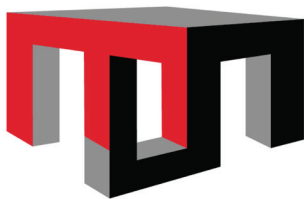
5TH INTERNATIONAL CONFERENCE ON EVIDENCE LAW AND FORENSIC SCIENCE (ICELFS 2015)

Held in Adelaide, South Australia 20-23 July 2015
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ICELFS 2015 – CONFERENCE STATEMENT

The ICELFS Program has its origins in the efforts of Professor Zhang Baosheng to introduce rules of evidence in Chinese courts. Professor Zhang studied under Professor Ronald J. Allen, the John Henry Wigmore Chair of Law at Northwestern University. In 2002, Professor Zhang returned to Beijing and his home University, the Chinese University of Political Science and Law (CUPL). By 2006, Professor Zhang had established the Institute of Evidence Law and Forensic Science within CUPL. The Institute, in turn, welcomed and invited Professor Allen to teach evidence law and to advise on the development of uniform evidence laws for Chinese courts. Professor Allen and Professor Zhang then worked together to welcome other international scholars of evidence law and forensic science to share their knowledge through teaching at the Institute.

In conjunction with this work, a biennial conference on evidence law and forensic science was conceived, to foster, develop and promote the work of the Institute. The first ICELFS was held at CUPL in Beijing in 2007. It was generously sponsored by CUPL, with the support of the Key Laboratory of Evidence Science of the Ministry of Education and co- sponsored by Northwestern University.

The first ICELFS was attended by a number of international delegates. They joined their Chinese colleagues to discuss and debate the content of the *Draft Uniform Provisions of Evidence of the People's Court (Proposals for Judicial Interpretation)* which had been developed. Since 2007, these laws have been trialed in selected courts of China for empirical assessment.

The success of the first ICELFS led to its continuation and expansion. It was biennially convened with conferences in 2009, 2011 and 2013. ICELFS attracted the support of the Collaborative Innovation Center of Judicial Civilization (CICJC), created through the Chinese Ministries of Education and Finance and of which Professor Zhang is currently Co-Chair. The CICJC now provides support to CUPL to bring to China, on a regular basis, internationally known, foreign scholars to take part in its law and forensic science programs.

At the 2011 ICELFS, the International Association of Evidence Science (IAES) was established. IAES formalised the relationships and work being undertaken to foster international collaboration between evidence scholars and forensic scientists and also took responsibility for the biennial ICELFS. The officers and members of IAES include

scholars and practitioners of law and science from Asia, the Americas, Europe, Africa and Australasia.

At the Council Meeting of IAES at the 2013 ICELFS, I submitted to the Council that the ICELFS Programs were of such merit and value to the international community of evidence law and forensic science, that ICELFS should further its ambitions by convening beyond the borders of China. The suggestion was considered by the Council with interest and support.

In 2014, Professor Paul Babie, the Associate Dean of Research for the Adelaide Law School and Faculty of Professions, met with Professor Zhang to further discuss bringing the ICELFS Program to Adelaide in partnership. The convention of ICELFS 2015 in Adelaide garnered the interest and support of the Deputy Dean of the Adelaide Law School, Associate Professor Christopher Symes, and the Dean of the Law School, Professor John Williams. Professor Williams gave the generous support of the Law School for ICELFS 2015.

In addition to the University of Adelaide Law School, ICELFS 2015 enjoyed the support of the Law Foundation of South Australia; Ms Karen Thomas, Managing Partner of Fisher Jeffries Barristers and Solicitors; the Right Honourable the Lord Mayor of Adelaide, Mr Martin Haese; the “2011 Plan” China Collaborative Innovation Center of Judicial Civilization (“2011 计划” 司法文明协同创新中心); the “111 Plan” China Base for Evidence Science Innovation and Talent Recruitment (“111 计划” 证据科学创新引智基地); CUPL (中国政法大学) and IAES.

ICELFS 2015 is the inaugural convention of ICELFS outside Beijing. The Proceedings over 20-23 July 2015 comprise more than 150 Speakers and Chairs from more than 10 countries. The ICELFS 2015 Delegation exceeds 250.

The Conference Program is testament to the work that has been dedicated to the Proceedings of ICELFS 2015 and the personal and professional relationships it has enriched.

The Conference is honoured by the attendance and support of the Chief Justice of Australia, the Honourable Robert S. French AC, and the Chief Justice of Tanzania, the Honourable Mohamed C. Othman. Their Honours’ interest in these Proceedings demonstrates the multinational importance of the issues addressed by ICELFS 2015.

Professor Zhang Baosheng began and grew ICELFS to enjoy magnificent success. I would like to extend sincere and deep personal thanks to Professor Zhang for entrusting the University of Adelaide, its Law School and Litigation Law Unit, to host the 5th ICELFS.

I would also like to extend my thanks and acknowledge the significant work of Assistant Professor Zhuhao Wang of CUPL. Professor Wang has worked meticulously on every detail of these Proceedings on behalf of CUPL.

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Each member of the Organising Committee has given their time to bring together these Proceedings. I particularly acknowledge Professor Chris Pearman, the Director of Forensic Science SA, who has been instrumental in ensuring the strength of the forensic program. Professor Gary Edmond, an Australian Research Council Future Fellow, took an immediate interest in this Conference and I am grateful to him for assembling two key specialist panels within the Program. I thank and acknowledge the Chief Justice of South Australia, the Honourable Christopher J. Kourakis, for the invaluable support his Honour gave every aspect of these Proceedings.

On behalf of the Organising Committee, I humbly thank the Chairs, Co-Chairs and above all, the Speakers, that constitute ICELFS 2015. The opportunity to sit within this assembly of distinguished colleagues, to learn of their work and to reflect on their words, is a rare privilege.

The Conference Secretariat and Litigation Law Unit Secretariat, Ms Charlotte Thomas, and Litigation Law Unit Associate, Mr Jordan Phoustanis, worked assiduously to ensure the success of these Proceedings and to meet the needs of delegates. Charlotte is in her final year of undergraduate law at the Adelaide Law School. Jordan graduated in 2015 with First Class Honours in Law and was awarded the University Medal for his outstanding academic achievements. Both will make significant contributions to the administration of justice. My thanks also to Ms Brigid Symes and Mr Jarrad Napier for their support and efforts throughout the Conference.

I am also much obliged to Chief Judge Muecke and Judge Millstead of the District Court of South Australia for seconding to the Conference the service of three Associates, Ms Cindy Chang, Ms Wei Xin Lee and Ms Tania Stevens, each of whom has been a wonderful assistant to these Proceedings.

Ms Rhiannon Black is the Event Coordinator of Adelaide Law School. Her contribution to these Proceedings defies an appropriate superlative. We who share in, learn from and enjoy this Conference are indebted to Rhiannon.

Finally, may I recognise my teacher, mentor, colleague and friend: Emeritus Fellow, Mr Andrew Ligertwood. Andrew is a Vice President of IAES. Andrew's treatise on the laws of evidence continues to inform the teaching of evidence law in South Australia and Australia. He continues to instill rigour in legal minds through his teachings at CUPL. The convention of ICELFS 2015 is in large measure the product of the esteem with which Andrew is held amongst legal and forensic thinkers and the eminence of his work.

The theme of ICELFS 2015 is *Proof in Modern Litigation: Developments and Reforms in Evidence Law and Forensic Science*. The Proceedings critique contemporary issues in evidence law and forensic science from the perspectives of law, forensic science, political science and cultural study. The principal focus is on the intersection of evidence laws and forensic science; in recognition that judicial decisions are dependent upon the accurate determination of facts. The search for just processes and reliable sciences is the quest for rectitude in decision-making: a concern for all courts in all countries.

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We gather to advance and develop systems of proof for the administration of justice through a comparative, interdisciplinary and international exchange. My best wishes in this rewarding and vital endeavour.

David Caruso

July 2015

POSTSCRIPT

The consolidation of knowledge from the 5th ICELFS into the pages you are about to read was made possible by a grant from the Law Foundation of South Australia and the Collaborative Innovation Center for Judicial Civilization. *Proof in Modern Litigation* includes some of the finest papers presented at the 5th ICELFS. On behalf of the authors chronicled in this work, I extend deep thanks to the Team of Editors and the University of Adelaide Press, led by Dr John Emerson and Ms Julia Keller, for their assiduous efforts in the publication of this record of scholarship.

1

AN INTERNATIONAL APPROACH TO EVIDENCE — CAN THERE BE ONE?

ANDREW ROBERTSON¹

ABSTRACT

The global nature of international arbitration requires a process retaining that which is essential and encourages rejecting that which may be culturally dear but is not necessary for a binding award. Discerning the difference is the difficulty but it is an endeavour which many have attempted. From an Australian perspective, this is demonstrated by publications such as the International Bar Association's 'Rules on the Taking of Evidence in Arbitration'. CIETAC has however made its own attempt to identify the essential evidential steps. Underlying these steps is also the potentially differing priorities seen as implicit in the process. The common law system can have misgivings with the Chinese emphasis on mediation in arbitration. How can we go about to further distilling the common elements to the rules of evidence from a Chinese and a Western perspective?

¹ Andrew Robertson is a partner at the national Australian law firm Piper Alderman, where he practices in commercial litigation. He has bachelor's degrees in economics, law (with honours) and commerce from the University of Adelaide and a master's in construction law from the University of Melbourne. He is a Fellow of multiple arbitral bodies: Chartered Institute of Arbitrators, Institute of Arbitrators and Mediators Australia, Australian Centre of International Commercial Arbitration and Philippine Institute of Arbitrators Inc.

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I. THE ROLE AND PURPOSE OF EVIDENCE

Confucius is quoted as saying, ‘The object of the superior man is truth’. In Western jurisprudence, as represented by English common law at least, the purpose of evidence is to aid in the discerning of the truth. In *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, Evatt J said on p. 256:

[the] rules of evidence ... represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party.²

This desire for processes that aid in the elucidation of truth is common across cultures. If the rules of evidence are the tool by which truth is sorted in contested environments, then it should be possible to produce rules of evidence that are applicable across cultures. However, that is not the case. While the goal may be consistent across cultures, the tools used to achieve this goal differ. All cultures will tend to preserve that which is intrinsically inherent to them. I suggest that there is a common consensus which should be capable of identification and expression while respecting the different approaches used by individual cultures.

II. INTERNATIONAL ARBITRATION AS A CASE STUDY

If there is something universal to be found in the rules for evidence and procedure for tribunals, such universality should, arguably, be most evident in the process of arbitrations conducted pursuant to *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (‘*New York Convention*’).³

The *New York Convention* was first concluded in New York in 1958. It sets out a process for mutual recognition and enforcement of arbitration agreements⁴ and the awards⁵ arising from those agreements. The treaty provides that arbitral awards bind the parties and are to be enforced in contracting states.

The *New York Convention* is a highly successful treaty with 156 parties adopting the common assertion embodied in the treaty: to recognise and enforce arbitral agreements and the awards that flow from them. The process that derives from that treaty, through necessity and need, is a synthesis of the approaches of many countries towards the elicitation of truth.

² *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256.

³ *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 UNTS 3 (entered into force 7 June 1958).

⁴ *Ibid*, art II.

⁵ *Ibid*, art III.

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The *New York Convention* has always been globally minded. The original ten contracting states involved four Asian states (the Philippines, India, Israel and Jordan), together with four European, one Central American and one South American state.⁶ Although there is no East Asian State in the original ten contracting parties, China has been a party to the convention for 27 years.

The differences in court systems from country to country, and perhaps an unease about those differences, mean that it can be very difficult to enforce court judgments from foreign countries. The *New York Convention* means that the arbitral award is often, therefore, of greater practical value than a court judgment if enforcement is sought in a foreign jurisdiction. Achieving a successful outcome at trial is of no utility if it cannot be enforced.

There are checks and balances in the *New York Convention* designed to ensure that any award sought to be enforced is consistent with the arbitral agreement and that the basics of the process leading to the award have been properly undertaken. One of the reasons that the *New York Convention* is so effective is the very limited terms prescribing the procedural elements required in an arbitration.⁷ This permits a flexibility to adapt to the individual systems of arbitration in the various contracting states.

The United Nations have been active in creating resources and materials to further the use of international arbitration. The United Nations Commissions on International Trade Law have produced material that have become widely accepted internationally. One of these is the Model Law,⁸ which provides a statement in legislative form to guide contracting states to the *New York Convention* in implementing the requirements of the *Convention* into legislation. Foremost, there is the UNCITRAL Model Law. However, more relevantly for this paper, UNCITRAL has also developed Arbitration Rules⁹ that can be adopted and used in international arbitrations, which also complement the Model Law but remain a standalone document.

These global influences on international arbitration are significant. The process and outcomes of international arbitration must obtain a base level of acceptability in all contracting states for the system to maintain its status. Otherwise, there is a danger

6 New York Arbitration Convention, *Contracting States* (2015) <<http://www.newyorkconvention.org/contracting-states>>.

7 *New York Convention*, art V(1)(a) through to (e) set out the grounds for refusing recognition and enforcement of the award.

8 *Model Law on International Commercial Arbitration*, GA Res 40/72 (1985), 112th Plenary meeting (11 December 1985); an English language version can be accessed at: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

9 *UNCITRAL Arbitration Rules*, GA Res 31/98 (1976), 99th Plenary meeting (15 December 1976); an English language version can be accessed at: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html>.

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that the contracting states will not remain in the *New York Convention*¹⁰ nor will new states adopt the treaty. Its longevity and success as a treaty demonstrates that it must be satisfying that base level of acceptability for contracting states.

The process of international arbitration, therefore, cannot adopt the world view of any one contracting state to the exclusion of others. It needs to retain that which is essential and to remove that which may be culturally dear but not necessary to the ultimate goal of a binding award. Discerning the difference is the difficulty.

Specialist international arbitration bodies or arbitral sections to international bodies are frequent and these have also sought to aid in the development of arbitral practice and knowledge.

From an Australian perspective, the publication from the International Bar Association's Rules on the Taking of Evidence in Arbitration¹¹ has been widely endorsed. It is a reference often cited in Australia as a guide to understanding what process should be adopted towards evidence in international arbitrations.

The International Bar Association has a global membership and reach. Although it is London based, it draws its members from many jurisdictions worldwide and this breadth of outlook is reflected in the publication itself. However, when considering the authorship of that document, I notice only one of the 16 members of the working party were from Asia, an English-educated engineer based in Hong Kong. While Asia is better represented in the subcommittee, would the document be different with a greater Asian input?

III. THE ASIA-PACIFIC PERSPECTIVE

The Singapore International Arbitration Centre¹² and Hong Kong International Arbitration Centre¹³ websites' commentary on their rules refer to the International Bar Association's Rules on the Taking of Evidence in Arbitration and the Australian Centre for International Commercial Arbitration ('ACICA') rules¹⁴ expressly refer to the document in Article 27.2, in the following terms:

10 *New York Convention* art XIII(1) provides that a Contracting State may denounce the treaty by the giving of one year's notice to the Secretary-General of the United Nations.

11 International Bar Association, *International Bar Association's Rules on the Taking of Evidence in Arbitration* (29 May 2010) International Bar Association; an English language version can be accessed at: <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC>>.

12 Singapore International Arbitration Centre, *Articles* (22 May 2004) <<http://siac.org.sg/component/content/article/61-our-rules/166-guides>>.

13 Hong Kong International Arbitration Centre, *Arbitration Rules Guidelines* (2013) <<http://www.hkiac.org/en/arbitration/arbitration-rules-guidelines>>.

14 Australian Centre for International Commercial Arbitration, *Arbitration Rules* (1 January 2016); an English language version can be accessed at: <<https://acica.org.au/arbitration-rules/>>.

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The Arbitral Tribunal shall have regard to, but is not bound to apply, the International Bar Association Rules on the Taking of Evidence in International Arbitration in the version current at the commencement of the arbitration.

This is not surprising, as the International Bar Association is an English body and these three jurisdictions, while located in the Asia Pacific, sourced their jurisprudence from the English common law.

The China International Economic and Trade Arbitration Commission ('CIETAC') has its own rules for the taking of evidence,¹⁵ which may be seen as broadly consistent with IBA rules in their expression. Comparing the structure and the layout of the two approaches is of interest, more for their similarity than their disparity. However, the CIETAC rules are more heavily focused on matters which are usually considered procedural in Western jurisdictions. Therefore, there are Articles in the CIETAC document which might otherwise be expected by a Western lawyer to be in the procedural rules. The CIETAC Guidelines on evidence contain provisions the subject matter of which are in the UNCITRAL Rules. As a result, the CIETAC Guidelines are best compared both with the IBA Guidelines and the UNCITRAL Rules.

The content of the guidelines is not the only difference. They also have a different status. The preamble of the rules emphasises that they are not integral to arbitration. Their application and use is a matter for submissions of the parties and the consideration of the tribunal. The language in Article 27.2 of the ACICA rules requires regard to be had to the International Bar Association document.

A. Evidence Rules Contain Cultural Elements

It is, perhaps, reasonable to consider why, if all systems are seeking the same goal, which is truth, all systems are materially different in the first place. If we keep evaluating these issues, the cultural elements can and will continue to reduce the differences. To work on these differences, we need to explore where they have come from. What follows is by necessity a broad generalisation.¹⁶

In the West, there are broadly two distinct legal systems: the common law and the civil law.

The common law world includes countries such as the United States of America, the United Kingdom, Australia, Canada, New Zealand, Singapore and Malaysia. These systems tend to have a very adversarial approach to dispute resolution, so that the focus is on the parties' advocates to bring the evidence forth and, where necessary, to contest

¹⁵ China International Economic and Trade Arbitration Commission, *China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules* (1 January 2015); an English language version can be accessed at: <<http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en>>.

¹⁶ There are far better analyses done by others such as in A Redfern and M Hunter, with N Blackaby and C Partasides, *The Law and Practice of International Commercial Arbitration*, (Thomson Sweet and Maxwell, 4th edition, 2004) at 6-62.

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the other party's evidence. The focus of this system tends towards limitations on what the parties' advocates may properly do. The Judge sits above and outside of this contest. Historically, but no longer in Australia, the contest would be resolved with a jury determining the facts, subject to the Judge supervising and determining the law. Hence, controls needed to be in place in order to limit the opportunities for juries to be swayed by appeals to emotion or rhetoric rather than logic.

This also creates an emphasis on rights of being heard. If the advocate is the instrument of justice then the advocate must be permitted to know the case against her/his client and be afforded an opportunity to speak for her/his client. This concept becomes so embedded in the common law systems that is actually called by several names:¹⁷ procedural fairness, the *audi alteram partem* principle (to hear the other side) and natural justice. That terminology is interesting: the common law refers to the concept as natural. This process of being heard and responding is seen as natural and inherent, elemental to doing justice in a fact-finding process. To not follow it suggests a process which is wrong or unnatural.

Essential to being heard is an understanding of what you are responding to. To be given an opportunity to respond, without knowing what is put against you, is a meaningless exercise.

Then, there is the civil or codified law commonly seen across continental Europe and countries which descended from those systems. These systems are far more inquisitorial, with the decision-maker having a greater role in the process than that which occurs in the common law system.

This creates a system less concerned with the need to protect witnesses from improper evidence and less emphasis on court room advocacy. Civil systems place a greater reliance on documentary evidence over oral testimony and the work of the trial advocate. This creates a different perspective on the process of identifying the truth. The *audi alteram partem* principle is also found in civil law, although I do not express expertise in civil law principles.

There are also mixed systems, due to the nations' historical or geographic location, where they have elements of both common law and civil law systems. Examples include the Philippines and Scotland. This demonstrates that even in the Western systems, there are multiple approaches to determine the truth in contested hearings, which are all deemed acceptable, albeit different arising from the varied cultural and historical background.

The *audi alteram partem* principle is one element of procedure which is reflected in the *New York Convention* itself. Article V(1)(b) provides that a ground for refusal and enforcement of the award includes where '[t]he party against whom the award

17 I accept that conflating these concepts is an over-generalisation but I am focusing on the common underlying principles.

is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case’.

The Chinese context places a significantly greater emphasis on consensus dispute resolution, as noted by other speakers on today’s panel, than these other systems do. This consensus process is more than an inquisitorial process, but is closer to mediation in a Western context.¹⁸ This is relatively unknown in an Australian context.

IV. DIFFERENCES

The CIETAC Guidelines on Evidence contain a significant amount of material that is familiar to either the IBA Guidelines and/or the UNCITRAL Rules. There are, however, elements which a common law lawyer would be surprised to see.

A. Inquisitorial

Many of the differences reflect the inquisitorial nature of the proceedings in CIETAC arbitrations. Article 11 CIETAC provides that the tribunal itself is able, on its own initiative, to require a party to produce any evidence that the tribunal considers necessary. Such intervention is unknown to a common law litigation lawyer. It highlights a difference that is cultural — there is nothing inherently inconsistent with the evidence gathering process in providing mechanisms for a tribunal, if it is seeking to do so, to engage in an inquisitorial process as long as it keeps an open mind and does not pre-judge.

Article 27(3) UNCITRAL Rules could be seen as broad, but the Article is silent as to whether this can be done on the tribunal’s own initiative. Article 27(3) has, on occasions, been used by arbitral tribunals on their own initiative.

The inquisitorial nature is also reflected in Article 17 CIETAC which indicates that in the examination of witnesses, the tribunal may put a question at any time (Article 17.6). Again, this is unusual in the common law context.

However, in international commercial arbitration, and arbitration more broadly, the tensions arising from the adversarial-inquisitorial divide are now familiar. These provisions, while surprising in an Australian litigation context, are less so in an international commercial arbitration context.

B. Mediation-Arbitration

It is in the approach to mediation-arbitration where the cultural difference may be starkest.

¹⁸ As noted in *Gao Haiyan and Another v Keeneye Holdings Ltd and Another* [2012] 1 HKLRD 627; while the process may be translated as mediation, in practice it differs from what mediation is understood to involve in an Australian context.

1. Australian Domestic Arbitration Legislation

Australia used to have its own bespoke arbitration for domestic arbitrations. It was repealed a few years ago and the contrast between the handling of these two sets of legislation mediation are interesting. What is perhaps even more interesting is the way these legislative provisions were received.

Australia's now repealed domestic arbitration legislation used to permit conferences, known as Section 27 conferences for the section of the Act¹⁹ in which the relevant provision was contained, which permitted elements of mediation in arbitration. These provisions were rarely used. When they were used, they were used in a very restricted manner or with different individuals acting as arbitrator and mediator.

The view was expressed by one learned author in this way:

The current view of the majority of the legal profession is that an arbitrator who conducts a s27 conference cannot later act as an arbitrator in relation to the same dispute without almost inevitably infringing the rules of natural justice.²⁰

The concerns with the same person acting as mediator-arbitrator were multiple:

This analysis is based on the danger that, in the course of the s27 conference, the mediator-arbitrator will either form or disclose his or her opinions of the merits of the parties' respective cases in such a way as to prevent him or her from being regarded as unbiased in any later resumption of the arbitration proceeding.

A further problem is that, in the course of a conciliation conference, the arbitrator may obtain information which would prejudice his or her conduct of later arbitration proceedings.

These concerns are reflected in Articles 19 and 20 of the UNCITRAL conciliation rules, which expressly prevent the conciliator from playing any further part at all in the subsequent arbitration, and from making any further use of the conciliation materials.

The UNCITRAL Conciliation Rules referred to are rules specifically for conciliation.²¹ They remain current although they are now 35 years old. They reflected the accepted position at that time in the international community.

Australia's domestic commercial arbitration legislation was amended approximately five years ago so that it more closely followed the UNCITRAL Model Law. The new statutes contain a provision in Section 27D(4) that

19 The now largely repealed *Commercial Arbitration Acts* in common form across Australia's States and Territories passed in the early 1980s. The replacement legislation is also perhaps confusingly called the *Commercial Arbitration Acts* but passed in the early 2010s, e.g., *Commercial Arbitration Act 2010* (NSW).

20 Adrian J Bradbrook, 'Legal Issues for Lay Commercial Arbitrators' (1998) 20 *Adelaide Law Review* 265, 286.

21 *UNCITRAL Conciliation Rules*, GA Res 35/52 (4 December 1980); an English language version can be accessed at: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980Conciliation_rules.html>.

[a]n arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings.²²

Prior agreement, by the adoption of a form of rules at the time of the arbitration agreement, would not be sufficient as the agreement must be 'on or after the termination of the mediation proceedings'.

This suggests, however, a movement over the last decade in terms of the attitude to mixed mediation and arbitration. In Australia, discussion of what tends to be called 'med-arb' has grown significantly, including publication on how to conduct med-arb without infringing the requirements of natural justice.²³

2. CIETAC's approach

The China International Economic and Trade Arbitration Commission's Guidelines on Evidence²⁴ have dealt with the same issue without the concerns reflected above. Article 19.2 provides simply that '[e]vidence adduced and information disclosed only in the course of mediation proceedings shall not be admissible in the arbitration, and shall not be permitted to form the basis for the arbitral award'.

The common law is familiar with the tribunal receiving evidence for the purpose of determining admissibility, in which, if the determination is that the material is not admissible, it is to be disregarded and not taken into account by the tribunal. That is effectively the approach of Article 19.2. However, this is not the Australian approach because of the concerns around perceptions of bias and the issue of natural justice.

It seems to me that it would be possible to craft an approach that could go some way to respecting these two contrasting approaches.

3. Other international views

The UNCITRAL Rules have already been discussed.

Article 17(4) of the UNCITRAL Rules presents the same difficulty discussed previously with respect to Section 27 conferences in the old domestic Australian arbitral context. It is a black letter rigid approach that '[a]ll communications to the arbitral

22 *Commercial Arbitration Act 2010* (NSW) s 27D(4).

23 See a paper by Robert Angyal SC available at the NSW Bar Association site. Though I cannot identify a direct URL, it can be found in a Google search 'Robert Angyal med-arb'. It was of interest for discussing the same concerns as the paper by Professor Adrian Bradbrook but seeing them as issues to be navigated past rather than road blocks.

24 China International Economic and Trade Arbitration Commission, *Guidelines on Evidence* (1 March 2015) <<http://www.cietac.org/index.php?m=Page&a=index&id=107&cl=en>>.

tribunal by one party shall be communicated by that party to all other parties'.²⁵ The approach reflected in that rule prevents an arbitrator from undertaking a mediation-arbitration approach. If a mediation is undertaken in name, then in form it must be truncated. It is not truly a mediation, as understood in Australia, if it cannot involve speaking to one party without the other present.

These same concerns have also arisen in Hong Kong when considering mainland arbitrations, as discussed below.

V. CONFLICT IN SUBSTANCE OVER FORM

The conflict between Chinese system and the common law traditions can perhaps best be seen in the application of the rules and the difficulties seen when the Chinese emphasis on consensus and mediation is encountered by the common law system. This conflict was demonstrated in *Gao Haiyan and Another v Keeneye Holdings Ltd and Another* [2012] 1 HKLRD 627, where, at first instance, a Hong Kong court refused to enforce the arbitral award from Xian.

At first instance the enforcement of an award issued by a three-member tribunal appointed by the Xi'an Arbitration Commission was refused. At issue was the fact that prior to the award there was a failed attempt at mediation conducted at a dinner. The accepted facts, as held by the Trial Judge were:²⁶

there is no dispute that at least the following events took place:

- (1) Following the first sitting, the members of the Tribunal decided to suggest to the parties to settle the case by the Respondents paying RMB 250 million to the Applicants. The Tribunal appointed Pan Junxin (XAC's Secretary General) and Zhou Jian (an arbitrator) to contact the parties with this suggestion. Pan and Zhou were appointed because they were based in Xian, whereas Jiang Ping and Liu Chuntian (the other 2 arbitrators) were based in Beijing.
- (2) Pan's office communicated the suggestion to Kang Ming, a lawyer acting for the Applicants.
- (3) Pan and Zhou contacted Zeng Wei and asked him to meet them at the Xian Shangri-la hotel over dinner. Zeng Wei is a shareholder of Angola. Zeng was contacted because he was regarded as friendly with the Respondents. During the arbitration, Zeng through a mutual acquaintance had sought to get in touch with Pan. Zeng had described himself at this time as 'a person related to' (關係人) the Respondents. But Pan had initially refused the request. When the Tribunal came up with its RMB 250 million proposal, Pan remembered Zeng's request and Zeng's description of himself. Pan then asked Li Tao for Zeng's contact number.

²⁵ *UNCITRAL Conciliation Rules*, GA Res 35/52 (4 December 1980) art 17(4).

²⁶ *Gao Haiyan and Another v Keeneye Holdings Ltd and Another* [2012] 1 HKLRD 627 (C.A.) [42].

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- (4) The persons at the Xian Shangri-la hotel dinner were Pan, Zeng and Zhou Jian. Pan told Zeng about the Tribunal's RMB 250 million proposal and asked Zeng 'to work on' the Respondents.
- (5) The Respondents refused to pay RMB 250 million to the Applicants.
- (6) The Applicants subsequently informed the Tribunal that the Applicants were not prepared to settle the dispute with the Respondents for RMB 250 million.

The mediation was therefore held after the first sitting of the arbitral panel, but before the second sitting. The mediation involved one of the arbitrators and views as to the outcome were expressed. When discussing med-arb in Australia, the view is often taken that as mediator the approach should be facilitative, that is to help parties engage with the process, but not evaluative, which is to express views as to outcomes as part of the process.

On appeal, the issues were whether, by their silence, the Respondents had waived their right to complain about the mediation process by not raising the issue earlier, specifically at the second subsequent sitting of the arbitral tribunal, and whether they had not waived their right to complain was apparent bias established through the conduct of a mediation in circumstances of what occurred at the Shangri-La Hotel over dinner.

On appeal, the Court of Appeal enforced the award. Notably, the Court looked not to the form of what took place but the substance. The Court acknowledged that things may occur differently in other jurisdictions but it is whether the difference is one of substance or of perception. Vice President Hon Tang held:

With respect, although one might share the learned Judge's unease about the way in which the mediation was conducted because mediation is normally conducted differently in Hong Kong, whether that would give rise to an apprehension of apparent bias, may depend also on an understanding of how mediation is normally conducted in the place where it was conducted. In this context, I believe due weight must be given to the decision of the Xian Court refusing to set aside the Award.

It is considering matters in this manner that we can further reduce the differences.

VI. WE CAN FOCUS ON THE SIMILARITIES OR THE DIFFERENCES

We can choose to focus on where the approaches differ or where they are similar. We tend to do the former because it is usually the differences which are interesting and engaging, but what should not be over-looked is the extent to which the approaches are similar.

There is much that is similar or reconcilable, but it is when we continue to discuss the differences and look as to why they exist that we can identify what is truly essential and what can be accommodated to respect all concerns.

VII. CONCLUSIONS

I suggest the following about the differences between the CIETAC approach and the IBA/UNCITRAL approach to issues of evidence and procedure:

1. The systems are more noted for their similarity than difference. This is only to be expected because no one system can claim to have priority and all contracting states to the *New York Convention* have a need to see a base level of performance.
2. In the Chinese approach, the focus in discussing evidence is mixed with procedure. The evidence guidelines do not have the detail nor status that a Western lawyer may assume. The arbitrators are more empowered, both expressly to seek consensus and be inquisitorial but also implicitly in not being restricted. If this is of concern, it comes back to the old adage that the most important part of the arbitral process is: 'choose your arbitrators wisely'. If you have trust in your arbitrators, then you are more likely to have trust in the process.
3. The Chinese approach is more inquisitorial than in the common law world and involves mediation in ways with which they are not familiar. However, there is nothing inherently inconsistent with the processes that exposure and education will not resolve.
4. It might assist all sides if it was possible to gauge in the Rules or in the Guidelines the limits of conduct to demonstrate an awareness of the concerns of the other. One of the strengths of the *New York Convention* is that it avoided being overly prescriptive. However, it does identify minimum standards of conduct to demonstrate the base level of what is acceptable and what is prohibited. What may provide a way forward is by identifying greater commonality in these approaches is through statements that are broad and flexible to permit individual cultural circumstances to be respected, but still identify base levels of what is acceptable and what is prohibited. We should be able to produce guidelines that either a Chinese or Australian arbitrator could read and feel comfortable in implementing as arbitrator.

There are different views as to the process of arbitration. However, there is a very real opportunity, with conferences such as this, to further synthesise the approaches in the hope of finding a more robust international approach to evidence.

2

EXCLUSIONARY RULE OF ILLEGALLY OBTAINED EVIDENCE IN JAPAN

RUN NI¹

ABSTRACT

The exclusionary rule for illegally obtained evidence is pertinent in Japan's evidence law, which greatly promotes the development of evidence law in Japan from its establishment since 1978. In 1978, the Supreme Court of Japan established the exclusionary rule of illegally obtained evidence in the Osaka Drug Case, in which, while checking the defendant's items, the investigator put the hand into the defendant's jacket and pulled out drugs wrapped in a plastic bag from the defendant's pocket without the defendant's consent. Japan's Supreme Court held that it is improper to admit illegally obtained evidence from the perspective of preventing illegal interrogation in the future, when the illegal search has seriously violated the regulations related to the writs in this case. Later, the 'serious violation' criterion, 'illegal inheritance' and 'close relevance' criterion were also used to judge whether or not illegally obtained evidence should be excluded and what criteria may necessitate this. In addition, the admissibility of illegally obtained evidence with the defendant's consent and evidence illegally collected by individuals will be discussed in this article.

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I. INTRODUCTION

Before World War II, Japan's *Criminal Procedure Law* was deeply influenced by the traditions of Continental law, which paid great attention to the discovery of the truth of the facts of the case. During this period, there was no exclusionary rule of illegally obtained evidence in Japan, and illegally obtained evidence possessed admissibility. Remedies for illegally obtained evidence was available through compensations and investigators' penalties.

While after World War II, Japan's *Constitutional Law*, deeply influenced by America, accepted the 'due process' concept of common law and added ten provisions relating to the fundamental rights, providing protection into criminal law. This included provisions relating to the writs, cause of action, cross-examination, and the confession and hearsay rules. However, both the *Constitutional Law* and *Criminal Procedure Law* of Japan have avoided the exclusionary rule of illegally obtained evidence. In 1949, soon after enactment of the current *Criminal Procedure Law*, Japan's Supreme Court made a judgment stating: 'even if the collection of evidence is against law, the nature and the shape of the evidence itself has not been changed, so whether the evidence can be used in ascertaining the case facts depends on *intime conviction* of judge in court'.²

Later, with the increasingly deep influence of the American 'due process' concept, scholars in Japan have begun to study American exclusionary rules of evidence, which have affected the judicial practice in Japan. At first, Tokyo's High Court had the opinion that 'it is possible to suppress illegal search by using exclusionary rules of evidence' in its judgment; then other courts, such as Osaka's High Court, began to adopt exclusionary rules of illegally obtained evidence in their judgments. However, their judgments were overruled by Japan's Supreme Court. Until 1978, Japan's Supreme Court confirmed the exclusionary rule of illegally obtained evidence in the *Osaka Drug Case*.³ In this case, while checking the defendant's items, the investigator put the hand into the defendant's jacket and pulled out drugs wrapped in a plastic bag from the defendant's pocket without the defendant's consent. Japan's Supreme Court held that it is improper to confirm the admissibility of illegally obtained evidence from the perspective of preventing illegal interrogation in the future, when the illegal search has seriously violated the regulations related to the writs. This is the leading case of exclusionary rule of evidence in Japan. It should be noted that exclusionary rules of evidence in Japan are created by Japan's Supreme Court in the case. Until now, they are still not regulated in Japan's *Criminal Procedure Law*, and exclusionary rules of evidence in Japan apply only to material evidence, not to verbal evidence because Japan's *Criminal Procedure Law* has stipulated a confessions rule especially dealing with verbal evidence.

2 Supreme Court of Japan, SaibanshuKei 15/349, 13 December 1949.

3 Supreme Court of Japan, Keishu 32/6/1672,7 September 1978.

II. THEORETICAL GROUNDS AND CRITERIA OF ILLEGAL EVIDENCE EXCLUSION

A. Theoretical Grounds

On the grounds of exclusionary rules of illegally obtained evidence, there are mainly three theories that exist in Japan. They are: (1) the Norms Theory, (2) the Judicial Integrity Theory and (3) the Effect Preventing Theory. Specifically, (1) the Norms Theory (that is Constitutional Protection Theory) holds that the use of evidence obtained illegally violates *Constitutional Law* and *Criminal Procedure Law*. The opinions against it hold that it is inappropriate to release criminals for the sake of *Constitutional Law* and *Criminal Procedure Law*. (2) The Judicial Integrity Theory (that is Judicial Flawless Theory) holds that it betrays the trust of citizens to use evidence obtained illegally. However, the opinions against this hold that it is to betray the citizens to release criminals. (3) The Effect Preventing Theory holds that in order to prevent potential illegal investigation, excluding illegally obtained evidence is the best method. However, the opinions against it hold that it cannot be proved that this is the best way. Some scholars suggest that the Effect Preventing Theory is the most important ground to suppress illegal evidence, while some scholars suggest that any of the three grounds is appropriate.⁴

B. Theoretical Criteria

On standards of illegal evidence exclusion, there are mainly two theories in Japan: (1) the Absolute Exclusion Theory and (2) the Relative Exclusion Theory. The Absolute Exclusion Theory holds that the criterion of exclusion is whether the interrogation procedure violates the law. Specifically, there are two different interpretations of it. One refers only to violations of fundamental rights under the Constitution whereas the other refers to a seriously illegal investigation.⁵ Here, the 'seriously illegal' investigation requires the following four aspects: (a) violation of the regulations related to the writ; (b) violation of the basic human rights of the defendant; (c) violation to the extent of criminal penalties; (d) violation of the mandatory provisions related to investigation in *Criminal Procedure Law*.⁶

Some scholars hold that the Absolute Exclusion Theory is close to the already explained Norms Theory. The opinions against it hold that if the evidence is excluded because interrogation procedures violate the law, then the court will be cautious in judging the problem of interrogation procedures. The Relative Exclusion Theory holds that the evidence is absolutely excluded if it violates the Constitution, but in other circumstances, evidence exclusion should be determined comprehensively from judicial integrity and with the view of preventing illegal investigation. Specifically, the extent and

4 Shigetsugu Suzuki, *Criminal Procedure Law* (Seirinn shoin Press, 1990) 227.

5 Touyou Atsumi, *Criminal Procedure Law* (Yuhikaku Press, 2009) 185.

6 Yutaka Tamiya, *Criminal Procedure Law* (Yuhikaku Press, 1996) 402.

condition of violation, whether a causal relationship exists between the violation and the evidence, the intention of the investigators, the nature of the case, the importance of the evidence, and so on, all should be considered.⁷ The opinions against it hold that it will inevitably lead to an emphasis on punishment instead of excluding evidence to consider the seriousness of the case and the importance of the evidence. Also, the opinions supporting it hold that it is reasonable to consider comprehensively all the elements case by case.

III. TRENDS AND CRITERIA OF CASES ON ILLEGAL EVIDENCE EXCLUSION

A. Establishment of the Exclusionary Rule in Cases

Japan's Supreme Court established the exclusionary rule in the *Osaka Drug Case* in 1978. In this case, while checking the defendant's items, the investigator put the hand into the defendant's jacket and pulled out drugs wrapped in a plastic bag from the defendant's pocket without the defendant's consent. Japan's Supreme Court ruled that on the admissibility of the evidence collected illegally, *Constitutional* and *Criminal Procedure Law* had no regulations, so this problem should be interpreted to be dealt with according to the interpretation of *Criminal Procedure Law*. In judging whether the drug collected in the illegal check of the items possessed admissibility, Japan's Supreme Court held that

it is necessary to protect the basic human rights of individuals in ascertaining the truth of the facts of the case, so proper procedures are required. Except in situations which are stipulated in Article 33 of the Constitutional Law and in which the writ is provided, Article 35 of Constitutional Law guarantees the right that the accommodation shall not be violated, searched or seized. According to the stipulation, Criminal Procedure Law strictly regulates the situation in which could be searched and seized. According to the due procedure provisions of Article 31 of Constitutional Law, the ignorance of the writ in the seizure of evidence is deemed as a serious violation of the law. The items collected in this way can be used as evidence, but to prevent future illegal investigation, it is not appropriate, and the admissibility of the evidence should be denied.⁸

This case was the first time that Japan's Supreme Court positively responded to the exclusionary rule of illegal evidence, and of course it is the leading case. In this case, Japan's Supreme Court established the exclusionary rule of illegal evidence. However, in this case, Japan's Supreme Court also held that, 'although in this case the investigator's behaviour of taking out the drugs from the defendant's pocket without the defendant's consent, was illegal, the investigators did not intend to break the rules of the writ, and did not use force, so this kind of illegal behaviour just slightly exceeded the limit allowed

⁷ Masahito Inoue, *Evidence Exclusion in Criminal Procedure* (Koubunn dou Press, 1985), 404.

⁸ Supreme Court of Japan, Keishu 32/6/1672,7 September 1978.

for item check', so the admissibility of the drugs obtained through the illegal check should be confirmed.⁹

It can be seen from the judgment that the attitude of Japan's Supreme Court towards the exclusionary rule of illegal evidence at that time was not clear. That is to say, that at first, the Court held that the illegal behaviour did not change the nature of the evidence, and had no effect on the proof. However, later, from the perspective of protecting human rights, the admissibility of the evidence should be denied; and finally the Court held that the behaviour was deemed as illegal, but was not seriously illegal, and so ruled that the evidence collected illegally would not be excluded. Therefore, Japan's Supreme Court was quite cautious in judging whether the illegally obtained evidence should be excluded.

After the *Osaka Drug Case*, the issues in judicial practice of Japan have been: (1) whether the behaviour of investigators was illegal, and if it was, whether it was seriously illegal; (2) whether the exclusion of evidence could prevent the illegal investigation, that is, taking both the 'serious violation' criterion and 'preventing of illegal investigation' criterion into account. The 'serious violation' should mainly consider the extent and condition of violation, whether a causal relationship exists between the violation and the evidence, intention of the investigators, the nature of the case, the importance of the evidence, and so on (that is Relative Exclusion Theory).

After the illegal investigation behaviour has been considered as a 'serious violation', it shall be measured in the next step — whether the exclusion can prevent the illegal investigation, which is mainly to prevent the recurrence of similar illegal investigation behaviours in the future, and only the evidence exclusion which can achieve this purpose could be excluded. For example, (1) this violation happens often despite the minor degree of illegality; (2) investigators evade the regulations related to writs intentionally in spite of the minor degree of illegality.

In practice, there are no cases which confirm the 'serious violation' criterion and meanwhile deny the criterion of 'preventing illegal investigation'. Therefore, in practice, whether the evidence is excluded is actually judged by the 'serious violation' criterion in almost all the cases, so the 'serious violation' criterion is of decisive significance in judging the exclusion.

B 'Serious Violation' Criterion

After the *Osaka Drug Case*, Japan's Supreme Court made several judgments concerning drug crime in succession, all of which held that the investigator's behaviour was illegal, but confirmed the admissibility with the reason that they do not satisfy the 'serious violation' criterion. For example, in a case in 1986, investigators not only entered the defendant's bedroom without consent, but also took the defendant to the police station

⁹ Supreme Court of Japan, Keishu 32/6/1672, 7 September 1978.

by the way of accompany with consent. After that, investigators detained the defendant in the police station by rejecting the defendant's request to leave, and they required the defendant to offer a urine sample for analysis. In this case, Japan's Supreme Court held that 'the behaviour of entering the defendant's house, taking away the defendant and collecting a urine sample is a procedural violation but not a 'serious violation', so the Court ruled that the urine sample collected by the investigators illegally was admissible.¹⁰ Another example is of a case in 1988. The investigators took the defendant to the police station forcibly against his will, checked the items in his possession and collected a urine sample from him. The investigators detained the defendant after they found drugs hidden in a fallen paper parcel of the defendant. Japan's Supreme Court held that

the behaviour of taking the defendant to the police station forcibly without the defendant's permission was illegal, and so was the behaviour of gaining evidence under this compulsive behaviour; meanwhile, collecting the defendant's urine under such conditions was a procedural violation. However, the defendant having been arrested and being searched in urgency does not constitute a serious violation. Thus, the urine sample that was collected was admissible.¹¹

A case in 1994 concerned similar aspects: when questioning the defendant suspected of taking drugs, the investigators seized the key of the car driven by the defendant and arrested him at the scene. About six hours later, the court issued a search and seizure warrant, based on which the investigators collected a urine sample. The urine sample showed a positive result for drugs. In this case, Japan's Supreme Court held that the previous procedure of collecting a urine sample forcibly and the procedure of questioning and arresting is a procedural violation but not a 'serious violation', so the court confirmed the admissibility of the urine appraisal report.¹² Further, a case in 1995 concerned a patrol where the investigators found that the defendant was behaving suspiciously, so they required the defendant to stop the car when the defendant attempted to evade the authorities. Investigators suspected that the defendant was in possession of and was using drugs so they examined the defendant's car forcibly and the defendant did not oppose it. After examination, investigators found that the defendant was in possession of drugs and they arrested him, taking the defendant to the police station with his consent, requesting him to submit to a urine test. In this case, Japan's Supreme Court held that 'when the investigators examined the items in the defendant's possession during questioning, it was illegal to examine the car'. But it was not a 'serious violation' as it was necessary and urgent to examine the items held by the defendant, and the defendant did not oppose to it clearly. In addition, after the investigators arrested the defendant, the urine collecting procedure followed a series of illegal procedures mentioned above, which is certainly illegal; however, when obtaining the urine sample,

10 Supreme Court of Japan, Keishu 40/3/215, 25 April 1986.

11 Supreme Court of Japan, Keishu 42/7/1051, 16 September 1988.

12 Supreme Court of Japan, Keishu 48/6/420, 16 September 1994.

investigators did not exercise compelling force, and the urine collecting was conducted based on the defendant's free will. Therefore, the degree of illegality is not defined as serious either. Thus, the urine appraisal report should be admitted.¹³

It may be concluded from the analysis of the cases above that the following situations are not considered to be 'serious violations': (1) the degree of illegality is minor, especially when there are faults in examining sequence under the condition that urgent arrest is allowed; (2) investigators do not have the intention to violate the regulations related to writs; and (3) investigators do not use force. Here, we should specially pay attention to (2), which is the subjective requirement emphasised in the *Osaka Drug Case* by Japan's Supreme Court. Some scholars criticised that if the subjective requirement of the investigators is overemphasised, there might be a possibility that the regulations related to writs would not be complied with, the rights of suspects and defendants would not be well protected and evidence would not be excluded. In practice, there are loyal investigators determined to succeed that might violate the regulations related to writs although they never intend to. In such cases, collecting evidence this way might be not illegal in Japan, so the exclusionary rule of illegal evidence might be undermined.¹⁴

C. 'Illegal Inheritance' Criterion

When applying the exclusionary rule of illegal evidence, there are two conditions that should be distinguished. (1) The evidence collecting procedures themselves are illegal — in other words, the problem of the admissibility of the evidence collected through an illegal procedure. (2) The evidence collecting procedures themselves are not illegal but the previous procedures are illegal — in other words, the problem lies in the admissibility of the evidence collected in the subsequent legal procedure (namely, the problem of 'illegal inheritance').

On the issue 'illegal inheritance', Japan's Supreme Court responded for the first time in a case in 1986. The case details have already been mentioned in the part of 'serious violation' above. Investigators entered the defendant's house without permission and took him to the police station without his consent. Later, the investigators did not accept the request to leave by the defendant and kept him in the police station, requesting him to complete a urine sample for testing. In this case, Japan's Supreme Court ruled the issue of 'illegal inheritance' in this way: a series of procedures including the investigator's entering the defendant's house without permission and taking him to the police station without his consent and the urine collecting procedure were based on the same purpose — to find out whether the defendant had consumed drugs. The urine collection procedure was directly carried out based on the situation caused in the previous series of events. Therefore, when judging whether the urine collecting

13 Supreme Court of Japan, Keishu 49/5/703, 5 July 1995.

14 Yuji Shiratori, *Criminal Procedure Law* (Nihonn hyouronn sha Press, 2012) 372.

procedure was legal, it should be fully considered whether the previous procedure was illegal and what was the degree of illegality. According to this, it is concluded that the urine collection procedure is illegal. However, Japan's Supreme Court held that 'it is illegal, but not seriously illegal that investigators entered the defendant's house without permission, took him to the police station without his clear consent and collected his urine; therefore, the urine is admissible'.¹⁵

After this case, Japan's Supreme Court ruled several judgments on 'whether illegal inheritance can be inherited'. For example, (1) in 1994, Japan's Supreme Court gave a judgment to affirm that illegality of the previous behaviours is inherited by the following behaviours, but deny its seriousness of illegality. The details of this case are as follows: when questioning the defendant for using drugs whilst driving, the investigators seized his car key and detained him at the scene. About six hours later, the court gave the search and seizure warrant. The investigators collected his urine according to the warrant and found traces of drugs in his urine.

Japan's Supreme Court held that the previous behaviours of collecting urine forcefully, questioning and keeping the defendant on the spot was illegal but not a 'serious violation'. Thus, the urine appraisal report was admissible.¹⁶ (2) In 1996, Japan's Supreme Court gave a judgment, which held that 'illegality cannot be inherited'. The details of this case are as follows: when the investigators were carrying out the search and seizure warrant in a drug crime case, they found the defendant had drugs. Whilst the investigators were showing the drugs to the defendant, he insulted the investigators.

Consequently, several investigators assaulted the defendant. In this case, Japan's Supreme Court held that 'during the search, investigators are not allowed to use violence'. Therefore, the investigators' behaviour mentioned above was deemed illegal. The investigators' illegal behaviour took place on the spot, however, the time of their assault was after finding the evidence and the reason of the beating was the defendant's insult but not using force to look for evidence. Therefore, the admissibility of drugs could not be denied.¹⁷

The two cases above adopt the following method to determine whether the evidence is admissible: (1) the previous and the subsequent behaviour should be based on the same purpose. The evidence which is determined by the subsequent behaviour directly based on the situation that the previous behaviour caused (namely, 'the same purpose and direct use' criterion). (2) The degree of illegality of the subsequent behaviour is judged according to the 'serious violation' criterion which was established in the *Osaka Drug Case*. Only when (1) the same purpose and direct use criterion coupled with (2) 'serious violation' criterion are both satisfied, the evidence can be excluded.¹⁸

15 Supreme Court of Japan, Keishu 40/3/215, 5 April 1986.

16 Supreme Court of Japan, above n 8.

17 Supreme Court of Japan, Keishu 50/9/683, 29 August 1996.

18 Daisuke Midori, *Criminal Procedure Law* (Nihon hyouron sha Press, 2012) 296.

D. 'Close Relevance' Criterion

The 'close relevance' criterion has been argued by Professor Kawade of Tokyo University in recent years.¹⁹ In 2003, Japan's Supreme Court used the criterion for the first time in the *Otsu Doping Case* to deny the admissibility of evidence. The 'close relevance' criterion holds that when judging the admissibility of evidence, there is no need to consider the 'illegal inheritance' between the previous behaviour and the evidence collection behaviour. It should only be considered in which situation the evidence should be excluded when it has a causation with the previous behaviour.

The 2003 case details are as follows: on the morning of 1 May 1998, when the arrest warrant involving the defendant's theft was just issued, three investigators A, B, and C of Otsu police station drove to Ueno City to arrest the defendant without taking the warrant. At 8:25 am, the three investigators arrested the defendant and showed him the warrant after bringing him back to the police station. The warrant was recorded by A that had been shown at 8:25 am (on the spot) to the defendant. At 7:10 pm, the defendant was forced to give a urine sample in the police station. The test analysis of the urine showed that there were traces of drugs in his urine. On the 6th of the same month, the Otsu court issued a search warrant for the defendant's house based on the urine appraisal report. Investigators carried out this warrant and another theft search warrant issued before in the same time. In his house, 0.423 grams of drugs were found. On 11 June, the defendant was accused of illegal drug possession and use.

Contrary to the defendant's claim, the three investigators of Otsu police station insisted that 'they had shown the arrest warrant to defendant on the spot', and 'because of the emergency situation, the search warrant was screwed up and thrown into the pocket, so the defendant may not have seen it clearly when it was shown to him'. After comprehensive examination of the testimonies of witnesses near the location of the arrest and checks whether the warrant itself has folds, the court of first instance held that the testimonies of three investigators had obvious flaws, so their testimonies would not be adopted. Their behaviour of not showing the arrest warrant to the defendant is illegal, and therefore, the urine appraisal report, the 0.423 grams of drugs found during the search and the report of this have all been excluded.

Different from the logic and conclusion of the court of first instance, Japan's Supreme Court ruled that

- (1) in this case, it is illegal that investigators neither showed the warrant while arresting the defendant, nor executed the warrant in the emergency. In addition, in order to cover up this illegal behaviour, the investigators recorded false information on the warrant and made a false search report. In addition, the investigators also gave false testimonies in court. Considering the attitude of the investigators mentioned

19 Toshihiro Kawade, 'Meaning and appropriate Range of the Fruits of the Poisonous Tree', in Kuniji Shibahara, Masahito Inoue and Noriyuki Nishida (eds), *Collected Works on Celebration of 70 years Birthday to Kouya Matsuo* (Yuhikaku Press, 1998) 515.

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above, this case is a serious violation to the regulations related on the writs. If the evidence (urine collection and urine appraisal report at the arrest day) which is closely related to the illegal arrest is adopted, it is of no good to prevent the illegal search in the future. Thus, its admissibility should be denied. (2) The doping found in the defendant's house is the evidence obtained based on the search warrant issued according to the suspected use of doping by the defendant, and this doping is the derivative evidence of the illegally obtained evidence mentioned above. Based on this point, the court of first instance excluded it. However, the doping evidence was legally obtained by the search warrant issued by court, as well as the result of simultaneous execution of a theft-search warrant. Throughout this case, it is related with the excluded evidence but not closely related, and there is no serious violation of the doping collection procedure. Through comprehensive consideration of the importance of this evidence, its admissibility should not be denied.

In this case, Japan's Supreme Court held that the arrest was seriously illegal, and that 'close relevance' existed between the arrest, urine collection and its appraisal report; therefore, the urine appraisal report had no admissibility. However, because there was no 'close relevance' between the drug search at the defendant's house and the urine appraisal report, the admissibility of the drug evidence should be confirmed. This method of judging admissibility is different from the method used by Japan's Supreme Court in 1986 mentioned before. This case used the 'close relevance' criterion instead of the 'illegal inheritance' criterion. In this case, the sequence of events is that after the defendant was arrested due to theft, drugs were identified in the urine appraisal report. If judging according to the 'illegal inheritance' criterion, the previous behaviour (arrested due to theft) and the obtained evidence (urine appraisal report) are based on different purposes, thus, the exclusionary rule of illegal evidence could not be adopted. It is concluded that the 'close relevance' criterion focuses on two aspects: (1) the seriousness of the previous behaviour's illegality; (2) the strength of the causation between the illegality and later obtained evidence.

III. OTHER PROBLEMS

A. Agreement of the Defendant

Even if the evidence is collected illegally, if the defendant agrees that it could be used as evidence, does it have admissibility? On this question, the High Court of Osaka has made a decision in a case that denied the admissibility of drug evidence because of the illegality of the seizure, however, confirmed the admissibility of the seizure records of the drugs because the defendant and his lawyer agreed to take them as evidence.²⁰ About this, there are mainly three different opinions in Japan, namely, the Positive Theory, the Negative Theory and the Compromised Theory. (1) The Positive Theory holds that the agreement under this situation is similar to the regulation of the agreement in the

²⁰ High Court of Osaka, Law Cases Reports 998/126, 23 January 1981.

hearsay rule in Article 326 of Japan's *Criminal Procedure Law*. Therefore, the evidence has admissibility. (2) The Negative Theory holds that the illegality of violating the due process cannot be cured by the agreement of parties. Therefore, the evidence has no admissibility. (3) The Compromised Theory holds that for the interests that might be given up, the admissibility can be confirmed based on the party's agreement, while in a situation of infringing social public interests and comprising serious illegality, the admissibility cannot be confirmed based on the party's agreement.²¹

B. Evidence Illegally Collected by Individuals

From the theoretical view of applying the exclusionary rule of illegal evidence, the evidence illegally collected by an individual cannot prevent illegal investigation in the future carried out by authorities. Therefore, there is no need to exclude it. However, when (1) illegally collected evidence by an individual is part of the investigation carried out by an authority — for example, individuals accept the authorisation of the authorities or are privately willing to assist the authority to investigate; (2) the illegality is serious and cannot be tolerated, according to the Judicial Integrity Theory, as using this kind of evidence is a betrayal of citizens' trusts, so it can be excluded as an exception.

As for this problem, Japan's Supreme Court made a controversial decision in a case in 2005.²² The case details are as follows: for the purpose of treatment, the doctor examined the urine of an emergency patient and made a urine appraisal report without the patient's consent. The urine appraisal report showed that there were traces of drugs in the urine of the patient. The doctor called the police, and the police seized the urine of the defendant. Japan's Supreme Court held that the doctor's conduct was a kind of medical treatment, and did not violate the law. And it is also not against the secrecy obligation of doctors to call the police. Thus, the lawyer's request of exclusion of the urine was dismissed. Some scholars hold that there was no need to test the urine for drugs for the treatment itself, but the doctor still conducted the procedure without the patient's consent and then called the police. If we deem this behaviour as against the secrecy obligation of doctors, the illegality could be further discussed.

21 See Yuji Shiratori, *Criminal Procedure Law* (Nihon hyouron sha Press, 2012) 375.

22 Supreme Court of Japan, Keishu 59/6/600, 19 July 2005.

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THE INTERNAL CONFLICTS AND COMPROMISES OF THE CHINESE CONFESSION RULE SYSTEM: A COMPARATIVE ANALYSIS WITH THE WESTERN TYPICAL MODEL

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ABSTRACT

The current Chinese confession rule system was established by the 2012 amendment to Criminal Procedure Law and several accompanying judicial interpretation documents. Contrasted with the 'typical model' in Western law, some obvious conflicts can be observed within the Chinese confession system: The principle against self-incrimination is explicitly expressed, whereas the right to silence seems to be denied by an 'obligation to truthfully answer' provision. Some procedures are established to regulate the interrogating process and protect the suspect's rights; however, they are very incomplete and not linked to certain sanctions such as exclusion of evidence. The exclusionary rule for illegally obtained confessions has been legislated, whereas a judicial interpretation restricts its application by a 'severe pain or suffering' criteria. These conflicts are mainly attributed to the fact that the reform of the confession system in China has to strike a balance between transplanting rules from Western law and giving consideration to native judicial practice. In order to further improve this confession rule system, a transition in research methodology is proposed.

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I. THE DEVELOPMENT OF THE CHINESE CONFESSION RULE SYSTEM

The ‘confession rule system’ refers to a collection of legal norms, including rule and principle, regulating the obtaining and use of confession in criminal procedures. The system consists of four parts: (1) fundamental principles which express the basic attitude and value of the legal system in terms of obtaining and using confessions and used to develop other confession rules. (2) Interrogating procedure, which sets procedural requirements for the police in interrogating the criminal suspect for obtaining his/her confession. (3) Rules for the confession’s admissibility which stipulate the requirements for a confession to be admitted as evidence in court. (4) Rules for the confession’s probative force, which regulates the fact finder’s evaluation of confession evidence. Modern procedural law and evidence law are based on a principle of ‘free proof’ (*intime conviction*, or *Freie Beweiswürdigung*),² which means the weight or probative force of evidence is not regulated by legal rules (with a very few exceptions)³ and is left to the fact finder’s free evaluation. Therefore, there’s not much room for the rules regulating confession’s probative force in modern law. The discussion in this paper will not involve rules of probative force. These four parts constitute a holistic system, in which they are interrelated and interdependent.

The history of formation and development of China’s current confession rule system can be divided into several stages. Several time points can be picked out for discussion:

1. **1979:** The new *Criminal Procedure Law* went into effect. This law established a new set of rules for regulating criminal proceedings and laid foundations for its further development. The historical background of this law should be mentioned: the Great Cultural Revolution had just ended and The Reform and Opening-Up Policy was just starting. Therefore, the main concern of the 1979 law was to restore order in proceedings and to reinforce control over crimes. Accordingly, the confession rules in this law are mainly designed to promote prosecuting criminals, not to protect human rights.

2 Of course, the historical background, content and significance of this principle differ between the Anglo-American legal system and the Continental legal system. But in terms of ‘free evaluation of evidence’ or ‘anti-norms or value of evidence’, they have much in common. Relevant discussion, see L Jonathan Cohen, ‘Freedom of Proof’, in William Twining (ed), *Fact in Law* (Franz Steiner Verlag GmbH Wiesbaden, 1983). William Twining, ‘Freedom of Proof and the Reform of Criminal Evidence’ (1997) 31 *Israel Law Review* 439. Damaska, ‘Free Proof and its Detractors’ (1995) 43 *The American Journal of Comparative Law* 343-57.

3 For example, the rule of corroboration. See Article 53 of *Criminal Procedure Law of the People’s Republic of China* (People’s Republic of China) National People’s Congress, 12 March 2012: ‘A defendant cannot be found guilty and sentenced to criminal punishments if there is no evidence other than his/her own statement. On the other hand, a defendant may be found guilty and sentenced to criminal punishment even without his/her own statements, as long as there is sufficient and concrete evidence’. A similar provision can be found in Article 319 of *Criminal Procedure Code* (Japan) (Act No. 131 of 1948): ‘If the confession is the only evidence against the accused, he/she shall not be found guilty’.

2. **1996:** The First Amendment to the Criminal Procedure Code. In 1996, China made a comprehensive amendment to the 1979 Code,⁴ and the revised law is also called the 1996 Code. The main concern of this amendment is to ‘reform court trial model’.

In the 1979 law, the trial model is similar to the so-called inquisitorial system, and the defence lawyer plays a very limited role. The 1996 law absorbed to some extent the adversarial system model and enlarged the lawyer’s role. However, the amendment concentrated mostly on the court trial stage, not on the police investigation stage. Therefore, it did not have much to do with the confession rule system.

3. **2010:** The Supreme Court, the Supreme Procuratorate and the Ministry of Public Security jointly issued a normative document called *Some Provisions for Excluding Illegal Evidence in Criminal Proceedings*. It carried similar legal force to judicial interpretation. The provisions in this document established for the first time in China the exclusion rule for illegally obtained evidence. In 2012, the *Criminal Procedure Law* adopted them.
4. **2012:** The Second Amendment to Criminal Procedure Code is best characterised as emphasising the protection of human rights. In 2004, the Fourth Amendment to the Chinese Constitution contained a provision: ‘The state respects and guarantees human rights’.⁵ It suggests that the protection of human rights is confirmed hereafter as one of the fundamental objectives of Chinese legal reform. Criminal procedure has close connections with human rights protection, so the 2012 law states: ‘The task of the criminal procedure law of People’s Republic of China is ... to respect and guarantee human rights’. (Article 2) Many specific rules are established for this purpose, and among them — also the most important part of them — are the rules of confession. Also, several interpretation documents were issued at the end of 2012, which provided detailed criterions for applying the new code.

Therefore, at the end of more than 30 years of ongoing reform, the current Chinese confession rules are contained in 2012 modified *Criminal Procedure Law* and accompanying interpretation documents. There is still a question: from where does a Chinese legislator find inspiration or material for reforming the confession rules (as well as other criminal procedure rules)?

Since the Reform and Opening-Up Policy was started in 1978, Chinese law has gradually got rid of the influence of former Soviet Union’s law. The legislation tries to

⁴ Here the ‘amendment’ has a different meaning in current China from that in most countries. It refers to a comprehensive modification to the existing statute, and consequently transfers it into an almost new one. This may be attributed to the transitional society characteristic of China, because the law has to be revised frequently and largely to adapt to the social and also political change.

⁵ It is now the third clause in Article 33 of the *Constitution of the People’s Republic of China* (People’s Republic of China).

find inspiration and material from two sources: (1) modern Western law, and (2) current Chinese judicial practice. Accordingly, there are two paths of legal reform in modern China: (1) transplanting Western law, including rules from Anglo-American and Continental law systems; and (2) summing up the practical experience or conventions in Chinese judicial processes, and transferring them into statute law. Some scholars call the latter path reform through ‘native resources’.⁶ This is also the case in criminal procedure reform. The existing criminal procedural law is in fact a mixture: some concepts, principles and rules are transplanted from European or American law,⁷ and some other rules come from native judicial practice.

It needs to be noted that there is competition and conflict between these two sources. This leads to the fact that, although many parts of the existing Chinese confession rule system are transplanted from Western law, many conflicts or deviations can be observed when contrasted with the Western law. Before analysing these conflicts, and in order to give the analysis more coherence and clarity, the paper will provide a brief overview of the confession rule in Western legal systems.

II. THE TYPICAL MODEL OF THE MODERN CONFESSION RULE SYSTEM

There is no doubt that there are many differences between modern Anglo-American and Continental law systems in terms of confession rules. At the same time, they have something in common — that is, they share the same basic values, logical structure and fundamental principles. This section will first summarise a ‘typical model’⁸ which can represent the basic characteristics of modern confession rules in Western countries. The typical model can both apply to common law countries, such as the US and UK, and civil law countries, such as Germany and France. The content of the typical model will be described in three parts, with quoting some legal provisions; and then its logical structure will be analysed.

6 The interpretation documents including *The Interpretation for Applying Criminal Procedure Law* (By the Supreme Court), *Rule of Criminal Proceeding* (by the Supreme Procuratorate) and *Procedural Provisions for Handling Criminal Cases* (by Ministry of Public Security).

7 See, 苏力 [Su Li] 法治及其本土资源 [Rule of Law and its native resources], ((中国政法大学出版社) [China University of Political Science and Law], 1996).

8 Although Chinese Criminal Procedure is more similar with the European Continental pattern, the legislator and scholars have shown great interest in American law; Here the ‘typical model’ does not mean what it refers to is perfect or ideal; it is value-neutral and is presented just for comparative study. It is somewhat similar to the approach adopted by Mirjan R Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1991).

A. Content of the Typical Model

1. *Fundamental Principle*

Presumption of innocence is the basic principle of the whole criminal procedure and criminal law. Therefore, it is certainly the fundamental principle of confession rules. Since the idea of presumption of innocence has a close relation to and can be inferred from the due process clause, it dates back to the 1215 Great Charter. But it is in the 1789 *Declaration of the Rights of Man and of the Citizen* it came to a standard formulation: ‘Any man being presumed innocent until he is declared culpable’. (Article IX) Similar formulation can be found in *The Universal Declaration of Human Rights* Article 11(1), *International Covenant on Civil and Political Rights* Article 14(2) and *Convention for the Protection of Human Rights and Fundamental Freedoms* (also called *European Convention on Human Rights*) Article 6.2.

The presumption of innocence has an abundant but also vague meaning for formulating confession rules. Therefore, a more applicable and specific principle is needed: *The principle/privilege against compulsory self-incrimination*. It carries out what the presumption of innocence requires for confession rule system, and can serve as an organising principle. The principle against self-incrimination can be traced back to canon law in the Middle Ages⁹ and is established as a significant principle in modern criminal procedure. The *International Covenant on Civil and Political Rights* Article 14(3) contains a standard formulation of it: ‘In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (g) Not to be compelled to testify against himself or to confess guilt’. The Fifth Amendment to the American Constitution establishes this principle in a similar formulation.¹⁰ In the UK, France and Germany, the principle is expressed slightly differently in each of the countries’ constitutions. But the UK’s *Police and Criminal Evidence Act 1984*, Section 76, the French Criminal Procedure Code Article 116 (4) and the German Criminal Procedure Code Article 136a all prohibit compulsory confession. They, in essence, implement the principle against self-incrimination. Moreover, the principle is usually quoted in judicial cases in these countries.¹¹

9 Although Chinese Criminal Procedure is more similar with the European Continental pattern, the legislator and scholars have shown great interest in American law.

10 Here, the ‘typical model’ does not mean what it refers to is perfect or ideal; it is value neutral and is presented just for comparative study. It is somewhat similar to the approach adopted by Mirjan R Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1991).

11 From a historical perspective, the principle (or rule) against self-incrimination is earlier than the principle of innocence presumption. In the canon law of the Middle Ages, there was already something like that, just as the Latin motto suggests: *nemo tenetur prodere seipsum* (no one shall be compelled to accuse himself). But at that time this rule served a different purpose and had a different rationale. It required that Christian’s duty should be divided into two parts, and the duty of confessing to God was not equal to the obligation of confessing to a judge (or accusing themselves). See John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003) 277.

The operation of the principle against self-incrimination can be divided into two aspects. First, it is a ‘privilege’, which means an exemption from being interrogated — precisely, from being compulsorily interrogated.¹² Second, it is a ‘right’, which means the suspect has freedom to keep silent or to confess.¹³ The first aspect is called *privilege against compulsory self-incrimination*, and the second aspect is called *right to silence*.¹⁴ To ensure these two rights and privileges, a so-called *voluntary confession* rule is established: a voluntary confession can be admitted as evidence against the accused while involuntary confessions lack admissibility. Therefore, the principle against self-incrimination gave rise to specific and applicable rules: (1) the police shall not compel the suspect to confess; (2) the suspect can decide to keep silent or to speak; and (3) only a voluntary confession is admissible.¹⁵

2. Procedure of Interrogation

The principle against self-incrimination serves as the fundamental principle of the confession rule system, and its key element is ‘voluntariness’: the suspect shall *voluntarily* confess/shall *not be compelled* to make a confession. But how can the suspect’s voluntariness be guaranteed? And according to what is the voluntary/uncompelled confession to be distinguished from involuntary/compelled confession? It is usually difficult to identify voluntariness, especially at trial stage. The typical model constructs many procedural requirements of interrogation to guarantee voluntariness, and breach of some of these requirements is presumed to be a violation of voluntariness.

12 Privilege is ‘an exception to a duty’, and ‘immunizes conduct that, under ordinary circumstances, would subject the actor to liability’ see *Blacks Law Dictionary* (10th ed) 1390.

13 The Fifth Amendment to the American Constitution: ‘No person ... shall be compelled in any criminal case to be a witness against himself’.

14 In the British case *R v Sang* (1979) 2 All ER 1222, J Diplock’s opinion is that it is for the protection of the accused’s privilege against self-incrimination that confession and other evidence collected from the accused should be concluded. European countries must abide by the *European Convention on Human Rights* and the judgments made by the European Court of Human Rights. Although the Convention does not definitely stipulate the privilege against self-incrimination, the European Court accepted it in the case of *Funke v France* (Case A/256-A) European Court of Human Rights [1993] 1 CMLR 897, according to *International Covenant on Civil and Political Rights* Article 14(3)(g). This case urged France to establish the suspect’s right to silence in 2000. See Bernad Bouloc, *Procedure Penale* (21st) § 123 (DALLOP publisher, 2008).

15 Such a dichotomy approach of analysing the principle against self-indiscrimination can be found in Ronald Joseph Delisle and Don Stuart, *Learning Canadian Procedure* (Casewell Thomson Professional Publishing, 3rd ed, 1994) 354 (the principle gives the accused two rights: the right not to be compelled and the right to state or not); 宋英辉主编 [Song Yinghui (ed)], 《 刑事诉讼原理 (第二版) 》 [The Rationale of Criminal Procedure] (法律出版社 [Law Press China], 2007) 93-4 (the principle contains two parts: the ‘negative’ right, which exempts the suspect from compelling and the ‘positive’ right, according to which the suspect can choose to confess or not).

The typical illustration is the *Miranda* rule in America. Through the *Miranda v Arizona* cases,¹⁶ the Supreme Court established a set of procedural requirements which must be met by the police when interrogating the suspect. The requirements consist of: (1) *Miranda* warnings. Prior to ‘custodial interrogation’, the police have to indicate that the suspect has the right to remain silent, the consequence of a waiver, the right to consult with a lawyer and to have the lawyer with them during interrogation. (2) Right to counsel.

Miranda observed that ‘the circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege’ against compulsory self-incrimination. Therefore, the Court held that an in-custody suspect also has a right to consult counsel prior to questioning and to have counsel present during interrogation.¹⁷

(3) Waiver of the right. A suspect may waive the right to remain silent and make a confession, but the waiver must be ‘voluntary, knowingly, and intelligently’ made.¹⁸ The *Miranda* rule is a watershed in the development of American confession rules because it remodels the relation between interrogation procedure and fundamental principles of the confession rule system. The *Miranda* rule is used to safeguard the protection against self-incrimination contained in the Fifth Amendment to the American Constitution and aims to ensure voluntariness. Moreover, these requirements are also established as standards for reviewing voluntariness: if the police does not meet these formal procedural rules, for example, without warning the suspect or if the lawyer is not present as requested, then the substantial voluntariness is presumed to be violated, regardless of whether the suspect is in fact compelled to make the confession or not. Therefore, the judgment of voluntariness is in accordance with the formal standard rather than the substantial standard.

The *Miranda* rule may go too far in protecting the suspect’s rights and it is perhaps the most controversial part of Warren Court’s criminal procedure reform. Other countries have not legislated such a radical procedure. However, the values and principles reflected in the *Miranda* rule can also be found in the law of European countries: some procedural rules are established for safeguarding voluntariness in an interrogation, and to some extent the procedural rule serves as the standard for distinguishing a voluntary from an involuntary confession. Let’s take the rules in the French Criminal Procedure Code, for example. Article 116 stipulates that ‘the investigation judge should inform the person of his choice to remain silent, to make a statement or to be interrogated. A record of this information is made in the official record’ (informing the right). ‘The consent to being

16 See Christopher Osakwe, ‘The Bill of Rights for the Criminal Defendant in American Law’, in *Human Rights in Criminal Procedure* (Martinus Nijhoff Publishers, 1982) 274-5 (the principle contains three requirements: forbiddance of compelling, right to silence and admissibility of voluntary confession).

17 384 U.S. 436 (1996).

18 Joshua Dressler and Alan C Michaels, *Understanding Criminal Procedure Investigation* (Matthew Bender & Co, 4th ed, 2005) 452; See *Johnson v Zerbst* 304 U.S. 458 (1938).

interrogated can only be given in the presence of an advocate. The person's advocate may also present his remarks to the investigating judge' (waiver of right). Article 114 stipulates that '[u]nless they expressly waive this right, parties may only be heard, interrogated or confronted in the presence of their advocates or when their advocates have been duly called upon' (right to have counsel present).¹⁹ In addition, according to Article 116-1, the investigating judge may record or videotape the interrogation process if the person is suspected of committing a felony.²⁰

3. Admissibility of Confession

As discussed above, to ensure the requirements of the principle against self-incrimination are met, a so-called voluntary confession rule has been established: voluntary confession can be admitted as evidence against the accused, while involuntary confessions lack admissibility. This rule regulates the admissibility of confession. If the rule is restated in another fashion, then it leads to what is called exclusionary rule of illegal/illegally obtained evidence: an item of evidence (including confessions) that is obtained through illegal methods shall be excluded. Of course, the 'illegal evidence' here consists of illegal confession and other illegal evidence, such as tangible evidence which is obtained by unlawful search. In this paper, illegal evidence refers to illegal confession evidence.

Illegal confession shall be excluded — and 'illegal' essentially means 'involuntary' or 'compelled'. This is a standard characteristic of the typical model. In the US, the court have mainly applied the formal (procedural) standard to judge involuntariness since the *Miranda* rule was established, whereas in European countries the courts tend to make substantial or material review and consider the police's violation to interrogating procedure as factors (not standard!) which can be taken into consideration in judging a suspect's involuntariness. Although the judging method or operating model is different in the US and Europe, the basic principle is the same: excluding involuntary/compelled/illegal/illegally obtained confession. Several illustrations are listed below.

In the UK, Section 76(2) of the *Police and Criminal Evidence Act 1984* stipulates that [i]f, in any proceedings where the prosecution proposes to give as evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained (a) by oppression of the person who made it; ... the court shall not allow the confession to be given as evidence against him except in so far

19 The suspect's right to counsel is also contained in Article 116: 'in all other cases, the investigating judge informs the person if his right to choose and advocate or to ask that one be officially appointed for him ... if the chosen advocate cannot be contacted or cannot come, the person is advised of his right to request a court appointed advocate, in order to help him during his first appearance'.

20 The tape or visual recording requirement can be found in Law E and Law F of the *Police and Criminal Evidence Act 1984 (PACE)* (UK). Law E deals with the tape recording of interviews with suspects in the police station. Law F deals with the visual recording with sound of interviews with suspects.

as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

In Germany, Article 136a [Prohibited Methods of Examination] of Criminal Procedure Code stipulates that

[t]he accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. ... Statements which were obtained in breach of this prohibition shall not be used, even if the accused consents to their use.

Article 319 of Japanese Criminal Procedure Code stipulates that a 'confession obtained by coercion, torture and threat, or made after unjust long-term detainment or custody and other confession which is suspicious of not coming out of free will, shall not be used as evidence'.

B. Structure of the Typical Model

In the typical model of the confession rule system, the three kinds of rules are interrelated and interdependent. Their relations form the logic structure of that system, which is outlined below.

The fundamental principle, which is the principle against self-incrimination, expresses the basic attitude of modern law toward confession. That attitude gives rise to specific requirements: (1) the police shall not compel the suspect to confess; (2) the suspect has the right to remain silent; and (3) only voluntary confessions are admissible. At the core of the principle and these requirements is 'voluntariness', for the sake of which some procedural rules are established to regulate the interrogating process. However, these procedural rules not only provide safeguards for voluntariness, but also to some extent serve as the standard or factor for identifying involuntary confessions. The rule of illegally obtained confessions is in essence a rule of sanction. An involuntary confession is determined as illegal and subject to exclusion, thereby suppressing compulsory interrogating acts.

This structure can be easily identified in US confession rules. It is reflected in the interrelation between the Fifth Amendment of the Constitution (*privilege against compulsory self-incrimination*), procedure of custodial interrogation (*Miranda* rule) and the exclusionary rule (rule excluding involuntary confession).²¹ In many European countries, this structure also applies. For example, in German law it is reflected in the interrelation between (1) principle against self-incrimination which can be inferred from constitutional articles; (2) interrogating procedure prescribed in the Criminal Procedure Code; and (3) the rule regulating 'forbidden evidence' (*Beweisverbote*) of which the

21 A detailed and precise analysis of this interrelation can be found in Joshua Dressler and Alan C Michaels, *Understanding Criminal Procedure Investigation* (Matthew Bender & Co, 4th ed, 2005).

so-called *unselbständige Beweisverwertungsverbote* are equivalent to the exclusionary rule of illegal evidence.²²

III. THE CONFLICTS WITHIN THE CHINESE CONFESSION RULE SYSTEM

Contrasted with the typical model, there are several conflicts inside the current Chinese confession rule system. Although transplanting rules from the typical model has been one of the means for China to reforming its confession rules, the existing rules present some deviations to that model. This paper will list the conflicts first and then explain them.

A. Conflicting Rules

1. *Right to Silence or Obligation to Confess?*

Article 50 of the 2012 law explicitly provides the principle against self-incrimination:

Judges, procuratorial personnel and investigators shall adhere to statutory procedures when gathering and obtaining evidence that may prove whether criminal suspects or defendants are guilty or innocent, or whether cases involve serious criminal offences or not. They are strictly prohibited from extorting confessions by torture, collecting evidence through threats, enticement, deception or other unlawful means, or forcing anyone to provide evidence proving his/her own guilt.

As analysed above, in the typical model this principle is first a ‘privilege’, which means an exemption from being compulsorily interrogated, and second a ‘right’, which means the suspect has the right to keep silent. On the surface, it seems that Article 50 satisfies the first requirement, because ‘extorting confessions by torture’ and ‘collecting evidence through threats, enticement, deception or other unlawful means’ are prohibited. Do the ‘unlawful means’ here involve all questioning methods which impair a suspect’s will? The answer should be ‘yes’ if it can be inferred from Article 50, since ‘[j]udges, procuratorial personnel and investigators ... are strictly prohibited from ... forcing anyone to provide evidence proving his/her own guilt’. If forcing methods are prohibited, then the suspect’s free will is protected.

But by examining another provision, a conflict can be found. Article 118 stipulates that [w]hen interrogating a criminal suspect, the investigators shall first ask the criminal suspect whether or not he has committed any criminal act, and let him state the circumstances of his guilt or explain his innocence; then they may ask him questions.

22 Professor Hermann’s interpretation of the right to silence in a German law context also reflects such relation. Hermann, 《德国刑事诉讼法典》[Law of German Criminal Procedure, Chinese Version, Translated by Li Changke] (中国政法大学出版社 [China University of Political Science and Law] 1995) 14. In German criminal procedure, the right to silence and the accompanying informing procedure reflect what the principle against self-incrimination requires; and this principle is inferred from Articles 1, 2 and 20 of the *Grundgesetz für die Bundesrepublik Deutschland*.

The criminal suspect shall answer the investigators' questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case.

According to this provision, the suspect shall reply to the interrogating, and his/her answer shall be truthful. He/she has right to keep silent merely when the question is irrelevant to the case. What this provision involves is so-called the 'obligation to truthfully answer'. It is legislated both in the 1979 law and 1996 law, and retained in the 2012 law.

Compared with the typical model, Article 50 and 118 in Chinese *Criminal Procedure Law* are contradictory to each other. Article 50 established the principle against self-incrimination, which leads to the right to silence whereas Article 118 stipulates the 'obligation to truthfully answer', which denies the defendant the right to silence.

2. Defective Procedural Protection

The 2012 law provides some procedural protection for the principle against self-incrimination — though its specific content is in dispute. For example, in terms of the interrogation location, according to Article 116 of the Code, investigators shall interrogate a criminal suspect in the detention house (not the investigators' own working place!) if the suspect has already been transferred to a detention house for custody.²³ Another example is the suspect's right to counsel at investigation stage. According to Article 33, a criminal suspect shall be entitled to entrust a defender after he/she is interrogated for the first time by an investigating organ or as of the date on which compulsive measures are taken. Before 2012, he/she can entrust a lawyer as defender only when he/she is accused — that is, when the police has finished the investigation and handed over the case to the prosecutor.²⁴

An important procedural requirement established in the 2012 law is about tape recording or visual recording of the interrogation process. Article 121 stipulates that

investigators, when interrogating a criminal suspect, may tape-record or video-tape the interrogation process, and shall do so where the criminal suspect is involved in a crime punishable by life imprisonment or capital punishment or in an otherwise major criminal case. Tape-recording or video-taping shall run throughout the interrogation process for the purpose of completeness.

Making tape recording or visual recording is to ensure the legality of the interrogation, and the recording can be used as evidence when the legality of the

²³ In China, the detention house is administrated by another government department, which is independent of the investigating police department. Therefore, it is expected that, if the interrogation occurs in a detention house and is supervised by another office, it will be more difficult for the police to commit torture.

²⁴ According to the old Criminal Procedure Code, in the investigation stage a suspect can get some help and advice from an entrusted lawyer. But the lawyer's work is not 'defending' in essence and its content is very limited.

interrogation is an issue. According to Article 121, if the suspect is involved in a major criminal case, the interrogation must be tape-/visual-recorded, and the recording shall run throughout the interrogation process for completeness. But what if the investigator does not make the recording? Or what if the recording is not complete, that is, some part of it is deleted? No explicit sanction is established for these in the law and in accompanying interpretations. Therefore, it is not possible for an interrogation and a confession obtained to be ruled as invalid, just because the recording has not been made as required. The tape/visual recording procedure is not closely linked to the exclusionary rule.

Other procedural protections, which are required in the typical model, have not been established in China. Since the right to silence is not explicitly stipulated, there is no corresponding procedure for informing of right or waiver of right. Besides, although the suspect has a right to counsel in the investigation stage according to the 2012 Code, he/she has neither the right to consult counsel prior to questioning, nor the right to have counsel present during interrogation. So if the American *Miranda* rule is taken as the standard (a somewhat extreme standard), it can be concluded that there is almost no procedural protection for the suspect when he/she is interrogated during Chinese criminal procedure. Overall, the 2012 Law tries to increase procedural protection for the interrogated suspect. But the existing procedure is defective, partly because some important procedural rules are absent and partly because no sanctions are established for breach. Especially interrogation in breach of these procedures will not lead to the application of the exclusionary rule.

3. *Excluding the Confession for What?*

In the typical model, breaching the exclusionary rule of illegally obtained confessions has consequences: an involuntary confession is determined as illegal and subject to exclusion, thereby suppressing compulsory interrogating acts. Since Article 50 of the 2012 Chinese law requires that investigators ‘are strictly prohibited from extorting confessions by torture, collecting evidence through threats, enticement, deception or other unlawful means, or forcing anyone to provide evidence proving his/her own guilt’, it can be expected that certain exclusionary rules should be established for ensuring this.

Article 54 stipulates the Chinese Exclusionary Rule for Illegally Obtained Testimony (including confessions): ‘Confessions extorted from a criminal suspect or defendant by illegal means such as torture, testimony of witnesses and statements of victims collected by violent means, threat or other unlawful means shall be excluded’.²⁵ Accordingly, if an item of confession is obtained by ‘illegal means such as torture’, it is subjected to

²⁵ In China, the exclusionary rule was first established in 2009 by a judicial interpretation document called *Supreme Provisions for Excluding Illegally Obtained Evidence*. The 2012 *Criminal Procedure Law* absorbed this judicial interpretation.

exclusion. But what does this mean? The law merely illustrates the ‘illegal means’ with ‘torture’, and leaves great space of discretion for the judge in applying this rule.

On account of this vague criterion, the Supreme Court has issued a judicial interpretation:

[F]orcing the suspect or accused to confess in breach of his or her will, by means of corporal punishment, disguised corporal punishment, or other methods which subject him or her to severe pain or suffering corporeally or mentally, shall be identified as the ‘illegal means such as torture’ stipulated in Article 54 of Criminal Procedure Code.²⁶

Accordingly, the involuntariness is not a sufficient condition for a confession to be excluded; a further condition shall be met: causing ‘severe pain or suffering’ to the suspect or defendant.²⁷ This interpretation narrows the application of the exclusionary rule. A confession obtained through other compelling methods, such as enticement, deception, environmental oppression and even corporeal or mental compulsion which is not severe enough, will not be excluded by applying Article 54.

B. Making Sense of the Conflicts

The current Chinese confession rule system draws on the typical model on the one hand, and departs slightly from it on the other hand. The principle against self-incrimination is explicitly expressed, whereas the right to silence seems to be denied by the ‘obligation to truthfully answer’. Some procedures are established to regulate the police’s interrogation method and protect the suspect’s rights, but they are very incomplete and not linked to certain consequences such as the triggering of the exclusionary rule; the exclusionary rule for illegally obtained confessions has been legislated, whereas the accompanying judicial interpretation restricts its application by a ‘severe pain or suffering’ criteria. How to make sense of these conflicts? This paper does not mean to ‘justify’ them, but to describe the somewhat unique structure of Chinese confession rules, especially its contrast with the typical model described in Part Two.

First, the implication of Article 118 (the criminal suspect shall answer the investigators’ questions truthfully) should be clarified. Although this provision is called ‘obligation to truthfully answer’ by many researchers, it is not a real legal obligation. If something is a legal obligation, then breach of it will cause adverse legal sanction or some other consequence. But even if the suspect refuses to answer the investigator’s question, this will not give rise to any punishment according to the current law. For example,

²⁶ *Supreme Court’s Judicial Interpretation for applying Criminal Procedure Law of the People’s Republic of China* s 95.

²⁷ Therefore, a Chinese Scholar Professor Long Zongzhi names the existing exclusionary rule for illegal confessions in China as the ‘rule of pain’. See 龙宗智 [Long Zongzhi] 《我国非法口供排除的‘痛苦规则’及相关问题》 [The Rule of Pain in Excluding Illegal Confession Evidence in China] (2013) 政法论坛 *Tribune of Political Science and Law US*.

a suspect's silence does not warrant the police to commit compulsory interrogation; and the judge shall not make adverse inference from the silence against the accused. Article 118 can only be seen as a moral duty or appeal to the suspect, in terms of providing useful information for the crime investigation — but not as a strictly applied legal obligation.

Therefore, the so-called 'obligation to truthfully answer' does not deny the fact that the principle against self-incrimination has been established in the confession rule system. In the typical model, the central element of this principle and its affiliated rules is 'voluntariness', which seeks to reduce methods of compulsion. But the methods of compulsion can be divided into two types, according to their degree: (1) torture, or some methods that are equal to torture; (2) other methods, the degree of compulsion of which is less than torture, such as enticement, deception, environmental oppression and some minor corporeal or mental compulsion. Although the current Chinese confession rule system 'declares' to prohibit compulsory interrogating and protect the suspect's privilege against self-incrimination, it places emphasis on prohibiting torture, which is explained to contain 'corporal punishment, disguised corporal punishment, or other methods which subject him or her to severe pain or suffering corporeally or mentally'. For other compelling methods besides torture, the system takes a tolerant attitude. So the principle against self-incrimination is a bit more lax; the third requirement of the voluntary confession rule is in essence transferred to an anti-torture confession rule in China: a confession that is not the outcome of torture can be admitted as evidence against the accused, while confession that is the outcome of torture lacks admissibility.²⁸ Such compromising attitude is also reflected in the interrogating procedure: the key point is to prevent torture, not other methods, regardless of whether they are in breach of the voluntariness requirement.

IV. CONCLUSION

The conflicts and compromise inside the Chinese confession rule system are by and large inevitable. Like many other post-developing countries, China has been and still is transplanting legal rules from abroad, expecting to find useful resources in other countries. On this background, the typical model in America and Europe has become a significant reference for China to reform the confession rules. Meanwhile, the reform must give consideration to domestic judicial practice, and place another emphasis on making use of the so-called native resource. Specifically in Chinese judicial practice, there have long been conventions or even customary laws in terms of obtaining, using and evaluating confessions, and they are applied by judges. Therefore, the reform of the confession rule system in China has to strike a balance between the typical model and the native judicial

²⁸ The main driving force which urges China to establish the Exclusionary Rule of illegal confessions is the fact that many wrong convictions happening or discovered these years are attributed to the use of confessions under torture.

practice. The former puts the ‘involuntariness’ at its core, thereby organising confession rules; whereas the latter relies much on confession and, as a consequence, is reluctant to fully safeguard involuntariness. The existing Chinese confession rule system is the outcome of balancing these two legal considerations.

This paper has tried to indicate the conflicts in the existing confession rule system, and used them to describe the structure or model of Chinese confession rules. How to improve this system in the future, especially to make it better at respecting and guaranteeing human rights?²⁹ This mission needs to be accomplished by many legal professionals in China. Here the paper proposes a transition in methodology for legal researchers. This transition may be only comprehensible in the light of the Chinese background of social transformation and legal reform. In the last few decades Chinese legal researchers have mainly taken a methodology (or research approach) which can be named ‘value-argumentation’. Since the Reform and Opening-up Policy was started, China has been reforming the whole legal system, aimed at ‘establishing a socialist legal system with Chinese characteristics by 2010’.³⁰ During this stage, legal research mainly focused on legislations or were legislation-oriented.

The research task is to answer questions such as: on what value-basis should the legal system be based on? What kind of law is expected? To what extent shall the Western law be transplanted? Because a generally accepted legal system remained to be established, so researchers’ central task was to argue for the approach of legislation, instead of legal application method. But at the present stage, a relatively complete (not in the sense of perfect) law system has been established in China, and the next step is to repair defect, fill gaps and develop details of this system. Research methodology should be more jurisdiction-oriented, which means to accept constraints of the existing system and to carry out systematisation or explanatory work. It does not mean that the research should be isolated from and give no advice to legislation, but rather means the work should be carried out inside the existing legal system — the researcher in principle should not ignore existing rules and conduct unconstrained research. This methodology is exactly what German scholars call the ‘*Rechtsdogmatik*’ method.³¹

In terms of the confession rule system in the Chinese law context, the jurisdiction-oriented method (or *Rechtsdogmatik*) shall be used to solve the conflicts mentioned in this paper, thereby improving its utility for protecting human rights. Several approaches may

29 Article 2 of the 2012 *Criminal Procedure Law* states, ‘The task of the criminal procedure law of People’s Republic of China is ... to respect and guarantee human rights’.

30 This aim is first formulated in the *Report of the 15th National Congress of the Communist Party of China* (1997).

31 Professor Robert Alexy concluded that *Rechtsdogmatik* (also called *Juristische Dogmatik*) contains three levels of connotation: 1) as descriptions of the existing law; 2) as a study of the concept-system of law; 3) as a method for providing advice to resolve cases. See Robert Alexy, *Theorie der Juristischen Argumentation, Zweite Auflage* (Taschenbuch, 1991) 308 (Chinese version translated by Shu Guoying), 中国法制出版社 (2002) 311.

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be taken into consideration: (1) Reduce or deny the validity of certain rules or judicial interpretations, according to some provision that has higher hierarchy or precedence of legal force; especially, apply constitutional provisions and rights to systematise confession rules. (2) The new law has priority over the old law; therefore, newly implemented provisions in the 2012 law shall suppress the conflicting old rules. (3) According to the principle of '*Legal Reservation*', only the law can set limitations to citizens' rights; therefore, the sections in judicial interpretation that impose larger limitation on a suspect's rights than the law shall be invalid. Of course, this short paper will not arrive at any hasty specific conclusions; it merely is bringing the issues to attention of researchers.

4

FACTORS INFLUENCING EXPERT OPINION CROSS-EXAMINATION IN CRIMINAL CASES — WITH DNA EVIDENCE AS OBJECT

YUAN LI¹

ABSTRACT

The probability of error in DNA evidence itself and its application is very low, but such an error can directly lead to misjudgement as DNA evidence is often considered to be authoritative and easily taken for granted. The Criminal Procedure Law 2012² and the recently initiated judicial reform require the court to strictly follow the principle of evidence judgment in trial and ask the judge to strictly control adoption of evidence for conviction and sentencing. It is necessary to strengthen cross-examination of DNA evidence. Despite the development of the expert appearance, expert advisor and pre-trial evidence disclosure systems, there are some obstacles in existing DNA evidence cross-examination, and minor issues that affect cross-examination efficiency, which should be addressed.

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2 *Criminal Procedure Law of the People's Republic of China* (People's Republic of China) National People's Congress, 12 March 2012.

I. INTRODUCTION

DNA identification techniques have played a role in criminal cases for nearly 30 years. They can identify the suspect, connect cases, determine genetic relationships, ascertain the original dumping ground of a dead body and provide general clues to the investigation. They are a key technical lever for the investigation of criminal cases. In various expert opinions, DNA evidence is the most scientific and objective. But in the DNA testing process, there may be DNA errors caused by sample mix-indexing/loss or data misreading.³ As DNA evidence is often considered to be authoritative, such an error can directly lead to misjudgement. The *Criminal Procedure Law* 2012 and the recently initiated judicial reform require the court to strictly follow the principle of evidence judgment in trials and ask the judge to strictly control adoption of evidence for conviction and sentencing. It is necessary to strengthen cross-examination experts who present DNA evidence.

A trial procedure includes two stages: fact-finding and law application. Cross-examination is an important part of fact-finding. In a narrow sense, cross-examination means a proving action where both the defence and the procuratorate challenge each other on the evidence presented and the process of putting to proof the facts in issue under the auspices of the judge in the court trial stage, thus affecting the fact finder's inner conviction about the facts. Its main forms include cross-interrogation and confrontation.⁴ In most criminal cases, the defence cross-examines the evidence submitted by the procuratorate against the suspect, and DNA expert opinion is just one kind of the evidence. However, although the *Criminal Procedure Law* 2012 provides for expert appearance, expert advisor and pre-trial evidence disclosure systems, there are some obstacles in existing cross-examination, and minor issues that affect efficiency of cross-examination, which should be addressed.

II. STATUS AND RIGHTS ARE IMBALANCED BETWEEN THE PROCURATORATE AND THE DEFENCE IN IDENTIFICATION

In modern criminal proceedings, the procuratorate and the defence are on opposite sides, and the procurator bears the burden of proof. The suspect and his/her counsel may exercise the right to defence. Balance between the procuratorate and the defence is a basic principle of criminal proceedings. But at this stage the imbalance between the two parties is still outstanding, which is embodied in the following aspects.

3 Committee on Identifying the Needs of the Forensic Sciences Community; Committee on Applied and Theoretical Statistics, National Research Council Strengthening, *Forensic Science in the United States: A Path Forward*, co-translated by Wang Jinxi (China Renmin University Press, 2012) 49; Chen Shuiqin, Liu Shuchao and Li Qiong, 'Influencing Factors and Guarantee Measures in the Quality of DNA Identification' (2012) 5 *Journal of Hunan Public Security College* 5.

4 Zhang Baosheng, *Science of Evidence Law* (China University of Political Science and Law Press, 2014) 379.

1. There Is an Inherent Imbalance in Status Between the Procuratorate and the Defence

According to the *Criminal Procedure Law*, in criminal proceedings, the investigation authority and the procuratorate shall perform their duties and powers conferred by law on behalf of national interests and use national identification resources and the criminal investigation techniques to exercise the right of criminal procuratorate in the name of the country. Their status is authoritative. In China, the society has long had full trust in and dependence on the public power, and the public has been full of reverence for and fear for authority. Therefore, in a criminal trial, the procuratorate is often seen as the representative of the interests of the state and society as a whole, while the status of the defence is negligible. Because of this imbalance, it is likely that the protection of personal rights of the suspect and cross-examination of the expert opinion against the suspect cannot be guaranteed.

2. Role and Status of the Procuratorate and the Defence Are Different in Identification

In practice, in a criminal case, evidence collection occurs primarily during the investigation stage and is completed by investigation personnel. It includes collection, packaging and preservation of key biological evidence from the scene as well as collection of control samples. In a case of public procuratorate, the party concerned does not have the right to collect samples. In addition, the right to involve forensic expertise is only enjoyed by public security, procuratorial and judicial authorities and almost unfettered by the rights of the party concerned. In more than 90 per cent of the cases, forensic expertise is conducted by a forensic institution under the public security authority. The suspect has no right to choose a forensic institution or expert and does not know what biological evidence is collected or delivered and is not informed of the risk of the identification techniques. The defence can only passively await the identification result. And he/she is informed of the identification result only in the form of 'expert opinion notice', which contains only the last part of the expert opinion with brief and abstract content instead of the whole identification report.

3. The Defence's Ability to Cross-Examine the Expert Opinion Is Poor

As a DNA expert opinion involves knowledge of high-tech fields, its cross-examination is more difficult than usual verbal evidence. Questioning by a defence counsel who has no knowledge of DNA testing techniques about a piece of DNA evidence is often limited to the level of perceptual cognition and hard to reach its essential content. Even if the defence counsel has consulted professionals outside the court and questions the essential

content of the expert opinion, the expert can easily justify himself/herself with jargons in the court while the defence counsel cannot make detailed inquiries due to his/her lack of expert knowledge. Thus, no real effective cross-examination can be conducted.

Thus, before the trial, the procuratorate is obviously in the ascendancy with the right to collect biological evidence, initiate expertise and choose a forensic institution, while the defence is at a disadvantage in terms of the ability to participate in the proceedings and cross-examine DNA evidence. In the trial, there is a serious imbalance between the procuratorate and the defence in ability to cross-examine, and cross-examination cannot be conducted on an equal footing.

III. JUDGES' NEUTRAL BEHAVIOUR IN CROSS-EXAMINATION SHOULD BE STRENGTHENED

1. The Time for Cross-Examination Is Short, and the Defence Cannot Fully Cross-Interrogate or Voice His/Her Opinions

In China, a court session generally lasts only half day, except if the case is a particularly major and complex one. A court session will cover many issues in a tight time frame, and time for cross-examination key expert opinions is very short. Within the limited time, the judge often does not allow the defence to cross-examine thoroughly and only allows him/her to ask the expert a few questions closely related to the case. The judge does not give the defence ample time and opportunities to get such important information as background of the forensic laboratory, professional proficiency of the expert and the test process. Thus, the efficiency of cross-examination is low.

2. Judges' Motivation to Recognise Special Issues Is Not Enough

A DNA expert's opinion is evidence regenerated by the laboratory through testing of biological evidence and is full of professional technical issues that are hard to understand or determine for the public. In a cross-examination, even if the expert appears in court and the defence invites an expert advisor to help express views and interrogate the expert in court, the judge would fail to listen to opinions from both parties to properly understand issues during cross-examination if he/she has no great patience or interest in the pursuit of knowledge of DNA techniques.

In court, the judge often interferes too much in the debate and cross-examination between the procuratorate and the defence. The judge often limits the defence's questions or has no regard for the questions asked by the defence during cross-examination of procuratorate witnesses and only asks the clerk to make a record. Thus, cross-examination becomes a mere formality.

3. Neutrality of Judge Should Be Strengthened

China's Constitution allocates right to control at different stages of criminal proceedings to the public security bureau, the procuratorate and the court.⁵ Over the years, the public security bureau, the procuratorate and the court have formed a relationship featuring division of labour, coordination and restriction with a priority to the public security bureau, and the three authorities jointly accept the leadership of the authority of politics and law. In a criminal case, the court tends to focus on crime control and blindly adopts the expert opinion and cannot handle the case independently. The judge is seen to be another fighter against crime after the public security bureau and the procuratorate. Professor Chen Ruihua from Peking University pointed out, 'The court can easily accommodate itself to local Party committee or government, public opinion and emotion of the families of the victim and take the same stand as the procuratorial and public security authorities, tending to look into the crime and abandon the basic capability of fair trial'. Besides, the judge reads all the dossiers before the court session, and the dossiers transferred by the procuratorate often contain only evidence of the guilt and the severity of the guilt of the suspect. After reading the dossiers, the judge may prejudge the defendant's guilt. Thus, the subsequent court trial will become a mere formality. Furthermore, when the defence challenges the procuratorate's expert opinion, the judge often communicates with the procurator and the police expert on the defence's line of questioning outside the court and reaches a consensus through discussion about specific issues.

Even if the judge does not communicate with the procurator and the police expert outside the court, the court will prefer the expert opinion submitted by the procuratorial and public security authorities due to the inherent coordinating relationship between the public security bureau, the procuratorate and the court as well as the stable understanding formed through long-term coordination.⁶ Therefore, China's criminal proceedings actually cannot effectively ensure the defence's efficient exercise of his/her right of defence, and the defence has difficulty in effectively cross-examine the expert opinion provided by the investigation authority to sway the judge's decision.

IV. THERE ARE PRACTICAL PROBLEMS IN THE EXPERT ADVISOR SYSTEM

The introduction of the expert advisor system into the *Criminal Procedure Law* 2012 is of great significance. Both the procuratorate and the defence can quest an expert advisor to appear in court. But given the serious imbalance between the procuratorate and the defence in terms of resources, the new provision is of greater significance for the

5 Han Dayuan and Ding Wenhao, 'Constitutional Relationship between Court, Procuratorate and Public Security Bureau' (2011) 3 *Chinese Journal of Law* 3.

6 Dou Chunlei, *Relationship between Procuratorate and Court in Criminal Proceedings* (Master's Thesis, Jilin University, 2013) 27.

defence. It can make up for the lack of the defence's ability to cross-examine and to a certain extent affect the judge's inner conviction to provide a reference for the judge in screening expert opinions and making the judgment. The expert advisor system plays a role in ensuring reliability of the expert opinion. But there are practical problems in the system in practice.

1. Neutrality of Expert Advisor Is Questioned

An expert advisor is engaged by the client and accepts a remuneration paid by the client. He/she questions the expert opinion submitted by the procuratorate to the court using his/her own expertise according to the client's instruction. Although the opinion provided by the expert advisor is professional and 'scientific', it is to the advantage of the client since the expert advisor gets a large remuneration from the client. Subconsciously or consciously, the expert advisor may provide an opinion supporting the client, which is to some extent not impartial.⁷ This is somewhat similar to the function of the expert witness system in the Anglo-American Legal System. 'For the interests of his own in the proceedings, the party concerned more often than not does not find the best expert to clarify the controversial item, but finds the best witness to his case'.⁸ 'In the U.S., an expert witness is just like a saxophone in the hands of the lawyer, which plays the tune the lawyer wants.'⁹ Given the lack of neutrality of expert advisors, expert advisor's opinions should be reviewed and screened.

2. The Role of Expert Advisors Is Exaggerated

In a criminal case, the expert advisor is not and cannot be involved in the whole process of identification. He/she can only make a written review of the delivered sample, test procedure, test result, result analysis and conclusion of the expert opinion contained in the identification report. Factors related to reliability of the expert opinion include personnel, key equipment, reagent, method, environment and test record.¹⁰ The time limit and the limited opportunity for cross-examination in court can greatly reduce the opportunities for the expert advisor to find errors in the expert report. Besides, the

7 Du Chunpeng and Li Yao, 'Inspirations from British Expert Witness System for Improvement of China's Forensic Expert System' (2012) 20 *Evidence Science*.

8 Wang Jiancheng and Wu Jiang, 'Further Review of Basic Theory of Forensic Expertise' 5 (2002) *Legal Forum*.

9 Xu Jingcun and Yan Fei, 'Bridging Gap between Procedures through Procedures: Challenge of Scientific Evidence for Criminal Trial and Solution' (2009) 2 *Chinese Journal of Forensic Sciences* 1.

10 ISO/IEC 17025: 2005 *General Requirements for the Competence of Testing and Calibration Laboratories* and CNAS-CL28: 2014 *Notes on Application of Criteria for Recognition of Competence of Forensic Expertise/Forensic Science Institutions in Identification of Forensic Biological Evidence DNA* by the China National Accreditation Service for Conformity Assessment (CNAS).

expert advisor only questions the expert opinion from a professional perspective.¹¹ Their function is to question the effectiveness of the expert opinion rather than the facts. In DNA identification, the best role the expert advisor can play is after the judge approves the defence's request for re-identification. In China, almost no judge dares to absolve the suspect's guilt through cross-examination.

3. The Number of Expert Advisor Candidates Is Limited

In essence, when the defence engages an expert advisor, the latter should serve the former using his/her expertise as much as possible. The more authoritative the expert advisor is, the better the defence result will be. However, the reality in China is that the number of expert advisor candidates is very limited, and the number of expert advisor candidates who are willing to appear in court to be cross-examined by police expert is even less. A police expert in court will definitely not point out any error in the system where he/she is in. Private forensic organisations are for profit and they carry out only paternity testing. Candidates from these laboratories cannot play the role of expert advisor as their ability to examine the samples from the scene is very poor. In contrast, forensic institutions under politics/law/medical schools and scientific research institutes, and the Institute of Forensic Science, Ministry of Justice, have excellent forensic resources, and experts from these institutions are the best expert advisor candidates. But an expert advisor from such an institution is generally unwilling to be cross-examined by an expert witness associated with the police. Even if he/she is engaged as an expert advisor, he/she would be worried.

V. OTHER FACTORS THAT INFLUENCE THE EFFECT OF CROSS-EXAMINATION

1. Lack of Unified Forensic Administration

To regulate forensic activities of forensic institutions and experts and guarantee forensic quality, the Ministry of Justice has introduced a series of regulations, such as the *Regulations on Forensic Institution Registration Administration*, the *Regulations on Forensic Expert Registration Administration*, the *General Rules on Forensic Procedure*, the *Forensic Identification Report Criterion*, the *Regulations on Forensic Identification Education and Training* and the *Criterion for Internal Management of Forensic Institutions*. However, these provisions do not necessarily apply to the forensic institutions or experts to which the investigation authority belongs. The investigation authority administrates the forensic institutions and its experts by performing such duties as qualification examination, annual examination, qualification renewal/change/cancellation, issuing of qualification certificates, system roster preparation, technical examination, business guidance administration, team building and supervision and inspection.

¹¹ *Interpretation of Criminal Procedure Law and Practical Guide*, People's Republic of China, compiled by Criminal Law Office, Legislative Affairs Committee, NPC Standing Committee, 2012367.

The Ministry of Public Security has introduced the *Regulations on Administration of Registration of Forensic Institutions of Public Security Organs*, the *Regulations on Administration of Registration of Forensic Experts of Public Security Organs*, the *Rules on Identification of Public Security Organs* and the *Regulations on Procedure of Criminal Cases for Public Security Organs*.

China has no unified criteria or rules on the regulation of expert witnesses. The Ministry of Justice and the Ministry of Public Security administers different rules on these issues in their respective ways, setting different requirements for expert qualifications, continuing education and the identification report criterion. If the defence and the expert are unfamiliar with the difference between the two systems in, there will inevitably be disputes about general rules on the cross-examination process, which will affect the progress and effectiveness of cross-examination. For example, for continuing education of experts, experts from private forensic organisations shall participate in continuing education for no less than forty hours per year. But the Ministry of Public Security has no clear unified regulations on this issue. Only the *Regulations on Administration of Registration of Forensic Experts of Public Security Organs* stipulates, 'Qualification of experts shall be reviewed every two years, and those who do not accept the professional skill training or fail the training will fail the annual examination'. All experts are equally engaged in forensic identification and can accept engagement in DNA identification for criminal cases, but they are subject to different regulations as they are in different systems. These issues should be addressed in cross-examination.

2. Lack of a Special Law on DNA

For any country, DNA technologies and databases are important technical resources for the investigation of criminal cases and fight against crimes. There should be a legislation on the legitimacy of DNA examination, identification and sampling, adoptability of conclusions and construction and application of DNA databases. Many countries/regions have developed laws and regulations on DNA sampling, application of expert opinions and DNA databases, such as the *Regulations on Sample Collection* promulgated by the British Home Office in 1995, the *Federal DNA Identification Act* adopted by the US Congress in 1994, the *Canadian DNA Identification Act* adopted by Canada in 1997, the *DNA Identification Act* adopted by the German parliament in 1998 and the *Regulations on DNA Sampling* promulgated by Taiwan in 1999.¹² These laws on DNA identification have been revised many times and adapted to the new situation and environment.

The *Criminal Procedure Law* 2012 has identified the legal status of DNA identification. However, there is no separate legislation on other areas of DNA

¹² Fang Jianxin, Yu Hongwei and Cheng Dalin 'Probe into Development of China Criminal DNA Database Administration Regulations' 1 (2001) *Chinese Journal of Forensic Sciences* 38.

identification which is an important means of investigation. The provisions in the new Criminal Procedure Code are relatively abstract, and many specific issues are hard to be solved from the legal perspective.¹³ The lack of legislation will directly affect cross-examination of legitimacy of DNA evidence.

3. Inconsistence between Standards and Technical Specifications

The Standardisation Law of the People’s Republic of China classifies standards into National, Industry, Local and Enterprise. The English name of national standards is GB. The industry standards that regulate forensic identification belong to the category of public security and their code is GA. Their developer and approver is the Ministry of Public Security. In China’s current judicial identification administration system, the judiciary is responsible for administration of forensic institutions and experts. The Forensic Authority, Ministry of Justice, promulgated three sets of forensic technical specifications respectively on 7 April 2010, 17 March 2011 and 17 March 2014. Two of the three criteria involve forensic identification. Table 1 lists the current national and industry standards and technical specifications for the forensic identification field.

Promulgator	Name	Role
National standard	Criterion for forensic DNA database (GB/T 21679-2008)	It provides forensic DNA database functions, structure and responsibilities, database object sample collection, database requirements, database construction procedure and locus
Public security industry standard	Specifications for collection, preservation and delivery of forensic biologic samples (GA/T 1162-2014)	It provides methods for collection, preservation and delivery of forensic biologic evidence samples
	Detection method of human haemoglobin—Rapid test strip (GA 765-2008)	It provides working principles, material preparation, operation method, result determination and precautions for detection of human haemoglobin with rapid test strip

13 Zhao Xingchun ‘Legislative Status of Sampling and Identification for DNA Identification in Criminal Cases’ (2009) 1 *Evidence Science*; Weng Yijie ‘Extraterritorial Forensic DNA Database System and Inspirations for China: From Perspective of Criminal Justice’ (2012) 6 *Political Science and Law*.

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Public security industry standard (continued)	Detection method of human semen PSA—Rapid test strip (GA 766-2008)	It provides working principles, material preparation, operation method, result determination and precautions for detection of human semen PSA with rapid test strip
	Specifications for construction of forensic DNA laboratory (GA/T382-2014)	It provides basic requirements for forensic DNA laboratories
	Specifications for examination of forensic DNA laboratory (GA/T 383-2014)	It provides basic requirements for examination of forensic DNA laboratories
	Analysis and application of the human DNA fluorescent STR genotyping result (GA/T 1163-2014)	It provides basic requirements for use of human DNA fluorescent STR genotyping result in the forensic field
	Criterion for the human fluorescent STR multiplex PCR reagent (GA/T 815-2009)	It provides basic requirements for human fluorescent STR multiplex PCR reagent
	Regulation for parentage testing laboratories of forensic DNA (GA/T 965-2011)	It provides triplet paternity test content and result determination rules
	Content and format of forensic DNA examination and identification report (GA/T 1161-2014)	It provides content and formats forensic DNA examination and identification report
Technical specifications	Technical specifications of paternity test (SF/Z JD0105001-2010)	It provides technical requirements for paternity test (triplet, dyad and grandparent-grandchild paternity test)
	Specifications for implementation of biologic full-sib identification (SF/Z JD0105002-2014)	It provides biologic full-sib identification content and result determination criterion

Table 1: National and industry standards and technical specifications for the forensic identification field.

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It can be seen from Table 1 that China lacks standards or technical specifications for individual identification. In the majority of criminal cases, DNA identification involves individual identification. There is no standard that regulates recognition of individual identification. Furthermore, criteria for judgment of expert opinions about paternity tests are inconsistent. There are inconsistencies between industry standards as well as between industry standards and technical specifications. Besides, various standards have different requirements for identification reports. The inconsistencies in the forensic identification industry have made the application of criteria for DNA cross-examination in court even more confusing.

Through analysis, we are aware of the obstacles that exist in the process of DNA evidence cross-examination, which include aspects from the judicial system to DNA legislations and standard settings. Based on constant judicial reform and related DNA standard settings, those obstacles will be gradually removed, and DNA evidence will play a bigger role.

5

ON RULES OF PROOF IN FORENSIC PSYCHIATRIC EVALUATION

HU JINIAN¹

I. INTRODUCTION

Forensic psychiatrists collect and evaluate information or evidence related to the patient's mental state; they then give their expert opinions on the patient's legal competence or legal relationship. In this process, forensic psychiatrists must support their opinions with evidence. In other words, forensic psychiatrists must prove their expert opinions. Therefore, forensic psychiatric evaluation is a measure for proving facts.

Different rules of proof will lead to different expert opinions. However, must some rules of proof be observed? What rules of proof must be observed? What differences are there between the rules of proof in clinical psychiatric diagnosis and that in forensic psychiatric evaluation? Such questions have not been studied properly so far; however, answers to these questions are of great significance to forensic psychiatric evaluation.

Based on the comparison of the characteristics of the way that proof is conducted in forensic psychiatric evaluation and that in judicial proof, the author concludes that forensic psychiatric evaluation has the nature of quasi-judicial proof and therefore should observe similar rules of proof that are adopted in the court trial.

II. CHARACTERISTICS OF FORENSIC PSYCHIATRIC EVALUATION

Forensic psychiatric evaluation is the activity or process where qualified forensic psychiatrists, entrusted by others such as the State or individuals, according to legal

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procedure, make a diagnosis of the patient's mental state and evaluate the patient's corresponding legal competence or legal relationship based on the collected information. The opinion consists of two parts: diagnosis and opinions on legal competence or legal relationship, both of which should be supported by evidence. From this perspective, forensic psychiatric evaluation is a measure for proving facts. Actually, forensic psychiatric evaluation and court trial share some similarities, such as normalisation, antagonism, timeliness and relativity.

A. Forensic Psychiatric Evaluation Shares the Four Basic Characteristics of Judicial Proof

While normalisation, antagonism, timeliness and relativity are considered to be the four basic characteristics of judicial proof, forensic psychiatric evaluation shares all these characteristics.

1. Normalisation

The performance of forensic psychiatric evaluation must be carried out in accordance with *The General Rules of Forensic Authentication Procedure* and related regulations. The qualification of the expert, the procedure for acceptance of instructions and performance of evaluation, criteria for diagnosis and evaluation of legal competence, the form of evaluation report, the delivering of the report, the protection of files and the time limit are all set out in related regulations, and breach of these regulations will lead to loss of legitimacy of the evaluation.

2. Antagonism

In forensic psychiatric evaluation, no matter whether it is a criminal or civil case, the opposing two parties are always in opposite positions. One party presents evidence to support its claim that the patient is/was suffering mental disorders and therefore has impaired or no legal competence, while the opposing party presents contrary evidence. Forensic psychiatrists always face conflicting material/evidence: some suggest and support that the patient has certain symptoms and syndromes and meets the diagnostic criteria for a certain mental disorder, and therefore, the patient's legal competence is impaired. Other evidence refute the above claims.

3. Timeliness

The General Rules of Forensic Authentication Procedure stipulates the time limit for acceptance of instructions, through to finalisation of the evaluation. Breach of these regulations will result in loss of legitimacy.

4. *Relativity*

It is quite common that forensic psychiatric evaluations of the same case result in different conclusions/opinions, due to the incompleteness of the evidence in forensic psychiatric evaluation. And that is why whether the opinion is admissible or not shall be determined through the examination procedure in court.

B. Other Characteristics Forensic Psychiatric Evaluation Shares with Judicial Proof

Activities for proving facts in forensic psychiatric evaluations share similarities with judicial proof in court trial in goal, target, nature, material, method, process, rules of evidence, results, pursued values and avoidance system. (Table 1).

Take the evaluation of criminal responsibility as an example: forensic psychiatrists deal with the same material faced by a trial judge — there are confessions and excuses of the suspect, interview records of the victims and witnesses, records of the inspection, medical records of the suspect and earlier forensic psychiatric reports of the patient. In a civil case, the forensic psychiatrist deals with the same material faced by a civil judge in civil proceedings.

However, the two steps, namely, fact determination and application of law, taken in court trials by judges are also taken by forensic psychiatrists in forensic psychiatric evaluation. Firstly, these two steps are taken when diagnosing, where fact determination takes the form of symptom determination, and application of law takes a similar form of the application of the diagnostic criteria. The first thing to do when diagnosing is symptom determination, through which questions such as whether the patient has certain symptoms or syndromes and therefore meets the diagnostic criteria are determined. Usually, whether a symptom or syndrome exists is determined by analysis of the collected information. In practice, forensic psychiatrists usually face information from different resources, in different forms, and sometimes, their contents are conflicting, thus cannot be used directly as diagnostic evidence. Forensic psychiatrists must analyse the conflicting information to get the diagnostic evidence. The same situation happens during determination of illnesses. After determination of a symptom, severity and cause, a diagnosis is made against the legally specified diagnostic criteria, including International Classification of Diseases (ICD-10) or Chinese Classification of Mental Disorders (CCMD-3), which functions like the application of law in trial.

The above discussion can be illustrated by using the evaluation of criminal responsibility as an example. The opinion that the patient was unable to recognise or control his/her conduct at the time of committing the crime due to mental disorders must be based on analysis of different — sometimes conflicting — information, and use of standards for evaluating criminal responsibility.

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It should be noted that although a diagnosis is made when forensic psychiatric evaluation is performed, the thinking mode, ways and progress of diagnosis in forensic psychiatric assessment is different from that in medical treatment (Table 1).

	Judicial Proof	Forensic Psychiatric Evaluation	Clinical Diagnosis
Purpose	To solve legal issues	To help solve legal issues	To solve health problems
Nature	Judicial Activity	Part of Judicial Activity	Medical treatment
Evidence materials	Criminal or civil case files	Criminal or civil case files, records of mental state examination	Medical records, records of examination
Methods	Collecting, presenting, examination and determination of evidence	Collecting, presenting, examination and determination of evidence	Collecting and analyzing diagnostic information
Process	Determination of fact, application of law	Determination of fact, application of law	Determination of diagnostic evidence, application of diagnostic criteria
Rules	Three procedure laws	<i>The General Rules of Forensic Authentication Procedure</i> and related regulations	Diagnostic and treatment routines
Results	Written Judgment, award	Forensic psychiatric report	Medical record
Values pursuit	Truth, fairness, efficiency	Truth, fairness, efficiency	Truth, efficiency
Avoidance system	Yes	Yes	No
Responsible department	Superior courts, people's congress	Judicial Administrative department	Health Administrative department

Table 1: Comparison of judicial proof, forensic psychiatric evaluation and clinical psychiatric diagnosis.

C. Difference Between Psychiatric Evaluation and Judicial Proof

There are remarkable differences between forensic psychiatric evaluation and judicial proof even though the two share a lot of similarities in some respects. One of the main differences is that judicial proof is provided by the three procedure laws, namely, the *Criminal Procedure Law*, the *Civil Procedure Law* and the *Administrative Procedure Law*. Specifically, the main body of proof, distribution of burden of proof, standard of proof and credibility and probative force of evidence are provided by the procedure laws, but there are no such laws and regulations of proof in forensic psychiatric evaluation. Therefore, the process of proving facts in forensic psychiatric evaluation is not strictly judicial proof. That is to say, forensic psychiatric evaluation is a quasi-judicial proof procedure, which means that forensic psychiatric evaluation observes similar but not exactly the same rules of evidence adopted in court trial.

III. RESPONSIBILITIES OF PARTIES

In forensic psychiatric evaluation, there are four main parties: the entrusting party, the evaluator, the party who claims that the patient has a mental disorder and the opposing party. The evaluators perform the evaluation when entrusted by the entrusting party, analysing information collected from both the party who claims the patient has a mental disorder and the opposite party to form the diagnostic evidence and evidence of legal competence.

A. Responsibility of the Entrusting Party

In criminal cases, the public security organ, the procuratorate and the court are the legally qualified entrusting party, while in civil cases, courts are the main entrusting party. Article 12 of *The General Rules of Forensic Authentication Procedure* states: the principal shall provide material necessary for the entrusted authentication. Article 13 states ‘the principal shall provide to the facilities with true, complete, sufficient material, and shall be responsible for the truthfulness and lawfulness of this material’. However, this responsibility of providing material is different from the burden of proof shouldered by the patient in forensic psychiatric evaluation, which will be discussed later.

B. Responsibility of the Evaluators

1. Responsibility for Their Expert Opinion

Article 4 of *The General Rules of Forensic Authentication Procedure* states: ‘the expert responsibility system is carried out in judicial authentication. The experts shall perform the authentication independently, objectively and impartially, and be responsible for their expert opinions’. Article 6 states: ‘judicial facility and its expert shall observe

the avoidance system in judicial authentication according to relevant procedure laws and the present rules'. This requires forensic psychiatrists to perform the evaluation independently and to take responsibility to form their own expert opinions.

2. Responsibility of Checking Material

Article 14 of The General Rules of Forensic Authentication Procedure states that the authentication facility shall check the provided material for truthfulness, completeness and sufficiency to determine whether or not to accept the request. Article 27 states that the experts may suspend authentication if the provided material is false, illegally collected or incomplete, insufficient or damaged. Article 16 states that the authentication facility shall not accept the instructions of the entrusting party if the provided material is false, incomplete, insufficient or illegally collected. That is to say, the authentication facility and its experts have the obligation to check, analyse, and determine the provided material.

3. The Evaluator Has the Authority to Investigate and Collect Evidence When Necessary

Currently, according to laws and regulations, forensic psychiatrists are authorised to investigate the case and collect related evidence. Usually, the evaluator will interview interested parties to collect information about the mental state and legal competence of the patient and do a mental state examination with the patient to gather direct information or evidence about the mental state and related legal competence. Similarly, the burden of proof is not shouldered by the party who claimed that the patient was mentally disordered so severely that his/her legal competence is impaired or even lost.

C. Burden of Proof of the Party Who Claims that the Patient Has a Mental Disorder and Whose Legal Competence Is Therefore Impaired

Distribution of burden of proof is one of the main subjects of evidence law. This question also exists in forensic psychiatric evaluation, that is who shall have the responsibility to provide enough evidence to prove that the patient has a mental disorder, and that the mental disorder he/she is suffering is so severe that his/her legal competence is impaired. The principle of 'burden of proof borne by claimant' is observed in judicial proof, especially in civil cases. In criminal cases, the procuratorate exercises prosecution on behalf of the country. Usually, suspects do not bear the burden of proof.²

According to the principle of burden of proof borne by the claimant in judicial proof, and the 'three presumptions' in forensic psychiatric evaluation introduced later, the party who claims that the patient is mentally ill and whose legal competence is

² GZ Chen, *The Law of Evidence* (Law Press, 2011) 326-9.

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therefore impaired shall take the burden of proof in the process of forensic psychiatric evaluation. That is to say, conclusions such as Not Guilty by Reason of Insanity (NGRI) cannot be reached if the claimant fails to provide sufficient evidence to prove it.

The evaluator's power to investigate and collect evidence if necessary does not mean that the evaluator bears the burden of proof mainly for two reasons: first, the evaluator does not have his/her own claims in the evaluation; second, the evaluator does not bear the adverse results of failure of proving that the patient has a mental disorder and whose legal competence is therefore impaired.

D. Responsibility of the Opposite Party

The opposite party of the party who claims that the patient has a mental disorder and whose legal competence is therefore impaired may also provide evidence, but strictly, this is its right rather than its responsibility.

IV. PRESUMPTION ADOPTED IN FORENSIC PSYCHIATRIC EVALUATION

Legally, presumption means that one fact can be taken to be true on the basis of probability, unless there is evidence to the contrary. For example, presumption of innocence means no one is guilty unless he or she is convicted through a court trial. Here, the proposition that one is not guilty is not based on evidence but a result of presumption.

Traditionally, presumption of sanity is followed in forensic psychiatric evaluation, which we think can be further divided into three presumptions: presumption of complete legal competence, presumption of sanity and presumption of no mental disorder in doubtful cases.

A. Presumption of Complete Legal Competence

The presumption of complete legal competence which should be followed in forensic psychiatric evaluation can be traced back to the McNaughton rules in 1843, which state: 'the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction'. The McNaughton rules were applied in criminal cases, but now, the principle of this rule has also been adopted in civil cases. The fifth principle of the WHO document *Mental Health Care Law: Ten Basic Principles* states: 'presuming that patients are capable of making their own decision unless proven otherwise'.³ Therefore, the patient's legal competence should be presumed complete unless proven otherwise, no matter if it is a criminal or civil case.

³ WHO/MNH/MND/96.9 Mental Health Care Law: Ten Basic Principles.

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Presumption of complete legal competence is in accordance with both the Criminal Law and the General Rules of Civil Law of our country. Article 17 of the Criminal Law states: 'A person who has reached the age of eighteen who commits a crime shall bear criminal responsibility'. Article 11 of the General Principles of the Civil Law states: 'A citizen aged 18 or over shall be an adult. He shall have full capacity for civil conduct, may independently engage in civil activities and shall be called a person with full capacity for civil conduct'.

B. Presumption of Sanity

In the context of forensic psychiatric evaluation, a diagnosis is established at the end of the legal competence evaluation, which is quite different from the diagnosis in clinical settings. This special goal requires the presumption of sanity which was set out by the McNaughton rules be adopted.

In China, the majority of forensic psychiatrists are clinical psychiatrists who have not been systemically trained in laws and tend to think that those who come to see a doctor are more likely to be sick. With this mode of thinking in mind, their opinions are more likely biased.

C. Presumption of No Disorder in Doubtful Cases

In practice, sometimes, it is still not clear as to whether or not a specific symptom or syndrome exists although the evaluator has already tried his/her best to investigate and collect information about the patient's mental state. In these types of cases, presumption of no disorder in doubtful cases should be followed, which is also a requirement of the McNaughton rules. This presumption requires that doubtful symptoms or syndromes should not be considered while establishing a diagnosis in forensic psychiatric evaluation.

V. STANDARD OF PROOF

In judicial proof, the standard of proof in criminal cases is higher than that in civil cases. In criminal proceedings, the standard of beyond a reasonable doubt is adopted, while in civil proceedings, the standard of preponderance of the evidence or the standard of high probability is adopted.

The conduct of criminal psychiatric evaluation is to help solve special problems in criminal proceedings, and the conduct of civil psychiatric evaluation is to help solve special problems in civil proceedings. This difference requires different standards of proof be followed in different types of evaluation. Evaluation of criminal responsibility, competence to stand trial, competence of imprisonment, and so on, should take the standard of proof of beyond a reasonable doubt. If there is reasonable doubt that a symptom, a syndrome and a certain type of mental disorder can be established, and

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therefore the conclusion of no legal competence, such as criminal responsibility cannot be made. However, in civil psychiatric evaluation, if the probability that the patient's legal competence is impaired is higher than that it is not, the evaluator can reach a conclusion that the patient's legal competence is impaired.

VI. EXAMINATION AND DETERMINATION OF EVIDENCE IN FORENSIC PSYCHIATRIC EVALUATION

A. Evidence in Forensic Psychiatric Evaluation

1. Evaluation Material vs. Evaluation Evidence

Evaluation material refers to all material where information about the facts of the case is documented. Evaluation evidence derives from the evaluation material gained through analysis and can be used as evidence directly to support the evaluation results. Their relationship is similar to that of evidence material to evidence.

2. Diagnostic Evidence vs. Legal Competence Evidence

From the perspective of purpose of proof, evidence can be divided into two types: evidence for establishment of diagnosis and evidence for determination of legal competence. However, they are not completely independent from each other.

3. Evidence for the Claimant vs. Evidence for the Opposing Party

Evidence that supports the patient has a mental disorder and therefore that his/her legal competence is impaired usually includes the interview records of the patient's family members and other related parties and his/her medical records, while opposing evidence is typically presented by the victims or complainants. The evaluator needs to weigh the two types of evidence.

4. Testimony of Witness vs. Physical Evidence

The majority of evidence dealt with by forensic psychiatrists in forensic psychiatric evaluation is different kinds of statements, for example, the testimony of witnesses, which has the advantage of directness and completeness, but also the weakness of subjectivity and unstableness. Physical evidence does not account for a large proportion in forensic psychiatric evaluation.

5. Evidence Collected by The Evaluator vs. Evidence Not Collected by the Evaluator

Evidence collected by the evaluator usually includes interview records of different individuals and records of the mental state examination. The evidence that is not collected

by the evaluator is mainly written material including interrogation records, testimony of witnesses, medical records and earlier psychiatric reports. From the perspective of evidence law, they have different characteristics.

B. Evidence Determination Method

The evidence determination method used in forensic psychiatric evaluation decides the final expert opinion on diagnosis and legal competence. The forensic psychiatrist evaluates the credibility of evidence and the probative force of evidence to determine whether the patient has a certain symptom, whether the patient meets the diagnostic criteria for a certain kind of mental disorder and whether the patient's mental disorder has impaired his legal competence based on his/her experience and rationale. Here the forensic psychiatrist's role is similar to a trial judge in court. Thus, a similar evidence determination method should be adopted, which is free evaluation of evidence combined with rules of proof. Without the limitation of rules of proof, the discrepancy rate of forensic psychiatric opinions would be much higher.

C. Examination of Credibility of Evidence

The examination of evidence performed by forensic psychiatrists should be governed by two types of rules: rules of determination of credibility of evidence and rules of determination of probative force of evidence. Evaluators are encouraged to collect as much evidence as possible in a forensic psychiatric evaluation. Only the evidence that is definitely forbidden by related laws and regulations is excluded.

D. Examination of Probative Force of Evidence

The issue of the determination of probative force of evidence is based largely on experience. It is impossible to have a formula for it, nor can it be defined by a statute. The determination of probative force reflects a judge's wisdom. Currently, there is no specific regulation on probative force of evidence in our country, which is similar to the Continental law system. However, drawing experience from common law countries' legislatures, the *Regulations of the Supreme People's Court on Evidence in Civil Proceedings* sets out many rules for probative force of evidence: therefore, rules of probative force has become the focus of evidence system in our country.

According to the *Regulations of the Supreme People's Court on Evidence in Civil Proceedings*, evidence is divided into three types: evidence with complete probative force, evidence with incomplete probative force and evidence with probative force that should be determined comprehensively. In addition, there are also provisions regulating the probative force of each piece of evidence in cases where more than one piece of evidence are probative to a fact in issue.

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Similar rules of probative force of evidence should be adopted in the conduct of forensic psychiatric evaluation. To be specific, evidence that fits the psychiatric theories has greater probative force, and evidence that corroborate with other evidence material has greater probative force.

VII. CONCLUSIONS

Forensic psychiatric evaluation is a measure for proving facts. The rules of used proof directly influence the final expert opinions. The lack of research in this area has become a barrier to the normalisation of forensic psychiatric evaluation. Forensic psychiatric evaluation has the nature of quasi-judicial proof and therefore should follow similar rules of proof in judicial proof.

6

THE SYSTEM OF EVIDENCE RULES AND ITS ESTABLISHMENT IN CHINA

ZHENG XI¹

ABSTRACT

Different evidence rules can be included into a system after being permuted. According to their basic roles and implementation of goals, the rules can be divided into relevancy, auxiliary, and extrinsic policy rules. Furthermore, the auxiliary rules can be divided into preferential, analytic, prophylactic, simplificative, and quantitative rules. There are some evidence rules in China; however, they have not formed a completed system. We can learn from the common law countries to achieve the completion of the system of evidence rules and to coordinate the exercise of the individual rules.

I. NECESSITY FOR A SYSTEM OF EVIDENCE RULES

Evidence rules answer the question of whether a piece of evidence can be presented before triers of fact (especially juries) and admitted in trials. When we are talking about evidence rules, we are talking about the rules that regulate the admissibility of evidence. A typical manifestation lies in *Federal Rules of Evidence*,² where evidence rules are considered as rules of ‘admissibility of evidence only’.³

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2 See *Federal Rules of Evidence* (US Government Printing Office, 2010).

3 Yi Yanyou, ‘Codification of the Rules of Evidence’ (2008) 6 *Tribune of Political Science and Law* 80, 82.

Some of the evidence rules are familiar to us, for example, the relevancy rules, the hearsay rule, the best evidence rule, the voluntary confession rule, the corroboration rules, the opinion rule, and the character evidence rule, and so on. Evidence rules can be seen as two sides to one coin: on the one side, evidence against the rules are not allowed to be presented before triers of fact; on the other side, evidence rules shall be used to exclude evidence that does not conform to the rules. However, parallel enumeration of the above rules is not appropriate since these rules are at different levels and hierarchies in the system of evidence law. The relevancy rules, for example, play a fundamental role in evidence law amongst common law systems, and are considered as ‘the basic and unifying principle underlying the evidence law’⁴, with higher importance than any other evidence rule. Among other evidence rules, the hearsay rule, the best evidence rule, the voluntary confession rule and the corroboration rules are relatively more important. Confused understanding about the roles of these rules may be caused by the lack of systemic study of the evidence rules.

Absence of a systemic study of evidence rules has historical and practical reasons. Although some evidence rules can be traced back to the Middle Ages, most rules took shape in the 17th and 18th centuries of Britain.⁵ Inheriting common law traditions, these evidence rules were established through individual cases and thus rules could be made that contradict one another. These evidence rules are ‘established in solving specific problems’⁶ and therefore only attend to their respective problems. Such scattered rules are detrimental to both theoretical research and judicial practice and may lead to misunderstanding about interaction among different rules. Further, the lack of systematic understanding may even result in failure of fully implementing these rules in judicial practice.

To solve the problem, some scholars have tried to consolidate the system by classifying the evidence rules into rules governing the content of evidence, rules governing witnesses and substitutes of evidence.⁷ Some Chinese scholars also classify evidence rules into rules governing admissibility and rules governing probative value, or rules guaranteeing substantive truth finding and rules safeguarding due procedure, based on different criteria.⁸ However, such ‘one-or-the-other’ classification may well lead to ‘The Manichaeic Dichotomy’⁹ and therefore bring the extreme expression that cuts out connections amongst the rules. Such classifications are also too rough to change the ‘individual application’ of evidence rules. Hence, it is believed that evidence rules need to be analysed and reformed into a coordinated system.

4 Graham C Lily, *An Introduction to the Law of Evidence* (West Publishing Co, 1978) 17.

5 See John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003) 180.

6 Chen Guangzhong, *Evidence Law* (Law Press, 2011) 23.

7 Paul C Giannelli, *Understanding Evidence* (LexisNexis, 2009) 4.

8 See Chen Guangzhong, *Evidence Law* (Law Press, 2011) 227.

9 Mirjan Damaska, ‘Evidential Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study’ (1973) 121 *University of Pennsylvania Law Review* 506, 569.

II. ANALYSIS OF THE SYSTEM OF EVIDENCE RULES

A. Primary classification of evidence rules

According to traditional theories of common law, rules of admissibility can be classified as the relevancy rules, the auxiliary probative policy rules (the auxiliary rules), and extrinsic policy rules. The relevancy rules and the auxiliary probative policy rules together are rules of probative policy.¹⁰ The classification is based on pragmatism whose classification standards are basic functions and goals of implementation of the evidence rules or, in Wigmore's words, 'what does it do?'.¹¹

The relevancy rules are about the probative value of a particular fact with the aim of determining whether the probative value of a matter is enough for it to become evidence in a legal sense — that is, determining whether a matter has probative value by using logics of empiricism and principles of inference. The relevancy rules, regarded by James Stephen as the core principle of the entire evidence law¹², address the question of whether a matter has enough probative value to be considered by triers of fact. It must have logic or inferential relevancy to the case before it can become the evidence for a trial; otherwise, it does not qualify to be considered as evidence. The relevancy rules are the first checkpoint for a matter to be admitted as evidence; only when it passes this first checkpoint can it receive further examination and be admitted into trial. Among the relevancy rules, the character evidence rule and the 'rape shield' rule are the most familiar ones to us. According to the relevancy theories, evidence can thus be classified into two forms: the first is the presentation of the object designed to persuade, and the second is the presentation of some independent fact by inference from which the persuasion is to be produced. And the second falls further into two classes: the one class is termed 'testimonial' or 'direct' evidence, the other 'circumstantial' or 'indirect' evidence.¹³

Auxiliary probative policy rules (the auxiliary rules) are rules acquired through judicial practice and used to guarantee or enhance the probative value of evidence. If the relevancy rules are primary evidence rules, then the auxiliary probative rules include the most features of the Anglo-American law of evidence¹⁴ and the most concerned part of evidence rules. The auxiliary rules are 'artificial'¹⁵ rules established to determine whether some evidence should be admitted under the Anglo-American empirical judicial traditions. The rules are not aimed to determine the probative value of a matter, but to

10 John H Wigmore, *Evidence in Trials at Common Law* (Aspen Publishers, 1974) §11.

11 Wigmore § 1171.

12 See James F Stephen, *A Digest of the Law of Evidence* (Macmillan and Co, Limited, 1909) xi.

13 The direct and indirect evidence we are talking about here is different from the direct and indirect evidence classified on whether the evidence can proof the basic facts of a case independently. See Wigmore § 24.

14 Wigmore § 1171.

15 Wigmore § 1171.

guarantee that such value is demonstrated accurately and effectively, and are therefore named after such auxiliary function. In brief, a rule of ‘auxiliary probative policy’ is a rule designed to further the accuracy of fact-finding.¹⁶

These auxiliary rules have nothing to do with relevancy. The auxiliary rules only examine evidence that has passed the relevancy rules checkpoint and therefore seldom examine the nature and content of the evidence, but examine whether the evidence satisfies the empirical requirement of safely using the evidence. This is a significant difference between the auxiliary rules and the relevancy rules. The auxiliary rules lay down auxiliary tests and safeguards, usually for particular kinds of facts, over and above the required minimum probative value.¹⁷ The most typical example is the best evidence rule, which is only for documentary evidence. The auxiliary rules can be classified based on goals of implementation, and therefore form a system that is independent from the relevancy rules but is also related to probative value of evidence. The core function of the auxiliary rules is excluding potential deficiencies and risks of evidence based on experience to guarantee and enhance the probative value of evidence. From this perspective, the significance of the auxiliary rules is guaranteeing that the probative value is accurately and effectively played using auxiliary examination after the probative value of the evidence is proven to exist.

The extrinsic policy rules are rules that exclude particular evidence based on considering interests other than fact-finding in the process of proof. According to these rules, even if some evidence has probative value, if admitting such evidence can help fact-finding but may cause damage to other social interests and the damage is more than the significance of the fact-finding, then such evidence shall be excluded. The extrinsic policy rules differ from the relevancy rules and the auxiliary rules in that ‘their effect is to obstruct, not to facilitate, the search for truth’¹⁸ since the evidence demonstrates extrinsic policies outside evidence law. The most natural grouping of these extrinsic policy rules is by their absolute or conditional nature. The former class of prohibitions are enforced by the court like other rules of evidence; the latter are applied only on demand of the person who is supposed to be affected in his/her interests by the extrinsic policy in question and to be protected by the rule from an injury to that interest.¹⁹ Thus, the latter are the rules of privilege.²⁰ Those privileges are large in quantity, well-established and of great significance to the proof in trials. They ‘frankly exclude good evidence on other grounds of policy which are supposed to override the policy of obtaining all possible useful evidence’.²¹

16 See Mirjan R Damaska, ‘Propensity Evidence in Continental Legal Systems’ (1994) 70 *Chicago-Kent Law Review* 56, 59.

17 See Wigmore § 11.

18 Wigmore § 2175.

19 Wigmore § 2175.

20 See Article V. Privileges, *Federal Rules of Evidence* (US Government Printing Office, 2010).

21 William Twining, *Theories of Evidence: Bentham and Wigmore* (Weidenfeld & Nicolson, 1985) 159.

III. DELICATE ANALYSIS OF THE AUXILIARY RULES

Among the three major categories of evidence rules, the auxiliary rules are the most complicated, most related to specific rules and most popular amongst evidence law scholars. To have an in-depth study, based on functions and goals of implementation, the auxiliary rules are divisible into five classes: (1) preferential; (2) analytic (or scrutinative); (3) prophylactic; (4) simplificative; and (5) quantitative (or synthetic).²²

Preferential rules provide that a particular type of evidence is preferred to another type. The rules are established by judicial experience that indicates one type of evidence is more credible than another and therefore may be used as precedence over another. Preferential rules may work in one of two ways: (a) they may require one kind of evidence to be brought in before any other can be resorted to, and may refuse provisionally to listen to the latter until the former is procured or is shown to be inaccessible; or (b) they may prefer one kind of evidence absolutely, that is, they may require its production, and, as long as it is available, consider no other kind of evidence, even after the preferred kind has been supplied.²³ Preferential rules can be classified into preferential rules about evidence itself and preferential rules about evidence content based on the preferred type of evidence, and the latter can be further classified into absolute preferential rules and relative preferential rules.

The second type is the analytic rule, which accomplishes the desired aim by subjecting the offered evidence to a scrutiny or analysis calculated to discover and expose in detail its possible weakness, and thus to enable the tribunal to estimate it at no more than its actual value.²⁴ There is but only one analytic rule, the hearsay rule.²⁵ The hearsay rule states that unless subject to exceptions, a statement made to prove a proposed fact or factuality of the fact outside trial or hearing is not admissible. According to the hearsay rule, the hardcore approach to conduct examination and analysis is through cross-examination. Hearsay evidence does not apply to cross-examination, which is considered 'the most efficacious test which the law has devised for the discovery of truth'²⁶ and should be inadmissible at trial.²⁷ Hearsay evidence is also excluded because it does not undergo oath in court, may mislead juries, and with such evidence, triers of fact are unable to observe the behaviour of the witness, and the right to confrontation of a litigant may be jeopardised.

22 Wigmore § 1172.

23 Wigmore § 1172.

24 Wigmore § 1360.

25 See Thomas J Reed, 'Evidentiary Failures: A Structural Theory of Evidence Applied to Hearsay Issues' (1994) 18 *American Journal of Trial Advocacy*, 353, 359.

26 J Nisbet, in *McCleskey v Leadbetter*, 1 Ga. 551, 555 (1846).

27 See Edmund M Morgan, *Some Problems of Proof under the Anglo-American System of Litigation* (Columbia University Press, 1956) 139.

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Prophylactic rules use particular prophylactic means to prevent potential weaknesses or risks before admitting certain evidence. The difference between prophylactic rules and analytic rules is that analytic rules are aimed to present deficiencies of particular evidence before triers of fact in the courtroom, while prophylactic rules are aimed to use deterrence and other means to lower or eliminate risks of using the evidence before admitting the evidence into trials. Prophylactic rules have five uses: (1) the oath operates by setting against the witness's motives to falsify through his/her fear of divine punishment; (2) the perjury penalty operates by substituting the fear of temporal punishment for divine punishment; (3) the publicity rule operates by subjecting the witness to the fear of public opinion and of a present exposure by interested bystanders, and by providing the means of counteracting his/her possible falsities through the presence of those who can contradict him/her; (4) the sequestration of witness operates by preventing collusion and furnishing a mean of exposing the collusion if it has already taken place; (5) the notice of evidence to the opponent operates by furnishing the opponent in advance of the trial with knowledge of the proposed evidence and enabling him/her to prepare to expose false evidence.²⁸ According to the above analysis, prophylactic rules are mainly targeted at witness statements towards a fact, or testimonial evidence. Admissibility of evidence that fails to meet these prophylactic rules will be weakened.

The basic content of the simplificative rules is that some evidence is relevant and credible, but using the evidence may confuse the triers of fact and make fact-finding more difficult and shall therefore be excluded. Such rules take 'policy-based' judgment in advance about the effect of certain types of evidence on proof and adjudication and are rather empirical. The focus of simplificative rules is not the probative value of evidence, but the real disadvantageous effect of using the evidence in fact-finding. These disadvantageous effects may be broadly summarised as, (a) confusion of issues, and (b) unfair prejudice issues.²⁹ For example, the use of certain evidence may divert the judge or jurors' attention from the real issue, or arouse an unfair prejudice to the opponent, or cause undue weight to be placed on the evidence. Therefore, the simplificative rules are those which exclude (1) evidence offered at an improper time, (2) testimony of an excessive number of witnesses, or of particular persons (such as a judge or counsel) likely to be over-influential, or of an opinion when superfluous and likely to be abused, and (3) circumstantial evidence (such as an accused's moral character) likely to cause undue prejudice.³⁰

Quantitative rules state that in particular cases, particular evidence should be related to other evidence and reach a quantitative threshold before being presented to triers of fact — that is, a requirement for mutually corroborative evidence is that 'certain kinds of evidence are to be confirmed or supported by other, independent evidence,

28 See Wigmore § 1813.

29 Wigmore § 1864.

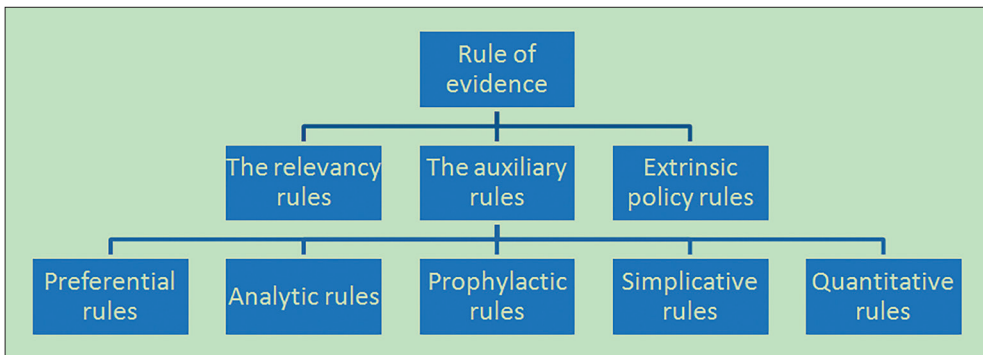
30 Wigmore § 1172.

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in order to be sufficient to sustain a given result, such as for a conviction of a criminal offence'.³¹ Certain evidence can be seen as a segment of evidence that is admissible itself, but unless combined with other segments, is not enough to be admitted. There are three general classes of such rules: (1) a rule may prescribe a definite number of witnesses as the minimum, for example, on an issue of testamentary execution, two witnesses or more are generally required; (2) a rule may prescribe that in given cases one witness is not sufficient unless additionally there is circumstantial evidence of a specified sort; and (3) a rule may prescribe that one kind of circumstantial evidence shall on certain issues be insufficient without other circumstantial evidence.³²

IV. SUMMARY: STRUCTURE OF THE SYSTEM OF EVIDENCE RULES

The following conclusions can be drawn from the above discussion: (1) evidence rules can be classified into the relevancy rules, the auxiliary rules and extrinsic policy rules; (2) the relevancy rules are the fundamental ones, and the logic relevancy of the evidence is the first checkpoint for the evidence into the trial; (3) extrinsic policy rules are mainly rules of privileges, and may hinder fact-finding in particular cases; (4) the auxiliary rules are complicated and can be further classified into preferential rules, analytical rules, prophylactic rules, simplicative rules and quantitative rules. Based on these above conclusions, the structure of the system of evidence can be mapped out as follows:



James B. Thayer had pointed out that the two leading principles should be brought into conspicuous relief: (1) that nothing is to be received that is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should be admitted, unless a clear ground of policy or law exists to exclude it.³³ Accordingly, the system of evidence rules has clear total utility: the relevancy rules

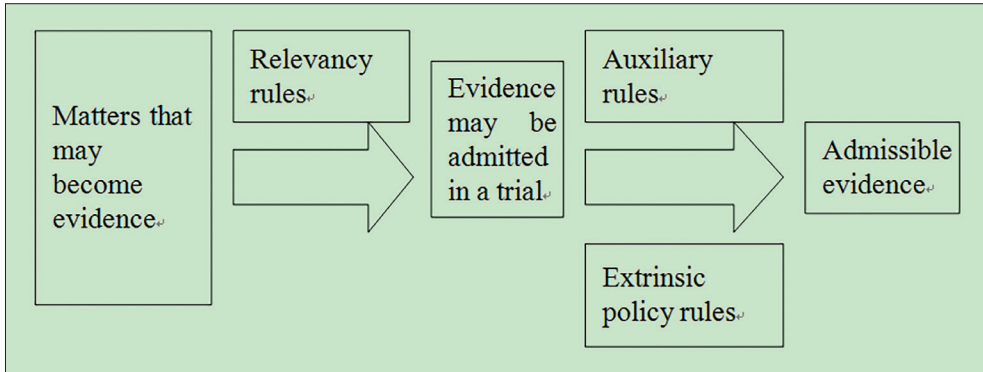
31 Peter Murphy, *Murphy on Evidence* (11th edn, Oxford University Press, 2009) 634.

32 Wigmore § 1172.

33 James B Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown, and Company, 1896) 530.

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are the first checkpoint checking whether evidence can be presented before triers of fact and therefore are fundamental to the system; the auxiliary rules and extrinsic policy rules are policies or legal provisions that determine whether logically relevant evidence can be presented in a trial, and filter evidence through interests and policy consideration; the auxiliary rules are large in quantity and form a frequently used cluster of rules in judicial practice. With such an understanding, to overcome ‘Evidential Barriers’,³⁴ the procedure for evidence to pass examination and enter a trial can be depicted as follows:



V. THE ATTITUDE TOWARDS THE SYSTEM OF EVIDENCE RULES FROM COMMON LAW

The system of evidence rules from common law is comprehensive and integrated. However, some people doubt its applicability in the Chinese context, especially whether the difference between the so-called Western legal traditions and Chinese legal traditions may lead to ‘non-acclimatization’ when the former is transplanted into the latter.

However, I believe that it is still debatable whether the so-called Chinese legal traditions have real influence on contemporary legal institutions and system in China. There are many questions that can be raised. Are legal traditions an objective existence, or ‘fantasy and fabrication’ that cut out from past specific rules and scholars’ ideas added with contemporary perspectives and views? Is the summary of legal traditions a ‘take-what-I-need’ subjective construction made with pre-planted thinking and value choice fixed by ‘position determines propositions’? Even if the so-called legal traditions do exist and have been authentically recognised, do they really influence the contemporary legal institutions and systems? Even if it does exist, is the influence as heavy as we believed?

I am not able to give any definite answers to the above questions. But I believe the idea that even the established foreign legal systems should not be transplanted into

³⁴ See Mirjan Damaska, ‘Evidential Barriers to Conviction and Two Models of Criminal procedure: A Comparative Study’ (1973) 121 *University of Pennsylvania Law Review* 506, 558-60.

the Chinese context because of the difference in legal traditions. Some law officials and scholars have developed ‘attitudes that might be likened to those of a museum curator’³⁵ that put Chinese and Western laws in complete opposition and even are hostile towards any view that wants to overcome such binary opposition. However, it is obvious that it is reasonable to use Western medicine without hesitation to treat Chinese illness as long as the medicine works. The ‘Grabism’ (*nalai zhuyi*) idea passionately advocated by Mr. Lu Xun, a famous Chinese writer, suggests that Chinese people should deliberately choose and take whatever is good from foreign countries and then ‘use them, save them, or destroy them’.³⁶ Accordingly, we should use our brain and insight to borrow Western ideas and institutions. It helps to avoid mistakes they have already made and could be a shortcut for China’s journey towards the rule of law. We can learn to establish the system of evidence rules in China as well. Many countries have adopted most rules in the system of evidence rules; they are not exclusive to common law countries and are even provided and presented in relevant UN conventions and documents. Such a widely acknowledged and proven effective system can be ‘grabbed’ and used in China.

V. EVIDENCE RULES IN TEXT AND IN ACTION IN CHINA

Inheriting from continental law, China does not have an independent code of evidence. However, evidence rules are provided and presented in *Criminal Procedure Law*, *Civil Procedure Law* and *Administrative Procedure Law* as well as related judicial interpretations and legal documents. Evidence rules explicitly provided by laws, judicial interpretations and legal documents in China are the voluntary confession rule, the opinion rule and the corroboration rules.

The voluntary confession rule has the typical nature of criminal justice, and has been provided in *Criminal Procedure Law* since 1979. In 2010, 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 provides that illegally obtained confessions of suspects and defendants shall be excluded. Article 54 in the *Criminal Procedure Law* states that ‘a confession of a criminal suspect or defendant extorted by torture or obtained by other illegal means and a witness or victim statement obtained by violence, threat, or other illegal means shall be excluded’. However, these provisions have some deficiencies such as defining ‘illegal means’ too narrowly, demonstrating that Chinese law has explicitly confirmed the voluntary confession rule.

The opinion rule is mainly stipulated in judicial interpretations given by the Supreme People’s Court. For instance, Item 2 of Article 75 in the *Interpretation of the Supreme People’s Court concerning the Implementation of the Criminal Procedure Law*

35 Philip CC Huang, *Chinese Civil Justice, Past and Present* (Rowman & Littlefield Publishers, Inc, 2010) xiv.

36 Lu Xun, *Nalai Zhuyi (Grabism)*, Complete Collection of Lu Xun, Volume VI (People’s Literature Publishing House, 2005) 39-41.

provides, ‘Speculative, commentary or inferential testimony by a witness shall not be used as evidence unless the testimony can be determined based on sense, to be factual’. Article 57 in *Some Provisions of the Supreme People’s Court on Evidence in Civil Procedures* provides that ‘When bearing witness, the witnesses may not use language of conjecture, induction or comments’. Article 46 in *The Supreme People’s Court Administrative Litigation Evidence Rules* states that ‘Judgmental, inferential or commentary testimony based on the experience of a witness shall not be the basis of a verdict’.

In criminal justice, China’s corroboration rules mainly focus on oral confessions. Article 18 in *The 2010 Provisions on Several Issues Concerning the Examination and Judgment of Evidence in Death Sentence Cases* states that ‘[t]he examination of the confession and defence of a defendant shall focus on: ... 7. Whether the defendant’s confession and defence corroborate with the accomplice’s confession and defence and other evidence, and whether there is any conflict among them’, Article 53 in the *Criminal Procedure Law* states that ‘[i]n deciding each case, a people’s court shall focus on evidence, investigation, and research, and credence shall not be readily provided for confessions. A defendant shall not be convicted and sentenced to a criminal punishment merely based on the defendant’s confession without other evidence; a defendant may be convicted and sentenced to a criminal punishment based on hard and sufficient evidence even without his or her confession’. The *Interpretation of the Supreme People’s Court Concerning the Implementation of the Criminal Procedure Law* gives more detailed provisions where Article 83 and Article 106 stipulate the measures of mutual corroboration between confessions of a defendant and other evidence. The corroborative rule in China’s Civil Procedure Law breaks through the limitations on testimony: Article 71 provides that ‘The people’s court shall identify the authenticity of audio-visual recordings and, in consideration of other evidence in the case, examine and determine whether the audio-visual recordings may serve as a basis for deciding facts’.

Besides, rules explicitly provided by the above laws, judicial interpretations and legal documents, reflect the content of some evidence rules in the legal texts. For example, *Interpretation of the Supreme People’s Court concerning the Implementation of the Criminal Procedure Law* provides that ‘if upon notice from a people’s court, a witness refuses to appear in court to testify without a legitimate reason, or refuses to testify when appearing, so that the court is unable to verify the accuracy of his testimony, then the witness’s testimony shall not be the basis of the verdict’, which more or less functions as the hearsay rule. Article 70 in *Civil Procedure Law* provides that ‘The originals of documentary evidence shall be submitted. The originals as physical evidence shall be submitted. If it is difficult to submit the originals; replicas, photographs, copies or extracts may be submitted’, which reflects the concept of the best evidence rule.³⁷

However, ‘to understand Chinese law, it is necessary to go beyond both legal rules and legal institutions’.³⁸ Provisions in laws, judicial interpretations and legal documents

37 See Chen Guangzhong, *Evidence Law* (Law Press, 2011) 262.

38 Stanley B Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford University Press, 1999) 35.

are frequently different from their application in judicial practice. Divorce between evidence rules in law and in judicial practice is common, and the most typical example is the voluntary confession rule. Although laws explicitly provide that confessions of suspects or defendants obtained by illegal means shall not be taken as the basis of the verdict, obtaining confessions by deceit, threat of other illegal means, even by torture, which is explicitly prohibited by laws, still exists. From hanging with ropes, stuffing with towel, kneeling handcuffed to tying up with wires and electric shock with a baton,³⁹ new ways of torture keep emerging and torture has become a chronic problem in China's criminal justice. Using the voluntary confession rule to exclude confessions obtained by illegal means is difficult in judicial practice. The rule 'was not faithfully implemented in judicial practice'⁴⁰ as commented by Zhang Jun, the former vice president of the Supreme People's Court, and even becomes 'a bubble'.⁴¹ If not faithfully implemented, evidence rules in legal texts become a mere scrap of paper, which may even detriment the authority of law. We need to face up to the task of improving the implementation of rules on admissibility, and turning 'law in text' to 'law in action' in order to effectively exclude evidence inconsistent with the rules of evidence. I believe that establishing a complete system of rules of evidence, coordinating different evidence rules and setting up more 'checkpoints' before admitting evidence may be helpful to achieve that.

VI. IMPROVING CHINA'S SYSTEM OF EVIDENCE RULES

Compared to the comprehensive system of evidence rules in common law, China has three types of situations for the rules of evidence: (1) rules without any provision in laws and regulations; (2) rules with only ideas reflected but not content written in laws and regulations; (3) rules with provisions but still need for improvement. By referring to the relevancy rules, the auxiliary rules and extrinsic policy rules within the system of the rules of evidence, specific measure to improve the system can be put forward.

A. The Relevancy Rules

Chinese law does not have explicit provisions for the relevancy rules, yet the rules are regarded as a 'self-evident standard'⁴² for both theorists and practitioners who believe that evidence without logical relevancy to a case shall not be admitted as the basis for verdict. However, the absence of such fundamental rules in legal texts is still a pity. According to Confucius, 'if names are not correct, speech will not be in accordance

39 Pei Zhiyong, 'Supreme People's Procuratorate Publishes Three Case involving Gross Violations of Human Rights', *People's Daily*, 26 July 2005.

40 See Sun Yin, *Exclusionary Rule Is Not Faithfully Implemented, Lawyers Are Needed to Avoid Wrongful Convictions*, 11 July 2013 <http://www.cnr.cn/china/yaowen/201101/t20110110_507564061.html>

41 Zhang Jianwei, 'Why It Is Difficult to Exclude Illegal Evidence? An Analysis Based on the Revision of Criminal Procedure Law and Relevant Judicial Interpretations' (2012) 3 *Tsinghua Law Journal* 55, 65.

42 Chen Guangzhong, *Evidence Law* (Law Press, 2011) 223.

with actuality; when speech is not in accordance with actuality, things will not be successfully accomplished'.⁴³ Without legal provisions, the implementation of the rules lacks a foundation. Since there is no unified code of evidence, it is possible to add an article to provide that 'evidence without relevancy shall not be admissible' as the primary rule in examining evidence in *Criminal Procedure Law*, *Civil Procedure Law* and *Administrative Procedure Law*.

Among relevancy rules, the character evidence rule is important. China's *Criminal Procedure Law*, *Civil Procedure Law* and *Administrative Procedure Law* do not provide for the character evidence rule, but in *Interpretation on Several Issues in the Application of Law in Rape Cases* jointly issued by the Supreme People's Court, the Supreme People's Procuratorate and Ministry of Public Security in 1984, an article states, 'Ascertaining whether the sexual act is against the victim's will shall not be based on the victim's sexual behaviour, history, or reputation. Forcing a woman with bad sexual reputation to have sexual intercourse will be considered rape'. It is a correct understanding about the relevancy of character evidence in rape cases. However, complete character evidence rule should have the two provisions: (1) good character evidence generally can be admissible; (2) bad character evidence principally shall not be admissible with exceptions such as proving the credibility of the witness. Establishing the character evidence rule, especially the character evidence rule in criminal justice, is of great significance in China now. Such a rule can avoid negative influence on verdicts and sentencing or misjudged cases due to misuse of character evidence.

B. The Auxiliary Rules

Complementing and improving the auxiliary rules in China starts from the voluntary confession rule. As discussed above, China has basic provisions about the voluntary confession rule, but there are also some problems that impair implementation of the rule in judicial practice. Legal texts have the following deficiencies: (1) the scope of illegal interrogating means is too narrow when excluding non-voluntary confessions; (2) the voluntary confession rule and duty of truthful answer are in conflict to each other; (3) a provision for the right to silence is absent; (4) a provision of a right to presence of counsel during interrogations is absent. To implement the voluntary confession rule, it should start from an explicit provision in law stating that confessions obtained by 'threat, enticement or deceit' and other illegal means shall be excluded. It is to fix the potential legal loophole in the vague provision of 'etc.' in Article 54 of *Criminal Procedure Law*. The provision in Article 118 of *Criminal Procedure Law* stating that 'the criminal suspect shall truthfully answer the questions of the investigators, but has the right to refuse to answer questions irrelevant to the case' should be deleted. The

43 Philip J Ivanhoe and Bryan W Van Norden (ed), *Readings in Classical Chinese Philosophy* (Seven Bridges Press, 2001) 34-5.

'limited right to silence'⁴⁴ should be established to allow the accused to have the right to silence in certain circumstances. During the interrogation, the accused should have the right to have a lawyer present and this may prevent instances of torture and other illegal interrogation measures, alleviate hostility between investigators and the accused, improve quality and efficiency of handling cases, and solve the problem about burden of proof for illegal evidence as well.⁴⁵

The time-honoured hearsay rule has not been explicitly provided in Chinese law because (1) the rule is too complicated with content and connotations difficult to understand as well as numerous exceptions; (2) under the continental law traditions, it is easier for Chinese legislators and lawyers to accept the principles of direct and oral trial than the hearsay rule with 'an ocean of exceptions'. However, since 'there is a great head of the law of evidence, comprising, indeed, with its exceptions, much the largest part of all that truly belongs there, forbidding the introduction of hearsay',⁴⁶ and since the hearsay rule is related to important legal interests such as fact-finding and the right of confrontation for the accused, it should be brought to the attention of the court. China does not necessarily need to establish the Anglo-American hearsay rule, but taking up some reasonable connotations of the hearsay rule can help to guarantee the opportunity and right of confrontation with the witness against him/her for the accused and to improve the ratio and effectiveness of witnesses giving testimony in the courtroom, and therefore help to develop China's evidence law system. From this perspective, the effect of the hearsay rule can be implemented through procedural regulation instead of examination of admissibility.

The opinion rule and corroborative rule can also be improved. As for the opinion rule, statements of lay witnesses and statements of expert witnesses can be treated differently. Principally, the opinion of a lay witness should be excluded, but opinion of an expert witness should be admissible. As for the corroboration rules, the application of it in criminal justice should be expanded from verbal evidence to other evidence such as audio-visual recordings and documentary evidence.

C. Extrinsic Policy Rules

As discussed above, absolute exclusions in extrinsic policy rules are few and only have a small number of solid provisions. Thus, absolute exclusion rules have little effect on judicial practice and therefore are not worth examining here. In comparison, relative exclusion rules are numerous and stable. They are mainly privileges involving valuation

44 Chen Guangzhong and Chen Haiguang, 'Some Thoughts on Further Reform and Improvement of Chinese Criminal Procedure System' (2000) 4 *People's Judicature* 10, 11-12.

45 See Fan Chongyi, *Reform and Prospect of Criminal Pretrial Procedure* (Chinese People's Public Security University Press, 2005) 367-9.

46 James B Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown, and Company, 1896) 518.

of interests, and these privileges need our attention. In foreign legislation, privileges include the privilege against self-incrimination, the privilege for family members, the solicitor-client privilege, the medical professional privilege, the accountant-client privilege, the priest-penitent privilege, the psychotherapist-patient privilege, the public-interest immunity and the reporter's privilege. Chinese law has provisions about some of these privileges. Article 50 in *Criminal Procedure Law* provides the privilege against self-incrimination; Article 188 provides the privilege for the spouse, a parent or a child of the defendant against forced appearing before court as witness, and Article 46 provides the privilege for a defence lawyer to reserve the right of confidentiality. However, these textual provisions are still flawed and require improvement. For instance, the scope of the family members privilege is too narrow, and privileges for professionals other than lawyers are absent.

VII. CONCLUSION

According to the system theory, 'the whole is more than a sum of its parts'.⁴⁷ Any part of the whole exists and functions in a system. Looking at and using any part separately is overshadowed by the trivial and the general function cannot be realised in full. In the legal area, none of the legal institutions is isolated. Law is about correspondence, and therefore law as a whole is neither the complex of articles nor uniformity of norms, but the unity of relations. Interactions among rules largely determine how law is implemented as a whole. The whole system of law is based on the interactions of individual institutions, but not a simple linear overlaying of rules. For the whole system of law to function, individual institutions should keep appropriate relations to and interact with each other soundly. With a sound system, individual parts can function even better than each function separately. However, once institutions conflict with and set off each other, the whole system is worse off.

This is also true with evidence rules. In establishing a system of evidence rules, special attention should be paid to relations and interactions among different rules in order to avoid not only simple overlaying but also conflict and offsetting. If different rules can coordinate with each other and play their respective roles as to form a comprehensive system of evidence rules, then it is $1+1>2$, compared to each rule functioning separately.

⁴⁷ Ludwig von Bertalanffy, *General System Theory: Foundations, Development, Applications* (George Braziller, 1968) 18.

7

THE GUARANTEE OF RELIABLE APPLICATION OF EXPERT TESTIMONY — FROM THE PERSPECTIVE OF EXPERT WITNESSES' APPEARANCE

CHENG YAN¹

ABSTRACT

Analysis and identification through the use of high technology play an increasingly important role in criminal lawsuits, but the application of these means must, ultimately, be presented in the form of expert testimonies so as to be accepted by the courts. Due to the lack of relevant scientific knowledge, judges have not got the ability to comprehend expert testimony, so they have to depend on expert witnesses to clarify the science behind it in court. Otherwise, expert testimony will become the truth beyond doubt, which easily misleads the trial. In China, the implementation of the new Criminal Procedure Law has so far failed to change the present situation of an extremely low appearance rate of experts, which has seriously affected the judgment of expert testimony. The judge retains the unlimited discretionary power to decide whether it is necessary that the experts appear in court. Hearsay rules based on their strict exclusion and the operability of perfecting details can solve this problem significantly.

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I. THE SIGNIFICANCE OF EXPERTS' APPEARANCE IN COURT

A. Ensure the Practical Significance of the Trial

With the development of science and technology, the analysis and means of identification via high technology methods profoundly facilitate the investigation of a case. Testimony from forensic science experts is one of the main forms of testimony in criminal trials and plays an increasingly important role. In China, few expert witnesses testify in court while the judges lack the relevant professional knowledge. Therefore, an expert testimony becomes difficult to review and judge, making it a kind of indisputable evidence, which judges have no choice but to admit for its probative value. Thus, the court cannot effectively question the expert testimony at all, and the court trial descends into simply an affirmation procedure of the expert testimony produced at investigation stage. In this case, it is the police who dominate the trial, not the judges. It is very dangerous for the trial procedure to become a mere formality, because the whole criminal lawsuit is likely to become a punishment procedure dominated by the investigation organ. Especially in China, expert testimony in criminal cases is mainly produced by the internal certifying agency of the police station, and often is presumed to have a high probative force. However, in the United States, judges have already realised their power and flexibility when evaluating expert testimony. In order to make the judge better at exercising this power whilst maintaining appropriate constraints on its flexibility, expert witnesses' appearances in court are important because written expert testimony is more likely to offer the expert the power to determine the facts of a case, and thus, makes it hard to show the judge's transparency.²

B. Safeguard the Scientific Nature of the Expert Testimony

The science is constantly developing and progressing. Scientific conclusions are always self-correcting — that is to say, accurate and correct identification results are often just an ideal. Every decision made by judges, as the decision-makers in criminal cases, can affect the defendants' liberty and even their lives. Therefore, every judge should play the role of 'gatekeeper' and exclude so-called 'junk science'.³ A report in the *Washington Post* on 18 April alleged that America's Justice Department and the FBI had admitted that during the past twenty years, almost all judicial forensic staff of the FBI had given flawed expert opinions. Those unreliable expert testimonies have resulted in many wrongful convictions sending hundreds of innocent people to prison.

² See Hamish Stewart, Ronalda Murphy, Marilyn Pilkington, Steven Penney and James Stribopoulos, *Evidence: A Canadian Casebook* (Emond Montgomery Publication, 3rd ed, 2011) 8.

³ See Frederick Schauer and Barbara A Spellman, *Is Expert Evidence Really Different* (Notre Dame Law Review Press, 1st edn, 2013) 89.

But it is impossible for every judge to be an omniscient scientist who has the ability to find defects in expert testimony at a glance. Therefore, expert witnesses' appearances in court are necessary to demonstrate the scientific principles of expert testimony.⁴ Moreover, the authentication is processed secretly, which makes it difficult to identify careless omission and error in written expert testimony whereas the cross-examination in court can question any unilateral conclusions. In addition, due to lack of relevant professional knowledge, rarely can anyone but experts properly question the expert opinions in court, so the judge tends to be persuaded by expert witnesses. The 192nd regulation of *Criminal Procedural Law*,⁵ therefore, set out the expert auxiliary system: auxiliary experts can be hired by both the prosecution and the accused in order to question or further evidence the scientificity of the expert testimony.

The expert witnesses and auxiliary experts' appearance in court can strengthen the effect of cross-examination of the expert testimony. A collegial bench can make scientific judgment to special issues involved in the case and remove its excessive dependency on expert testimony or even credulity through demonstrating the special issues involved in the case in court and through effective cross-examination by both parties.

II. PLIGHT OF JUDICIAL PRACTICE — AN EXTREMELY LOW EXPERT WITNESS APPEARANCE RATE

A low expert witnesses' appearance rate in court has always been one of the main reasons for impacting the effectiveness of cross-examination of expert testimony. 'In Shanghai, Qingdao and Hohhot cities, which are big cities in China, after random retrieval of all court files from the Intermediate People's Court, we found there is not one case with a record of expert witnesses appearing in court to accept cross-examination'.⁶

In 2012, the new criminal litigation law made significant amendments in terms of judicial authentication, mainly the renaming of expert conclusion to expert testimony; stipulating that expert witnesses must appear in court under particular conditions; increasing the protection measures for the expert witnesses and their families, and so on. This series of modifications mainly aimed to increase the expert witnesses' appearance rate in court and guarantee that expert testimonies are materially reviewed by court. But judging from the results of empirical research, achievements are few. We selected three provinces in the west, south and centre of China respectively in this study that represent different economic levels, degree of openness and geographical environment so the results can have certain representativeness. Specific data is shown in the table below.

4 See Henry Wade Rogers, *Expert Testimony* (Fred B Rothman & Co Press, 2nd edn, 1991) 4.

5 *Criminal Procedure Law of the People's Republic of China* (People's Republic of China) National People's Congress, Order no 6 of the Chairman of the Standing Committee of the National People's Congress on 7 July 1979 (as amended 2012).

6 汪建成 [Wang Jiancheng], 《中国刑事司法鉴定制度实证调研报告》 [The Chinese Criminal Expert Testimony Empirical Research Report] (2010) 14(3) 中外法学 *Chinese and Foreign Law* 67, 72.

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	In 2012		In 2013		In 2014	
	Number of concluded cases	Number of expert witnesses in court	Number of concluded cases	Number of expert witnesses in court	Number of concluded cases	Number of expert witnesses in court
D District People' Court in C City, S Province	454	0	380	3	373	1
X District People' Court in C City, S Province	233	0	219	0	232	1
R District People' Court in S City, H Province	246	2	256	3	274	4
M District People' Court in S City, H Province	182	0	180	0	153	0
Intermediate Court in K City, Y Province	262	0	215	0	234	10
Y District People' Court in K City, Y Province	138	0	170	0	153	0

Table 1

Results show that after the implementation of the new criminal litigation law, the expert witness appearance rate in court stayed the same as before, still maintaining at a fairly low range.

III. ANALYSIS OF CAUSES

This study mainly consisted of a questionnaire survey to study the reasons why expert witnesses' appearance in court is so low. There were 450 questionnaires issued to the judges, lawyers and expert witnesses of the three provinces and cities mentioned above respectively. The research team entrusted local courts and judicial bureaus with the distribution job. Specific results are as follows:

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Profession	Main reason for a low expert witness appearance rate in court					Amount
	Expert witnesses were unwilling to appear	The judge did not want them to appear	Parties did not understand	Expert testimony without dispute	Others	
The Judge	65	56	5	17	7	150
Lawyer	56	63	8	19	4	150
Expert witness	53	69	2	23	3	150
Amount	174	188	15	59	14	450

Table 2

Results showed that there are many reasons for expert witnesses' absence from court, but the two most common reasons are that expert witnesses were unwilling to attend and the judges did not encourage them to appear. Then, the research group made a questionnaire about the deeper reasons.

Profession	The main reasons for expert witnesses' reluctance to appear in court					Amount
	Fear of retaliation	There is no need to attend for having given a clear expert testimony	Considerations of transportation, practice, energy and financial condition	Fear of inability to explain clearly for lack of capability	Others	
Expert witness	51	30	24	38	7	150

Table 3

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Profession	The main reasons for expecting expert witnesses to be absent					Amount
	It will consume too much judicial resources, and reduce the efficiency of lawsuit	Trust expert testimony	To avoid embarrassment for being unable to understand	To take account of the investigation organ	Others	
Judge	72	13	5	53	7	150

Table 4

Through the analysis of research results, the failure of the new criminal litigation law amendment on expert witnesses' appearance in court can be blamed on the partial cognition of this issue: most modifications of the criminal litigation law were to deny the effectiveness of the written expert witnesses, protect the safety of expert witnesses and their families, and ensure economic compensation. However, these measures are aimed at only the expert witnesses' subjective reluctance to appear in court and ignore the other reasons leading to expert witnesses' general absence from court, which is the reluctance of the court to have the expert attend the trial.⁷ Instead, the new law also grants the court a final right to decide about the requirement of an expert witness's attendance in court — that is to say, without the necessary conditions considered by the court, expert witnesses have an obligation to appear in court. Therefore, the court can exclude the need of expert witnesses' appearance in court and maintain the right of treating the expert testimony as the judicial basis. At the present stage, to increase expert witnesses' appearance rate in court will result in the limiting of the discretionary power of the court.

IV. HOW TO RESOLVE THE PROBLEM — HEARSAY EVIDENCE RULE

A. The Overview of Hearsay Evidence Rule

The hearsay evidence rule is one of the most distinctive rules from the evidence acts of common law countries and is also a great contribution to the outstanding judicial system of judicial procedure.⁸ According to the *Federal Rules of Evidence* of the US, hearsay

⁷ According to the research, the judges' unwillingness about the attendance of expert witnesses is mainly because they tend to trust the expert testimony, which is mainly provided by the prosecution and because questioning the testimony in court will take too much time.

⁸ See John H Wigmore, *Treatise on Evidence* (Chadburn Press, 5th edn, 2009) 28.

evidence refers to a statement that the declarant does not make while testifying at the current trial or hearing; and a party attempts to prove the truth of the matter asserted in the statement. In accordance with the hearsay rule, the evidence with the feature of hearsay must be strictly excluded from the court. Consequently, if an expert testimony is produced in the investigation phase, and no expert witness appears in court to testify, then this expert testimony, which is certainly within the scope of the adjustment of the hearsay evidence rules, will be excluded from court.

B. Hearsay Evidence Rules' Value to Guarantee Expert Witnesses' Appearance in Court

As stated above, the main reason for a low attendance rate of expert witnesses that has not been resolved by the new criminal litigation law is that no limit is given to the judges' discretionary power to determine whether the expert witnesses need to appear in court. Why can hearsay evidence rules guarantee expert witnesses appearance in court? First of all, it eliminates the absoluteness of hearsay evidence. In other words, evidence with hearsay attributes can be excluded as long as it is not within the exceptional reserve range, as even the judge does not have any discretionary power to overrule it.⁹ In accordance with the *Federal Rules of Evidence* of the US, if a declarant is considered to be unavailable to attend the trial, the testimony obtained before trial is admissible only if the declarant, first, is exempted from testifying about the subject because the court rules that a privilege applies; second, refuses to testify about the subject matter despite a court order to do so; third, testifies to not remember the subject matter; and finally, cannot be present or testify at the trial or hearing because of death or a then existing infirmity, physical illness, or mental illness. Consequently, the specific situations under which the judge can deny the necessity of witnesses' attendance are stipulated so clearly that the court cannot exempt expert witnesses' duties from appearing in court just because of their subjective preferences in that it has no discretionary power.

Furthermore, the hearsay evidence rules are not hollow doctrines with no content. Instead, hearsay is an evidence rule that contains rich contents and is extremely easily operated, including the definition of hearsay evidence; the applicable scope of hearsay evidence rules; specific programs of the rules applied in court, like proposing the program of motion, pleading program or reviewing program; and all exceptions of the hearsay evidence rules.¹⁰ Criminal Procedural Law focuses more on the practical procedures and one of the values lies in insuring the smooth running of judicial proceedings. However, if judges were only empowered to exclude the application of hearsay evidence without clearly following regulations, then, as for the power, there would be only two results:

⁹ See Ronald J Allen, Richard B Kuhns and Eleanor Swift, *Evidence: Text, Cases, and Problems* (Modern Press, 3rd edn, 2002) 109.

¹⁰ *The Federal Rules of Evidence*, 3 USC §§ 801 (2011).

abuse or abandonment, and both would cause the related procedure to be useless.¹¹ Introducing the hearsay evidence rule is equivalent to the introduction of a set of operating mechanisms, by which the judges are able to learn every step about excluding hearsay evidence, so the corresponding judicial procedures can go smoothly.

In China, the absence of evidence rules with strong operability contributes to a number of problems in judicial practice. According to the 187th clause of *Criminal Procedural Law*, the attendance of the witnesses in court has a precondition, which is that judge must consider expert witnesses' appearance in court to be necessary. Therefore, the question is, what are the necessary conditions? If it is necessary to ask expert witnesses to appear in court, how can the specific judicial proceeding be fulfilled then? And if the expert witnesses refuse to appear in court, are there any other measures to compel them to appear in addition to generally excluding the application of the expert testimony, especially in some cases where the authentication cannot be made again? These problems are unable to be solved in the concrete implementation process, as well as the obstacles that restrict the smooth running of the program.

C. Special Application of Hearsay Evidence in the Judicial Practice

The application of hearsay evidence rules is a costly procedure. First of all, it may exclude evidence collected by investigation organs out of the court, which could eventually lead to ill-founded accusation, and then all pre-trial judicial investment would be in vain; Secondly, the hearsay attributes of evidence need to be confirmed in court, and every procedure such as motion proposing, debate between parties of prosecution and defence, and judgment from the judge costs a lot of judicial resources. China faces a serious shortage of judicial resources, especially of the number of criminal trial judges. If every case is tried strictly in accordance with the requirements of hearsay evidence rules, it will inevitably cause long trials and then a backlog of cases; finally, the hearsay evidence rules have no foundation in criminal trials in China; the absorption of every new system often inevitably suffers intermittent pain during the adjustment period as to determine whether the effectiveness in practice can reach theoretic prospecting needs and stand the test of time. Therefore, a new system should be applied in a smaller range:

First, the application of hearsay evidence rules is limited to ordinary procedures of first-instance decisions. The value of hearsay evidence rules lies in the guarantee of the right to cross-examination by the parties of prosecution and defence so that they can prevent false evidence, which is difficult to distinguish from disturbing the facts of a case.¹² As prescribed in Paragraph 3 of Clause 225 of the *Criminal Procedure Law* in our country, if the people's court in the second instance considers that the facts of the

11 See D H Kaye, David E Bernstein and Jennifer L Mnookin, *The New Wigmore: Expert Evidence* (Aspen Publishers, 7th edn, 2003) 105-13.

12 See Christopher B Mueller and Laird C Kirkpatrick, *Evidence: Practice under the Rules* (Law & Business, 6th edn, 1999) 490-510.

original judgment are not clear or lack evidence, the court can amend the judgment of the first instance after ascertaining the facts or can cancel the original judgment, and require the people's court of first instance to rehear. Therefore, in the procedure of second instance, only under the condition of finding out the facts and amending the judgment of the first instance can the application of hearsay evidence rules realise its value. But even under this condition, the evidence has already experienced the cross-examination in the first instance, so its hearsay attribute has been ruled out. And in other kinds of second instances, there is no involvement of finding the facts, so the application of hearsay evidence rules is unnecessary.

As prescribed in Clause 208 of the *Criminal Procedure Law*, the applicable conditions of summary criminal procedure include: facts of a case are clear with complete evidence; the defendant admits his/her crimes and has no objection to the charges of the criminal facts. Since the facts of the case does not contain controversy, there is no need to apply hearsay evidence rules. In addition, the hearsay evidence rules run counter to the purpose of summary procedure, because the rules will make the process more complicated and time-consuming.

Furthermore, a motion to exclude hearsay evidence from either of the parties is indispensable. In common law countries, a motion to exclude hearsay evidence proposed by prosecution or defence should be on the premise of hearsay evidence exclusion. Even if the evidence has obvious hearsay attributes, but no presence of a motive, the judges have no right to exclude it, which, in addition to emphasising the dominating role of both the prosecution and the accused in criminal trial, also takes account of saving the cost and improving the efficiency of fact-finding, especially for expert testimony which itself has certain scientificity. If both parties of prosecution and defence have no objections, there is no need to spend extra resources on litigation. Therefore, although in China the judge plays a much more important role than both the prosecution and the accused, in order to more effectively determine the reality of the case, as long as there is no question of evidence from parties of prosecution and defence, even the judge should admit the probative force of evidence with the most obvious hearsay attribution. But an exception must be specified — as the hearsay evidence rules are highly theoretical, it is difficult for people except judicial and other legal professionals to clearly know the content, so the discrimination to hearsay evidence mainly depends on the judges, public prosecutors and lawyers. But, based on the results of empirical research of Professor Gu Yongzhong, the criminal defence rate has still been at a very low rate.¹³ It is difficult for the defendant to judge the hearsay attributes of the evidence without a lawyer's help; so if the defendant is absent, the judge shall explain the potential hearsay attribute of the evidence to the defendant and inquire whether he/she needs to apply to exclude it.

13 顾永忠, [Gu Yongzhong], 《中国司法实践与国际标准》 [International Standard and the Practice of China], (北京大学出版社 Peking University Press, 2012) 47.

D. About the Rebuttal to the View of Denying the Application for Hearsay Evidence Rules

There is a view in academia that the hearsay rule is not suitable for the criminal proceedings in China for hearsay's occurrence and development intends to meet the needs of the jury system litigation model of common law countries, not the needs of China's system. The jury consists of citizens from society without any legal expertise, and the establishment of the hearsay evidence rules is to provide the jury with a good judging environment, eliminating the improper influence of inadequate evidence to the jury; but in China, there is no such concern because of the litigation mode from Continental law systems, and the judges, who will not be misled by hearsay evidence because they are all elites and familiar with law and evidence, dominate the trial in court and are responsible for the cognisance of the facts of the case. Moreover, hearsay evidence rules will limit the judge's ability to find the facts of the case from the hearsay evidence and will not be conducive to finding the reality of the case.¹⁴

However, the research results show that the current situation of China is that in lower courts, there is a widespread problem of insufficient numbers of criminal justices, and a collegial panel basically consists of a judge with two people's assessors in practice (For specific data see Table 5). Based on years of experience in the trial and profound legal literacy, judges can naturally avoid being misled by hearsay evidence and form an accurate judgment. Compared to judges, people's assessors have the same decision-making power over the facts of the case, but because of the lack of legal professional competence, it is difficult for them to consciously shield misleading influence from false evidence. Therefore, the most important thing is to ensure that people's assessors in court can accurately cognise the facts of a case for the widespread collegial panel system of our country in the judicial practice. Although to some extent, hearsay evidence rules may hinder the formation of a judge's judgment, and their effect is indispensable for the jurors and the jury court. In addition, only in terms of expert testimony, no matter how much experience a judge has, he/she has no ability to judge the scientificity and authenticity of evidence independently. Therefore, hearsay evidence rules are indispensable for the comprehensive cognition of an expert testimony.

E. Some Detailed Measures

The expert rarely appears in court, which makes it difficult for expert testimony in both criminal and civil procedure to be properly examined. The introduction of the hearsay rule offers a practical solution; however, in order to properly implement the rule, some detailed procedural rights and measures to assist the expert witnesses' attendance would be indispensable, such as, to strengthen litigant's relevant procedure-choosing

14 汪蓉 [Wang Rong], 《传闻证据规则若干基本问题研究》 [Research on Basic Issues of Hearsay Rule] (2005) 11(2) 中国刑事法杂志 Criminal Science 90, 103.

right, endowing them with the reward-requiring right and security-requiring right. At the same time, we should define the contents of appearance in court, perfect the expert auxiliary system and testification system of two-way audio-visual transmission technology and so on, by detailing the regulation of appraiser appearance in court and of the appraisal opinion admission standard.

It is clear that the application of forensic science will reach historically high levels in the coming years with both pros and cons. Given these trends, how to make good use of modern technology and avoid its risk of misleading influence will almost certainly become increasingly prominent, with the emerging legal issues outlined in this article requiring the introduction of the hearsay rule into Chinese criminal procedure. With both the general hearsay rule and the detailed implementation procedures, there is still hope that the attendance of expert witnesses can be improved significantly.

	The number of judges	The number of officers working in criminal justice	The number of concluded criminal cases in 2014
D District People' Court in C City, S Province	51	3	373
X District People' Court in C City, S Province	18	3	232
R District People' Court in S City, H Province	14	3	274
M District People' Court in S City, H Province	36	3	153
Intermediate Court in K City, Y Province	60	8 (distributed in 2 courts)	234
Y District People' Court in K City, Y Province	40	3	142

Table 5

THE MICROSOFT CASE AND A NEW ERA IN ACCESS TO EXTRATERRITORIAL EVIDENCE¹

FELICITY GERRY QC² AND DAN SVANTESSON³

ABSTRACT

A case involving Microsoft that is currently before the US courts has raised important issues between the respective legal regimes in the EU and the US, particularly in relation to the protection of personal data. The case in question has given rise to a degree of legal uncertainty and the outcome could have potentially serious implications for data protection in the EU. By seeking direct access to data held in the EU through the US judicial system, existing legal mechanisms for mutual assistance between jurisdictions may be being effectively bypassed. There are fundamental issues at stake here as regards the protection of personal data

1 This contribution draws, and expands, upon the authors' research presented in: Dan Svantesson and Felicity Gerry, 'Access to Extraterritorial Evidence: The Microsoft Cloud Case and beyond' *Computer Law & Security Review* 31 (2015) 478-89.

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that is held within the EU. This is clearly an area where technological advances have taken place in a very rapid fashion. The right to privacy should be afforded maximum protection whilst ensuring that law enforcement agencies have the necessary mechanisms at their disposal to effectively fight serious crime.

I agree with her [the Privacy Commissioner of Canada] that PIPEDA [Personal Information Protection and Electronic Documents Act] gives no indication that Parliament intended to legislate extraterritorially. [...] [However, the] Commissioner does not lose her power to investigate because she can neither subpoena the organization nor enter its premises in Wyoming. ... It would be most regrettable indeed if Parliament gave the Commissioner jurisdiction to investigate foreigners who have Canadian sources of information only if those organizations voluntarily name names. Furthermore, even if an order against a non-resident might be ineffective, the Commissioner could target the Canadian sources of information.

I conclude as a matter of statutory interpretation that the Commissioner had jurisdiction to investigate, and that such an investigation was not contingent upon Parliament having legislated extraterritorially ...⁴

Where the activity of an individual or entity is across more than one state and territory, whether that activity is criminal or commercial or some other form of behaviour, particularly where that activity is conducted online, the current legal responses are often slow and ineffective. At the same time, some of the *ad hoc* responses by nations, notably the US, are intrusive and often lacking in any solid foundation in international law. The concerns raised in the above quote from *Lawson v Accusearch Inc dba Abika.com*,⁵ where the Privacy Commissioner of Canada was forced to defend, in court, her decision to decline to investigate a complaint made by Lawson of the Canadian Internet Policy and Public Interest Clinic against a US-based corporation, have been raised again in the more recent *Microsoft* case.⁶ In December 2013, the US Government served a search warrant on Microsoft Corporation ('Microsoft') under the *Electronic Communications Privacy Act of 1986*. The warrant, issued by the United States District Court for the Southern District of New York, authorised the search and seizure of information associated with a specific web-based email account that is stored at premises which is owned, maintained, controlled or operated by Microsoft. Microsoft opposed the warrant since the relevant emails are located exclusively on servers in Dublin, Ireland. The currently ongoing dispute between Microsoft and the US Government about the Government's attempt to make Microsoft provide details of an email account held by Microsoft's subsidiary

⁴ *Lawson v Accusearch Inc dba Abika.com* [2007] 4 FCR 314 <<https://www.canlii.org/en/ca/ctf/doc/2007/2007fc125/2007fc125.html>>.

⁵ *Ibid.*

⁶ *In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, F. Supp. 2d., No. 13 Mag. 2814, 2014 WL 1661004, at *11 (S.D.N.Y. 25 April 2014).

in Ireland is a good illustration as to why the time is right to distinguish, define and delineate what is known as ‘investigative jurisdiction’.

This *Microsoft* case has raised important issues between the respective legal regimes in the European Union and the United States, particularly in relation to the protection of personal data. The case in question has given rise to a degree of legal uncertainty, and the outcome may have potentially serious implications for data protection in the EU. By seeking direct access to data held in the EU through the US judicial system, existing legal mechanisms for mutual assistance between jurisdictions may be effectively bypassed. With regard to the protection of personal data that is held within the EU, there are fundamental issues at stake here that are bound to have a knock on effect on such issues globally. This is clearly an area where technological advances have taken place in a very rapid fashion. The *Microsoft* case comes at a time when there is a dangerous global drift away from human rights standards in the context of cybercrime law, and highlights a degree of urgency in finding a solution to access to extraterritorial evidence.

This paper discusses the issues in the context of global cyber fraud and suggests some potential solutions in cases where the border between business litigation and criminal activity may be hard to identify. There are several serious issues facing law enforcement, prosecutors and private parties seeking to secure access to extraterritorial evidence, not least in the cloud computing context. There can be no doubt that much work is needed to address these issues, but equally, there can be no doubt that these issues must be addressed. This paper will discuss some mechanisms that are of relevance and that should be considered in future attempts at improving the operation of the law in this field.

The problems of extraterritorial jurisdiction and the overlap between private litigation and law enforcement are exacerbated when one takes, for example, a legitimate international investment company operating across the globe using domain names, websites and call centres as well as banking institutions and then compare it with a criminal enterprise: an international investment fraud, where the actors are based in Asia but victims are global, carried out by use of falsified websites posted globally where the offenders dupe investors into transferring funds and maintain the deception with falsified monthly reports and dishonest banking, and dissipate the assets before discovery.⁷

The litigation that arises in the investigation of such an operation is potentially both commercial and criminal, and the evidence has the potential to be on servers in numerous locations. Decisions must be made on which country has the jurisdiction to

7 See the following cases, where various defendants were prosecuted separately: Joey Severn, ‘Crook Part of £4.5 Million Scam Ordered to Pay Back £66,000’, *Derby Telegraph* (online), 5 April 2012 <<http://www.derbytelegraph.co.uk/Crook-4-5-million-scam-ordered-pay-66-000/story-15727504-detail/story.html>>; ‘Boiler Room Scam: Graham Mills Jailed for Seven Years’ *BBC News*, 26 September 2013 <<http://www.bbc.com/news/uk-england-derbyshire-24281949>>; ‘Felinheli Woman Jailed for Document Frauds’ *Wales Online*, 27 March 2013 <<http://www.walesonline.co.uk/news/local-news/felinheli-woman-jailed-document-frauds-2056080>>.

prosecute, where to serve warrants for the production of material and how to collate the material required, not just to decide whether the operation is legitimate or not, but to decide whether to enable legal intervention at all. Often the result is piecemeal proceedings against identifiable individuals (sometimes they themselves are being exploited) and the main operators avoiding sanction. Sometimes, the investigations are commercial and not taken up by law enforcement at all, so the evidence lies in the cloud and the issues risk remaining unresolved. If these issues are not addressed, and they need to be addressed globally, there is little prospect of a solution.

The issues associated with access to extraterritorial evidence go further than what has surfaced in the *Microsoft* case but relate to the collection of relevant evidence across territorial borders. This can arise in any international commercial action that requires evidential collection. In the cyber context, this is where there is an intersection between criminal and commercial legal principles, particularly where breaches of privacy rules in some countries come with criminal penalties and/or significant financial sanctions. Imagine an individual who is the subject of inappropriate litigation by a former business partner who seeks disclosure of trade information that will fundamentally compromise the business. The company is based in one country, the server in another and the litigious adversary in a third. Why should one person have easy access to private information of another — whether business or personal — and how much more frightening is the potential that governments engaged in enquiries (commercial or criminal) could, through individual judges and without legal precedent, bypass scrutiny and engage in draconian seizure policies?

In all of the above examples, there is always evidence online (social media, emails, websites, messaging and so on) and other more physical evidence within territories (confessions, diaries, accounts, company documents and so on). How is it to be collected and used within a reasonable space of time? What of the data and privacy issues? All too often there is a knee jerk reaction to organised crime which inhibits the freedoms of law-abiding people and is used as a foundation for intrusive state surveillance.

In the absence of a comprehensive global instrument in this sphere, the potential solutions in a cyber context must be considered and there are a number of different components that ought to be considered in any ethical and principled move towards improving international law and cooperation in the context of transnational extraterritorial evidence.

Outside of the common law tradition, jurisdiction was to a great extent based on nationality, enabling countries to try their citizens for their conduct, although historically this was conduct within territorial boundaries in any event. More recently, prosecutorial jurisdiction has been the subject of codification or statutory exception depending on the state concerned and the legal tradition. The general tendency is to enlarge jurisdiction to prosecute beyond territorial boundaries, but these are disjointed regulations and generally relate only to conspiracies or child abuse. Such extraterritorial

jurisdiction is often dealt with in commercial litigation by lengthy arguments on proper law. It is here that the law is confronted by increasing technology and transport that cuts across borders with great ease. Countries now have competing claims to jurisdiction, and issues of parliamentary sovereignty can make commercial cases inherently political.

Jurisdiction, therefore, can be separated into more than one legal issue: It is customary to distinguish between three different forms of jurisdiction:

1. Prescriptive (or legislative) jurisdiction relating to the power to make law in relation to a specific subject matter;
2. Judicial (or adjudicative) jurisdiction which deals with the power to decide or adjudicate a particular matter; and
3. Enforcement jurisdiction which relates to the power to enforce the law put in place, in the sense of, for example, arresting, prosecuting and/or punishing an individual under that law.

However, not least due to the increase in cross-border contacts that stem from the internet, it is useful to also consider a fourth type of jurisdiction — what is called investigative jurisdiction. Investigative jurisdiction — where considered at all — is treated as a component of enforcement jurisdiction under conventional thinking. Investigative jurisdiction relates to the power to investigate a matter and must be kept separate from the jurisdiction to make rules, adjudicate disputes and to actually enforce the law. Perhaps the most important reason for treating investigative jurisdiction as a separate and distinct form of jurisdiction is that a state may have a range of reasons for wanting to investigate a matter without ending up exercising adjudicative jurisdiction over the matter, applying prescriptive jurisdiction to the matter or, indeed, seeking to take any enforcement actions against the person it investigates.

Such an outcome would, for example, be the case where (1) the investigation shows that there is no reason to pursue the matter or, more importantly, (2) where the investigation shows that the matter is best dealt with by a request seeking another state to claim adjudicative, legislative and enforcement jurisdiction over the matter. In light of this, it does not make sense to bundle investigative jurisdiction with enforcement jurisdiction, as is traditionally done. The instances where investigative jurisdiction plays a central role are numerous, for example, in the context of data privacy law and in areas such as consumer protection — areas where complaints are often best pursued by bodies such as privacy commissioners and /or ombudsmen and/or consumer protection agencies.

It is this crucial importance of distinguishing investigative jurisdiction from other forms of jurisdiction which was at the core of the 2007 decision by the Federal Court of Canada set out above. Looking at the *Microsoft* case, the very fact that dispute arose in the first place highlights that contemporary jurisdictional thinking has failed to adequately address the challenges posed by the internet in general, and perhaps cloud computing

in particular. This failure may partly be blamed on the law's unwillingness to part with traditional categorisations and thinking, so as to recognise models and structures that better correspond to the new technological reality. Investigative jurisdiction relates to the power to investigate a matter and must be kept separate from the jurisdiction to make rules, adjudicate disputes and to actually enforce the law. It is treated as a component of enforcement jurisdiction under conventional thinking.

As emphasised above, treating investigative jurisdiction as a separate and distinct form of jurisdiction is important because a state or an individual may have a range of reasons for wanting to investigate a matter without ending up exercising or seeking adjudicative jurisdiction over the matter, applying prescriptive jurisdiction to the matter or, indeed, seeking to take any enforcement actions against the person it investigates. It follows that it does not make sense to bundle investigative jurisdiction with enforcement jurisdiction, as is traditionally done.

In the *Microsoft* case, Microsoft argues that 'the search and seizure occur in Dublin, where the emails reside'⁸ and thus is extraterritorial, which is consistent with the relevant statutory language.⁹ However, the conclusion that is the subject of an appeal and a number of interesting interventions was that extraterritorial jurisdiction could be implied. This was justified by reference to the fact that there is a strong tradition that the interpretation of a statute includes consideration of Parliament's intention. The outcome is awaited with fevered anticipation.

The real question is whether the issue of extraterritoriality arises in the first place. If it does, Microsoft must be successful, and if it does not, the inquiry will have to go on. Unsurprisingly, Microsoft says the issue of extraterritoriality does arise and the US Government claims that it equally does not. The difference in perspective is apparent throughout, but is particularly well illustrated in the following quote from the Government's brief of 9 June 2014:

Relying on Section 432(2) of the Restatement (Third) of Foreign Relations, Microsoft argues that '[a] state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state.' ... But requiring the disclosure of records by a U.S. company does not involve any enforcement activity by government personnel on foreign territory, which is the concern of that section.¹⁰

It is obvious that Microsoft and the US Government are talking about two different things, and that they are arguably both correct. It is true, as the Government says, that there is no enforcement activity on foreign territory. However, and this is important,

8 Brief by Appellant Microsoft Corporation, *In the Matter of a Warrant to Search a Certain E-mail Account Controlled and Maintained by Microsoft Corporation* (No. 14-2985-cv) 26.

9 Ibid 9.

10 Government's Brief in Support of the Magistrate Judge's Decision to Uphold a Warrant Ordering Microsoft to Disclose Records Within its Custody and Control, *In the Matter of a Warrant to Search a Certain E-mail Account Controlled and Maintained by Microsoft Corporation* (1:13-mj-02814) 21.

there is an exercise of law enforcement functions in the territory of another state. In other words, the Government looks exclusively to the location from which jurisdiction is exercised (the US). Microsoft considers also the extraterritorial effects and that they occur in Ireland. In this way, the US Government gives extraterritoriality a narrow definition, while Microsoft gives it a broader definition. In support of its approach, the Government states, 'The principle against extraterritoriality presumes that Congress does not intend for a law to apply extraterritorially. It does not presume Congress's intention to be that the law has no incidental effects outside the country whatsoever'.¹¹ This, the Government supports by referring to the following quote: 'Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States'.¹²

However, this is simply going around in circles since the quote above may equally well support Microsoft's view depending on what may be the conduct in question. What is really arising here is a new form of statutory interpretation which requires courts to construe statutory language to be consistent with international law, following the presumption that Congress does not wish to enact a law that will create clashes of interest with foreign states. In other words, the presumption against extraterritoriality is just a proxy principle conveniently adopted as the focal point in a world, at the time, dominated by a territorial focus. The question that arises here is whether, perhaps unwittingly, the Magistrate in the *Microsoft* case, exposed a modern approach to legislative interpretation based on community needs and not individual sovereignty.

This in turn gives rise to examination of parliamentary sovereignty in the context of a global community. The court here was required to balance the essential rights to a fair trial. Without the necessary evidence, held by an organisation that operates in more than one state, the litigation would be compromised. At the same time, the issues engaged rights to privacy. These are not merely questions for the US Constitution or the equivalent Irish instruments but for the international community. The internet is global, and so there is an argument that courts must take a global approach in deciding the operation of domestic legislation.

The tradition of strict dualism, from decisions such as *R v Secretary of State for the Home Department; Ex parte Bhajan Singh*,¹³ which expounded the classical divide, has changed. Modern theoretical underpinning of dualist systems (national and international) recognise that courts can accommodate international law whether given effect by valid legislation or by assisting in the development of the common law. Even in cases where international law has not, by legislation or valid executive action, been incorporated into national law, there are occasional circumstances where that law may

11 Ibid 19.

12 *Environmental Defense Fund v Massey*, 986 F2d 528, 531-32 (DC Cir 1993).

13 [1976] 1 QB 198 at 207.

be used by judges and other independent decision-makers in the national legal system to influence their decisions. This is particularly so in the case of international human rights principles as they have been expounded, and developed, by international and regional bodies.

An expression of what the Hon Justice Michael Kirby AC CMG has called this ‘modern approach’ was given in February 1988 in Bangalore, India, in the so-called *Bangalore Principles* which state, in effect:¹⁴

- International law (whether human rights norms or otherwise) is not, in most common law countries, part of domestic law.
- Such law does not become part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare the norms thereby established to be part of domestic law.
- The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty -- even one ratified by their own State.
- But if an issue of uncertainty arises (by a gap in the common law or obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations.
- From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which makes it part of domestic law.

Further, the *Bangalore Principles* declare:

- [T]here is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete (*Bangalore Principles* No 4)
- It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law. (*Bangalore Principles* No 4)

Laws develop in line with international law, particularly in the context of Commonwealth land rights.¹⁵ Here there are property rights in the context of the contents of a server. This is logical to ensure conformity where, for example, the law of one country has been opened up to international remedies to individuals pursuant to accession to international instruments such as the Optional Protocol to the *International*

¹⁴ Taken in part from Michael Kirby, ‘Domestic Implementation of International Human Rights Norms’ (1999) 5(2) *Australian Journal of Human Rights* 109.

¹⁵ See the remarks of Justice Brennan (with the concurrence of Chief Justice Mason and Justice McHugh) in *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

Covenant on Civil and Political Rights ('*ICCPR*'). This brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The law of an individual state may not necessarily conform to international law, but international law is a legitimate and important influence on the development of domestic interpretation, especially when international law declares the existence of universal human rights. A doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values to entrench a discriminatory rule.¹⁶

It follows that international obligations must be considered in the performance of an administrative decision-making process. Effectively, the interpretation of the US instrument requires due consideration of individual rights to a fair hearing as against the rights of privacy. This leaves the courts responsible for enforceable rights, utilising international law where an appropriate gap appears or where a statute is ambiguous or there is a conflict between legislation. Arguably the same issues would then necessarily apply should there be litigation in the context of any breach of EU legislation by complying with the terms of the warrant. The *Microsoft* case highlights not just the tasks of individual judges but also the need for legal systems to work cooperatively in general harmony with the development of the international law of human rights.

Whenever the laws are applied to novel phenomena that need to become the subject of clear legal rules, the undergrowth of proxy principles need to be removed so that the core principles that are reflected in those proxy principles can be identified. Only then will it be possible to focus on the considerations and values that truly are to be balanced. Applying this to the matter at hand it may be asked whether jurisdictional claims with an extraterritorial effect can create clashes of interest with foreign states. Here there is no need to dig particularly deep; the answer is of course 'yes' as is evidenced by the strong European reactions to the *Microsoft* case.¹⁷ The US Government may of course continue pushing its argument that there is no extraterritoriality in the case. However, this senior court should not have any problems disposing of such an outdated and overly simplistic claim about extraterritoriality.

Having reached this conclusion, the more interesting question is, of course, whether a sensible system could be developed allowing more effective law enforcement access to cloud content.

In considering global conventions and/or the balancing exercise that an individual judge has to engage in, then it is important to remember that privacy is a qualified right and can be restricted, per Article 19(3) *ICCPR*. The requirement of a limitation to be 'provided by law' requires that the law should be 'formulated with sufficient

¹⁶ See *Derbyshire County Council v Times Newspapers Ltd* [1993] 1 All ER 1011.

¹⁷ Allison Grande, 'EU Official Slams US for Asking Microsoft For Overseas Data', *Law360.com*, 30 June 2014 <<http://www.law360.com/articles/553140/eu-official-slams-us-for-asking-microsoft-for-overseas-data>>.

precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public'.¹⁸ The law must also 'provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not'.¹⁹ Any restriction must be proportionate to the protective aim and must be the least intrusive measure.²⁰ This principle of proportionality must also account for the form of the expression, including its means of dissemination.²¹ Here it seems those requirements were not available and the Magistrate in the *Microsoft* case filled the gap.

Aside from improving any mutual legal assistance procedures, it is time to be explicit about the principles underpinning international data sharing. In analysing the work carried out by the separate stakeholder groups, these principles could be:

- i. respect human rights, notably the right to privacy and freedom of expression as outlined in the United Nations *International Covenant on Civil and Political Rights*;
- ii. focus on sharing data to support the investigation of serious crimes, organized crimes, terrorism and cybercrime clearly impacting on the jurisdiction making the request. It should also support existing measures to prevent threats to life and harm to children;
- iii. not support any intervention or activities of a political, military, religious or racial character. There must be integrity of motive, with no hidden agendas on the stated purpose of the investigation or the reasonable belief that an offense was committed;
- iv. support requests for information that are proportionate and necessary to the investigation, including relating to specific accounts and specific investigations;
- v. support requests that are lawfully authorized and where this authorization can be authenticated;
- vi. provide simplicity and clarity: all stakeholders — service providers, users, government and law enforcement — deserve clear and simple rules;
- vii. be transparent to all stakeholders, including internet users, internet service providers, governments, law enforcement, academics and non-governmental organizations;
- viii. support joint working between government and the private sector nationally and internationally to effectively tackle crime;
- ix. support effective global co-operation to tackle crime by providing an efficient and secure system;

18 Human Rights Committee, *General Comment No. 34* <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>> [25]; see also *Leonardus Johannes Maria de Groot v The Netherlands*, Communication No. 578/1994, U.N. Doc. CCPR/C/54/D/578/1994 (1995).

19 Human Rights Committee, above n 18, [25].

20 Ibid [34].

21 Ibid.

- x. have national and international governance and safeguarding structures, collectively determined by participants, that support the principles and ensure the long term success of the system. (Internal footnotes and some formatting removed)²²

A harmonisation of approach to statutory interpretation in this context necessarily invokes the need for uniformity of approaches in procedure. This, of itself, will make mutual legal assistance requests or global warrant enforcement more efficient. Here it is possible to re-analyse the investment or investment fraud example above. If these issues in relation to evidential collection are not effective, then all that can be done is to investigate individual actors within a particular jurisdiction relying on requests from other countries with different and often lengthy procedures. This means that, if the hub of the activity is extraterritorial, then those at the top of a transnational enterprise will escape the scrutiny that comes with litigation or criminal prosecution. Victims will find that crimes go unpunished, and genuine litigants will find no one to sue. The idea of global cooperation in such a context is of course likely to take a long time to develop and resolve. Given the recent conduct of the US in a surveillance context, there is inevitable fear that one superpower will use such an approach to ride roughshod over other national interests. Whilst the conversation on these issues has started in the context of the *Microsoft* case, there are other practical solutions which can be achieved in a swifter timescale. These can include uniformity of legal definitions and uniformity of police procedure thus reducing arguments on extradition as to whether an act in one country is defined in the same way in another and ensuring that evidence is collected properly in accordance with uniform procedures in each country — for example, collecting police confessions or downloading material using methods that are reliable and admissible in court. Such practicalities also then avoid arguments that evidence collected across nations then becomes inadmissible because the method of collection is considered improper in the country that has the nexus for prosecutorial jurisdiction. Super principles across jurisdictions will fail if basic methodology is unreliable. Such issues arise not just in relation to internet intermediaries but particularly to those involved in combatting transnational organised crime. Here the issue is not so much the proper law for the conduct of litigation but the collection of relevant evidence across territorial borders.

Tying questions of jurisdiction exclusively to the location of the server has never been a good idea. As a first step towards a balanced model allowing law enforcement access to data held overseas, it is unnecessarily aggressive to argue that all data located in the EU must automatically be protected by EU data privacy law. The real interest can

22 Gail Kent, 'Sharing Investigation Specific Data with Law Enforcement — An International Approach' (14 February 2014) Stanford Public Law Working Paper. <<http://ssrn.com/abstract=2472413>> or <<http://dx.doi.org/10.2139/ssrn.2472413>> 10; see also Kate Westmoreland and Gail Kent, 'International Law Enforcement Access to User Data: A Survival Guide and Call for Action' (8 January 2015). <<http://ssrn.com/abstract=2547289>> or <<http://dx.doi.org/10.2139/ssrn.2547289>>.

usefully be more narrowly defined not by focusing exclusively on the location of the data in question but by placing *primary focus* on the nationality of the person to which the data relates. At the same time, it must be remembered that an email account will contain both sent and received emails. Thus, in a selection of cases, the email account of, for example, a US citizen may also have a strong, for example, EU connection justifying the application of EU data privacy law. Consequently, a primary focus on the nationality of the person the data relates to may usefully be accompanied by some form of ‘interest’ or ‘connection’ test — where data held (for example in the EU) has a sufficiently strong connection to the EU, EU data privacy law should prevent US warrant-based access to the data even where the email account belongs to a US citizen. In such cases, US law enforcement agencies would have to rely on existing mutual legal assistance systems, and access to data located overseas should obviously only be provided where the government seeking access has legitimate jurisdiction over the internet intermediary it calls upon. In criminal cases, there may be international interest in certain types of offences, such as child abuse offences which tip the balance in a particular direction, but taking a legal model rule, it could, for example, look like this:

Outside a Mutual Legal Assistance Treaty, an internet intermediary may only disclose personal data it holds in one country, on behalf of its users, to a law enforcement agency in another country, where:

- a. the disclosure is mandated by the laws of the country in which the law enforcement agency is based;
- b. the country in which the law enforcement agency is based has legitimate jurisdiction over the internet intermediary;
- c. the person whose data the law enforcement agency is seeking access to is a national or permanent resident of the country in which the law enforcement agency is based; and
- d. the personal data to be disclosed lacks a substantial connection to the country in which the data is held.

The exact operation of this model will depend on how key terms, such as ‘legitimate jurisdiction’ and ‘substantial connection’ are defined. However, this proposal may represent a useful starting point for much needed discussions of this crucially important issue whilst recognising that the *Microsoft* case highlights a degree of urgency in finding the solution to access to extraterritorial evidence.

WHERE ARE THE WITNESSES: THE SYSTEM OF WITNESS APPEARANCE IN COURT IS BREAKING DOWN IN CRIMINAL PROCEDURE IN CHINA

ZHONG ZHANG¹

ABSTRACT

The witness appearance system has made great progress in China after the past thirty years it developed. However, there are serious challenges in implementing the system: the problem of non-appearance of witnesses has not been solved and notifying the police officer appearance in court is more difficult. Consequently, pre-trial testimonial transcripts are used widely. Even if the witness appears in court, his/her testimony cannot be guaranteed to be authentic. The main reasons for the witness not testifying in court are the flaws in the witness protection system and the lack of financial compensation. In addition, a witness privilege system needs to be established.

I. INTRODUCTION

Witness appearance is of great significance for investigation, evidence verification and fact-finding decisions. However, because China's traditional culture does not recognise the importance of witness appearance, and also because judicial officers lack sufficient

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understanding of the importance of witness appearance,² the witness appearance rate has long been low. The low rate of witness appearance was once regarded as one of the three abnormalities in the testimony system in China.³ Therefore, solving the problem of witness's non-appearance has become an important task in China's judicial reform. The *Third Five-Year Reform Program of the People's Court (2009-2013)* promulgated in 2009 stated:

There shall be established a system that will promote the witness and the expert taking the witness stand, provide protection to the witness and the expert who take the witness stand, and provide proper procedures to define the scopes of which the police investigators should take the witness stand.

The revised 2012 *Criminal Procedure Law* and the judicial interpretations provide important guarantees for establishing the witness appearance system.

First, the law requires the police officer to testify as a witness at the trial. The *Criminal Procedure Law* prescribes two situations that require the police officer's appearance. In one case, the police officer who saw the crime while performing official duties should take the witness stand. In the other case, when there is a dispute between the prosecutor and the defendant on the legitimacy of a piece of evidence obtained in the interrogation, and if such evidence is considered to be a confession extorted 'by torture', the police investigator should testify at the trial upon the court's notification. Such provisions play an important role in finding the facts of a case, safeguarding the defendant's confrontation right, and preventing extortion of confessions by torture.

Second, the law promotes the establishment of a compulsory witness appearance system. To solve the problem of non-appearance of witnesses, the *Criminal Procedure Law* reiterates witnesses' obligation to testify in court and formally establishes a compulsory witness appearance system in Section 188: 'If the witness, who has received the subpoena issued by the court, refuses to testify in court with no justified excuses, the court can force him/her to appear in court, except if he/she is the defendant's spouse, parent or children.' In the case where the witness refuses to testify in court, this provision provides the corresponding sanctions: 'If the witness refuses to appear in court or refuses to answer questions in court without any justified excuse, he/she shall be reprimanded; in serious cases, he/she shall be sentenced to ten days in detention upon approval of the chief judge'.

Third, the law provides improved protections to witnesses. The *Criminal Procedure Law* endeavours to promote witness protections. On the one hand, it is prescribed in the law that public security authorities and judicial authorities shall bear the responsibility to protect the witness's personal safety and his/her close relatives' safety; on the other

2 Fan Chongyi, *Problems in Implementation of Criminal Procedure Law and Countermeasures* (Chinese People's Public Security University Publishing House, 2001) 267.

3 Long Zongzhi, 'Three Abnormalities in China's Testimony System' in Chen Guangzhong (ed), *Theory and Practice of Procedure Law* (People's Court Press, 2001) 378.

hand, the law provides special safety protection measures that should be taken before the witness taking the stand. This provision has been a significant improvement of the old practice, which merely provided ex post sanctions. In other words, when a witness testifies in a trial which involves the criminal charge of endangering national security, terrorist attack, organised crime or drug offence, the judicial authorities shall take protection measures, such as securing the witness's private information, including name, address and place of work, veiling his/her look, altering his/her voice, prohibiting special persons from making contact with him/her and his/her close relatives, and specially protecting him/her and his/her house. If these measures can be implemented in practice, the risk of retaliation against the witness will be greatly reduced, and a witness will feel less worried to appear in court.

Fourth, the law promotes a witness appearance compensation system. To avoid a witness's additional financial loss caused by the appearance in court, Section 63 of the *Criminal Procedure Law* provides a witness appearance compensation system. On the one hand, it prescribes the scope of compensation for costs resulting from the witness's appearance, including the witness's expense in transportation, accommodation and meals, and the loss of working time caused by his/her fulfilment of the obligation to appear in court; on the other hand, it prescribes the source of the compensation fund. The subsidy for the witness's appearance is sponsored by the judicial authority's operational funds. The distribution of the subsidy is ensured by the government of the same level. In addition, to eliminate the witness's financial loss concerns, in light of this section, the witness's employer is prohibited to deduct money or deduct money in disguise from the witness's salary, bonuses or other benefits for the reason of the witness's absence from work.

To gain an understanding of the implementation of these measures, the study on *China Development Index of Evidence Rules* carried out in 2013 took witness appearance as a primary index. In this study, a survey on the implementation of the witness appearance was conducted among ten courts.⁴ In the 2014 research on *China Justice Index*, a survey on witness appearance was conducted again.⁵ The two surveys gained an intuitive understanding of the implementation of the witness appearance system and a better understanding of flaws and problems of the witness appearance system.

4 In September 2013, the Institute of Evidence Law and Forensic Science, China University of Political Science and Law and the Supreme People's Court Research Office cooperated with the National Social Science Fund's research project *People's Court Litigation Evidence Rules*, making a survey on the application of evidence rules among more than 800 judges from five appellate courts and five trial courts across China, and entrusting Beijing Horizon Research Consultancy Group to make the survey data analysis.

5 China Justice Index is a quantitative assessment measurement that shows the degree of the judicial civilisation in a jurisdiction. This Index was developed by the research team of National '2011 Program' Judicial Civilization Collaborative Innovation Center. In 2014, the research team randomly interviewed 7200 respondents among the non-judicial practitioners and judicial practitioners in nine provinces/municipalities across China. This survey aims to gain a dynamic understanding of how the current judicial civilisation affects everyone's daily life.

II. UNRESOLVED PROBLEM OF NON-APPEARANCE OF THE WITNESS

The biggest problem the court has long been faced with during the implementation of the *Criminal Procedure Law* is the witness's non-appearance.⁶ There is data indicating that, prior to 2000, the witness appearance rate was generally no more than 5% and even lower in some regions. For example, of the 185 criminal cases filed by Erdao District Procuratorate in Changchun, Jilin, in 1997, only in eight cases did the witness testify in court. The rate of witness appearance was only 4.3%.⁷ From January 1997 to June 1999, in the 297 criminal cases tried by the Nanguan District the People's Court in Kaifeng, Henan, of the 1397 witnesses who are required to appear in court, only five of them took the witness stand.⁸ If the witness does not appear in court, cross-examination, 'the greatest legal engine that reveals the truth' cannot be conducted.⁹ A direct consequence resulting from non-appearance of the witness is the distortion of the witness testimony, which will affect the accuracy of the fact-finding.

Based on the awareness of the negative impact of non-appearance of the witness, in some regions, the courts are required to accept stronger obligation to notify the witness taking the stand; besides, the judicial officers are required to undertake more effort to persuade and educate the witness to take the stand in court. In some regions, the compensation system is established to encourage the appearance of the key witness. Through years of efforts, the problem of the witness's non-appearance has been slightly, but not fundamentally, solved. At the end of 2009, in all the criminal cases across the country, the witness appearance rate in trial courts was no more than 10%, and less than 5% in appellate courts.¹⁰ In some regions, the situation was even worse than that before 2000. For example, in 2010, there were 2796 criminal cases tried in the Third Intermediate People's Court of Chongqing. In these cases, of the 4048 witnesses, who were supposed to testify at the trial in the trial courts and the appellate courts, only 13 in 12 cases actually took the stand. The witness appearance rate was only 0.32%.¹¹

To compel witness appearance, the *Criminal Procedure Law* strengthens the witness's obligation to testify in court, and prescribes the compulsory witness appearance and relevant sanctions for the non-appearance of a witness. But the problem of non-appearance of a witness has still not been fundamentally solved. In a survey on judges conducted in 2013 (Figure 1), 26.4% of the 750 respondents believed the witness

6 Chen Weidong, *Research Report on Implementation of Criminal Procedure Law* (China Fangzheng Press, 2001) 125.

7 Sun Fei and Liu Ying, 'What Are the Difficulties in Witness Appearance?' (1999) *The Procuratorate Daily*.

8 Wang Laichao, 'It's Hard to See Witness in Court' (2000) 2 *China Business Law*.

9 Ronald J Allen, Richard B Kuhns, Eleanor Swift and David S Schwartz, *Evidence: Text, Problems, and Cases*, co-translated by Zhang Baosheng (Higher Education Press, 2006) 205.

10 Long Pingchuan, 'Key Witness Can Receive Economic Compensation for Appearance in Court' (2009) *The Procuratorate Daily*.

11 Xu Wei, 'Witness Appearance Rate Was only 0.32% under Administration of Third Intermediate People's Court of Chongqing in 2010' (2011) *Legal Daily*.

appearance rate was below 5% in the cases they tried in the past three years, and 24.4% believed witness appearance rate was 5% to 20%. In the study the China Justice Index conducted in 2014 (Figure 2), 33.6% of the respondents believed that witness appearance rate was below 5% in criminal cases, and 32.5% believed witness appearance rate was 6% to 30%. It is worth noting that 43.1% of the respondents who had been involved in a legal career for more than twenty years believed witness appearance rate was 5%.

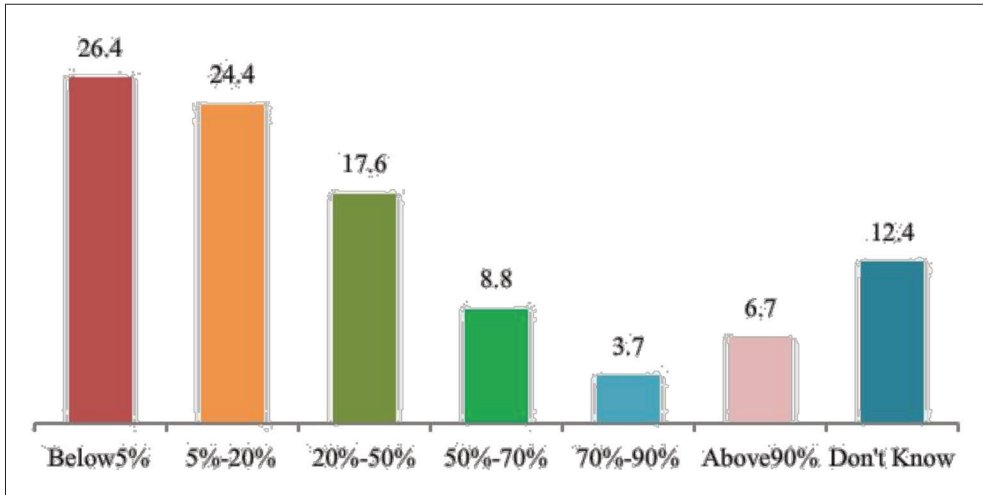


Figure 1: The rate of witness appearance in court (2003).

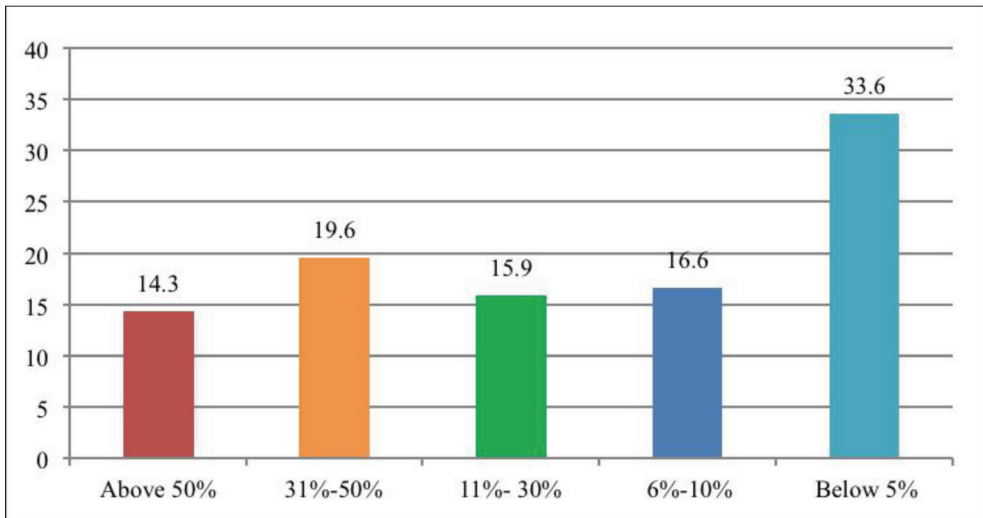


Figure 2: The rate of witness appearance in court in criminal procedures (2004).¹²

¹² Zhang Baosheng, Zhang Zhong and Wu Hongqi, *Report on China Justice Index 2014* (China University of Political Science and Law Press, 2015) 167.

III. DIFFICULTIES IN POLICE OFFICER'S APPEARANCE

There are two instances in which a police officer is required to testify at a trial. In one instance, the police officer is required to testify in court as an eyewitness. And in the other case, the police officer is required to testify in court on the issue of asserted illegal evidence collection. Since the implementation of the revised *Criminal Procedure Law*, police officer's appearance has been seen in various regions. For example, in a mobile phone theft case tried by the Haizhu District People's Court in Guangzhou, Zhejiang, on 24 January 2013, of the two in court testifying witnesses, who are the members of the anti-theft team of Guangzhou Municipal Public Security Bureau, one was a police officer. This officer's testimony provided strong evidence in determination of the facts of the case.¹³ But on the whole, very few police officers take the stand in court. In many regions, to request the police officer's appearance is very difficult. The higher authorities' involvement in persuading and educating the police officer to take stand is often needed. Even when a police officer appears in court, the effect of testifying does not always yield a positive result.

Appearance of a police officer is not different from the appearance of an ordinary witness even though the police officer only testifies in court about what he/she witnessed when he/she performed his/her duties. But it is difficult for a police officer to accept that he/she should be subject to the court's investigation as just an ordinary witness.¹⁴ Some police investigators believe that appearance in court degrades them. Taking the witness stand is psychologically unacceptable for a police investigator, for he/she might think about how an administrator of the state should present him/her in court as a witness to answer the lawyer's questions.¹⁵ Survey data indicate that only 34.5% of the respondents believe a police officer is 'very likely' to appear in court providing testimony on what he/she witnessed when he/she performed his/her duties. In fact, in many cases the police officer does not think he/she should or needs to appear in court, for what he/she witnessed on his/her duties have been documented and submitted to the court. Although there are objections against the non-appearance of the police officer, the investigation authority keeps issuing 'Investigation Notes' which are used to certify non-existence of illegal evidence collection and are used to substitute the appearance of the police officer. This approach is widely criticised for it bears many risks and flaws.¹⁶

Police officer's appearance is related with the accuracy of fact-finding. Police officer's appearance plays an important role in safeguarding the defendant's confrontation right

13 Liu Yingtuan, 'Sometimes Police Officer Is Called Witness' (2013) *People's Court Daily*.

14 Li Yuhua, Zhou Jun and Qian Zhijian, *Police Officer Appearance Guild* (Publishing House of Chinese People's Public Security University, 2014) 12-14.

15 Fan Chongyi, *Criminal Evidence System Development and Application* (The People's Court Press, 2012) 266.

16 Chen Ruihua, 'Investigators' Witness Status' (2012) 1 *Journal of Jinan University* (Philosophy and Social Sciences).

and curbing extortion of confession by torture.¹⁷ In practice, a police officer is notified in advance of testifying in court about the issue of asserted illegal evidence collection. In other words, the defendant asserts in court that his/her pre-trial confession was extorted by the police officer by torture, and thus requests the police officer to testify in court. To prove the legitimacy of the extortion of the confession, the court would notify the police officer who conducted the interrogation to appear in court. The survey result shows that in such a case it is very hard to enforce the appearance of the police officer. Only 31.2% of the respondents believe the police officer is ‘very likely’ to appear in court, while 29.6% believe that the police officer is ‘unlikely’ or ‘very unlikely’ to do that (Figure 3).

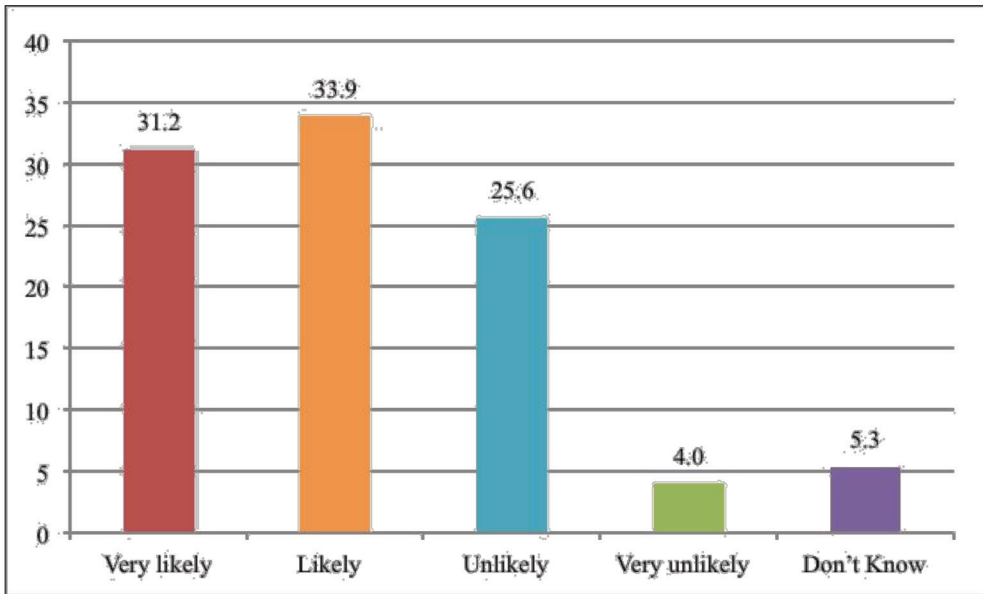


Figure 3: The probability of the police officer’s appearance in court to prove the legitimacy of the confession.

IV. WIDELY USED PRE-TRIAL TESTIMONIAL TRANSCRIPTS

Statements made by a witness outside the courtroom are hearsay. According to the hearsay rule, hearsay shall not be adopted except in special cases. But China’s evidence law does not incorporate the hearsay rule. A pre-trial testimonial transcript can be admitted as evidence as long as it has been verified. The *Criminal Procedure Law* Section 59 prescribes, ‘The witness’s pre-trial out-of-court testimonial transcript, expert opinion, crime scene investigation transcript and any evidentiary document shall be read out in

¹⁷ Zhang Zhong, ‘Revision of Criminal Procedure Law and Improvement of Evidence System’ in Wang Jinxi (eds), *New Developments in Criminal Evidence Law* (Law Press China, 2013) 30.

the court'. This provision in fact endorses the admissibility of the pre-trial testimonial transcripts. The admission of probative value of testimonial transcripts has resulted in numerous abnormalities in criminal trials in China, such as witness's non-appearance in court and the admission of the pre-trial testimonial transcripts as evidence.¹⁸

In practice, as a witnesses usually does not appear in court, the defendant is unable to confront the witnesses who offer testimonial evidence against him/her in the form of cross-examination during a trial, but are only able to confront a pile of paper which is pre-trial out-of-court testimonial transcripts. Such practice is absurd. However, a judge survey shows that only 10.3% of the respondents believe that the pre-trial testimonial transcripts are inadmissible (Figure 4).

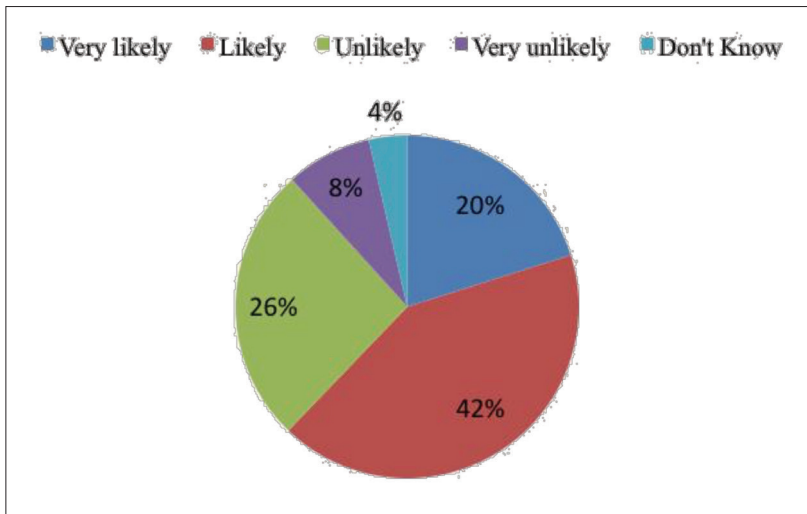


Figure 4: The probability of the adoption of pre-trial testimony transcripts.

According to the interviewees' responses to one of the judge survey's questions, which is to test the possibility for the admission of the pre-trial testimonial transcripts at trial, given the presumption that the witness, with full awareness of the fact that pre-trial testimonial transcripts can substitute his/her appearance in court, evades court appearance by giving pre-trial testimonial transcripts only; 62.1% of the judges believe the court is likely to directly use the pre-trial testimonial transcripts, while only 8.1% believe it is disallowed for the court to directly use the pre-trial testimonial transcripts (Figure 5).

According to the interviewees' responses to another judge survey question, which was to test how likely the judge was to allow the admission of the pre-trial testimonial transcripts, if a judge finds that there are too many witnesses in the case, he/she uses the pre-trial testimonial transcripts to avoid trouble: 44.9% of the judges believe the

18 Long Zongzhi, 'Written Testimony and Its Application' (2008) 4 *China Legal Science*.

PROOF IN MODERN LITIGATION

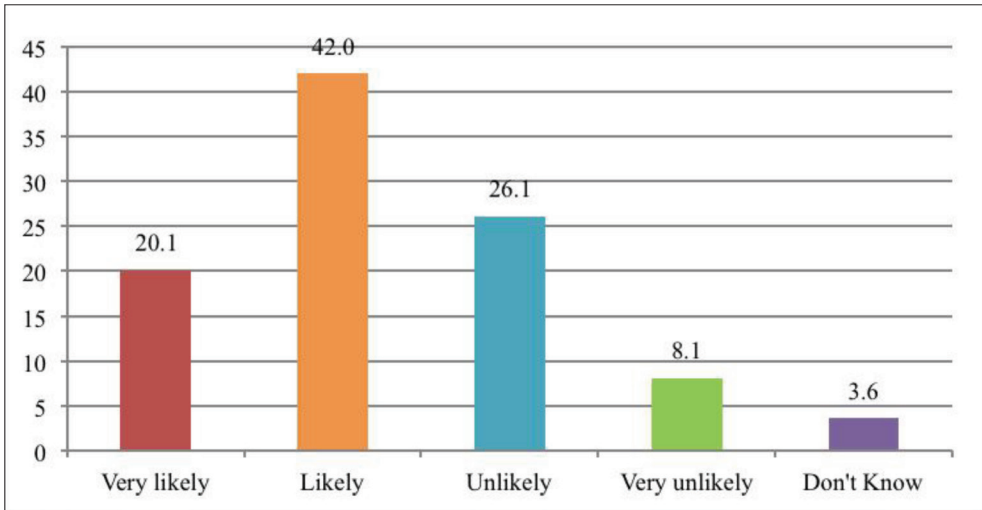


Figure 5: The probability of the witness evading appearance and the adoption of his/her pre-trial testimony transcripts.

court is likely or very likely to directly use the pre-trial testimonial transcripts, while only 11.6% believe the court is not allowed to use the pre-trial testimonial transcripts directly (Figure 6). The right to be confronted by the witness who accuses the defendant is considered to be a fundamental human right of the defendant.¹⁹ Admission of pre-trial testimonial transcripts means the deprivation of the defendant's right of confrontation.

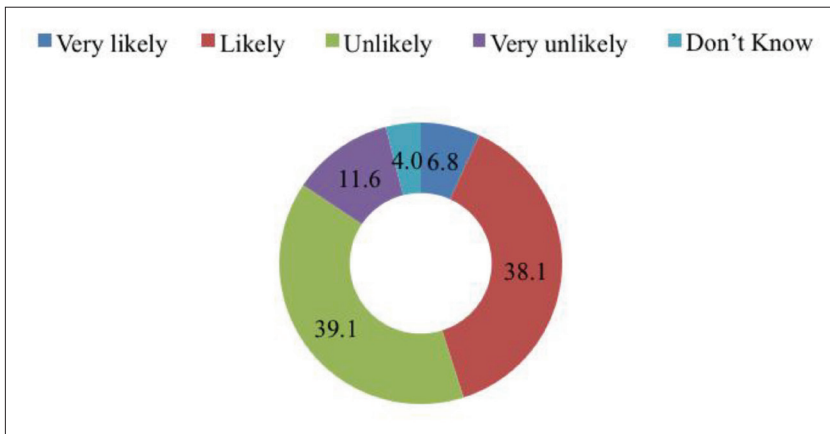


Figure 6: The probability of the judge using the pre-trial testimony transcripts for fear of trouble.

¹⁹ Chen Guangzhong, *Expert Proposal of Criminal Evidence Law of the People's Republic of China (Articles, Interpretation and Argumentation)* (China Legal Publishing House, 2004) 480.

V. THE LACK OF EFFECTIVE GUARANTEES FOR THE AUTHENTICITY OF THE WITNESS TESTIMONY

A witness has the obligation not only to testify but also to provide authentic testimony. Section 189 of the *Criminal Procedure Law* states, ‘When a witness gives testimony, the judge shall instruct him/her to give authentic testimony and of the sanctions if he/she intentionally gives false testimony or conceals evidence’. But in practice, for some reasons, the testimony given by the witness can rarely reflect the facts of a case accurately. Apart from intentionally false testimony or concealing of evidence by the witness, factors that can affect testimony authenticity also include the witness’ cognition, memory and expression. In other words, a witness may provide false testimony even if he/she does not intend to provide false testimony.²⁰

Witness testimony, specifically the eyewitness testimony, has high probative value. But such testimony may have a substantial impact on the accuracy of fact-finding if any deviations or errors occur.²¹ In practice, some witnesses provide false testimony in order to entrap others. Survey data show that up to 47.4% of the respondents believe this possibility exists. 6.9% of the respondents believe this possibility is ‘very likely’ to exist (Figure 7).

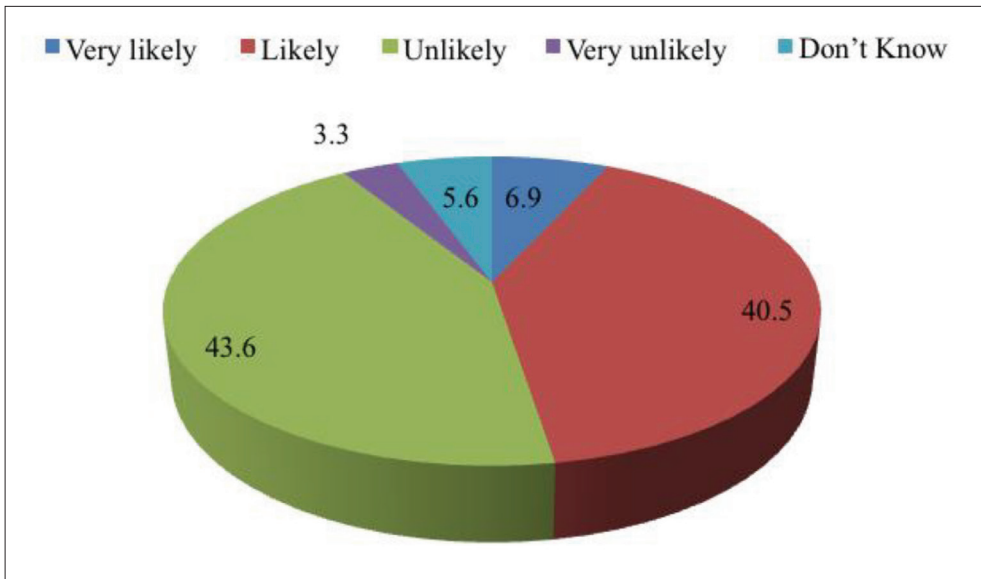


Figure 7: The probability of the witness providing false testimony in order to frame others.

²⁰ Liu Jinyou, *Science of Evidence Law* (new edn, China University of Political Science and Law Press, 2003) 115.

²¹ Zhang Jun, *Understanding and Application of Rules on Criminal Evidence* (Law Press China, 2010) 128.

If the witness intentionally gives false testimony, he/she can be charged with the crime of perjury. Some witnesses give testimony passively. For example, if a witness appears in court upon the court's subpoena, but is reluctant to testify, he/she often testifies in court by stating 'I did not see it' or 'I did not catch it'. Some witnesses demonstrate a careless attitude when testifying at the trial. They make nonsense statements in court. The result of the judge survey shows that 40.8% of the respondents believe such frivolous in-court testimony given by a witness may exist during the trial (Figure 8).

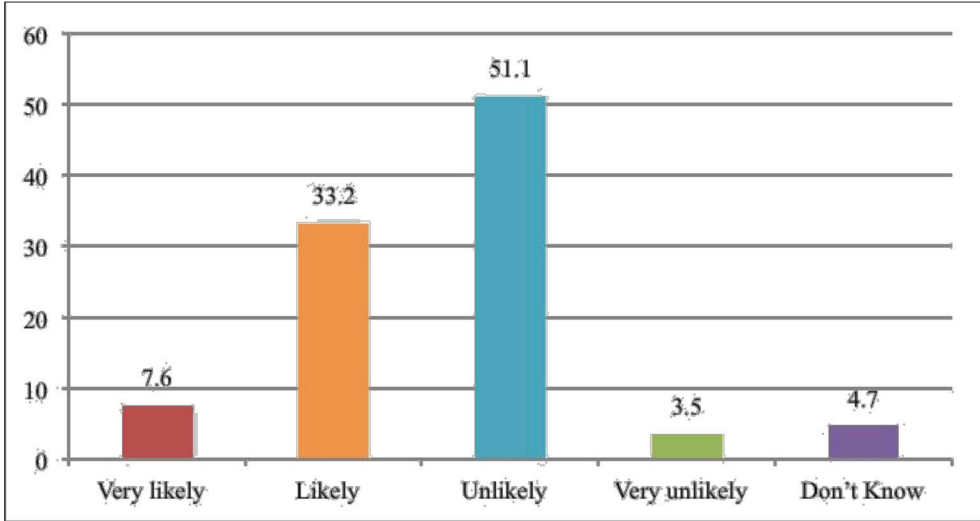


Figure 8: The probability of the witness talking nonsense in court.

In addition, some witnesses are reluctant to give testimony. For example, in some cases, the witness gives testimony in the court even though he/she was not on the crime scene at the relevant time. The result of the judge survey shows that 67.2% of the respondents believe this possibility exists (Figure 9).

Some people think that a witness should sign a sworn declaration before giving testimony in court in order to guarantee the testimony's authenticity. In some regions, the witness is even required to take an oath in court with one hand touching the Constitution.²² But the result of the judge survey shows that 90.1% of the respondents believe that safeguarding the witness's own interest is the most effective means to ensure the authenticity of the witness's testimony; 86.9% believe that severe punitive measures should be taken against perjury; and 82.7% suggest that witness protection should be strengthened. In that sense, the law should clearly prescribe the judicial authority's responsibility in protecting the safety of the witnesses and their close relatives, and the law should define and implement specific protection measures (Figure 10).

²² Zheng Jinxiong and Wang Xu, 'Xiamen Siming District Court Tries Witness Oath System' (2001) *Legal Daily*.

PROOF IN MODERN LITIGATION

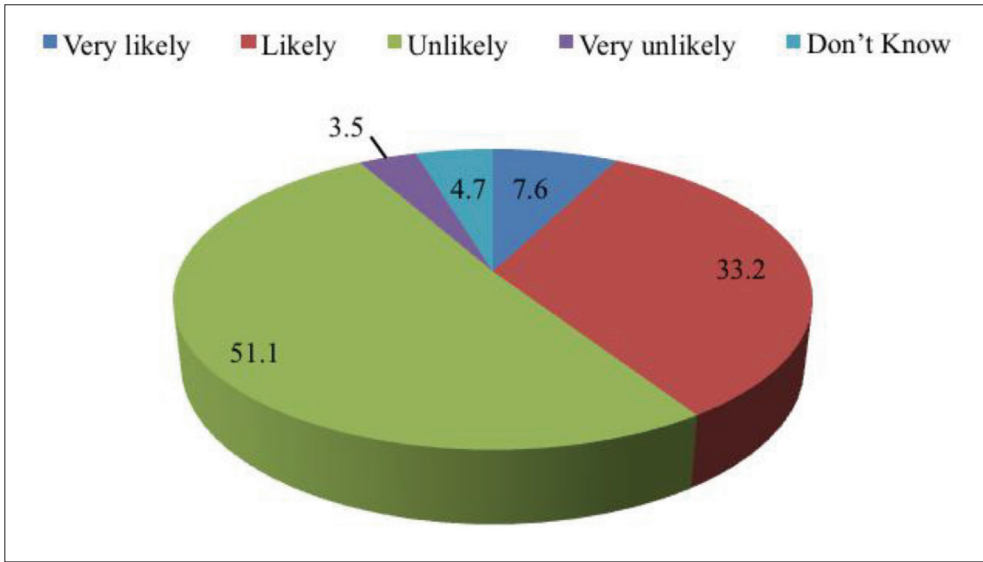


Figure 9: The probability of the witness giving testimony in court even though he/she was not on the crime scene at the moment of the crime.

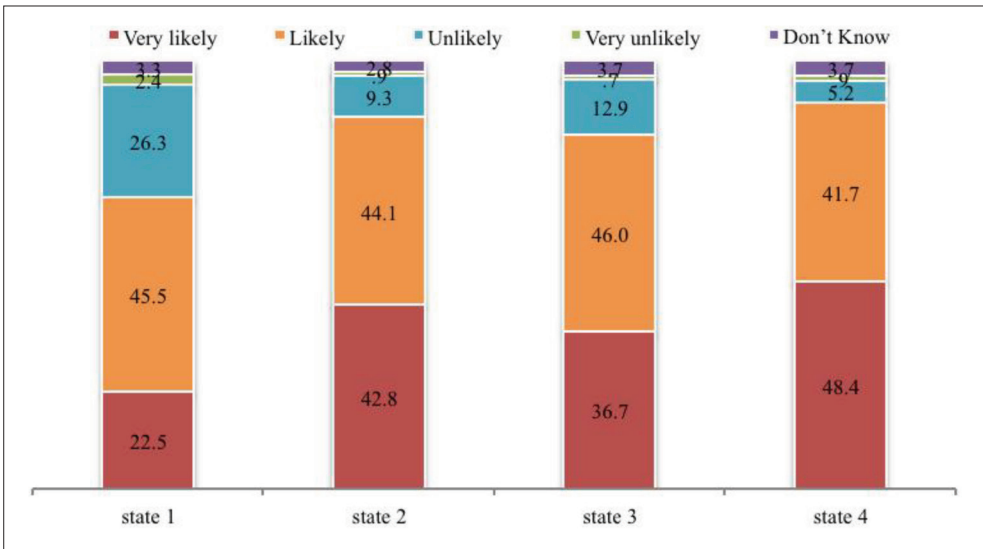


Figure 10: The probability of measures used for safeguarding the witness giving an authentic testimony in court.

State 1: Witness should sign an authentic testimony guarantee;

State 2: Severe punishments should be taken against perjury;

State 3: Witness protection should be strengthened;

State 4: The witness' interests are security.

VI. FLAWS IN THE WITNESS PROTECTION SYSTEM

The guarantee of the witness's safety is an important factor in encouraging the witness's appearance and the authenticity of the witness's testimony. If the safety of a witness and his/her close relatives cannot be guaranteed, the witness will lose motivation to give testimony in court. The great British judge Lord Denning said that if the witness suffers retaliation at the hands of those who do not like his/her testimony when the case is over, how can it be expected for the witness to freely and frankly give testimony?²³ Therefore, witness protection is not simply a state-wide responsibility. It is also a prerequisite for having the potential witness willingly appear in court to give testimony.

However, for a long time, there have been serious flaws in China's witness protection system. Apart from the excessive abstractness of the legislation and the lack of specific protection measures, the flaws also include the inadequate witness protection measures provided by the *Criminal Procedure Law*. The law only provides that penal sanctions, an ex post remedy, be enforced to any retaliating conduct against the witness.²⁴ However, in a witness protection system equipped with no specific measures, the 'protecting the safety of the witnesses and their close relatives' is nothing but an empty promise.²⁵

In awareness of the importance of witness protection and the lack of witness protection measures, five ministries and commissions led by the Supreme People's Court promulgated the *Regulations on Several Issues Concerning Evidence Review and Determination in Handling of Death Penalty Cases* in 2010. This judicial interpretation, aiming to change the current situation of low witness appearance rates, clearly provides witness protection measures, such as 'limiting publicity of the witness' information', 'limiting inquiry into the witness', 'veiling the witness' look', and 'changing the witness' sound'. The 2012 *Criminal Procedure Law* incorporates these provisions and also provides more witness protection measures, including securing the witness' personal information such as name, address and place of work, veiling his/her look, altering his/her voice, prohibiting special persons from making contact with him/her and his/her close relatives, and specially protecting him/her and his/her house.

However, in practice, these protection measures are not applied very well. Survey data show that the measure of securing the witness' personal information such as name, address and place of work is only done in 31.9% of the cases; the measure of veiling the witness' look or altering his/her voice is taken only in 19.9% of the cases; the measure of prohibiting certain persons from making contact with the witness and his/her close relatives occurs in 19.9% of the cases; and the measure of specially protecting the witness and his/her house is taken only in 14.5% of the cases. Only 18.1% of the witnesses who

23 Lord Denning, *The Due Process of Law*, co-translated by Li Keqiang (Law Press China, 1999) 25.

24 Wang Jinxi, *Criminal Witness Testimony*, (Publishing House of Chinese People's Public Security University, 2002) 226-7.

25 Fan Chongyi, *Special Report on Revision of Criminal Procedure Law* (Publishing House of Chinese People's Public Security University, 2004) 483.

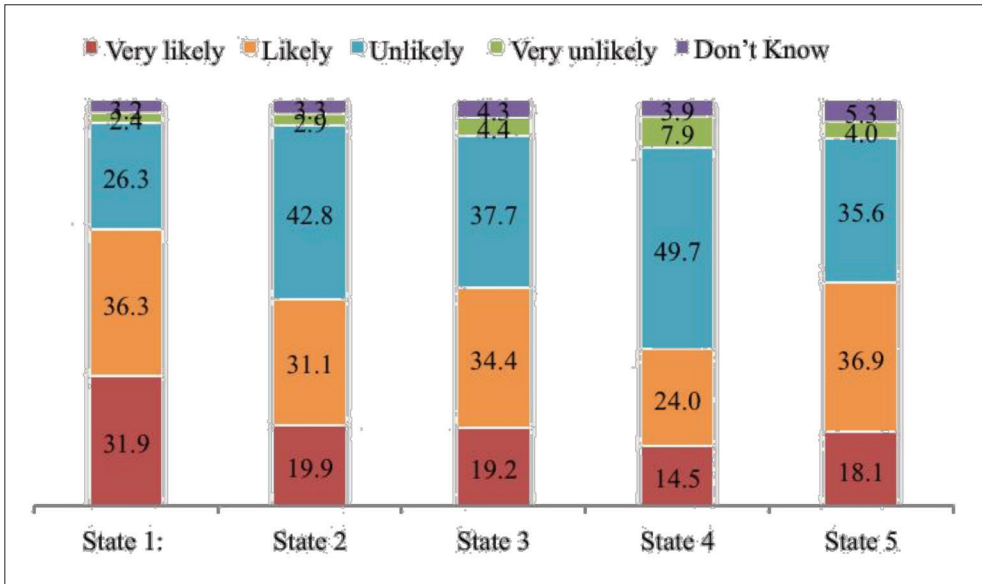


Figure 11: The probability of measures used for protecting the witness and his/her close relatives.

State 1: Secure the witness real personal information such as name, address and place of work;

State 2: Veil the witness' look and alter his/her voice;

State 3: Prohibit certain persons from making contact with the witness and his/her close relatives;

State 4: Protect the witness and his/her house specially;

State 5: Stipulate the court has responsibility to protect the witness.

filed request for safety protection to the people's court, people's procuratorate or public security bureau, are protected (Figure 11).

It should be specially noted that the witness protection measures prescribed in Section 62 of the *Criminal Procedure Law* are limited to 'ex ante protections'. This provision does not deal with witness protection after testimony is given. However, what the witness mostly worries about is the retaliation. Therefore, the legislators should strengthen the protection measures for witnesses after they give testimony. Such measures might include changing the witness's identity, assisting the witness with moving to another area, or changing the witness's appearance.

VII. THE LACK OF FINANCIAL COMPENSATION FOR WITNESSES' APPEARANCE

Appearance in court is a witness's legal obligation, but the appearance may involve certain expenses for the witness or have him/her lose potential income. If the potential cost is over the potential gaining, the witness's refusal to appear in court is considered to

be a 'rational' request. To change the witness's unwillingness of appearing in court, the factors that motivate the witness's behaviour must be controlled. Therefore, a financial subsidy to compensate the witness for his/her appearance in court is considered not only to be necessary to compensate the economic losses caused by the witness's appearance in court, but is also a solid guarantee for the witness's willing fulfilment of the in-court appearance obligation.²⁶

However, in China's criminal procedure system, there has long been lack of financial compensation measures to compensate witnesses. To solve the difficulties in encouraging the witnesses' appearance, some local courts have experimentally begun to set up the witness compensation system. For example, Section 112 of the *Regulations on Issues Concerning Evidence in Handling of Various Cases (Trial)* promulgated by the Beijing High People's Court in 2001 prescribes:

The costs resulting from the witness's appearance in court, such as the loss of working time, transportation costs, accommodation costs, and other necessary costs, should be compensated to the witness, given the witness files a request for compensation. The amount of the compensation should be inspected and decided by the court. The party who has the witness take stand in the party's favour should pay in advance the witness compensation along with other necessary litigation fees. The accurate allocation of the witness compensation should be decided by the court according to the court's decisions on the parties' contributory liabilities.

In 2003, the Chancheng District People's Court in Foshan, Guangdong, promulgated the *Regulations on the Witness's Appearance and Compensation in Criminal Cases*. This judicial interpretation prescribes that the court shall pay the witness the compensation, including the loss of working time, transportation cost, accommodation cost, meal cost, and other reasonable expenses, after the witness fulfils the obligation to appear in court. But these compensation measures are not implemented effectively in practice. For example, in Beijing, the first witness compensation was issued in December 2009 by Xicheng District People's Procuratorate. In this case, the witness was only paid 100 RMB for compensation.²⁷ This compensation case is both Beijing's and the country's first case of compensating a key witness who testifies in court in light of the procuratorial authority's institutionalised regulations.²⁸

To eliminate the witnesses' financial loss concerns and to encourage the witnesses' willingness in fulfilling the obligation to appear in court in order to assist the judicial authorities to find the truth about facts of a case, Section 63 of the revised *Criminal Procedure Law* prescribes that a witness shall be given a subsidy for his/her appearance in court. The witness's employer shall not withhold his/her salaries or bonuses for his/

26 Yao Li and Wu Danhong, 'Research on Witness Economic Compensation System' (2004) 3 *Journal of Zhongnan University of Economics and Law*.

27 Gao Jian, 'First Financial Compensation for Key Witness' (2009) *Beijing Daily*.

28 Long Pingchuan, 'Key Witness Can Receive Economic Compensation for Appearance in Court' (2009) *The Procuratorate Daily*.

her absence from work caused by his/her appearance in court. This section prescribes the scope and funding sources of the subsidy paid to the witness to compensate for his/her appearance in court. But it does not prescribe a clear standard for calculating the subsidy. The calculation standard provided by the Xicheng District People’s Procuratorate, which states 200 RMB per day for accommodation and meals, 20 RMB per meal, and 10 RMB (urban residents) or 30 RMB (suburban residents) for transportation, will hardly encourage the witnesses to fulfil their obligation to appear in court.

Normal expenses resulting from appearance in court including transportation, accommodation, meal and communication expenses and loss of working time cannot be compensated adequately. Survey data show that transportation expenses (78.8%) is the most likely to be compensated, followed by accommodation expenses (70.3%) and loss of working time (64.3%). The respondents believe communication expenses (46.8%) is the least likely to be compensated (Figure 12).

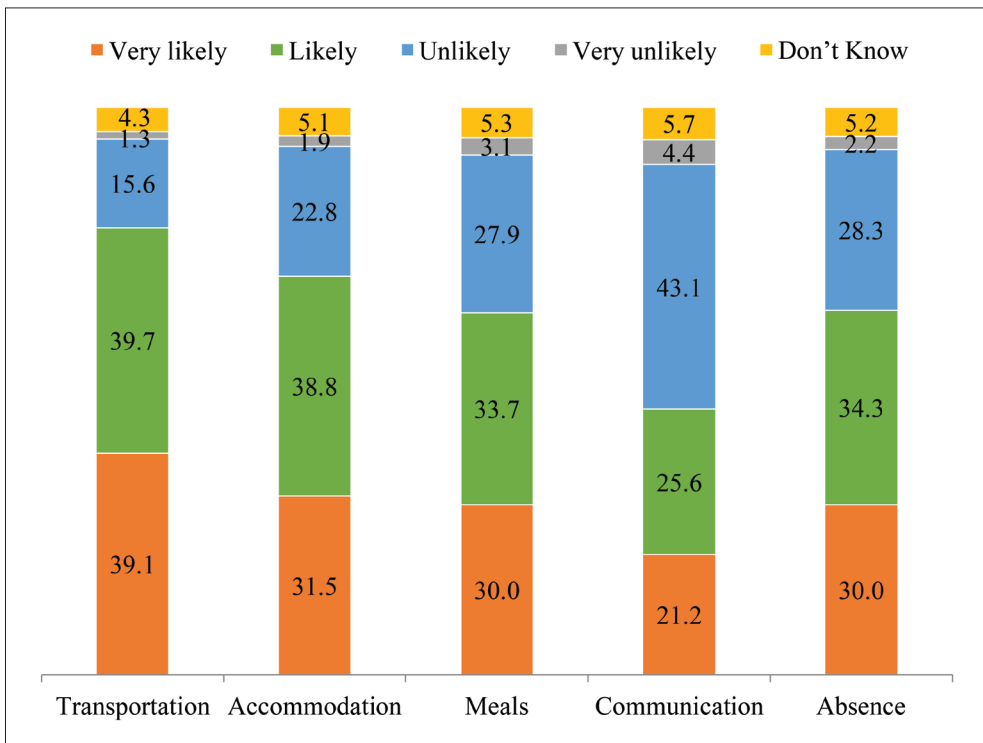


Figure 12: The probability of compensation for witness appearance in court.

VIII. AN URGENT NEED TO ESTABLISH A WITNESS PRIVILEGE SYSTEM

The criminal procedure is not only a process aiming to enable fact-finding but also a process implementing the value choice. Protecting the privilege of the witness is actually

the result of value choice.²⁹ The main purpose of protecting the witness’s privilege is to protect the witness’s interests and relationships outside court, whose importance is considered to be sufficiently outweighing the cost of losing useful evidence in the judicial process.³⁰ However, the privilege of the witness is apparently contrary to the goal of promoting the accuracy of fact-finding.³¹ Numerous countries have provided a clear scope of the witness privilege, although the scope described in different countries might be slightly different in specific cases.³²

In China, the majority of judges consider it necessary to establish the witness privilege system. The result of the judge survey shows that 79.7% of the respondents support specific relatives be given the privilege of not testifying in court; 87.2% support the privilege be provided to protect the communication between lawyer and client; and 82.9% advocate the privilege be provided to protect the communication between the psychiatrist or psychotherapy practitioner and the patient (Figure 13).

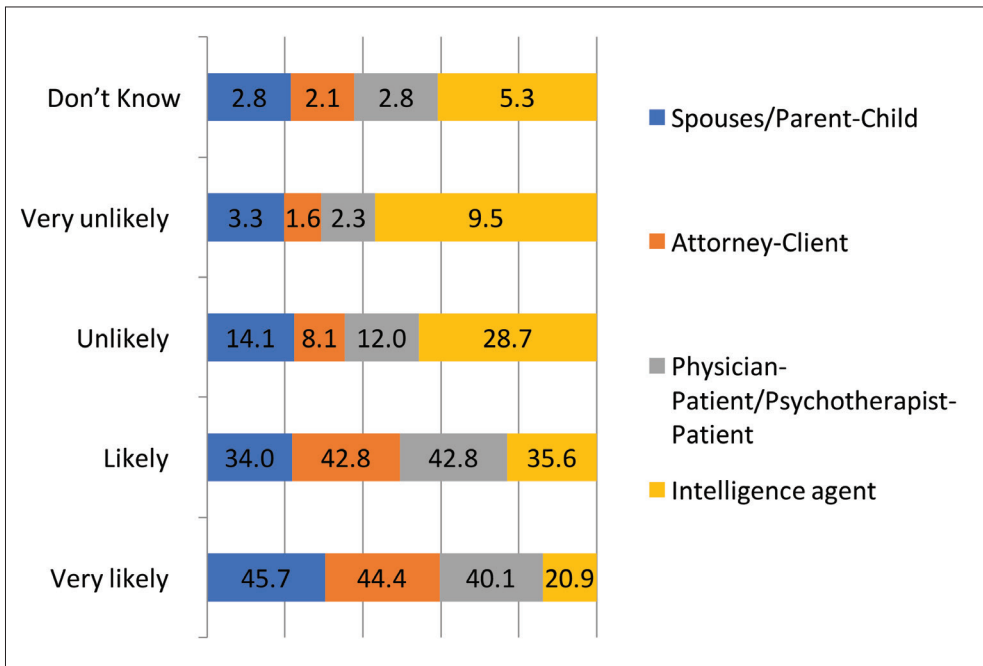


Figure13: Opinions on establishing a privileges system.

29 Wang Jinxi, *Criminal Witness Testimony* (Publishing House of Chinese People’s Public Security University, 2002) 84.

30 Ronald J Allen, Richard B Kuhns, Eleanor Swift and David S Schwartz, *Evidence: Text, Problems, and Cases*, co-translated by Zhang Baosheng (Higher Education Press, 2006) 905.

31 Zhang Baosheng, *Evidence Law* (China University of Political Science and Law Press, 2009) 254.

32 Fan Chongyi, *Special Report on Revision of Criminal Procedure Law* (Publishing House of Chinese People’s Public Security University, 2004) 487-8.

Section 188 of the *Criminal Procedure Law* basically reflects the idea of protecting the witness's privilege by prescribing exceptions to the mandatory witness appearance requirement. This provision states that

[i]f, the witness, who has received the subpoena issued by the court, refuses to testify in court with no justified excuse, the court can force him/her to appear in court, except if he/she is the defendant's spouse, parent or child.

In fact, after the promulgation of the *Draft Amendment to Criminal Procedure Law*, some scholars pointed out that this section means that the defendant's close relatives can refuse to appear in court to testify against the defendant.³³ This section, in fact, provides protections to the 'privilege of the witness'.³⁴ However, this section does not truly establish the privilege of witness. This section, only prescribing that the defendant's spouse, parents and children shall not be forced to appear in court, does not relieve the defendant's spouse, parents and children from the obligation to appear in court.

It should be noted that the Section 188 of the *Criminal Procedure Law* providing 'the defendant's specific relatives shall not be forced to appear in court' does not mean to destruct the value of 'placing righteousness above family loyalty'. Noted by some scholars, the revised *Criminal Procedure Law* will not 'interfere the current judicial regulations, which is based on the value of "placing righteousness above family loyalty"'.³⁵ In general, the establishment of the privilege for relatives is primarily aiming to protect family relationships, ethics and mutual trust. If a person who holds the privilege, for example, the defendant's spouse, parent or child, does not claim or waive the privilege, he/she can appear in court.³⁶

IX. CONCLUSION

Building the evidence system is a long-term and arduous task, and also a complex social systematic program. Through the past thirty years' development, the status of the law of evidence has been for the first time identified in China's legal system.³⁷ Particularly, since the beginning of the 21st century, China has entered a stage of rapid development of evidence law. The two 'criminal evidence rules' jointly promulgated by five ministries and commissions led by the Supreme People's Court in 2010 as a symbol has set a new milestone in China in establishing the evidence law. The promulgation of the

33 Li Xianzhao, Ding Yapeng and Jiang Tingyu, 'Criminal Procedure Law Alters Righteousness above Family Loyalty' (2011) *Xinhua Daily*.

34 Wang Hong, 'Police Officers Need to Appear in Court for Clarification' (2011) *Legal Evening News*.

35 Li Xianzhao, Ding Yapeng and Jiang Tingyu: 'Criminal Procedure Law Deletes Righteousness above Family Loyalty' (2011) *Xinhua Daily*.

36 Yin Hong and Wang Yiyin, 'Seven Highlights in Revision of Criminal Procedure Law' (2011) *Guangming Daily*.

37 Zhang Baosheng and Chang Lin, *China Evidence Legislation Development Report (1978-2008)* (China University of Political Science and Law Press, 2011) 1.

2012 revised *Criminal Procedure Law* and the relevant judicial interpretations, which aim to promote the establishment of the witness appearance system, has pushed the development of the evidence law to a new level.

However, the key to the rule of law is the implementation of the law. Section 14 of the *Opinions on Comprehensive Intensification of Reform of People's Court* promulgated by the Supreme People's Court in 2015 stresses that China shall 'strictly implement the witness appearance system'. It can be seen from the survey results that there are serious challenges in implementing the witness appearance system. The reasonableness of the establishment of the evidence system should be reconsidered while striving to overcome the practical obstacles. The enforcement of the witness appearance system shall take into consideration other countries' experience as well as China's legal traditions, the basis of China's society's evolvement of civilisation, and the awareness and tolerance of China's citizens of the rule of law.

ELECTRONIC SURVEILLANCE AND SYSTEMIC DEFICIENCIES IN LANGUAGE CAPABILITY: IMPLICATIONS FOR AUSTRALIA'S COURTS AND NATIONAL SECURITY

DAVID GILBERT¹

ABSTRACT

Australian law enforcement agencies increasingly deploy electronic surveillance techniques to combat serious and organised crime to maintain national security. The criminal justice system is an important source of data that can shed light upon non-traditional security challenges. Telephone interception and listening device recordings often comprise conversations conducted in languages other than English containing alleged jargon and/or code words associated with criminal activity. Community translators and interpreters are relied upon to translate these conversations into English for evidentiary purposes. Unlike ongoing language

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capability development in the military in support of meeting traditional security objectives, language capability supporting non-traditional security areas of law enforcement has remained relatively unchanged for at least the past three decades. Using qualitative interviewing methods and discourse analysis of court transcripts, this research investigated the strengths and weaknesses of language capability available to support law enforcement agencies. Systemic deficiencies in language capability and associated causal factors are identified. It is argued that language capability supporting the criminal justice sphere is seriously under-resourced adversely affecting the integrity of the judicial system and having significant implications for Australia's national security defined to include non-traditional security challenges.

I. INTRODUCTION

The contemporary security environment has compelled governments to expand portfolios and increase powers of national security and law enforcement in response to escalating levels of serious and organised crime and the heightened threat of violent extremism. In the Australian context, this is reflected in three key policy documents: the *National Security Statement* (2008),² the *Australia in the Asian Century White Paper* (2011)³ and the *National Security Strategy* (2013),⁴ all describing a broadened security agenda. The Prime Minister's statement on national security released on 23 February 2015 introduced further security measures to improve Australia's ability to more effectively prevent and respond to terrorist acts.⁵ However, unlike the US, which introduced a National Security Language Initiative in 2006,⁶ Australia has yet to explicitly address the importance of language capability development required to keep Australians safe from serious and organised crime.⁷ This gap in policy making has significant implications for Australia's national security and the criminal justice system as discussed in this article.

2 Kevin Rudd, *The First National Security Statement to the Australian Parliament* (Commonwealth of Australia, 2008).

3 Department of the Prime Minister and Cabinet, Australia in the Asian Century Taskforce, *Australia in the Asian Century: White Paper* (Commonwealth of Australia, 2012).

4 Department of the Prime Minister and Cabinet, *Strong and Secure: A strategy for Australia's National Security* (Commonwealth of Australia, 2013).

5 Tony Abbott, National Security Statement, Canberra (23 February 2015). <<http://www.pm.gov.au/media/2015-02-23/national-security-statement-canberra>>.

6 Office of Postsecondary Education, US Department of Education, *Enhancing Foreign Language Proficiency in the United States: Preliminary Results of the National Security Language Initiative* (US Department of Education, 2008) ('*Enhancing Foreign Language Proficiency*') <<http://www.lep.gov/resources/nsli-preliminary-results.pdf>>.

7 Language capability is defined as the sum of a nation's foreign language resources available to provide professional interpreting and translation services.

Rapid advances in technology have seen an increased reliance upon electronic surveillance measures to monitor threats of violent extremism and to prosecute alleged criminal behaviour.⁸ The nexus between terrorism and organised crime, including illicit drug activity, has been well established.⁹ Community interpreters and translators are frequently engaged by law enforcement and national security agencies to transcribe and translate telephone calls, text messages, emails and conversations intercepted by covertly placed listening devices for operational and evidentiary purposes. Translated transcripts presented as evidence in the open court system provide a valuable source of data that can shed light on the reliability of Australia's language capability relied upon to meet national security objectives.

II. THE RESEARCH

Recent research conducted at RMIT University Melbourne investigated language capability relied upon by Australian law enforcement agencies to combat serious and organised crime.¹⁰ The study aimed to answer the following questions framed within the broader scope of language capability supporting national security objectives:

1. What evidence points to systemic deficiencies in language capability available to combat illicit drug activity?
2. How do identified deficiencies affect the judicial process?
3. What causal factors contribute to these deficiencies?
4. What impact do any identified deficiencies have on meeting national security objectives in an Australian context?

Qualitative interviews were conducted with judicial officers, barristers, court interpreters, and interpreters and translators with experience in preparing translated transcripts for evidentiary purposes. Australian military cryptologic supervisors and cryptologic linguists were also interviewed in relation to the transcription of languages other than English (LOTE) for operational and strategic purposes. The research compared approaches to the translation process taken by law enforcement engaged community interpreters and translators with those adopted by military cryptologic linguists.¹¹ The research findings have significant implications for the criminal justice system operating within the context of a broadened security agenda to include non-traditional security challenges such as terrorism and drug-related crime.

8 S Adamoli, A Di Nicoli, E Savona and P Zoffi, *Organized Crime around the World* (European Institute for Crime Prevention and Control Affiliated with the United Nations, 1998) 31.

9 Australian Crime Commission, *Organised Crime in Australia 2015* (Commonwealth of Australia 2015) 7.

10 David Gilbert, *Electronic Surveillance and Systemic Deficiencies in Language Capability: Implications for Australia's National Security*, (Doctoral Thesis, RMIT, 2014) ('*Electronic Surveillance and Language Capability*') <<https://researchbank.rmit.edu.au/view/rmit:161277>>.

11 Details of participants were de-identified for research ethical considerations.

A. Evidence of Systemic Deficiencies in Language Capability

Analysis of qualitative and quantitative data collected from 2012 to 2014 revealed systemic deficiencies in Australia's language capability upon which law enforcement agencies rely to produce translated transcripts. The research also identified how language deficiencies adversely affect the integrity of the criminal justice system. It was found that there is a common misconception held by the courts that transcripts are accurate in the absence of adequate quality control procedures to check the veracity of translated transcripts used as evidence in criminal trials. This misconception paves the way for expert witnesses to draw conclusions and proffer evidence based on incorrect information, which often remains undetected by the court. Causal factors leading to deficiencies in language capability were identified in the areas of interpreter and translator training, skills recognition and the working environment.

Analysis of three case studies revealed significant distortions of meaning in translated transcripts. The transcripts were of intercepted telephone conversations and listening device recordings proffered as evidence in Vietnamese drug-related trials heard in the County Court of Victoria. Errors of translation were further compounded by expert opinion evidence proffered by police officers concerning the alleged meaning of code words for drugs ascertained from English terms and phrases quoted from translated transcripts during the trial. Numerous mistranslations were identified. Of particular interest was the inconsistent way the English word 'thingy', alleged by the prosecution to mean drugs, appeared throughout transcripts translated from intercepted Vietnamese conversations. During court observations, it was noted that a police officer proffered expert opinion evidence that the word 'thingy' was a term used by the accused to refer to one ounce of heroin and further stated that the word is consistent with Vietnamese drug-related activity. This researcher assesses the expert opinion evidence to have been based on the misconception that the translations were accurate, as will be demonstrated below.

Discourse analysis of translated transcripts revealed that the English word 'thingy' had been incorrectly used in place of optimally appropriate anaphoric and exophoric reference words such as 'it', 'that', 'there', and so on, in accordance with the context of intercepted Vietnamese conversations. Further investigation revealed that Vietnamese community interpreters and translators contracted to transcribe telephone calls and listening device recordings had become accustomed to using the word 'thingy' when they were unsure of what was being referred to in intercepted conversations.

1. The Data

The following five consecutive Vietnamese utterances (intercepted by listening device) appeared in a translated transcript used as evidence and were selected for analysis.¹²

12 The data samples have been de-identified for research ethical considerations.

They demonstrate how the word ‘thingy’ frequently appears in Vietnamese drug-related transcripts. The Crown alleged that the intercepted conversation was held between two people in a room discussing the dividing of heroin for subsequent distribution. The source text utterance below is a direct transcription of what was said in Vietnamese contained in the audio recordings played to the court.¹³ This is followed by a word for word (literal) translation into English produced by this author in consultation with another professional Vietnamese court interpreter and translator. The corresponding extract from the translated transcript as read to the court in English is then provided. This is followed by a proposed alternative translation produced by this author in consultation with a Vietnamese court interpreter of twenty-five years’ experience. A brief analysis of the translated transcript is provided for each utterance.

(a) Utterance One

Source text: *‘Đụ mẹ. Tôi không biết chia. Tôi chia ra tôi mất thấy mẹ. Chia nó chút lần nào cũng mất.’*

Literal translation: [Fuck-mother. I-not-know-divide. I-divide-out-I-lose-father-mother. Divide-it-little-little-time-each-also-lose.]

Translated transcript: ‘Mother fucker! I don’t know how to divide it. Divide it and I would lose damn it.’

Proposed alternative translation: [Mother fucker! I don’t know how to divide it. I lose (some) when I divide it, damn it. Each time I divide into small portions I lose (some).]

Analysis: The producer of the translated transcript has omitted the final statement ‘Each time I divide into small portions I lose (some)’. This represents a significant omission in the translated transcript read to the court.

(b) Utterance Two

Source text: *‘Chia là mất, chết.’*

Literal translation: [Divide-is-lose,-dead.]

Translated transcript: ‘Lose it, God oh God, is it dead?’

Proposed alternative translation: [Dividing (it) means losing (some), damn it!]

Analysis: The source text contains a statement and an idiomatic exclamation. It does not contain an interrogative component as reflected in the translated transcript read to the court. The idiomatic expression ‘chết’ literally means ‘dead’. However, when used in the above context, ‘chết’ is an expression of frustration and is more accurately translated idiomatically as ‘damn it!’ as it appears in the proposed alternative translation provided above. During the trial, a non-English speaking witness was asked to clarify through a court interpreter what or who was ‘dead’. The literal translation of the idiomatic expression ‘chết’ as ‘dead’ as it appeared in the translated transcript resulted in

13 The recorded conversations (primary evidence) held in Vietnamese were transcribed word for word by this author in consultation with a professional Vietnamese court interpreter of 25 years’ experience.

a significant loss of time during the trial until the discrepancy was eventually clarified by a Vietnamese court interpreter. The producer of the translated transcript also added the expression ‘God oh God’ which is assessed to be an unjustified addition.

(c) Utterance Three

Source text: *‘Cái đó, có ấy chút xíu à, tại thằng kia lấy thử chút xíu.’*

Literal translation: [(Classifier)-that-that,-have-it-little-(particle),-because-guy-that-take-try-little-bit.]

Translated transcript: ‘That one, only thingy a little bit, because the guy thingy, tested a little bit.’

Proposed alternative translation: [That one; it’s smaller because that guy took a little bit to try it.]

Analysis: Of significant concern with the above section of the translated transcript is the appearance of the word ‘thingy’. A police officer proffered expert opinion evidence in this trial that the word ‘thingy’ was a reference to heroin. The use of ‘thingy’ in this segment of the translated transcript is assessed as unjustified and renders the translation awkward, ambiguous and lacking coherence. The evidence provided by the police informant in this trial, that ‘thingy’ is a code word for drugs, carries with it major implications for the way the translated transcript is understood by the jury. This extract from the translated transcript represents a significant distortion in translation.

(d) Utterance Four

Source text: *‘Không có mấy đâu, xíu à, nó cạo chút xíu à.’*

Literal translation: [Not-have-much-at-all,-little-little-(particle),-he/she-scrape-little-bit-(particle).]

Translated transcript: ‘No thingy, he scratched a little bit.’

Proposed alternative translation: [Not much at all, just a bit, he/she scraped a bit (off).]

Analysis: There is no evidence in the Vietnamese text that a code word or any other word exists that can be correctly translated as ‘thingy’ within the context of the sampled utterance. This resulted in a significant mistranslation.

(e) Utterance Five

Source text: *‘Nói anh vậy đó, mấy cái này chắc tôi cân dư. Dư chút xíu... mệt quá, mẹ.’*

Literal translation: [Speak-you-like-that,-few-these-probably-I-weight-excess.-Excess-little-bit...-tired-too,-mum.]

Translated transcript: ‘To tell you that bro, these I weighted and they may have been weighted with extra. A little bit extra but (mumbles) I was so tired, damn it.’

Proposed alternative translation: [Well, having said that, perhaps I’ll add extra to the weight of these ones. Just a little extra ... God, I’m so tired!]

Analysis: The producer of the translated transcript has incorrectly translated the phrase ‘Nói anh vậy đó’ as ‘To tell you that bro’ breaking textual cohesion with the previous utterance. Optimally, the utterance could have been translated as ‘Well, having said that ...’ as shown in the proposed alternative translation. The appearance of the word ‘bro’ in the translated transcript read to the court is indicative of unjustifiable intervention by the translator allowing extra-linguistic knowledge of the assumed context to influence his/her choice of register. The most direct and correct translation in this instance is simply the word ‘you’ and not ‘bro’.

(f) Further Evidence

Aside from qualitative interviews and detailed quantitative analysis of court transcripts,¹⁴ this researcher also conducted a keyword search of ‘thingy’ at the Australasian Legal Information Institute (AUSTLII) website.¹⁵ The search returned twenty-five references to the word ‘thingy’ of which three were associated with cases outside Australia. The remaining twenty-two references were categorised as follows: sex offences (14), theft (2), drugs (3) and other (3). Of the three references related to drugs, two involved a LOTE being Vietnamese. Both related to electronic surveillance evidence used to prosecute drug offences. One case was heard in the New South Wales Court of Criminal Appeal in 2010 and the other in the Victorian Supreme Court of Appeal 2011. In both instances ‘thingy’ appeared in translated transcripts of telephone calls or listening device recordings. The remaining appeals case related to a cannabis-related offence where the word ‘thingy’ was used in relation to a football tipping competition and was not alleged to be a reference to drugs. The results provide further evidence of the word ‘thingy’ taking on a unique meaning in translated transcripts peculiar to Vietnamese drug-related trials.

2. Summary

Extracts from the translated transcript shown above are ambiguous and misleading, resulting in an incoherent sequence of utterances across the five samples shown. It has been demonstrated that textual cohesion is lost when comparing the translated transcript with the proposed alternative translations. It is evident the producer of the transcript has had difficulty applying a consistent approach to the translation to the point where sections of the final product do not make sense. Forensic translation requires consistency in relation to logical coherence of the translation at all levels of text.¹⁶ The sampled translations failed to logically connect at lexical, sentence and text levels. The translated transcript containing the above extracts was agreed by the prosecution and defence counsels to be accurate.

14 Gilbert, *Electronic Surveillance and Language Capability*, above n 9.

15 Australasian Legal Information Institute <www.austlii.edu.au>.

16 Ali Darwish, *Forensic Translation: An Introduction to Forensic Translation Analysis* (Writescope, 2012).

II. IMPLICATIONS OF LANGUAGE DEFICIENCIES FOR THE JUDICIAL SYSTEM

The upstream problem of translators making significant errors when preparing translated transcripts give rise to a snowball effect once the transcripts are admitted as evidence. Errors of translation are compounded when expert witnesses provide further opinion of what certain terms contained in the English version mean within the alleged context of the conversation. As in this case, it is often a police officer who is called to give expert opinion evidence relating to the alleged use of drug-related code words. There is increased risk of jurors drawing incorrect conclusions based on their understanding of the evidence presented in the form of a translated transcript in English, and particularly in this case having been informed by an expert witness (police officer) that the word 'thingy' is a reference to drugs.

From the above examples, it is clear that the evidence relied upon by the jury is potentially misleading and confusing due to the frequency and gravity of errors contained throughout the translation. This raises consideration of whether the evidence should have been excluded in accordance with Section 135 and Section 137 of the *Evidence Act 2008* (Vic) ('the Act') had the severity of these errors been detected prior to commencement of the trial. At Section 137 of the act it is stated that 'in a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused'.¹⁷ When balancing the 'probative value' of the evidence against the 'danger' of unfair prejudice, the court is reliant upon a translated transcript accepted as 'accurate' by both counsels in the absence of appropriate quality control procedures being applied to the translation process and product.

Aside from the examples provided above, the research revealed further evidence that significant errors of translation are likely to go undetected during court proceedings. A defence barrister interviewed during the research made the comment that nobody really knows whether the translated transcripts are accurate or not. Further investigation revealed that the transcripts are seldom checked for accuracy due to a lack of available funding or motivation by the defence to have them checked by a professionally accredited and independent translator. When the issue of translation accuracy was raised during a drug-related trial in the County Court of Victoria, the judge drew a distinction between translation accuracy at word level and what the utterances actually meant. This reasoning allowed the translated transcript to be admitted as 'accurate' but only as it appears as words on a page. It was emphasised by the judge that what those words actually meant was considered to be a different matter and one which the trier of fact is best placed to decide. Only one translated transcript is usually presented to the court without competing hypotheses of intended meaning in the form of alternative translations. It has been established that 'where the evidence reproduces a conversation,

¹⁷ *Evidence Act 2008* (Vic) s 137.

it is necessary for at least the substance of the conversation to be reproduced so as to allow it to be properly interpreted in context'.¹⁸ The 'substance of the conversation' in the examples shown has been distorted through the translation process, and therefore this author argues that the correct context was never made available to the court in this trial and other trials analysed throughout the course of the research.

Context is essential to making sense of intercepted utterances; however, translators and interpreters who had produced translated transcripts commented that they were denied background and intelligence information to help them make sense of what they were translating for reasons of impartiality and accuracy. Contrasting words/language with sense, the translation theorist, Viaggio, emphasises that intended meaning is reliant upon the sense made of words and language and states that '[t]ranslation, as any other kind of communication, still succeeds as long as sense is conveyed, while it fails completely and inescapably if it is not'.¹⁹ Examples provided in this article show how translated communication fails due to the non-conveyance of sense.

The research established that the unjustified use of the word 'thingy' is indicative of systemic mistranslations that often remain undetected in translated transcripts. This can lead to expert opinion evidence proffered by police officers in relation to drug-related code words being misleading or confusing for the jury. Had the translated transcript been checked for correctness and the aforementioned errors been identified, the probative value of the expert opinion evidence in this case may have been significantly reduced due to demonstrated flaws in its factual basis and the process of reasoning.²⁰

Interviews with judicial officers and barristers reaffirmed that there is a widely-held expectation that translated transcripts proffered as evidence are accurate. Further interviews were conducted with Vietnamese court interpreters who stated that they were well aware that translated transcripts from Vietnamese frequently contain significant errors of translation. They made particular reference to the word 'thingy', stating that it is a term frequently misused by law enforcement engaged translators producing the transcripts and is peculiar to Vietnamese drug-related cases. Court interpreters interviewed said they do not take any action when they detect errors in translated transcripts read to the court because they are ethically obliged to remain impartial. Vietnamese translators and interpreters who had produced translated transcripts were also interviewed. Research participants stated that while they do not agree with the way the word 'thingy' had been used in translated transcripts, they stated that it has appeared in Vietnamese drug-related cases in NSW and Victorian courts over a period of at least 14 years and reaffirmed that it is a term peculiar to Vietnamese drug-related evidence. During observation of a Vietnamese drug-related trial that took place in

18 See *La Trobe & Mortgage Corp Ltd v Hay Property Consultants Pty Ltd* [2011] FCAFC 4 Finkelstein J (Jacobson and Besanko JJ agreeing) [67].

19 Sergio Viaggio, 'Contesting Peter Newmark' (1991) 0 *Rivista Internazionale di Tecnica della Traduzione* 37.

20 See *Australian Securities & Investments Commission v Rich* [2005] NSWCA 152 [168] (Spigelman CJ).

the County Court of Victoria in 2014, a Vietnamese interpreter who had transcribed telephone calls and listening device recordings for Victoria Police was subpoenaed to clarify discrepancies found in the translated transcripts. During cross-examination, the interpreter was asked when the word ‘thingy’ was used. The interpreter stated:

Sometimes we have different Vietnamese words we use, but basically the appropriate way is when we don’t know for sure what that object is or are and when they use that word and we don’t know for sure, then I put the word ‘thingy’, because sometimes they will say, ‘áy’ – they just use the word ‘that one’ or ‘cái’. It could mean anything so I just put the word ‘thingy’ meaning that we are not so sure of what they are talking about.²¹

In the above-mentioned trial, ‘thingy’ was alleged to be a code word for heroin. Sporadic and inappropriate use of this word was evident in sampled transcripts across three drug-related trials where it was alleged by the prosecution that the word ‘thingy’ meant drugs. It was shown that inappropriate use of the word ‘thingy’ in Vietnamese translated transcripts is a cross-jurisdictional phenomenon noting that it has been used the same way in NSW and Victorian criminal cases. It was also established that the problem is across languages. In an interview with a Chinese interpreter with experience in producing drug-related translated transcripts, the interpreter admitted using the word ‘thingy’ in a drug-related translated transcript from Chinese. The interpreter stated that this approach to the translation was based on the advice of a Vietnamese interpreter who at the time was a work colleague in a law enforcement agency. It has therefore been established that a unique genre of discourse has entered the transcription space in at least in relation to Vietnamese and to some extent Chinese translated transcripts. The clumsy English contained in translated transcripts conveys the impression that the translator is applying literal approaches to the translation process for purposes of accurately preserving the integrity of the evidence. Rather, it has been shown that the translated transcripts contain a combination of literal, meaning-based, and sub-optimal translations of the primary evidence — the original utterances.

III. THE EXPERT WITNESS AND VIETNAMESE WHISPERS

Expert opinion evidence is frequently proffered by investigating police officers in relation to the alleged meaning of drug-related code words.²² In the US it was established that ‘drug traffickers’ jargon is a specialised body of knowledge and thus an appropriate subject for expert testimony’.²³ In *United States v Boissoneault*, the court of appeal held that ‘experienced narcotics agents may explain the use and meaning of codes and

21 Transcription of evidence presented during a Voir Dire. Case de-identified for research ethical considerations.

22 See Joelle Anne Moreno ‘What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?’ (2004) *Tulane Law Review* 79.

23 *United States v Gibbs*, 190 F 3d 188, 211 (Fed Cir, 1999).

jargon developed by drug dealers to camouflage their activities'.²⁴ It has been argued that police officers who proffer expert opinion evidence in relation to drug jargon are often spared rigorous gatekeeping scrutiny by judges in relation to the reliability of their expert opinions.²⁵ In the Australian context, Section 79(1) requires that expert opinion evidence is proffered by a person who has 'specialised knowledge'; that the specialised knowledge is based on the person's training, study or experience; and, the opinion is 'wholly or substantially' based on that specialised knowledge.²⁶

The following suggested direction is provided by the Judicial Commission of New South Wales where there is conflict as to the facts or assumptions underlying the opinion:

The expert evidence of [GH], called on behalf of the Crown, relating to ... [specify points], appears to be based on facts which [he/she] has been told, or on assumptions which [he/she] has been asked to make [specify the facts or assumptions]. You should analyse the evidence of [GH] and determine the extent to which [his/her] opinion depends upon the facts or assumptions being correct.

If the opinion is based upon facts which you are satisfied have been proved, or assumptions that you are satisfied are valid, then it is a matter for you to consider whether the opinion that is based upon those facts or assumptions is correct. On the other hand, if you decide that the facts have not been proved, or the assumptions are not valid, then any opinion based upon them is of no assistance because it has no foundation. If that is the case, the opinion should be disregarded.²⁷

The suggested direction above raises the question of how members of a jury would be able to determine whether or not the facts, being the utterances filtered through the translation process and represented in the translated transcripts, are correct or not. Moreover, this brings into question the validity of further interpretations and assumptions proffered by monolingual expert witnesses (usually police officers) of utterances contained in translated transcripts when the translations themselves may not be correct, noting that there is an onus on lawyers to ensure that the reports written by experts address the legal tests of admissibility.²⁸ However, the research findings contained in this article reveal a significant bias towards the prosecution case due to ineffective translation quality control procedures.

The High Court addressed the issue of expert evidence in *Dasreef Pty Ltd v Hawchar* with Heydon J stating:

24 926 F 2d 230, 23 (Fed Cir, 1991).

25 Moreno, above n 21.

26 Stephen Odgers SC, *Uniform Evidence Law* (10th edn, Thomson Reuters, 2012) 352; FED. R. EVID. 702; see generally Peter Justice Peter McClellan, *Admissibility of Expert Evidence under the Uniform Evidence Act* (2 October 2009) <<http://www.austlii.edu.au/au/journals/NSWJSchol/2009/13.pdf>>.

27 Judicial Commission of New South Wales, *Suggested Direction —Expert Witnesses* (2015) [2-1110] <http://www.judcom.nsw.gov.au/publications/benchbks/criminal/expert_evidence.html>.

28 See *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424; [2003] FCA 893 [19] (Lindgren J).

Opinion evidence is a bridge between data in the form of primary evidence and a conclusion which cannot be reached without the application of expertise. The bridge cannot stand if the primary evidence end of it does not exist. The expert opinion is then only a misleading jumble, uselessly cluttering up the evidentiary scene.²⁹

The dangers of experts proffering their opinion without proper scrutiny of the primary data was highlight in *HG v Queen* where Gleeson CJ said:

Experts who venture ‘opinions’, (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted.³⁰

An expert opinion may not be considered relevant should the expert witness not distinguish the factual assumptions upon which the opinion is based to allow the tribunal of fact to assess the reliability of that opinion.³¹ Failure of the expert witness to establish the basis of their opinion would bring the element of relevance into question in accordance with Section 56 of the *Evidence Act 1995* (NSW). To establish relevance, the monolingual police officer should be required to establish the reliability of his or her opinion of what is alleged to be a code word for drugs based on their opinion of the secondary evidence produced in the form of a translated transcript. The primary evidence being the sounds recorded on the audio file. These sounds are translated and presented as secondary evidence in the form of translated transcripts from LOTE which are presented to the jury as evidence with appropriate direction from the judge.³² It therefore follows that the reliability of expert opinion testimony in relation to the alleged meaning of code words contained in translated transcripts is reliant upon the accuracy of the translated transcripts in terms of conveyed meaning. It can be argued that there will always be reasonable doubt that the words contained in the translated transcripts may mean something other than what they say or what they are purported to say. Therefore, the notion of factual assumptions drawn from translated transcripts challenges the reliability of any opinion in relation to intended meaning. Establishing that translated transcripts are accurate is arguably elusive due the nature of language and the distance between distinctly different languages such as Vietnamese and English. House makes a sound argument that ‘a translated text can never be identical to its original, it can only be equivalent to it in certain aspects’.³³ This is an important point to consider when weighing up the reliability of translated transcripts and associated expert opinion evidence and whether or not it is wholly or substantially based on specialised knowledge.³⁴

29 (2011) 243 CLR 588 [90].

30 (1999) 197 CLR 414 [44].

31 *R v Juric* (2002) 129 A Crim R 408; [2002] VSCA 77 [19]-[22]; *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424; [2003] FCA 893 [25] (Lindgren J).

32 *Butera* (1987) 164 CLR 180 [188].

33 Juliane House, *Translation* (Oxford University Press, 2009).

34 See *Honeysett v The Queen* [2014] HCA 29 (13 August 2014).

Expert opinion evidence proffered by police officers in relation to drug-related code words translated from a LOTE has been tested in appeals cases. In *Pham, Van Diep; Tran John Xanvi v R* the New South Wales Court of Criminal Appeal considered grounds of appeal relating to conviction of the appellants found guilty of 17 counts associated with supply of prohibited drugs including heroin, cocaine and ice (crystalline methamphetamine).³⁵ The first ground of appeal was that the trial judge erred in allowing the expert evidence of a NSW Police officer.³⁶ In this trial the police officer assigned meaning to alleged code words in translated transcripts of recorded conversations from intercepted telephone conversations. The intercepted telephone conversations were almost all in Vietnamese and when translated, did not directly refer to any of the drugs in question. The Court of Criminal Appeal reported that '[t]he Crown's case was that when one appreciated the code was present one could interpret the conversations as ones relevant to the dealing in drugs in question'.³⁷

The submissions put as to the inadmissibility of the evidence were that the interpretation of drug-related code words was not a 'proper subject of expert evidence', that the police officer 'was not shown to be qualified', and that the police officer 'did not sufficiently disclose his reasoning'.³⁸ Only the third argument was pressed on appeal; that the police officer did not sufficiently disclose his reasoning as he did not produce a drug code table and drug price table referred to in his evidence, and did not disclose previous matters in which he had been involved. It was argued that this prevented the appellant from adequately testing the evidence or its basis.³⁹ It was ruled that the absence of the tables did not detract from the reasoning process the police officer had applied to support his evidence; that is, 'The absence of these documents did not mean that the witness' reasoning was not exposed'.⁴⁰

The police officer gave evidence that the word 'cabinet' is commonly used as a term to refer to the prohibited drug ice. The officer had cited a number of reasons for making this statement, including his experience and some sources of reference, which were not specifically identified in the Criminal Court of Appeals report. The officer stated that his reasoning was also based on 'a translation of a Vietnamese word which literally [led him] to believe the word cabinet is an alternate word for fridge'.⁴¹ Referring to his notes, the police officer explained that '[t]he word "fridge" in Vietnamese is in my knowledge

35 [2008] NSWCCA 194 (15 August 2008).

36 Ibid [21].

37 Ibid [23].

38 Ibid [24].

39 Ibid [25].

40 Ibid [29].

41 Ibid.

is made up of two words being To and Lun, now I don't profess to have the tone marks or the pronunciation correct in those words'.⁴²

During cross-examination, the police officer gave evidence that this is consistent with drug terminology, specifically in relation to the drug ice or crystalline methamphetamine. The officer also gave evidence that the word 'to' by itself is consistent with reference to the drug ice or crystalline methamphetamine stating that the words 'to' and 'to lun' are interchangeable. During cross-examination, the officer also gave evidence to the effect that the words 'old man' were consistent in previous calls he had seen, which is a reference to heroin.⁴³

The Court of Appeal ruled that there was no absence of reasoning on the part of the police officer and therefore the ground of the appeal fails.⁴⁴

From the information available about this appeal, the police officer's expert opinion evidence in relation to the meaning of individual Vietnamese lexical units and their combined and individual meanings was allowed when the officer admitted to the court he could not properly write or pronounce the Vietnamese words. Therefore, it can only be assumed that the police officer's opinion was fundamentally reliant upon the discretion of the translator and his/her translation strategies applied when producing the translated transcript.

The police officer gave evidence that the word 'to' (properly written as *tủ*) is interchangeable with 'to lun' (properly written as *tủ lạnh*) and that both terms are consistent in relation to reference to the drug ice. This is problematic because the word *tủ* accompanies many other words in Vietnamese, which together form words to describe any box-type of container, such as a wardrobe *tủ áo* or a safe *tủ sắt*. It therefore follows that while the word 'cabinet' may be a term used in the drug trade for the drug ice, it comes down to the lexical choice the translator made upon translating the word *tủ* into English. The translator could have chosen the words 'cabinet', 'container', 'box' or 'trunk'. In Vietnamese, the words 'fridge' and 'refrigerator' are written and spoken the same way. The Vietnamese compound word *tủ lạnh* can be translated into English as either 'fridge' or 'refrigerator' but the Vietnamese word cannot be abbreviated so that one or the other syllable only means 'fridge' instead of 'refrigerator'.

A further example of how lexical choices made by the translator provide leverage to expert opinion evidence has been noted in Vietnamese drug-related trials when the Vietnamese word *đồ* is often translated as 'gear' when optimally it means 'stuff' or 'things'. Police officers have referred to the word 'gear' as being consistent with drug-related terminology.⁴⁵ Had the translator translated the Vietnamese word *đồ* as 'stuff' it

42 Ibid.

43 Ibid.

44 Ibid [33].

45 Gilbert, *Electronic Surveillance and Language Capability*, above n 9.

would arguably reduce the weight of the evidence that use of the word could be related to drugs.

It is apparent and logical that police officers' expert opinion evidence is mostly predicated upon the choices the translator makes when preparing the translated transcript. However, it is important to determine whether the monolingual police officer as an expert witness is 'wholly or substantially' basing his/her expert opinion on specialised knowledge, training and experience or whether the opinion is a further interpretation of his or her understanding of a previously interpreted utterance produced by the translator.

In contrast to the above decision, in *Nguyen v R* the NSW Criminal Court of Appeal considered expert opinion evidence proffered by a NSW police officer and native speaker of Vietnamese, relating to drug-related code words.⁴⁶ It was stated that the police officer had extensive experience listening to recordings of conversations about supply of prohibited drugs and it was noted that he 'had become extremely familiar with drug related terminology, drug related prices and the methods of operation of drug dealers'.⁴⁷ Of note, the appellant did not object to evidence relating to the literal translations into English of the intercepted conversations in Vietnamese; however, objection was taken to the evidence of the opinions the police officer had formed. As there had been no challenge to the police officer's expertise at the trial, it was noted that he 'could give evidence that among drug dealers certain words, not ordinarily used to describe drugs, are used to describe drugs, in the hope of preventing other people who happen to hear what is said knowing what the speakers are talking about' and that the police officer 'could give evidence to the meaning of words and expressions recognised as argot of the drug trade'. However, the trial judge held that

... it is impermissible to give evidence of what a person means when he uses certain words and phrases, that is a witness cannot give evidence of what is in the mind of the person who is speaking or speculate as to what he is meaning.⁴⁸

The above statement is interesting noting that utterances contained in translated transcripts presented as evidence are produced as a result of the translator having speculated as to what the meaning is of what he/she hears. It is speculation because the translator in the instance of communications interception is not a party to the conversation but a witness to it, and, in the absence of extra-linguistic information, can therefore only speculate as to the intended meaning of what he/she hears. Provision of extra-linguistic information such as intelligence support to assist the translator potentially weakens the prosecution case as it risks bringing the integrity of the evidence into question. According to translators and interpreters interviewed during the research, this explains why translators try to adopt a more literal approach when preparing transcripts resulting

46 [2007] NSWCCA 249.

47 Ibid [15].

48 Ibid [20].

in awkward sentence structures and frequent distortions of meaning. Viaggio's following statement is relevant to the translator's dilemma when producing translated transcripts within the constraints of preserving evidentiary value:

Every single utterance can have countless senses. Sense is, basically, the result of the interaction between the semantic meaning of the utterance and the communication situation, which in turn is its only actualiser. Out of situation, and even within a linguistic context, any word, any clause, any sentence, any paragraph, and any speech may have a myriad of possible senses; in the specific situation — only one (which can include deliberate ambiguity). The translator ideally has to know all the relevant features of the situation unequivocally to make out sense.⁴⁹

It is acknowledged that translators producing transcripts are not dealing with an ideal situation, particularly when it is highly unlikely that all features of the communication event are known to the translator. This therefore raises reasonable doubt in relation to the accuracy of the translation from its point of origin, noting that context is an integral part of translation based on assumptions of meaning. Gutt raises the issue of optimal relevance. In doing so, he states that successful communication requires consistency and is always context-dependent, as the author of the source text has produced it as such in a way that is optimally relevant in the context assumed of the intended audience and not so in any other context.⁵⁰ The translator can only assume the context between author and intended recipient and arguably intervenes in the translation by bringing their own understanding of reality to the process. In the above-mentioned trial, counsel for the appellant did not dispute that the police officer could give evidence based on his specialised knowledge. Neither was it disputed that the police officer could give evidence that people engaged in drug dealings often communicate in coded language, and that words and expressions not normally associated with drugs are used by drug dealers to refer to drugs.⁵¹ What was in dispute was that the police officer 'could not give evidence that in his opinion particular words and expressions used in an intercepted conversation were in fact being used by the speakers to refer to drugs'.⁵² For example, counsel for the appellant argued at that the police officer's opinion that the word 'fridge' meant 'heroin' was not substantially based on his specialised knowledge and therefore was not admissible under Section 79 of the *Evidence Act 1995* (NSW).⁵³

The Court of Appeal considered *R v David & Gugea*, where the appellants did not dispute the alleged accuracy of literal translations from Romanian into English taken from recordings of conversations intercepted by telephone or listening device.⁵⁴

49 Viaggio, above n 18, 31.

50 Ernst-August Gutt, 'Pragmatic Aspects of Translation: Some Relevance-Theory', in L Hickey (ed), *The Pragmatics of Translation* (Cromwell Press Ltd, 1998) 49, 51.

51 *Nguyen v R* [2007] NSWCCA 249.

52 Ibid [33].

53 Ibid [34].

54 (Unreported NSWCCA 10 October 1995).

The conversations were alleged to have been about the supply of heroin; however, the appellants maintained that the conversations were about the supply of gold and brandy, and of women for prostitution.⁵⁵ At this trial, a police officer and an analyst/interpreter from the New South Wales Crimes Commission gave evidence that, in their opinion, the speakers were referring to the supply of heroin. The Court of Appeal acknowledged that the police officer could give expert evidence that drug dealers very rarely, if ever, refer to drugs directly, but use coded language to disguise the nature of their activities. The police officer gave evidence that, in his opinion, the subject matter of the recorded conversations was ‘in fact’ the supply of heroin. The Court concluded that so long as the police officer gave evidence that the conversations ‘could’ have referred to the supply of heroin having explained how he reached this opinion, the evidence would have been permissible. However, this was not the case, and because each of the expert witnesses in the two cases stated that in their opinions ‘the subject matter of the recorded conversations was in fact the supply of heroin, the appeal against conviction was allowed’.⁵⁶

The lexical choices translators make when preparing translated transcripts significantly influence the outcome of court decisions.⁵⁷

IV. CAUSAL FACTORS LEADING TO ERRORS OF TRANSLATION

The research established that causal factors contributing to systemic errors found in drug-related translated transcripts can be attributed to the absence of a national accreditation standard for producing translated transcripts for evidentiary purposes, poor levels of interpreter/translator training, working environment influences, and the apparent lack of quality control procedures to check the translated transcripts for correctness prior to being admitted as evidence. Using the alleged code word ‘thingy’ as an example, the causal factors giving rise to the widespread misuse of the word by law enforcement translators of Vietnamese were attributed to deficiencies in appropriate specialised training and limited or no access to essential background information to enable the translator to determine context. Law-enforcement-engaged translators and interpreters commented that they were not provided with sufficient background information for them to be able to determine the context of the utterances they were transcribing. They described the transcriber’s dilemma is to produce an ‘accurate’ translation with little or no extra-linguistic information to assist with determining context. It is therefore not surprising that translated transcripts presented as evidence demonstrate a very literal approach adopted by transcribers to the point where the transcript does not make much sense as demonstrated in the samples provided in this article. National accreditation standards for producing translated transcripts do not exist at the time of writing.

⁵⁵ Ibid [37].

⁵⁶ Ibid [41].

⁵⁷ See *Chen v R* [2011] NSWCCA 145 (22 June 2011); *Keller v R* [2006] NSWCCA 204; *Le v The Queen*; *Nguyen v The Queen* [2011] VSCA 42 (24 February 2011).

Therefore, because a translated transcript is admitted as expert evidence and not as an aid to the jury,⁵⁸ the question to be asked is whether the transcriber as an expert witness has the necessary training, skills and experience in that particular field of expertise.

A. Accreditation Standards and Procedures

At the time of writing, community interpreters and translators are not accredited by NAATI to transcribe LOTE for operational or evidentiary purposes. They are accredited to perform interpreting and translating tasks in a community setting.⁵⁹ Producing transcripts from listening to a LOTE and translating it directly into written English (the practice currently required by law enforcement agencies) is a specific skill requiring specialised training. Such training requires high-order listening skills, comprehension and translation skills from LOTE into English as taught in military cryptologic linguist training.⁶⁰ The United States National Association of Judiciary Interpreters and Translators (NAJIT) has recognised the complexity of this process and has produced a position paper on producing translated transcripts for evidentiary purposes. According to the position paper, translators must transcribe what they hear in LOTE into written LOTE. The written LOTE is then translated into written English by a qualified translator. The translated transcript presented as evidence contains three columns detailing who the speakers were, a transcript in LOTE, and the English translation of the written LOTE. This process provides the court with a traceable account of what was actually said (transcribed from the primary evidence) and allows proper scrutiny of the transcription/translation process resulting in the translated transcript (secondary evidence).⁶¹ The conventions for producing translated transcripts for operational and evidentiary purposes vary significantly between Australian law enforcement and intelligence agencies, which, in the absence of specialised training, causes confusion for translators and interpreters.⁶² Transcription is a specialised skill requiring specialised training.

58 *Butera v DPP* (Vic) (1987) 164 CLR 180.

59 A community setting here is defined as situations where members of the public require assistance with accessing community services. Transcription of intercepted conversations relating to suspected or alleged illegal activity where alleged code words are involved is not a routine service provided by community interpreters and translators.

60 US Air Force, *Airborne Cryptologic Language Analyst Specialty: Air Force Career Field Education and Training Plan* (Department of the Air Force, 2011) 5.

61 National Association of Judiciary Interpreters and Translators, *NAJIT POSITION PAPER: General Guidelines and Minimum Requirements for Transcript Translation in any Legal Setting* (2009) <www.najit.org/publications/Transcript%20Translation.pdf>.

62 University of New South Wales, *The Role and Professional and Ethical Boundaries of Linguists Working in Law Enforcement*, Interpreting and Translation Seminar <<http://hal.arts.unsw.edu.au/events/the-role-and-professional-boundaries-of-linguists-working-in-law-enforcement/>>.

B. Transcription: A Specialised Skill

Participants in the research acknowledged that transcribing LOTE directly into written English is a specialised skill not normally required for community interpreting and translating tasks. Interviewees stated that highly developed listening skills are required to produce translated transcripts in order to capture important elements of operational and evidentiary value. Further research by this author has revealed theoretical grounds supporting the hypothesis that transcription is a specialised skill that places increased demands on the cognitive processes required to produce translated transcripts, whether for immediate operational support or longer term evidentiary purposes.⁶³

Having identified deficiencies in translated transcripts presented in court, and noting the specialised skills required of transcription tasks, the research investigated areas of training and skills recognition. It was found that law enforcement agencies have established professional accreditation of interpreters and translators issued by NAATI as a benchmark to determine the level of proficiency held in the area of transcription from LOTE to English. It is generally known that the NAATI testing process does not specifically address transcription skills nor is formal skills recognition awarded in this area. Translators and interpreters with transcription experience who had participated in the research all stated that they had not received any specific training relating to transcription skills prior to taking up the task of transcribing LOTE conversations from telephone calls and listening devices for law enforcement agencies. It was stated that even experienced court interpreters may have difficulty performing transcription tasks as it requires high-order listening skills not normally required of interpreting.

The study found that a unit of competency has been established for producing translated transcripts designated 'PSPTIS609A — Prepare Translated Transcripts', which resides as a subject within the qualification 'Diploma of Translation'.⁶⁴ However, only one learning institution in Australia was delivering this training at the time of writing. The unit of competency is notably deficient in some key areas. It is assessed as unlikely that the two key areas of 'Rules of evidence' and 'Analyse coded language for meaning' listed as 'required knowledge', in addition to a further 30 subjects to be covered under the unit of competency, can be effectively delivered within the time allocated of 30 nominal hours.⁶⁵ Moreover, expertise required to effectively deliver training in relation to analysing coded language for meaning is not commonly found within academia. Research participants were aware that the unit of competency 'PSPTIS609A – Prepare Translated Transcripts' existed. It is important to note that the unit of competency PSPTIS609A is not required for NAATI accreditation as a professional interpreter or translator.

63 Gilbert, *Electronic Surveillance and Language Capability*, above n 9.

64 Australian Government, *PSPTIS609A – Prepare translated transcripts (Release 3)* (1 November 2012) <<https://training.gov.au/Training/Details/PSPTIS609a>>.

65 See, for example, RMIT University, *Course Title: Prepare Translated Transcripts* (2015) <<http://www1.rmit.edu.au/courses/c6133046805>>.

C. Working Environment Influence

In relation to the working environment, the research revealed that law-enforcement-engaged interpreters and translators are heavily reliant upon learning transcription skills from each other in the absence of formal transcription training. While this practice is commendable, it also presents a risk that systemic deficiencies in practice and technique will become embedded within the law enforcement transcription environment. Evidence of this phenomenon was discovered during the research where drug-related code words were found to have been systemic mistranslations peculiar to translated transcripts of drug-related dialogue in two Asian languages, and only in relation to drug-related crime. This systemic deficiency in transcription capability presents a risk to the operational effectiveness of law enforcement and national security operations and undermines the integrity of the judicial system. Detected deficiencies in translation performance highlight the importance of appropriate specialised training and formal skills recognition for transcription tasks undertaken by interpreters and translators for law enforcement and national security purposes.

V. CONCLUSION

In the contemporary security environment, specialised training and formal skills recognition are required in the area of LOTE transcription for operational and evidentiary purposes. This can be achieved through effective policy making that clearly articulates the important nexus between national security objectives and Australia's language capability requirements. Australia's closest security ally, the US, introduced a National Security Language Initiative in 2006 to address deficiencies in language capability following the events of 9/11.⁶⁶ Australia needs to introduce a similar policy to keep Australians safe in the current environment of increased threats to national security. Until this happens, it is probable that the courts will continue to rely upon translated transcripts containing serious errors that are likely to remain undetected and exacerbated by expert opinion evidence. The implications of deficiencies in Australia's language capability not only heighten the risk of innocent people being convicted and the guilty set free, but also impact on Australia's operational readiness to keep Australians safe.

⁶⁶ US Office of Postsecondary Education, '*Enhancing Foreign Language Proficiency*', above n 5.

THE ADMISSIBILITY OF EVIDENCE OBTAINED BY INTIMATE BODY SEARCHES: A SOUTH AFRICAN PERSPECTIVE

PETER DU TOIT¹

I. INTRODUCTION

The South African Criminal Procedure Act provides for proof of the bodily features of persons and also regulates the issue of searches of persons. However, the Act contains no provisions as far as intimate body searches are concerned, although provision is made for the obtaining of ‘intimate samples’. As a result, there are differing judicial pronouncements on the powers of the authorities in this respect. One High Court judgment has, for example, held that a court may order a surgical procedure to obtain evidence linking a suspect to a crime, whilst another has held (it is submitted correctly) that such an order is impermissible. More recently, a High Court was asked to decide whether the police was negligent in not detecting a concealed weapon used by an arrestee to murder a fellow detainee. In terms of the South African Constitution, evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. The question arises as to whether evidence obtained as a result of intimate body searches will be admissible in South African law. The issue is complicated by the absence of a law of general application that clearly defines the powers

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of the police in this regard — a constitutional prerequisite. Recommendations will be made to improve the South African legal position. In this regard valuable lessons can be learned from the *Police and Criminal Evidence Act* (England and Wales) as well as South Africa's own *Correctional Services Act*. Notwithstanding the absence of legislation, it will be argued that situations may arise where evidence obtained as a result of an intimate body search will be admissible in a court.

The South African Bill of Rights guarantees the right to privacy. It includes the right not to have one's person searched, one's property or home searched or one's possessions seized.² The Constitution furthermore guarantees the right to freedom and security of the person,³ the right to bodily and psychological integrity, including the right to security in and control over one's body,⁴ as well as the right to inherent dignity.⁵ These rights may be limited only in terms of general application of law to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account a number of factors set out in the Constitution.⁶ The paper considers the powers of police officials in South Africa to conduct intimate body searches as well as the admissibility of evidence obtained as a result of searches of this nature.

II. TYPES OF SEARCHES

Cohen⁷ identified three types of searches. The first is the frisk or pat-down search of the outer clothing. The second is the 'strip search' or 'skin search' being the removal of outer clothing in order to reveal the person's body or part thereof, and finally the body cavity search or probe which may involve the use of x-rays and other intrusive techniques and may require the assistance of medical experts.

III. THE PROVISIONS OF THE *CRIMINAL PROCEDURE ACT*

In South Africa, the *Criminal Procedure Act 51 of 1977* ('CPA') contains provisions pertaining to search and seizure and the establishment of bodily features of persons. Chapter 2 of the Act provides for search and seizure. The state may seize anything which is concerned or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence; which may afford evidence of the commission or suspected commission of an offence; or which is intended to be used or is on reasonable

2 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 14.

3 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 12(1).

4 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 12(2).

5 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 10.

6 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 36.

7 Cohen (1998) *Criminal Law Quarterly* 374.

grounds believed to be intended to be used in the commission of an offence.⁸ On the arrest of a person, the arrestor (if a peace officer) may search the person arrested and seize any article referred to in Section 20 found in the possession of or in the custody or under the control of the person arrested.⁹ On the arrest of any person, the person making the arrest may place in safe custody any objects found on the person arrested and which may be used to cause bodily harm to himself or others.¹⁰ The term ‘search’ is not defined. Chapter 3 of the Act provides for the ascertainment of bodily features of suspects and arrested persons. It does refer to ‘bodily sample[s]’ which is defined as ‘intimate or buccal samples taken from a person’. And ‘intimate sample’ means a ‘sample of blood or pubic hair or a sample taken from the genitals or anal orifice area of the body, excluding a buccal sample’.¹¹ Intimate samples may only be taken by a registered medical practitioner or a registered nurse and only in respect of strictly defined categories of persons.¹² These provisions are clearly for investigative purposes, such as obtaining a forensic DNA profile. Legislation pertaining to drug offences also makes no provision for intimate searches.¹³

IV. SURGICAL INTERVENTIONS

A provincial division of the High Court held that the court may authorise the infringement of the right to bodily and psychological integrity in order to assist police in the investigation of crime by ordering the surgical removal of a bullet from the leg of an alleged robber. In this regard the court relied on Section 205 of the South African Constitution, which places an obligation on the police to investigate crimes; Section 27 of the *Criminal Procedure Act*, which provides for the use of force as may be reasonable and necessary to overcome any resistance against a lawful search; as well as Section 37 (as it stood at the time) of the same Act, which had permitted an official to take such steps as he or she may deem necessary in order to ascertain whether the body of any person has any mark, characteristic distinguishing feature or shows any condition or appearance.¹⁴ Although the decision has found support from leading authors in the field of the law of criminal procedure,¹⁵ it is submitted that it is clearly wrong.¹⁶ A different division of the High Court has rejected this approach with convincing arguments. The court held that Section 12 of the Constitution would clearly be infringed if the

8 *Criminal Procedure Act 1977* (South Africa) s 20 (hereafter ‘CPA’).

9 CPA s 23(1)(a).

10 CPA s 23(2).

11 CPA s 36A.

12 CPA ss 36D(1)(b) and (7)(d).

13 *Drugs and Drug Trafficking Act 1992* (South Africa).

14 *Minister of Safety and Security and Another v Gaqa* 2002 (1) SACR 654 (C).

15 E Du Toit et al, Juta, *Commentary on the Criminal Procedure Act* 3-49.

16 *Minister of Safety and Security and Another v Gaqa* 2002 (1) SACR 654 (C).

proposed surgery were to take place without the suspect's consent and not under some law limiting its protection as intended in Section 36 of the Constitution. The court convincingly indicated that the search and seizure provisions of the *CPA* relied upon by the Cape Provincial Division were stretched to give them a meaning not compatible with the express sanctions of the legislature.

The court held that the legislature should deal with the issue of striking a balance between the interests of the individual and those of the community in the solving of crimes by surgical intervention.¹⁷ This approach is supported by another leading text on criminal procedure in South Africa.¹⁸ It is suggested that courts should be provided with a statutory discretion to be exercised with reference to criteria such as the relevance and probative value of the evidence, the seriousness of the crime, the seriousness of the bodily intrusion and the risks pertaining to the surgery.¹⁹

V. INTIMATE SEARCHES

In another matter,²⁰ an arrested person was stabbed to death by a co-detainee (Q) in a police cell. Q was subjected to standard external bodily searches which included his limbs, his torso and his clothing, including his shoes. The police did not conduct a cavity search. No metal detector was available at the police station. Subsequent to the incident, Q admitted that he had concealed the murder weapon in his anus. The court held that a cavity search would only be justifiable where an arresting officer has reasonable cause for believing that an arrestee was concealing evidence. In this regard the court relied heavily on Canadian case law²¹ relating to strip searches. Unfortunately, the court did not adequately analyse the South African legal position. It seems that the court accepted that a strip search or a cavity search may be conducted in terms of Section 23 *CPA* if additional requirements as pointed out in the Canadian case are met. For all practical purposes the court thus 'read in' provisions into Section 23 *CPA*. The problem is that the court failed to make any specific finding regarding the constitutionality of Section 23. The Constitution requires that legislation be interpreted to promote the spirit, purport and objects of the Bill of Rights.²² This interpretive process is limited to what the text is reasonably capable of meaning.

Thus, where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible, the

17 *Minister of Safety and Security and Another v Xaba* 2004 (1) SACR 149 (D).

18 A Hiemstra Kruger, LexisNexis *Hiemstra's Criminal Procedure*.

19 P Du Toit and W Pretorius, 'Die verkryging van getuienis deur middel van chirurgie' (2008) *Journal of Juridical Science* 20. Also see E Du Toit et al, Juta, *Commentary on the Criminal Procedure Act 3-46A – 3-49*.

20 *Yanta v Minister of Safety and Security* 2013 JDR 1378 (ECG).

21 *Golden v R* [2002] 3 LRC 803.

22 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 39(2).

legislation may be remedied by reading in, for example. Legislation which is open to a meaning which would be unconstitutional but is reasonably capable of being read ‘in conformity with the Constitution’ should be so read but the interpretation may not be unduly strained.²³ It is submitted that Section 23 *CPA* is perfectly capable of an interpretation that does not offend the Constitution. The ordinary meaning of the word ‘search’ does not include a strip search or a body cavity search. Furthermore, Section 23(2) makes it clear that the arrestor may place in safe custody any object found on the person arrested — the implication is that intimate searches are excluded.

Intimate searches are a serious infringement on the constitutional rights of privacy, dignity and bodily integrity. In order for legislation authorising searches and seizures to comply with the constitutional limitations clause, it must properly define the scope of the search and seizure.²⁴ As Currie and De Waal²⁵ put it: ‘The power to search and seize must be demarcated with reference to the purpose of the statute’. The Constitutional Court²⁶ once stated:

We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority.

Such delimitation of powers in respect of bodily searches is clearly absent in South Africa when it comes to intimate searches. Useful guidance may be gained from the *Correctional Services Act*.²⁷ The Act distinguishes between a ‘manual search, or search by technical means, of the clothed body. Upon reasonable grounds, the person of an inmate may be searched in the following ways (a) a search by visual inspection of the naked body; (b) search by the physical probing of any bodily orifice; (c) a search by taking a body tissue or body excretion sample for analysis; (d) a search by the use of an x-ray machine or technical device, by a qualified technician, if there are reasonable

23 *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) para [15].

24 I Currie and J De Waal, *The Bill of Rights Handbook* (Lansdowne Juta & Company, 2005) 305.

25 I Currie and J De Waal, *The Bill of Rights Handbook* (Lansdowne Juta & Company, 2005) 306.

26 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

27 *Correctional Services Act 1998* (South Africa) s 27.

grounds for believing that an inmate has swallowed or excreted any object or substance that may be needed as an exhibit in a hearing or may pose a danger to himself or herself or to correctional officials or to the security of the correctional centre; (e) by detaining an inmate for the recovery by the normal excretory process of an object that may pose a danger to that inmate, to any correctional official, to any other person or to the security of the correctional centre.

The search of the person of an inmate contemplated above is subject to a number of restrictions: (a) the search must be concluded in a manner which invades the privacy and undermines the dignity of the inmate as little as possible; (b) the correctional official of the same gender as the inmate must conduct the search; (c) all searches must be conducted in private; and the majority of intimate searches must be executed or supervised by a registered nurse, correctional medical practitioner or medical practitioner, depending on the procedure necessary to effect a search. From a functional comparative perspective, the South African legislator may also consider the very detailed provisions of the *Police and Criminal Evidence Act* of 1984 (England and Wales) and the supplementary Codes of Practice. This legislation provides for intimate searches and it is defined as ‘the physical examination of a person’s bodily orifices other than the mouth’.²⁸ It provides for the classes of items susceptible to seizure, the place where an intimate search may be carried out, persons who may carry out such searches and the keeping of records of such searches. It gives recognition to the inherent risks attached to these types of searches.²⁹

VI. THE ADMISSIBILITY OF EVIDENCE OBTAINED AS A RESULT OF INTIMATE SEARCHES

Although intimate searches are not provided for in the *Criminal Procedure Act* (or even legislation pertaining to drugs), it is submitted that it does not necessarily mean that evidence obtained in this manner will be automatically excluded in subsequent criminal proceedings. In this regard the ‘Exclusionary Clause’ in the Constitution provides: ‘Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.’ In this regard, the Supreme Court of Appeal³⁰ held that the notable feature of the Constitution’s specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave

28 *Police and Criminal Evidence Act 1984* (England and Wales) Annex A Code C of the Codes of Practice.

29 See P Onzin, H Norton and P Spivey, *PACE: A Practical Guide to the Police and Criminal Evidence Act 1984* (3rd edn, 2013) 121-6.

30 *S v Tandwa & others* 2008 (1) SACR 613 (SCA) paras 116-117.

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the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.

VII. CONCLUSION

The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.³¹ It is therefore conceivable that evidence obtained not in an attempt to garner any unfair advantage for the authorities, for example as a result of a lifesaving operation, or in order to protect the safety and security of arrestors and fellow detainees, may be admitted into evidence.

Factors that may convince the court that such evidence may be admitted may include the existence of a reasonable suspicion that the individual had in his possession an article that may provide evidence or pose a danger to the arrestor or fellow detainees, that all reasonable steps were taken to minimise the infringement upon the dignity of the person, that all reasonable steps were first taken to seize the item with the consent of the person, and whether the procedure was carried out by a medical expert.

³¹ *S v Jaipal* 2005 (1) SACR 215 (CC) para 29.

CHINESE FORENSIC EXAMINATION — AN INSTITUTIONAL AND FUNCTIONAL ANALYSIS

THOMAS Y MAN¹

ABSTRACT

Forensic examination (SiFa JianDing or JianDing) occupies a uniquely important place in the judicial system of the People's Republic of China ('PRC' or 'China'). Under the prevailing statutory and academic interpretations, this terminology may be understood in two similar, yet slightly different contexts. The first context encompasses all types of dispute resolution mechanism ranging from formal, judicial proceedings (such as civil and criminal trials) to arbitration and other modes of quasi-judicial proceedings (such as mediation and various administered dispute resolution procedures). In this context, forensic examination assumes its expanded definition and refers to the activities performed by designated expert examiners to provide answers or explanations to specialised issues using scientific and technical methods. By contrast, when forensic examination is performed in connection solely with formal judicial proceedings, that is, civil and administrative trials and criminal investigation, prosecution and adjudication, it assumes its narrow definition and refers only to the activities conducted by designated expert examiners to perform examination of specialised issues involved in the litigation using scientific and technical methods or specialised knowledge. Normally, but not

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always consistently, when used in the former context, forensic examination is called by its shorter, more generic name 'JianDing', and when used in the latter context, it is called by its longer, more specialized name 'SiFa JianDing'. The present paper intends to provide an interpretative description of forensic examination in its narrow definition viewed in the more confined context of formal judicial litigation proceedings with a view to achieving a better understanding of the role of forensic examination in the Chinese judicial process.

Forensic examination (*SiFa JianDing* or *JianDing*)² occupies a uniquely important place in the judicial system of the People's Republic of China ('PRC' or 'China').³ Under the prevailing statutory and academic interpretations, this terminology may be understood in two similar, yet slightly different contexts. The first context encompasses all types of dispute resolution mechanism ranging from formal, judicial proceedings (such as civil and criminal trials) to arbitration and other modes of quasi-judicial proceedings (such as mediation and various administered dispute resolution procedures). In this context, forensic examination assumes its expanded definition and refers to the activities performed by designated expert examiners to provide answers or explanations to specialised issues using scientific and technical methods.

By contrast, when forensic examination is performed in connection solely with formal judicial proceedings, that is, civil and administrative trials and criminal investigation, prosecution and adjudication, it assumes its narrow definition and refers only to the activities conducted by designated expert examiners to perform examination of specialised issues involved in the litigation using scientific and technical methods or specialised knowledge.⁴ Normally, but not always consistently, when used in the former context, forensic examination is called by its shorter, more generic name '*JianDing*', and when used in the latter context, it is called by its longer, more specialised name '*SiFa JianDing*'.⁵ The present paper intends to provide an interpretative description of forensic examination in its narrow definition viewed in the more confined context of formal judicial litigation proceedings with a view to achieving a better understanding of the role of forensic examination in the Chinese judicial process.

2 '司法鉴定' and '鉴定' in Chinese, respectively.

3 For the purposes of the discussion in this paper, 'China' refers to Mainland China, not including Taiwan, Hong Kong Special Administrative Region and Macau Special Administrative Region where separate and distinctive judicial and legal systems co-exist with that of Mainland China.

4 See Du Zhichun and Min Yinlong (eds), (杜志淳、闵银龙主编), *SiFa JianDing Gailun* (司法鉴定概论) [*An Overview of Forensic Examination*] (Law Press, China, 2012) 3-4.

5 There is a large body of scholarly literature dealing with the origin of this division between two different definitions of forensic examination from historical, institutional, statutory and practical perspectives. However, this issue continues to defy any easy, clear-cut delineation due to conflicting legislation and practical usages.

I. STATUTORY AND INSTITUTIONAL FRAMEWORK

A. Statutory Basis

Since the founding of the People's Republic of China ('PRC') in 1949, there have been a few hundred official documents in a variety of forms ranging from national statutes to local and agency regulations and court pronouncements that deal with or touch upon different aspects of forensic examination.⁶ However, the only national legislative document that deals exclusively with forensic examination is the Decision of the Standing Committee of the National People's Congress on Issues Concerning the Administration of Forensic Examination (issued on 28 February 2005 and took effect on 1 October 2005) (hereinafter referred to as the 'Decision'). This seminal legislation provides the basic statutory authority governing the Chinese forensic examination system. Article 1 of the Decision defines forensic examination as 'activities in litigation by which the examiner employs science and technology or specialised knowledge to identify, and make judgment on, special issues involved in litigation and provide examination opinions thereupon'.⁷

Two other concepts indispensably related to forensic examination are 'examiner' (*JianDingRen* 鉴定人), referring to the person(s) engaged in performing forensic examination, and 'examination opinion' (*JianDing YiJian* 鉴定意见), referring to one of the two written work products produced by the examiner at the conclusion of forensic examination, which can be used as a legally recognised form of evidence in judicial proceedings and other dispute resolution processes. An examiner must be affiliated with an examination institution (*JianDing JiGou* 鉴定机构) in order to perform the forensic examination and provide an opinion on the examination.⁸

Thus, according to Article 1 of the Decision, forensic examination has the following attributes: (a) it is an activity associated exclusively with litigation proceedings,⁹ and (b) it is performed by the examiner, who (c) uses scientific and technical means or specialised knowledge to (d) perform examination of, and provide opinion on, (e) special issues involved in litigation.

6 No comprehensive compilation of these official documents relating to forensic examination has been attempted. Thanks to computerisation of legal documents, a researcher is now able to conduct key word search of relevant databases in Chinese to determine the precise size of this body of official documents.

7 《全国人民代表大会常务委员会关于司法鉴定管理问题的决定》 [*Decision On Issues Concerning The Administration Of Forensic Examination*] (promulgated by The Standing Committee of the National People's Congress, February 28, 2005) <http://www.moj.gov.cn/zgsfjd/content/2005--10/26/content_798901.htm?node=5152> (last visited 30 April 2015).

8 Ibid art 8.

9 Note that the definition in the Decision takes up its narrow form covering only forensic examinations performed in connection with formal judicial proceedings.

While this definition appears to be equally capable of describing the work of an expert witness in a US court trial¹⁰ or that of a forensic scientist in a European forensic science institute in connection with a judicial process,¹¹ it nevertheless denotes a set of concepts, institutions, procedures and functions that constitute a truly unique Chinese legal institution that has no parallel or even close kin in other jurisdictions of the world. Its uniqueness is rooted in the contemporary history of the PRC and particularly the distinctive legal and institutional framework of the PRC judiciary.

B. The PRC Judiciary — Power and Institutions

Neither the ‘judiciary’ nor ‘judicial power’ is expressly recognised in the PRC Constitution. The Constitution gives the legislative power to the National People’s Congress (‘NPC’) and its Standing Committee as the ‘highest State authority’.¹² Under the NPC are the three functional branches of the national government, that is, the State Council (also known as the National People’s Government), the Supreme People’s Court (‘SPC’) and the Supreme People’s Procuratorate (‘SPP’), which are authorised to exercise the executive, adjudicative (trial) and public prosecution and legal supervision powers, respectively.¹³ Despite the silence in the Constitution, such concepts associated with judiciary as ‘judicial power’ (*SiFaQuan* 司法权) and ‘judicial organs’ (*SiFa JiQuan* 司法机关) are officially recognised in statutory and policy vocabulary and they appear frequently in these documents. According to the prevailing understanding commonly shared in official pronouncements and academic interpretations, judicial power refers to ‘the activities [of the judicial organs] in application of law’ that ‘deal with litigation cases and non-litigation events’.¹⁴

From the institutional perspective, the term ‘judiciary’ or its Chinese characteristic expression ‘judicial organs’ is customarily defined in either of the following two ways, depending on the specific context of the discussion. One is commonly known as the narrow definition, which refers to the court system headed by the SPC and the procuratorate system headed by the SPP. The People’s Courts at the four administrative levels (national, provincial, municipal and county) exercise the ‘adjudicative power’.¹⁵ The People’s Procuratorates at the same levels of government have the power of ‘legal

10 See generally Ronald J Allen et al, *Evidence: Test, Problems, and Cases* (Walters Kluwer, 5th edn, 2012) 647-715.

11 See generally Sven Timmerbeil, ‘The Role of Expert Witnesses in German and U.S. Civil Litigation’, (2010) 9(1) *Annual Survey of International & Comparative Law* Article 8; Erik Luna & Marianne Wade, ‘Prosecutors as Judges’ (2010) 67 *Washington and Lee Law Review* 1413.

12 (中华人民共和国宪法) [*The Constitution of The People’s Republic of China*], as amended in 1982, arts 57, 58.

13 Ibid art 3, 123, 129.

14 (法律词典) [*Law Dictionary*], (Law Press, China, 2002) 1330.

15 Above n 12, *The Constitution of The People’s Republic of China*, art 123.

supervision',¹⁶ which consists of public prosecution under the PRC Criminal Law and supervising and monitoring the work of the People's Courts and the Public Security and State Security departments which exercise the police power.

The second, expanded definition of judicial organs extends the coverage to the Public Security Department, the State Security Department and the 'judicial administration' department (which refers to the Ministry of Justice ('MOJ') in the National People's Government and its provincial and sub-provincial counterparts) within the executive branch, in addition to the People's Court and the People's Procuratorate systems. Whereas the courts and procuratorates exercise, respectively, the powers of adjudication and prosecution, the Public Security Department and State Security Department, often known (sometimes together with the People's Procuratorates when acting as public prosecutors) as the 'Investigative Organs (*ZhenCha JiGuan* 侦查机关)', are considered to 'take part in some part of the judicial activities' by virtue of their investigative functions.¹⁷ At the same time, as the executive department in charge of 'judicial administrative affairs', the MOJ is also considered to 'take part in some part of the judicial activities' by virtue of its broad functions ranging from regulating the legal profession (for example, lawyers' registration and discipline; law firm registration and supervision; bar examination; legal training), administering mediation to managing prisons and, since the promulgation of the Decision in 2005, regulating forensic examination.¹⁸

Viewed from the operational perspective by the ruling Chinese Communist Party to maintain control of the Party-State authority, judicial activities are treated to constitute a sub-system of the 'Political and Legal Affairs System', one of the six cross-bureaucracy systems (*XiTong* 系统) under the central control of the Party leadership.¹⁹ Comprised of the Public Security/State Security Departments, the People's Courts and the People's Procuratorates, this sub-system is best known for its collective name in the Party and government documents as the 'Public Security, Procuratorate and Judicial Apparatus' (*GongjianFa* 公、检、法), which are deemed to be the government organs sharing the judicial power.

As an evidentiary fact-finding tool employed in judicial and quasi-judicial proof process, the role and functions of forensic examination in judicial practice have been shaped by the formal, legal framework under the PRC Constitution, the NPC Decision and other laws and regulations as well as the operational, political control framework under the Party leadership.

16 Ibid art 129.

17 Above n 14, 1333.

18 Ibid.

19 The other five 'systems' are: the Party Affairs System, the Organization Affairs System, the Propaganda and Education System and the Finance and Economics System. For a discussion of these systems and their role in maintaining the political power of the Party leadership in state governance, please see Kenneth Liberthal, *Governing China: From Revolution through Reform* (New York, 2004) 215-33.

II. HISTORICAL EVOLUTION OF FORENSIC EXAMINATION

Forensic examination has a short, but storied history in China. In a strict sense, the forensic examination system that exists today started only with the promulgation of the Decision in 2005 by China's national legislature. Thus, it is logical to divide the history of forensic examination into two periods using the Decision as the critical moment.

A. Pre-Decision Period (1949-2005)

Prior to 1979, forensic examination was not made available to private parties in litigation proceedings, but was exclusively employed as an investigative instrument to 'fight crime' and maintain social order²⁰ by the government agencies comprising the Public Security, Procuratorate and Judicial Apparatus. It was essentially an official function of these agencies. Each part of the police (the Ministry of Public Security ('MPS') and the Ministry of State Security ('MSS') and their respective provincial and local counterparts (for example, the Public Security Bureaus ('PSB') at the sub-national levels of government), public prosecution (the SPP and its provincial and local counterparts) and adjudication (the SCP and its provincial and local counterparts) departments had its own, internal forensic division providing forensic services to the department.²¹

Established respectively within the court (in 1951), procuratorate (in mid 1950s), public security (in 1950), state security (in 1983) and the MOJ (as early as 1949) systems, these internal forensic laboratories or divisions were abolished during the Cultural Revolution (1966–76) together with the demolition of the agency with which they were affiliated²² or the suspension of functioning of their host agencies.²³ After the Cultural Revolution, along with the reconstruction of the Chinese legal system and legal and judicial institutions ushered in 1979 by the restoration of the People's Procuratorates and the enactment of the PRC Criminal Law and the PRC Criminal Procedural Law, these internal forensic divisions were gradually re-established.²⁴

The following two decades witnessed unprecedented growth of the Chinese economy, coupled with exponentially rapid increase of civil and criminal litigation and non-litigation disputes that required forensic examination services by all the parties

20 See above n 3, 34-5.

21 For a good summary of the origin and evolution of the forensic examination system before 2005, see Zhang Baosheng & Chang Lin (eds), (张保生、常林主编), (中国证据法治发展报告) [*The Report on Evidence and Rule of Law in China, 1978-2008*] (China), 139-77.

22 For instance, the People's Procuratorate was abolished in 1968 and was re-established in 1978 with the enactment of the new PRC Constitution (1978). See He Qinhu (ed), (何勤华主编) (检察制度史) [*A History of The Procuratorate System*], (Law Press, China, 2009), 416-434.

23 The court system was paralysed for the entire duration of the Cultural Revolution. The Public Security system, although kept in existence, was also rendered in disuse for the same time period. See above n 22, 250-79.

24 Above n 21, 139-59.

involved, both public agencies and private individuals and entities.²⁵ As a result, forensic examination became a marketable professional service that could be undertaken as a commercial business. For-profit forensic examination institutions mostly sponsored by various government departments with regulatory responsibility and technical capability in the relevant industrial or professional fields (such as the Ministry of Health in relation to medical practice), began to appear to meet this demand from the private parties.²⁶ Responding to the same market demand, the government agencies of the Public Security, Procuratorate and Judicial Apparatus invariably adopted the practice of ‘one institution, two names’ (一个机构, 两块牌子) to provide forensic examination services to parties involved in litigation. Under this practice that was characteristic of the redeployment of some of the service-oriented government functions from pure official act financed by the state treasury to commercialised services provided to private parties for service fees,²⁷ forensic examination became widely available to private parties. Many internal forensic examination divisions assumed a dual identity under a different name, usually called ‘forensic examination centre’ or ‘forensic examination institute’, to provide paid services to private parties. For instance, in 1996, No. 2 Research Institute of the Ministry of Public Security, one of the internal forensic examination divisions of the MPS, was given the second name ‘Physical Evidence Forensic Examination Center of the Ministry of Public Security’ in order to provide services to private parties.²⁸

In August 2002, the MPS issued a departmental regulation²⁹ for the specific purpose of standardising the use of two different names by the internal forensic examination divisions at different levels. Pursuant to this regulation, the forensic technical divisions of the PSBs at the provincial level should be known internally as the ‘Administrative Center for Criminal Scientific and Technical Research’ but should use the name ‘Physical Evidence Forensic Examination Center’ when providing external services. The forensic technical divisions of the PSBs at the municipal level should be known internally as the ‘Institute for Criminal Scientific and Technical Research’ but should use the name ‘Physical Evidence Forensic Examination Institute’ when providing external services. Similarly, the forensic technical divisions of the PSBs at the county level should be known internally as the ‘Office for Criminal Scientific and Technical Research’ but should use the name ‘Public Security Physical Evidence Forensic Examination Office’ when providing external services.³⁰

25 Ibid.

26 No readily available data exist to show a clear picture of the gradual and quiet process that made forensic examination available to private parties. From the available data, it appears that this transition had taken place no later than the mid-1990s. Additional research into the available data will be required to depict a clearer picture of this transition.

27 Above n 21, 142.

28 Above n 21, 148.

29 Ministry of Public Security, (《关于进一步明确刑事科学技术机构职责、统一称谓和规范内部设置的通知》) [*Circular Concerning Further Clarify Duties and Responsibilities of Criminal Scientific and Technical Units, Unify Names and Standardize Internal Organization*].

30 Above n 21, 149.

Commercialised forensic examination services provided by both commercial service organisations and the forensic divisions of the ‘judicial organs’ of the government, albeit under a different name, gained official recognition from the central government in 1998. In June of that year, the State Council delegated to the MOJ the authority to ‘direct forensic examination work provided as social services’.³¹ The next year the MOJ proclaimed the requirement that all forensic examination institutions providing services to private parties be published by the MOJ in its annual public announcement.³² The MOJ followed with a series of regulations aimed at centralising the registration of forensic institutions and examiners and setting practice standards for forensic examination services.³³

Despite the enthusiasm and tremendous efforts of the MOJ to centralise the administrative regulation of forensic examination services under the new State Council mandate, these efforts met with tacit resistance from other Ministry-level departments who acted as sponsors of, and stood to gain economically from, the commercialised forensic examination institutions.³⁴ In particular, MOJ’s fellow-departments within the Public Security, Procuratorate and Judicial Apparatus viewed this expansion of MOJ’s authority as an invasion of their bureaucratic turf and rebuffed the MOJ efforts with either silent non-cooperation or open rejection.³⁵ As a result, commercialised forensic examination institutions mushroomed without any effective oversight by either government regulation or professional self-regulation, creating a chaotic situation in the early 2000s.

Commercial interest, coupled with bureaucratic turf tension and lack of commonly observed professional standards, produced serious issues in forensic examination practice such as multiple examinations, repeated examinations and in-fights between forensic examination institutions.³⁶ For instance, based on the record of the Liuzhou Intermediary People’s Court, for the year 1999, of the 150 cases tried by the court that used forensic examination services, 109 cases, or 73%, were involved in multiple examinations or repeated examinations, most of which were resulted from disagreements between forensic examination institutions sponsored by the PSBs and the People’s Procuratorates.³⁷ As noted by one scholar,

31 Ministry of Justice, (《关于印发司法部职能配置内设机构和人员编制规定的通知》) [*Circular of The Ministry of Justice Concerning Internal Units for Functional Arrangement and Related Personnel Quota*].

32 Ministry of Justice, (《关于公告面向社会服务的司法鉴定机构的通知》) [*Circular Concerning Publishing Forensic Examination Institutions Providing Services to Society*].

33 Above n 21, 156-7.

34 Du Zhichun and Song Yuansheng (杜志淳、宋远升), (司法鉴定证据制度的中国模式) [*The Chinese Model of Forensic Examination Evidence System*], (Law Press, Beijing, 2013) 33.

35 Ibid.

36 Guo Hua (郭华), (司法鉴定与司法公正) [*Forensic Examination and Judicial Justice*], (Intellectual Property Press, China, 2008) 29-30.

37 Ibid 30.

distrust among the organs of the Public Security, Procuratorate and Judicial Apparatus due to struggle for power and conflict in commercial interest caused ‘fights between forensic examination institutions’, resulting in the situation that forensic examination itself become a subject of dispute [in litigation].³⁸

B. Post-Decision Period (since 2005)

Such a chaotic situation finally caught the attention of the NPC and, after several years of legislative study, consultation and closed-door negotiations, it issued the Decision in 2005, which represented a critical step by the national legislature to codify forensic examination activities in formal judicial process, that is, litigation.³⁹ In addition to defining the nature, scope, and function of forensic examination, the Decision attempted to centralise the administrative oversight of forensic examination institutions and set forth broad guidelines for the qualifications of examiners and examination institutions.

These efforts have achieved varying degrees of success. In terms of streamlining the administrative regulation of forensic examination institutions, the Decision provided that the courts and the MOJ are prohibited from maintaining forensic examination institutions and that the ‘Investigative Organs’ (mainly the Public Security and State Security Departments, but to certain extent also covering the People’s Procuratorates when acting as public prosecutors) may maintain forensic examination institutions but these institutions may not provide services to private parties (Article 7). It confirmed the State Council’s delegation to MOJ the authority to regulate forensic examination activities (Article 3), including the authority to issue permits to forensic examination institutions (Article 5), maintain one or more national registrars of forensic examination institutions and examiners (Article 2), prescribe qualifications for examiners (Article 4), monitor the activities of examiners and forensic examination institutions and issue administrative penalty for violation of the Decision by examiners or forensic examination institutions (Article 13).

The Decision clearly intended that all examination institutions would be put under the MOJ oversight. However, while the People’s Courts discontinued the maintenance of examination institutions, the Investigative Authorities continued to

38 Ibid.

39 The Decision has defined forensic examination within the scope of litigation procedures, thus limiting its application to formal civil, administrative and criminal proceedings. Forensic examination activities in connection with non-litigation procedures (such as arbitration, mediation and other administratively administered dispute resolution procedures) are therefore not covered by the Decision. In this sense, forensic examination in these non-litigation contexts still lacks national legislative attention, which itself is a subject of academic discussion.

maintain their respective forensic examination institutions.⁴⁰ In addition to assisting with the investigative work as internal forensic divisions in criminal cases, these forensic examination institutions, now prohibited from providing paid service to private parties, continued with their recently acquired function to issue forensic examination opinions as admissible evidence by the courts in judicial proceedings.

Take the Public Security department as an example. Shortly after the promulgation of the Decision, the MPS issued a number of department regulations⁴¹ to implement the Decision. These steps resulted in the following developments: (1) The forensic examination units, together with the examiners working for these units, of the Public Security system, after undergoing a formal registration process, were transformed from institutions and examiners by virtue of ‘functional affiliation’ with the PSBs to institutions and examiners by virtue of ‘professional qualifications’.⁴² (2) The MPS openly indicated that the forensic examination institutions and examiners affiliated with the Public Security system ‘do not belong to the scope of the ‘forensic examination institutions’ and ‘forensic examiners’ under the Decision’, thus are ‘not subject to registration by’ the MOJ.⁴³ (3) The Public Security system continued the practice of adopting a second name for its affiliated forensic examination institutions, now under the unified name ‘Forensic Examination Center’ (*SiFa JianDing ZhongXin* 司法鉴定中心),⁴⁴ perpetuating the dual identity of these forensic examination institutions.

These implementing measures by the MPS and other Investigative Authorities, especially the interpretation of the Decision as not to require registration with the MOJ by the forensic examination institutions and examiners affiliated with the Investigative Authorities, came in direct conflict in many aspects with the understanding and expectations of the MOJ, ensuing sharply divided public debates.⁴⁵ After much inter-department consultation and negotiation, a compromise was reached, apparently after intervention of the Central Political and Legal Affairs Commission, the powerful Party

40 In particular, the MPS asserted that its own forensic examination institutions and examiners are ‘not within the scope of the “forensic examination institutions” and “examiners” as defined in the Decision, thus not subject to registration’ with the MOJ. Ministry of Public Security, (关于贯彻落实全国人大常委会<关于司法鉴定问题的决定>进一步加强公安机关刑事科学技术工作的通知) [*Notice on Implementing the Standing Committee of the National People’s Congress on Issues Concerning the Administration of Forensic Examination and Further Strengthening the Criminal Scientific and Technical Work of the Public Security Offices*], 2006 <<http://www.lawtime.cn/info/jianding/sfjdlaw/2010111148778.html>>.

41 Ibid; Ministry of Public Security, (公安机关鉴定机构登记管理 办法) [*Measures for Registration and Administration of Public Security Forensic Examination Institutions*]; (公安机关鉴定人登记管理办法) [*Measures for Registration and Administration of Public Security Forensic Examiners*].

42 Above n 21, 151.

43 Above n 40.

44 (《关于公安机关鉴定机构加挂‘司法鉴定中心’称谓的通知》 [*Circular Concerning Adding The Name Of ‘Forensic Examination Center’ For Forensic Examination Institutions Of The Public Security Bureaus*].

45 Above n 36, 34.

leadership group in charge of the Political and Legal Affairs System,⁴⁶ to establish a separate track of registration and administration system for the forensic examination institutions of the Investigative Authorities. These institutions are not subject to administrative oversight of the MOJ when they perform forensic examination for internal purposes (that is, supporting the investigative work of the department in the informal fact-finding process) under their original name ‘Forensic Examination Institution’ (*SiFa JianDing JiGou* 司法鉴定机构). At the same time, these same institutions and their examiners are not subject to formal, pre-qualification registration (*DengJi* 登记) with the MOJ required for all forensic institutions and examiners providing services to private parties, but only need to make a ‘record-filing’ (*BeiAn* 备案) with the MOJ, which has no authority to review their qualifications or maintain oversight of their work.⁴⁷

As a result, the current forensic examination system, from an institutional administration view, is dual tracked: while all forensic examination institutions (and examiners affiliated with them) are subject to MOJ registration and administrative oversight, the forensic examination institutions affiliated with the Investigative Authorities stay outside of the MOJ supervision when they function as internal arms of their respective government department.

III. INSTITUTIONAL DEVELOPMENT AND EXPANSION OF SERVICES

Under the dual-track administrative structure erected by the NPC Decision and other implementing regulations of the MOJ and other administrative organs of the Public Security, Procuratorate and Judicial Apparatus, forensic examination has continued its growth. Since 2005, both the number of the forensic examination institutions and examiners and the scope and frequency of examinations performed in connection with litigation, arbitration and quasi-judicial proceedings have significantly expanded. Its impact on the fact-finding process of these proceedings has also grown accordingly.

There exist no comprehensively, officially maintained statistical data on forensic examination institutions and their activities. The available information, derived mainly from official records of different government agencies and narratives of professional publications, has many gaps, inconsistencies and anecdotal elements that cast serious doubt on the accuracy of such information. The following description is constructed on the basis of available information for the limited purpose to present a general picture of forensic examination institutions and their activities.

46 (关于进一步完善司法鉴定管理体制遴选国家级司法鉴定机构的意见) [*Opinion on Further Improving Administrative System of Forensic Examination and Selecting National-Level Forensic Examination Institutions*].

47 Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security, Ministry of State Security, Ministry of Justice, (最高人民法院、最高人民检察院、公安部、国家安全部、司法部《关于做好司法鉴定和司法鉴定人备案登记工作的通知》 [*Notice on Fully Implementing of Recordable and Registration of Forensic Examination and Forensic Examiners*], November 2008, <[HTTP://VIP.CHINALAWINFO.COM/NEWLAW2002/SLC/SLC.ASP?GID=160159](http://VIP.CHINALAWINFO.COM/NEWLAW2002/SLC/SLC.ASP?GID=160159)>.

A. Forensic Institutions

Pursuant to the Decision, the provincial Justice Bureaus under the MOJ are charged with the duty to register forensic examination institutions and examiners, create and maintain registrars and publish the registration in public announcements.⁴⁸ From 2006, MOJ has published annual registration statistics based on the reports from the provincial Justice Bureaus.⁴⁹ Such annual data is largely limited to (1) information for forensic examination in the so-called Major Three Categories (*SanDaLei* 三大类), namely, Forensic Pathology, Physical Evidence and Audio-Video Materials, which constitute the overwhelming majority of all forensic examination activities; and (2) information for forensic examination activities performed by institutions and examiners that are subject to registration with, and oversight by, the MOJ, thus excluding the information for forensic examination activities performed by institutions and examiners that are subject to registration with and oversight by the PSBs, State Security Bureaus and the People's Procuratorates.

The data for forensic examination relating to the institutions and examiners affiliated with the Investigative Authorities is sporadic at its best. Based on the narrative information in professional publications, the number of forensic institutions affiliated with the PSBs at different administrative levels had been maintained at around 3500 to 3700 between 2005 and 2010, and the number of forensic examination institutions affiliated with the People's Procuratorates was about 1753 in 2010.⁵⁰ According to one estimate, in 2004 the number of examiners affiliated with the Public Security system was about 33,000, which was only slightly fewer than the number of examiners subject to MOJ registration in the same year (36,417).⁵¹ Compared to the Public Security system, the People's Procuratorates and the State Security system have had fewer forensic examination institutions and examiners. Assuming that these numbers have, by and large, been kept constant with regard to the rate of growth, it appears that the size of the forensic examination capabilities in terms of the number of forensic institutions and examiners affiliated with the Investigative Authorities is relatively larger than that of the institutions and examiners subject to MOJ registration and oversight.

Aside from this quantitative comparison, it also appears that the quality of the former, measured by both 'hardware' (equipment and facilities) and 'software'

48 Art 3 of the Decision.

49 Unless otherwise noted, the data used this section is based on the annual 'Quan Guo Fa Yi Lei, Wu Zheng Lei, Sheng Xiang Zi Liao Si Fa Jian Ding Qing Kuang Tong Ji Fen Xi (全国法医类、物证类、声像资料司法鉴定情况统计分析) [*Analysis of Nationwide Statistics of Forensic Examination in Forensic Pathology, Physical Evidence and Audio-Video Materials*] published in *Chinese Journal of Forensic Science* (中国司法鉴定) for 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013.

50 Zhang Baosheng and Chang Lin, (eds), (张保生、常林主编), (中国证据法治发展报告) [*The Report on Evidence and Rule of Law in China, 2010*] (China) 57.

51 Chang Lin (常林), (司法鉴定专家辅助人制度研究) [*Expert Assistant System in Forensic Examination*], (China University of Political Science and Law Press, Beijing, 2012) 60.

PROOF IN MODERN LITIGATION

Year	Number of Institutions in 'Major Three Categories'	Number of Institutions in all categories	Number of Examiners in 'Major Three Categories'	Number of Examiners in all Categories	Number of Examinations performed
2004	2,864	3,336		3,6417	222,000
2005	1,385	3,560	17,692		
2006	1,772		22,601		
2007	1,986	4,000	23,935		639,889
2008	2,063		26,118		783,366
2009	2,150		25,872		899,252
2010	2,254		27,137	53,000	1,043,202
2011	2,284		26,294		1,180,414
2012	2,377	4,833		54,220	1,505,869
2013	2,240	4,876		55,206	1,675,423

Figure 1. Source: 'Analysis of Nationwide Statistics of Forensic Examination in Forensic Pathology, Physical Evidence and Audio-Video Materials', Chinese Journal Of Forensic Science, 2006, pp. 76-7; 2007, pp. 56-8; 2008, pp. 77-9; 2009, pp. S9-S11; 2010, pp. 91-4; 2011, pp. 124-7; 2012, pp. 112-115; and 2013, pp. 106-9.

(qualifications and experiences of examiners), is much superior to the latter. According to the MPS, at the time of the issuance of the NPC Decision, its forensic examination capacity 'occupied 80% of the forensic examination resources of the nation and undertook 95% of the examination work'.⁵² Discounting the possibility of self-aggrandisement, it nevertheless serves as a telling indicator of the qualitative disparity between the two groups of forensic examination institutions and examiners.

One reason for this qualitative disparity is the relatively new history of the MOJ registered forensic examination institutions that provide commercialised services to private parties. Most of them were organised in the late 1990s and early 2000s. By contrast, the PSB affiliated forensic labs and institutions can be traced back to the early 1950s. The size of the MOJ registered forensic institutions also tends to be very small, which further limits its technical capabilities and shared experiences in each institution. For instance, in 2006, almost half of all MOJ registered forensic institutions (41.5%)

52 Above n 40.

had only six to ten examiners. By 2013, this ratio changed only slightly to 39%, and only 11.9% had more than 20 examiners.⁵³

B. Scope of Services

Forensic examination is widely used in an exceedingly broad range of areas of dispute resolution proceedings from formal judicial procedures (that is, criminal, civil and administrative litigation) to other less formal, quasi-judicial dispute resolution procedures (such as arbitration, mediation, and various administratively administered procedures in labour disputes, medical or industrial accident disputes, traffic accident disputes and many others). Following the regulatory scope set forth in the NPC Decision, the present study focuses exclusively on the use of forensic examination in formal judicial procedures.

Under the formalistic regulatory system administered separately by the MOJ and the Investigative Organs, each forensic examination institution and examiner is subject to registration with a competent government body (currently, these competent government bodies include the provincial level Justice Bureaus, PSBs, State Security Bureaus, and the People's Procuratorates) upon meeting qualification requirements prescribed by that body.

1. Qualifications and Registration Requirements

Unlike an expert witness in any typical Anglo-American judicial proceedings,⁵⁴ an examiner must meet statutory qualification requirements prescribed by the competent regulatory authority in order to perform forensic examination and provide an examination opinion. He or she must be affiliated with a forensic examination institution, which in turn must be duly registered with the competent regulatory authority. After the Decision took effect on 1 October 2005, the MOJ, the MPS and the SPP respectively issued department regulations to set out the qualification requirements for examiners and registration requirements for forensic examination institutions.⁵⁵ While slightly

53 'Analysis of Nationwide Statistics of Forensic Examination in Forensic Pathology, Physical Evidence and Audio-Video Materials' (2006) *Chinese Journal of Forensic Science* 76 and 2013, 107.

54 See above n 11.

55 These regulations include mainly: Ministry of Justice, (司法鉴定机构登记管理办法) [*Administrative Measures for Registration of Forensic Examination Institutions*]; Ministry of Justice, (司法鉴定人登记管理办法) [*Administrative Measures for Registration of Forensic Examiners*]; Ministry of Public Security, (公安机关鉴定机构登记管理办法) [*Administrative Measures for Registration of Forensic Examination Institutions of Public Security Department*]; Ministry of Public Security, (公安机关鉴定人登记管理办法) [*Administrative Measures for Registration of Forensic Examiners of Public Security Department*]; Supreme People's Procuratorate, (人民检察院鉴定机构登记管理办法) [*Administrative Measures for Registration of Forensic Examination Institutions of the People's Procuratorates*]; Supreme People's Procuratorate, (人民检察院鉴定人登记管理办法) [*Administrative Measures for Registration of Forensic Examiners of the People's Procuratorates*]. The Ministry of State Security does not issue similar regulations.

different in language and some minor details reflecting the working style of the issuing authority, these requirements are generally similar in nature and scope.

To qualify as an examiner, one must, at the minimum, meet the following professional requirements: (i) possessing ‘advanced professional title⁵⁶ in a relevant specialised technical field’, or (ii) possessing practicing qualifications in the relevant field or at least a bachelor’s degree and having engaged in related work for five years or more; and (iii) being affiliated with a forensic examination institution with a valid Forensic Examination Permit.⁵⁷ To qualify as an examiner for a Public Security registered institution or a People’s Procuratorate registered institution, one must also be a civil servant employed (currently on duty or retired) police officer or prosecutor.⁵⁸ An examiner must obtain a Forensic Examiner License from the competent regulatory authority. The License is valid for renewable terms of five years each and prescribes the specific fields in which the license holder is permitted to perform forensic examination.⁵⁹

In terms of the legal form of an organisation, most forensic examination institutions have no separate legal person status, but are affiliated with a governmental or public entity or organisation, such as an executive department of the government (MSP, State Security, Ministry of Health, Ministry of Education, and so on), the People’s Procuratorates, a state-owned university or scientific research institute. They are mainly or at least partially supported by public funding from different levels of government allotted through the government entity or organisation with which they are affiliated.

Only a small number of forensic examination institutions are privately funded. They are usually organised as entities with independent legal person status and subject to MOJ regulation.⁶⁰ The qualification requirements for an MOJ registered forensic examination institution are not stringent, including mainly: (i) having at least three licensed examiners; (ii) having at least RMB200,000 operational funds; (iii) having a lab and necessary equipment.⁶¹ The PBS and SPP’s regulations do not impose additional substantially more stringent requirements.

The provincial level of each of the MOJ bureaus, PSB and the People’s Procuratorate is charged with the authority to issue Forensic Examination License to qualified forensic examination institutions, which specifies the categories in which the licensed institution is authorised to perform forensic examinations. The provincial MOJ bureau publishes

56 ‘高级专业技术职称’ in Chinese.

57 Above n 55, *Administrative Measures for Registration of Forensic Examiners*, art 12.

58 Above n 55, *Administrative Measures for Registration of Forensic Examiners of Public Security Department*, art 9; *Administrative Measures for Registration of Forensic Examiners of the People’s Procuratorates*, art 8.

59 Above n 55, *Administrative Measures for Registration of Forensic Examiners*, art 18; *Administrative Measures for Registration of Forensic Examiners of Public Security Department*, art 20; *Administrative Measures for Registration of Forensic Examiners of the People’s Procuratorate*, art 23.

60 Above n 55, *Administrative Measures for Registration of Forensic Examination Institutions*, arts 3, 16.

61 Ibid art 13.

within its province registrars of forensic examination institutions and examiners on an annual basis, and the MOJ publishes the same information nationally once every five years.⁶² By contrast, while the Public Security Bureaus and the People's Procuraterates also maintain similar registrars, these registrars are not regularly published, but only 'periodically' or 'on a timely basis'.⁶³

Implementing the mandate of the NPC Decision, an MOJ registered forensic examination institution may undertake forensic examination entrustment from government agencies, courts or private parties, whereas an institution registered with the PSB or the People's Procuratorate may not undertake entrustment from private parties. The MOJ has also prescribed rather detailed procedural requirements for performing forensic examinations.⁶⁴ Generally, an examination should be completed within 30 working days after signing off the examination entrustment agreement between the examination institution and the entrusting party, which period may be extended, usually for no more than another 30 working day period.⁶⁵ While a forensic examination institution undertakes the entrustment as the contracting party to the entrustment agreement, the examination is to be performed by at least two examiners under the principle of 'Examiner Responsibility System'.⁶⁶ At the conclusion of the examination, the entrusted institution issues the Forensic Examination Documents (consisting of the Forensic Examination Opinion and the Forensic Examination Testing Report) to the entrusting party, which are signed by the examiners individually and affixed with the entity seal of the institution.⁶⁷

In performing forensic examinations, examiners enjoy a number of enumerated rights, including the rights to gain access to information and documents relating to the underlying matter, to receive from the entrusting party free specimen or materials for examination, and to receive 'lawful compensation'. They assume the obligations of, among others, confidentiality and appearing in court to answer questions regarding the examination.⁶⁸ They are also liable to the entrusting party for any loss resulting from the examiners' 'intentional misconduct or gross negligence'.⁶⁹

62 Ibid art 29.

63 Above n 55, *Administrative Measures for Registration of Forensic Examiners of Public Security Department*, arts 25-28; *Administrative Measures for Registration of Forensic Examiners of the People's Procuratorates*, arts 23-25.

64 Ministry of Justice, (司法鉴定程序通则) [*General Rules of Forensic Examination Procedure*].

65 Above n 64, art 26.

66 Ibid art 19.

67 Ibid art 34, 35.

68 Ibid arts 21, 22.

69 Ibid art 31.

2. *Categories of Forensic Examination*

Forensic examination covers a wide range of categories grown out of practical experiences of the forensic examination institutions. They are generally divided into two groups. The first group includes examinations in the fields of medical pathology, physical evidence and audio-video material, which are customarily referred to as the ‘Major Three Categories’. Examinations in all other fields constitute the second group. In 2000, the MOJ issued the Provisions on Categorization of Forensic Examination Practice (for Pilot Implementation),⁷⁰ which provided the categories used by the MOJ to define the scope of field(s) in which each forensic examination institution is authorised to conduct its examination: (1) The ‘Major Three Categories’, which covers the following fields:

(i) forensic pathology examination; (ii) clinical forensic examination; (iii) forensic mental health examination; (iv) forensic physical evidence examination; (v) poison forensic examination; (vi) micro-substance examination; and (vii) audio-video materials examination.⁷¹ (2) ‘Other Categories’, which covers the following fields:

(i) Accounting examination; (ii) documents examination; (iii) trace examination; (iv) computer examination; (v) construction engineering examination; (vi) intellectual property examination.⁷²

IV. FORENSIC EXAMINATION AT WORK

A. Evidentiary Significance

Because the civil law tradition has provided the basic fabric for China’s legal and institutional framework, forensic examination bears more marks of an inquisitory system ‘similar to that of the continental law countries’. Most notably, it is ‘treated as a separate type of evidence and has some attributes and functions of expert testimony, but it is not expert opinion’.⁷³ Instead, it has traditionally been closely associated with criminal procedure and viewed as predominantly a tool of investigation, prosecution and adjudication by the ‘judicial organs’ or the Public Security, Procuratorate and Judicial Apparatus in executing their official functions. Only in recent years has it been gradually recognised as a means of evidentiary proof that may be availed by private parties in litigation in both criminal and civil/administrative proceedings as well as other quasi-judicial dispute resolution proceedings. The functioning of forensic examination in practice reflects this transitional role, resulting in considerable confusion, chaos and ambiguities.

70 Ministry of Justice, (司法鉴定执业分类规定（试行）) [*Provisions on Categorization of Forensic Examination Practice (For Pilot Implementation)*].

71 Ibid arts 4-16.

72 Ibid.

73 Above n 34, 6-7.

Conforming to its formalistic definition of evidence, PRC law lists forensic examination opinion as one type of statutorily recognised evidence, along with testimonial and real evidence.⁷⁴ Different from other types of evidence, forensic examination is also a statutorily recognised tool to ‘create’ admissible evidence. For example, copies of documents, after being ‘confirmed to be true by forensic examination’, may be adopted as the basis of fact determination.⁷⁵ Thus, forensic examination also has the functions of identification and authentication.⁷⁶ Based on these added functions and the perceived ‘scientific’ foundation of forensic examination, the SPC has given examination opinions higher probative value than other types of evidence such as documents, audio-video material and witnesses’ testimony.⁷⁷ While most Chinese legal scholars have criticised the SPC’s elevation of the probative value of forensic opinions above other forms of evidence, many of them have shared the belief that forensic examination is superior to other forms of evidence because ‘forensic examination, among a multitude of evidence, is considered to be the most reliable and powerful way of proof due to its quantifiable and testable scientific and technical methods’.⁷⁸ And for this reason, forensic examination is dubbed to be the ‘king of evidence in the scientific and technological age’.⁷⁹

Forensic examination is widely used in judicial and quasi-judicial proceedings. Procedurally, forensic examination can be undertaken in any of three ways at different stages of judicial or quasi-judicial proceedings: (1) Initial Examination; (2) Supplemental Examination; and (3) Re-examination. Chinese law has developed rather detailed rules in relation to allocating the right to initiate forensic examination, which, together with the legal provisions on the probative value and standards of adopting examination opinion by the court, determines the impact of forensic examination on the relevant legal proceedings.

B. Civil and Administrative Proceedings

In civil and administrative proceedings, each party may apply the court for forensic examination.⁸⁰ This has been treated as a party’s litigation right to obtain evidence as

74 (中华人民共和国民事诉讼法) [*PRC Civil Procedural Law*] (2012), art 48 <http://www.gov.cn/flfg/2012-03/17/content_2094354.htm>.

75 (中华人民共和国刑事诉讼法) [*PRC Criminal Procedural Law Interpretation*] art 71 <http://www.court.gov.cn/qwfb/sfjs/201212/t20121228_181551.htm>.

76 Zhang Baosheng, et al (张保生等), (证据法学) [*Evidence Law*] (2013, China) 172.

77 See above n 15, art 77.

78 Huo Xiandan and Guo Hua (霍宪丹、郭华), (中国司法鉴定制度改革与发展范式研究) [*Paradigms of Reform and Development of the Chinese Forensic Examination System*], (Law Press, Beijing, 2011) 1.

79 Ibid 2.

80 Above n 74, *PRC Civil Procedural Law*, art 76; (中华人民共和国行政诉讼法) [*PRC Administrative Procedural Law*], art 56.

well as an obligation to present evidence.⁸¹ The court has discretion to grant a party's application for forensic examination, but in practice such application has been routinely granted given the notion of the party's right to obtain evidence to fulfil its obligation of presenting evidence. The only statutory limitation is that the application must be made within the time limit for presenting evidence.⁸² The court also has the statutory authorisation to initiate forensic examination on its own initiative based on its power to investigate facts.⁸³

The court is authorised to designate the forensic examiner unless the parties have reached an agreement on the appointment.⁸⁴ The examiner is required to complete examination within 30 working days of the appointment, which can be extended for another 30 working days if necessary.⁸⁵ The time to perform forensic examination is counted toward the time limit for the case adjudication, so the examination must be performed within the specified time limit.

In addition, after the appointment of the examiner, a party may request the examiner to conduct supplementary examination to supplement items inadvertently missed from the initial request.⁸⁶ A supplementary examination constitutes part of the initial examination. If a party raises objection to the examination opinion produced by the examiner appointed by the other party or the court and such objection is supported by sufficient evidence, the court is required to grant such party's request for re-examination.⁸⁷

An examination opinion will be admitted into evidence after the court performs a formalistic review with respect to its format, signature and clarity of conclusion.⁸⁸ As a witness, the examiner has the legal obligation to testify in court and be examined by the opposing party if the opposing party has objection to the opinion or the court deems necessary to call the examiner to testify.⁸⁹ Before the latest amendment to the *PRC Civil Procedural Law* took effect on 1 January 2013, however, there was no adverse consequence for failing to testify in court by an examiner. The newly amended *Civil Procedural Law* made a significant change by stipulating that the examination opinion will not be adopted if the examiner failed to appear in court.⁹⁰ After in-court review,

81 Above n 3, 99.

82 Supreme People's Court, (关于执行《中华人民共和国刑事诉讼法》若干问题的解释) [*Interpretations of Several Issues Concerning Implementation of The PRC Criminal Procedural Law*], art 25.

83 Above n 74, *PRC Civil Procedural Law*, art 76.

84 Ibid art 76.

85 Above n 64, art 26.

86 Ibid art 28.

87 Ibid arts 27, 28.

88 Ibid art 29.

89 Above n 74, *Civil Procedural Law*, art 78.

90 Ibid.

which may include cross-examination by the opposing party, the judge has the discretion to adopt the opinion based on the principle of free proof unless in its judgment it has been objected with sufficient evidence.⁹¹

C. Criminal Proceedings

In contrast with the parties in civil and administrative proceedings, a defendant in a criminal proceeding does not enjoy a clearly prescribed statutory right to apply for forensic examination. Instead, only the Public Security, Procuratorate and Judicial Apparatus (that is, the police, prosecution and court) have been authorised to initiate forensic examination.⁹² Specifically, at the crime investigation stage, the Public Security department has the sole authority to initiate and perform forensic examinations. At the prosecution stage, the People's Procuratorate has the sole discretion, and at the adjudication stage, this authority is exercised by the court.⁹³ This imbalance of access to forensic examination reflects the decades' old belief that forensic examination is a fact-finding tool employed mainly by the public authorities to investigate crime. Viewed in the peculiar institutional framework of the Chinese judiciary, the court is not an independent or even neutral institution charged with adjudicating criminal trials, but an integral part of the Public Security, Procuratorate and Judicial Apparatus charged with the joint responsibility of dispensing justice under the principle of '[joint] responsibility under division of labour, mutual cooperation and checks'.⁹⁴ The principle of equality in criminal proceedings applies only to 'all citizens with respect to application of law and no entitlement to privilege in the face of law'.⁹⁵ But this equality has not been unequivocally declared to also exist between public authorities and private citizens. In practice, this helps further tilt the balance of criminal proceedings in favour of the police and prosecution and has been identified as one of the major reasons for the widespread injustice in the Chinese criminal justice system.

Under the PRC criminal legislation, like in civil and administrative proceedings, forensic examination is one of the statutorily recognised forms of evidence⁹⁶ and forensic examiners are part of the 'litigation participants', along with the parties and their legal counsels and representatives, witnesses and translators.⁹⁷ At the investigation phase⁹⁸

91 Above n 82, art 71.

92 Above n 82, art 144.

93 Above n 64, 101.

94 Above n 75, art 7.

95 Ibid art 6.

96 Above n 75, art 48(6).

97 Ibid, art 106(4).

98 The term 'investigation' used in criminal proceedings is defined to mean the 'specialized investigative work and related coercive measures undertaken according to law by the public security department and the people's procuratorate in the course of handling [criminal] cases'. Ibid art 106(1).

before court trial, the Public Security and the People's Procuratorate may perform forensic examination, usually by their own internal forensic examination departments and sometimes, when necessary, by external forensic examiners. Such examination reports are routinely submitted to the court as official evidence, which in practice will set the tone for the ensuing criminal trial. Without the right to apply for forensic examination, a defendant is unable to produce his or her own forensic opinion at the outset of the trial to counter the forensic evidence presented by the police and prosecution.

Pursuant to law, the court is required to conduct 'court investigation procedure' to ascertain the evidence. No evidence may be used as the basis to determine the case without being ascertained to be 'true'.⁹⁹ This court investigation procedure includes mainly (i) in-court presentation and identification of evidence and examination and cross-examination of the parties and litigation participants (including forensic examiners); and (ii) out-of-court investigation such as on-site inspection and investigation, garnishment, forensic examination and verification.¹⁰⁰ Like other forms of evidence, forensic examination opinion is subject to this investigation procedure. A written forensic opinion must be presented to court by 'reading aloud'.¹⁰¹ However, there is no mandatory requirement that an examiner must appear in court to face examination and cross-examination, although a party may apply to the court for appearance of the examiner,¹⁰² for which the presiding judge has the discretion to grant or reject the application.¹⁰³

Before the latest amendment to the *Criminal Procedural Law* (effective 1 January 2013), there was no consequence for an examiner who refused to appear in court, even he was ordered by the court to appear. As a result, forensic opinions produced by the police and the prosecution were routinely admitted into evidence without any in-court cross-examination of the examiners. By one estimate, the average rate of in-court testimony by examiners (for all types of proceedings) has been as low as merely 1.7% in recent years.¹⁰⁴ The latest amended *Criminal Procedural Law* made a significant change by providing a penalty for a failure to appear in court by an examiner. Article 187 of this Law provides that if a party raises objection to a forensic report and the court believes necessary for the examiner to appear in court, the examiner 'shall appear in court to testify'. If the examiner failed to appear upon court notice, 'the forensic opinion shall not be used as the basis for deciding the case'.¹⁰⁵ It is still too early to accurately assess the practical effect of this provision, but it is apparently a giant step toward ensuring

99 Ibid art 48.

100 Ibid art 56; Above n 82, art 154.

101 Above n 75, art 190.

102 Ibid art 187.

103 Above n 82, art 144.

104 Chand Lin (常林), ShuiShi SiFa JianDing de Shoumenren (谁是司法鉴定的守门人) [*Who Is the 'Gatekeeper' of Forensic Examination?*] (证据科学) (2010) 18(5) [*Evidence Science*] 630.

105 Above n 75, art 187.

the defendant's right to cross-examination in relation to forensic opinions, which under the current statutory framework are predominantly produced by the Investigative Authorities given their exclusive authority to initiate and perform forensic examination.

Unlike the right (more precisely, the lack of the right) to initiate forensic examination, a defendant is given the statutory right to apply for supplemental examination and re-examination.¹⁰⁶ In addition, a defendant is now permitted under the latest amended *Criminal Procedural Law* to apply to the court to allow an 'expert assistant' (or 'persons with specialized knowledge') to question the examiner in court on issues relating to the forensic opinion.¹⁰⁷ This new provision will help redress the imbalance of right between the Investigative Authorities and the criminal defendants in criminal proceedings with respect to the presentation and adoption of forensic opinions. Additional empirical data will need to be gathered before a reasonable assessment can be made in this regard.

V. FORENSIC EXAMINATION REFORM

While forensic examination is widely used in various litigations, its misuse or abuse is also commonplace, which has led to countless incidences of injustice in the Chinese judicial process, has weakened public confidence in the system. All parties involved in the litigation process must share the blame. First, the Investigative Authorities maintain a virtual monopoly of using forensic examination to investigate the facts during the investigative stage of a criminal case. They habitually submit forensic examination results to the court as conclusive evidence, and generally refuse to allow the examiners (their own employees in this process) to testify in court. Similarly, judges show great deference to the examination reports from the Investigative Authorities. Therefore, in criminal proceedings, the defendants and their lawyers face an uphill battle to overcome the 'conclusions' in the examination reports of the Investigative Authorities. At the investigative stage, the defendant may not initiate forensic examination, but can only petition for supplemental examination or re-examination. At the trial stage, the defendant is permitted to initiate forensic examination upon approval by the judge, who has discretion as to whether to grant such petition.¹⁰⁸ Unable to performing forensic examination on its own initiation and to cross-examining the examiners of the Investigative Authorities in open court, a criminal defendant often feels helpless to challenge the examination of the Investigative Authorities. Without effective check on its examination, the Investigative Authorities almost have free hand in determining

106 Above n 75, art 146; Above n 82, arts 128(2), 59.

107 Above n 75, art 192.

108 Du Chunpeng and Li Yao (杜春鹏、李尧), (英国专家证人制度对完善我国司法鉴定人制度的借鉴) [*Using for Reference of the Expert Witness System in the United Kingdom to Improve Chinese Judicial Appraiser System*], (证据法学) (2012) 20(6) [*Evidence Law*] 715.

even the most crucial fact of a case at the investigative stage, which will not be subject to examination and effective challenge at the adjudication stage.¹⁰⁹

The litigants in civil cases have relatively easy access to forensic examination. Due to the perceived (and actual) importance of examination opinions, litigants tend to overuse forensic examination. For this reason, repeated examinations by same litigants for the same issues become very common. In certain extreme cases, over 30 examinations were performed.¹¹⁰ Overusing forensic examination results in delay of proceedings and waste of judicial resources.

Finally, judges have also played a significant part in abusing forensic examination. Due to the lack of appropriate and effective standards of review and admission of examination opinions, judges in most part have failed to safeguard the proper use of forensic examination to assist with the fact-finding process. They either display unconditional deference to examination opinions (particularly examination reports of the Investigative Authorities in criminal cases) or refuse to exercise the power to limit the overuse of forensic examination. In either case, judges tend to relinquish their function as the fact finder and irresponsibly allow examiners to become the *de facto* fact finder, resulting in the well-known phenomenon that litigation in China, as put it by one legal scholar, 'ha[s] become litigation by forensic examination'.¹¹¹

Recognising the dismal performance of forensic examination in the functioning of the Chinese judicial process, Chinese legal scholars, jurists and legal practitioners have raised many proposals to reform the 'broken' forensic examination system. In some sense, the NPC Decision of 2005 took a giant step towards a rationalised forensic examination system, which, despite its many deficiencies, has set the tone for the continued reform efforts. The central purpose of the present paper is to set out the institutional context within which the misuse or abuse of forensic examination has taken place. Any efforts, past or future, to reform the forensic examination system will reply on and be constrained by this institutional framework, most importantly the particular structure of the Chinese judiciary under the PRC Constitution. An improved understanding of this underlying framework will help explain the institutional origins of the issues identified with the functioning of forensic examination, and hopefully provide guidance, at least from the institutional perspective, to the reform efforts lying ahead.

109 Chang Lin, above n 51, at 629.

110 See Huo Xiandan (霍宪丹), (关于司法鉴定体制改革的实践与探索) [*Practice and Exploration on the Reform of Forensic Science System*], (证据科学) (2007) 15(1-2) [*Evidence Science*] 85.

111 Ibid 85.

CLINICAL FORENSIC MEDICINE IN CHINA: HISTORY, CURRENT SITUATION AND DEVELOPMENT

WANG XU¹

ABSTRACT

The field of clinical forensic medicine (CFM) has developed rapidly in China during the past 30 years and has formed its own characteristics under a special legal system. Although 'living body injury appraisals' have a long history in China, this type of appraisal was not designated as professional technical work performed by a professional appraiser until the late 1970s. At present, CFM has become the most active branch of forensic science and has helped solve many legal issues associated with living body injuries, including appraisal of the degree of the living body injury, evaluation of the disability related to personal injury, identification of relationships between injuries and diseases and estimations of medical malpractice. Although the statistics are incomplete, until 2013, 2951 separate forensic agencies (including universities, hospitals, the Institute of Forensic Sciences of the Ministry of Justice and others) produced 19,278 exports and resolved 961,989 cases in the field of CFM. Thus, CFM has made many academic achievements in recent years.

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I. INTRODUCTION

The field of clinical forensic medicine (CFM) has developed into an independent discipline in China over the past 30 years or more. At present, CFM has become the most active branch of forensic science and has helped to solve many legal issues associated with living body injuries.

II. THE HISTORY OF CFM IN CHINA

[Although the appraisal of legal issues related to living body injuries has a long history in China, this field was not considered professional technical work performed by professional appraisers until the late 1970s. In 1979, the People's Intermediate Court of Nanchang City took the lead in establishing the first forensic medicine clinic in China; since then, appraisals of living body injuries (that is, CFM appraisal) gradually increased in public security departments, People's Procuratorate departments, the People's Court system and the health care system.

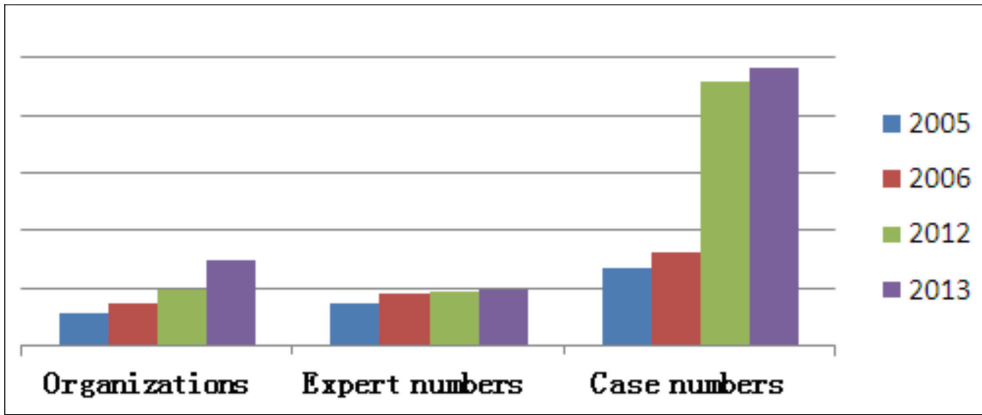
Up to 1997, 2503 medical examiners and other forensic experts were employed at different levels within the People's Court system, and 1133 People's Courts had established medicolegal organisations.² Although the statistics are incomplete, the judicial appraisal organisation belonging to the People's Court system has performed judicial appraisals and examinations of 842,000 criminal cases and 1,922,000 civil cases,³ most of which were CFM cases. The Decision of the Standing Committee of the National People's Congress on the Administration of Judicial Authentication (Adopted at the 14th Session of the Standing Committee of the National People's Congress on 28 February 2005; ['2.28 Decision']), which was enacted on 1 October 2005, ceased judicial appraisals performed by organisations in the People's Court system. The 2.28 Decision also opened the judicial appraisal process to the public, leading to a substantial increase in judicial appraisal organisations and employees and ushering in a new peak of CFM development.

According to the statistics, 1772 judicial appraisal organisations that were mainly categorised into 'three big groups' (medicolegal authentication, authentication of physical evidence and authentication of audio and visual material) existed in 2006; in the same year, 158 organisations were funded by universities, or 8.9% of the total number,⁴ representing a 68.1% increase from 2005 (94 organisations). In 2013, more than 2951 CFM appraisal organisations completed 961,989 cases, an increase of 261%

2 Huang Rui-ting, *Modern and Contemporary Chinese History of Forensic Medicine* (Fujian Education Publishing House, 1997) 215.

3 He Song-yue, 'Understanding and Application of 'Provisional Regulations of Forensic Science from People's Court' (2006) 5 *People's Judicature*.

4 Li Yu and Liu Sha-sha, 'Statistical Analysis of Cases of Forensic Medicine, Criminalistics an Audio-Visual Examination in 2006' (2007) 4 *Chinese Journal of Forensic Science* 76-7.



	2005	2006	2012	2013
Organisations	1108	1416	1901	2951
Expert numbers	14153	17760	18356	19278
Case numbers	266241	323264	910472	961989

Figure 1: Comparison of CFM Appraisal Organisations/Expert Numbers/Case Numbers in China.

when compared to the 266,241 completed cases in 2005 (see Figure 1). Evidently, CFM appraisals have experienced unprecedented development in China.⁵

The demand for judicial practice was a prerequisite for the development of CFM appraisal in China. From the *Criminal Law* 1979, Article 95: The term ‘heavy damage’ in this law refers to any one of the following injuries: ‘(1) injuries resulting in loss of the use of a person’s limbs or disfigurement; (2) injuries resulting in loss of the use of a person’s hearing, sight, or functions of any other organ; or (3) other injuries that cause grave harm to a person’s physical health’. From the *Regulations of The People’s Republic of China on Administrative Penalties for Public Security* (adopted at the 17th Meeting of the Standing Committee of the Sixth National People’s Congress and promulgated by Order No. 43 of the President of the People’s Republic of China on 5 September 1986, and effective as of 1 January 1987). The degree of ‘light damage’ represents an intermediate level between ‘heavy damage’ and ‘slight injury’. Obviously, correct assessment of the degree of injury is a critical pillar in the impartial application of criminal law to the specific cases. Only an officially certified, professionally trained medical examiner with

5 Li Yu, Dang Ling-yun, ‘National Statistical Analysis of Forensic Appraisals in 2012’ (2013) 4 *Chinese Journal of Forensic Science* 113-15; Li Yu and Dang Ling-yun, ‘National Statistical Analysis of Forensic Appraisals in 2013’ (2014) 4 *Chinese Journal of Forensic Science* 106-9.

knowledge and experience can perform a CFM appraisal to assess the degree of injury. Therefore, an appraisal of living body injuries by a medical examiner can satisfy the demands of judicial practice.

With the official issue of the Appraisal Criteria for Human Body Serious Injury (Trial Version) and the Appraisal Criteria for Human Body Slight Injury (Trial Version) by Ministry of Justice PRC, Supreme People's Court of the PRC, Supreme People's Procuratorate of the PRC, and Ministry of Public Security of the PRC in August 1986 and June 1990, three legal degrees of injury — heavy damage, light damage and slight injury — were officially standardised, thus formally establishing the living body appraisal system for criminal proceedings in China.⁶ In 1985, the National Forensic Medicine Education Committee, under the heading of the Ministry of Education, first designated CFM as a branch of the discipline of forensic medicine; since then, CFM has been considered an independent discipline in China.⁷

CFM is an interdisciplinary field comprising forensic medicine, clinical medicine, and jurisprudence that follows the principles of evidence law and provides services to legislative and judicial practices, using the theories and techniques of clinical medicine as a means of providing judicial appraisals such as living body injury assessments.

III. THE CURRENT SITUATION OF CFM IN CHINA

In Europe, CFM is involved in investigations of living persons and assessments of medical findings in the context of the justice administration.⁸ The main tasks of clinical forensic work comprise examinations of victims and suspected perpetrators in cases of criminal assault, rape, child abuse, and domestic violence. Apart from these main tasks, CFM also addresses some special categories such as traffic medicine (for example, examination of injured pedestrians, determination of driver vs. passenger, assessment of unfitness for driving), age estimations in persons without personal documents, and examinations regarding medical preconditions to determine criminal responsibility.

In China, the main subfields of clinical forensic work include the appraisal of the degree of a living body injury, evaluation of disability associated with personal injury, identification of relationships between injuries and diseases, speculation of the manner of injury, and estimations of medical malpractice, among others.

In summary, the current situation of CFM in China has the following characteristics:

First, CFM has had a huge impact on Chinese society. For many years, the general public considered forensic medicine to be a mysterious subject unrelated to their lives.

⁶ Zhang Bao-sheng, Chang Lin, *Report on Evidence and the Rule of Law in China* (China University of Political Science and Law Press, 2010) 104-6.

⁷ Ding Mei, *Introduction to Forensic Science* (People's Medical Publishing House, 2004) 31.

⁸ S Pollak and P Saukko, 'Clinical Forensic Medicine — Overview' (2013) *Encyclopedia of Forensic Sciences* 83-8.

In recent years, with the increase in traffic accident cases, work-injury cases, and medical dispute cases, the public realised that CFM (that is, living body injury appraisal) was closely related to their lives. In other words, the emergence of modern CFM has promoted the old discipline of forensic medicine to a new level.

Second, a large number of cases are subjected to CFM appraisal, and appraisal reports are frequently used as evidence in judicial practice. The number of cases processed by CFM significantly exceeds that of other types of judicial appraisal. For example, more than 961,989 cases were processed via CFM appraisal in China in 2014. Furthermore, the number of cases processed via CFM appraisal accounts for more than 57.4% (961,989/1,6754,23) of the total number of cases processed via all types of judicial appraisals, including forensic pathology, forensic clinical medicine, forensic biology, forensic document examination, trace evidence, and physical and chemical analysis.

Third, increasing numbers of professional experts have joined the CFM field. According to the previously noted incomplete statistics, approximately 30,000 forensic medical examiners and employees work in this field. Previously, CFM appraisals were mainly performed by medical examiners working in government departments such as public security, procuratorates, courts, and other justice departments. Following the 2.28 Decision made by the Standing Committee of the National People's Congress on 28 February 2005, judicial appraisals were opened to the public and, as a result, many retired medical examiners and doctors were hired as full-time or part-time employees.

Fourth, CFM is closely integrated with legislative and judicial practices. CFM is strongly associated with the needs of judicial practice, as it is used to solve legislative and regulatory problems related to living body injuries. The involvement of CFM progressed from appraising 'the degree of living body injuries' in criminal cases to 'evaluating the disability associated with personal injury in victims in civil cases', 'identifying the relationship between injury and diseases', 'appraising the extent of nursing for personal injury' and 'estimating medical malpractice'. CFM has become the most active subject that is strongly linked with legislation in China.

IV. ACADEMIC ACHIEVEMENTS IN THE FIELD OF CFM

To adapt to judicial demands, CFM has accomplished the following academic achievements in recent years:

First, CFM has made brilliant achievements in many aspects of objective assessments of human body function, and the techniques used by forensic medical examiners have become core technologies in CFM appraisals. To satisfy the needs of judicial practice and consider a particular client's psychological progress during litigation, CFM has accomplished great achievements with the help of core clinical diagnostic technologies, including electrophysiological, medical imaging, and physical diagnostics, to objectively assess many aspects of human body function.

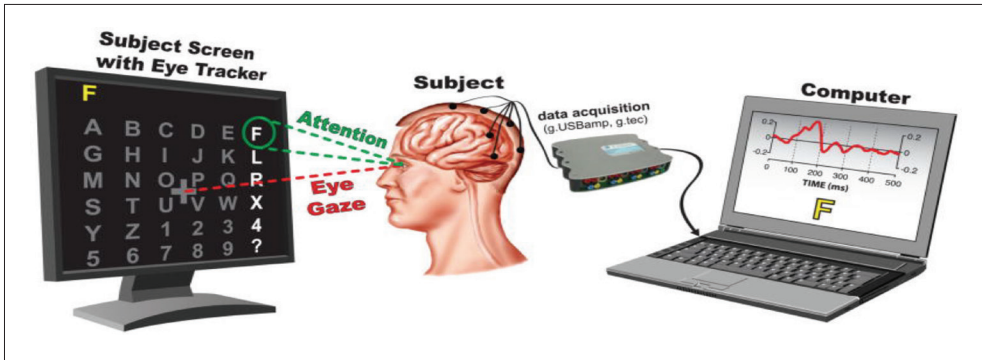


Figure 2: Human Body Visual Transmission System.

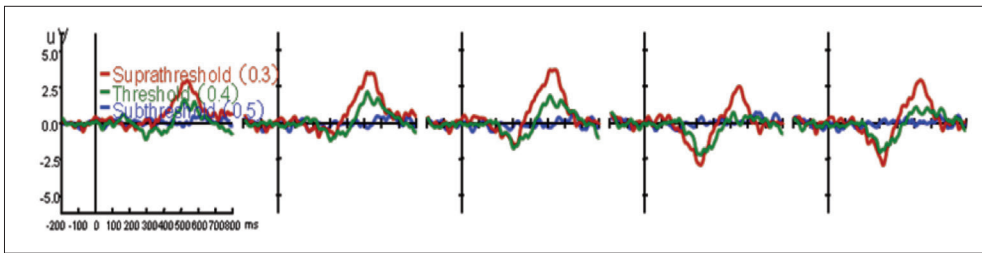


Figure 3: The automatic processing of visual information at different visual acuity levels.

These assessments include vision function assessment (Figures 2-4), hearing function assessment, male sexual function assessment, surrounding nerve injury assessment, and hand function assessment (Figure 5). More detailed assessments include multi-angled applications of visual electrophysiological techniques, which provide objective evidence for vision function assessments; auditory electrophysiology techniques, which provide objective standards for hearing function assessments; new clinical medicine auxiliary examination technologies such as multi-slice computed tomography, magnetic resonance imaging, computed radiography, and colour Doppler ultrasonography, which play increasingly important roles in CFM appraisals; and the application of P300⁹ potentials as indicators to assess visual acuity levels.

CFM appraisal cases are complex and include surgery, gynaecology, paediatrics, ophthalmology, otology, rhinology, and other medical specialties. Therefore, CFM appraisers must master a comprehensive base of medical science knowledge. Clinical imaging findings, injury assessments based on clinical records, relationships between

9 Chen XP, Tao LY et al, 'The Automatic Processing of Visual Information at Different Visual Acuity Levels: An ERP Study' (2015) *International Journal of Psychophysiology*.

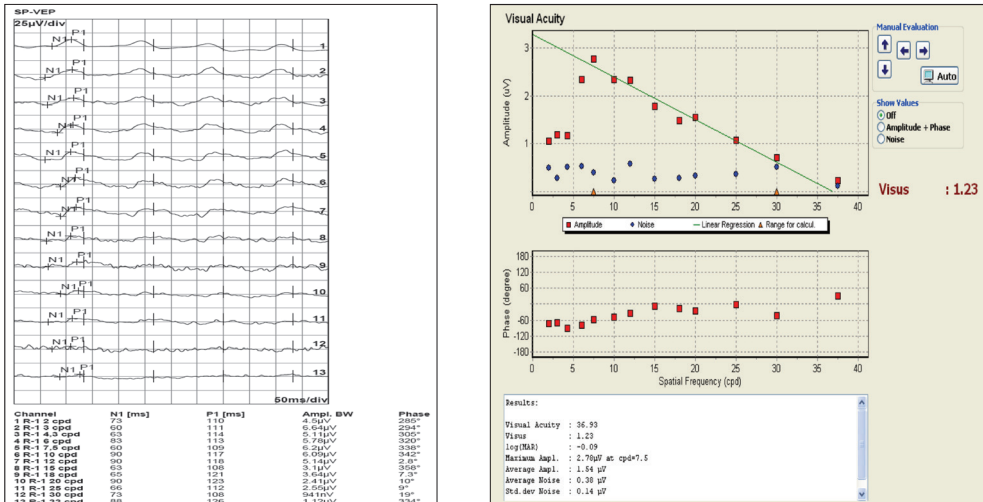


Figure 4: Scatter diagrams of amplitude vs. spatial frequency and phase vs. spatial frequency.

injuries and diseases, mechanisms of injury, rehabilitation medicine, evidence-based medicine, and evidence law theory are the main areas of CFM research.

Appraisal criteria are being actively formulated in China, using experiences with different areas of technology in other countries as a reference. Although the main CFM research directions in other countries differ from the research interests in China, which are mainly concentrated on issues such as abuse and drug abuse, these foreign research directions share many similarities with China’s research interests and include a medical compensation study in Japan, the World Health Organization International Classification of Functioning, Disability and Health (ICF), the American Medical Association Guides to the Evaluation of Permanent Impairment, 6th edition (GEPI), rehabilitation medicine, among others. To adapt CFM to the needs of the legal system framework, many appraisal criteria have been established. For example, the Assessment for Body Impairment of the Injured in Road Traffic Accident GB18667-2002, Standard for Identify Work Ability/Gradation of Disability Caused by Work-related Injuries and Occupational Diseases GB/T16180-2006 includes assessments of limb and hand function. Other official documents, such as the Assessment of the Extent of Nursing for Personal Injury and Guideline for Appraisal of Working Time Loss of Personal Injury Victims, have also provided standards for judicial appraisal.

Medical malpractice assessment became a highlight of forensic medical research. In the late 1990s, CFM was introduced to authenticate medical malpractice cases and, according to incomplete statistics, public judicial appraisal organisations have authenticated 1300 such cases. With development in recent decades, large numbers of forensic experts with a focus on medical malpractice authentication have emerged in the

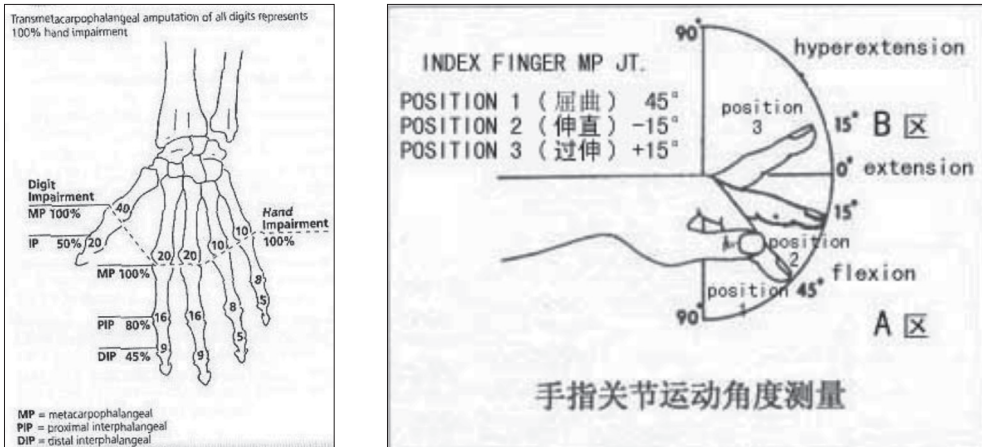


Figure 5: Measurement and evaluation of hand function.

area of forensic medicine and have issued a certain amount of monographs and research papers. With motivation from judicial practice, CFM has been used to formalise many appraisal regulations and procedures.¹⁰ Many local judicial appraisal regulations, such as those in Beijing, have also been issued.

Together with anthropological research, CFM has made substantial progress in estimations of living body age. Anthropological research conducts studies at a cellular and molecular level from a morphological perspective, whereas CFM focuses on living body age estimation. Professor Zhu Guangyou and his colleagues have applied radiological imaging technology for estimating dental age. These researchers have also used their ‘X-ray classification of bone growth’¹¹ to estimate the ages of living bodies. Their work has yielded substantial research results.

Interdisciplinary research involving fields such as social science and jurisprudence has gradually developed. Such topics include issues of scientific evidence, testimony by expert witnesses, and medical jurisprudence, among others.

V. CONCLUSION

In conclusion, many significant explorations involving scientific research, talent cultivation, and judicial appraisal have been made, and a large number of research achievements and forensic experts are emerging, thus providing a large body of objective scientific evidence for national judicial organisations.

¹⁰ Wang Xu, *Estimation of Forensic Appraisals of Medical Negligence* (People’s Public Security University of China Publishing House, 2009) 52-93.

¹¹ Wan lei, Ying Chong-liang, Zhu Guang-you et al, ‘Progress in Skeletal Age Estimation with Measurement Method of X-Ray Film’ (2009) 5 *Journal of Forensic Medicine* 373-6.

'BEYOND REASONABLE DOUBT' IN THE CHINESE LEGAL CONTEXT

LONG ZONGZHI¹

ABSTRACT

The standard of proof in the Chinese criminal procedure bears five characteristics: first, it centres around corroboration; second, its starting point is objectivity; third, its theoretical foundation is cognoscibilism, that is, the epistemological optimism; fourth, the objective of proof is used as the method of proof, which makes the standard less practical; and the last is that it is used as a universal rule, and lacks flexibility in different situations.

China should draw on the experience of other countries. As to the application of the standard, 'beyond reasonable doubt' not only applies to the credibility of evidence, but also applies to the sufficiency of evidence. It is used in the evaluation of both the overall evidence and individual pieces of evidence. As methods of proof, the differences between 'proof beyond reasonable doubt' and 'proof with credible and sufficient evidence' mainly lies in that the former is a kind of positive construction while the latter is a kind of passive deconstruction; the former has a semantic orientation to subjective evaluation while the latter has a semantic orientation to objective corroboration.

There are both differences and consistency in the degree of proof between the two standards. '[C]redible and sufficient evidence' is the sufficient condition for 'beyond reasonable doubt' while the latter is the necessary condition for the former. To apply the standard of 'beyond reasonable doubt' in the Chinese criminal

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procedure, the courts need to be more 'passive' in the examination of doubts so as to reinforce the error prevention mechanism. It should be treated as both a standard of proof and a method of proof. The standard of 'beyond reasonable doubt' can be applied to different types of cases as well as different stages of an individual case, but there can be some flexibility in practical application in different situations. The rules of thumb in the application of it should be adhered to and it should be combined with the Chinese experience of 'removal of doubts'. It should be interpreted and carry out the standard of proof through judicial precedents, and guarantee its effectiveness through proper evidence law and by making public the formation of proof.

I. INTRODUCTION

'Clear facts with credible and sufficient evidence' has always been the standard of proof in the Chinese criminal procedure.² The amendment of the *Criminal Procedure Law* in 2012 summed up the experience in judicial practice and drew on the standards of proof in other countries, and made further interpretation of the standard of 'credible and sufficient evidence'. Article 53, Paragraph 2 of the *Criminal Procedure Law* says:

Proof with credible and sufficient evidence means: (I) facts for conviction and sentence are all proved with evidence; (II) evidence used to determine a case has been checked to be credible through legal procedure; (III) the conclusion of fact-finding is beyond reasonable doubt with an overall review of all the evidence of the case.

Among the above mentioned three requirements, the first one is a basic requirement of the principle of evidentiary adjudication; the second one is a requirement of the legal validity of the procedure and the objectivity of specific evidence; the third is an important standard for whether the facts are all clear and whether the evidence is credible and sufficient. Thus it can be seen that in China, 'beyond reasonable doubt' has already been used as an interpretation of the standard of proof in the Chinese criminal procedure, or, a complementary standard for fact-finding. In the Chinese legal context, there is great theoretical and practical significance in exploring the connotation of 'beyond reasonable doubt' and its relationship with 'clear facts with credible and sufficient evidence'.

II. CHARACTERISTICS OF THE PRESENT STANDARD OF PROOF IN THE CHINESE CRIMINAL PROCEDURE

As has been mentioned, 'clear facts with credible and sufficient evidence'³ has always been the standard of proof in the Chinese criminal procedure. Judging from the legal

² See *Criminal Procedure Law* (People's Republic of China) Standing Committee of the National People's Congress, 19 March 2012 Rules 129, 141 and 162(1).

³ It is sometimes called for short 'the standard of credible and sufficient evidence' in judicial practice and jurisdictional interpretations.

wording, judicial interpretation, jurisprudential analysis and long judicial practice, this standard of proof has the following five characteristics:

The first is that it centres around corroboration. Mutual corroboration between different evidence is the most essential element and most important index of ‘credible and sufficient evidence’. The author has ever written that mutual corroboration between evidence is the most important requirement of proof in the Chinese criminal procedure, hence it is different from the typical discretionary evaluation of evidence, and the mode of proof in the Chinese criminal procedure is a corroboration mode.⁴ The corroboration mode of proof requires that there be at least two pieces of evidence to determine a case, and all the evidence should support each other (pointing to the same direction) and should not contradict each other, hence they form a steady and credible structure of proof. If the standard is broken from ‘credible and sufficient evidence’ into ‘credible evidence’ and ‘sufficient evidence’, the former indicates that the truthfulness of evidence needs to be confirmed through mutual corroboration of evidence; while the latter indicates that there are many pieces of evidence to prove the facts of a case, and all of them point to the same direction. Therefore, mutual corroboration between evidence is the most essential condition for ‘credible and sufficient evidence’.⁵

The second characteristic is that its starting point is objectivity. Influenced by the philosophy of materialism (anti-subjective idealism) and the extreme emphasis on corroboration, another characteristic of proof in the Chinese criminal procedure is the stress on objectivity in fact-finding. One is the objectivity of evidence. Objectivity is deemed as the most important attribute of evidence, and the correctness of fact-finding must be based on the objectivity of evidence. Another is the objectivity of the facts to be proved. The facts to be proved are objective facts; they are the true reflection of the case that has happened. Still another one is the objectivity of the procedure and methods of proof. To know the objective truth through objective evidence, there must be objective methods of proof. Such methods rely heavily on objective corroboration instead of subjective thinking. Case handlers in fact-finding should not rely on their own thinking, but on the objective state of facts of a case. Determination on facts is done mainly through corroboration. The corroboration mode of proof stresses the mutual support between evidence instead of one’s inner thinking, such as asking oneself whether he/she ‘truly believes’ the result of fact-finding, or whether the result is ‘beyond reasonable doubt’. The result is required to be the exclusive and only one, but such expressions as

4 See Long Zongzhi, ‘Corroboration and Free Evaluation of Evidence: The Mode of Proof in the Criminal Procedure of Our Country’ (2004) 2 *Chinese Journal of Law*.

5 There are many reasons why China has adopted the corroboration mode of proof instead of the free evaluation mode, among which the non-direct and non-verbal trial mode is the most important one. Other reasons like the separation between trial and sentence further requires the corroboration mode; repeated factual question needs the facts of a case to be testable and corroborative; the adoption of this mode is closely related to the quality of judges, the dominant epistemology, etc. See *ibid* for the difference between the corroboration mode of proof and the typical proof mode of free evaluation of evidence.

'beyond reasonable doubt' or 'inner conviction' are rarely used since they seem to be subjective.⁶

Such a stance of cognition which stresses objective corroboration instead of subjective thinking can be called the objective stance of cognition in evidence evaluation,⁷ which makes it different from the evidence laws and theories of proof in other countries. It is well known that the modern proof systems in other countries, whether common law countries or Continental countries, all adopt discretionary evaluation of evidence. The 'inner conviction' mode of proof based on confirmation in Continental countries and the 'beyond reasonable doubt' mode of proof based on falsification in common law countries both try to attain truthful knowledge of the facts of a case, and try to base their determination on objective data, but they both rely more heavily on subjective thinking.

The third characteristic of the Chinese standard of proof is that its theoretical foundation is cognoscibilism, that is the epistemological optimism. It is believed that 'basically, through the collection and analysis of evidence in proper ways, any fact of a case can be found out correctly'.⁸ The object of fact-finding is to 'find out the truth of the fact itself, or the true thing'.⁹ The truth attained through credible and sufficient evidence should adhere to absolute objectivity which excludes all possibility of doubt. It has to be admitted that such epistemological optimism is idealised.¹⁰ In recent years, it has encountered some challenges. Some scholars draw on foreign evidentiary theories and propose the theory of 'legal truth', and advocate the probability theory of proof. They hold that 'objective truth' is an idealised theory of proof which results from epistemological optimism. It is not practical and cannot successfully solve the problems of proof. They say that it is almost impossible for the fact finders to reach 'absolute objective truth' in practice. Instead, they can only reach a state that is 'approximately the same as' objective truth, or 'infinitely close to' objective truth. Hence, they advocate that 'objective truth' is replaced with 'legal truth'. In other words, they think that proof in criminal procedure should conform to substantive criminal law and procedural law,

6 This situation is changing due to the improvement of the quality of the legislators and judicial personnel and the increasing communication with Western countries. For example, in the *Regulations on Several Problems Concerning the Evaluation of Evidence in Capital Cases 2010*, Rule 5 interprets 'clear facts with credible and sufficient evidence' as 'the process of fact-finding based on evidence accords with logical and empirical rules, and the conclusion resulting from the evidence is the unique one'. Here the expression of 'uniqueness' is still used. While Rule 33 stipulates, 'fact-finding based on circumstantial evidence should reach only one conclusion which is beyond any reasonable doubt'. Here the term 'beyond any reasonable doubt' is adopted.

7 Long Zongzhi, 'On the Standard of Proof in the Chinese Criminal Procedure' (1996) 6 *Chinese Journal of Law*.

8 Zhang Zipei et al, *A Textbook of Criminal Procedure Law* (QunZhong Pres, 2nd edn, 1987) 192.

9 Pei Cangling, *New Theories on Evidence* (Law Press China 1989) 183.

10 However, idealised requirements may exert positive influence. When fact finders are not so good at using and evaluating evidence, a higher standard of proof can have a guiding function, which is called the 'utopian function' of ideas.

and that facts in criminal cases should be proved to such a degree that the law thinks it is true.¹¹

However, ‘objective truth’ is still the dominant ideology in the judicial world. The judicial authority, especially the judicial policy makers, still worry that denying ‘objective truth’ while advocating ‘legal truth’ and probability in proof will enhance arbitrary judgment, thus harm the correctness of case handling. Some famous scholars also question ‘legal truth’. They only agree with ‘legal truth’ under certain circumstances. Professor Chen Guangzhong even claimed that if one is to accept the theory of knowledge, one shall admit that the objective state of facts of a case can be known by case handlers. For example, the perpetrator must be definitely ascertained, so the guilty sentence must be absolutely objective. However, people’s cognitive ability is both limited and limitless, thus in criminal procedure objective truths should be pursued, and it would be possible to attain it. But, under certain circumstances, it must also be complemented with legal truth. If only the legal truths are pursued in criminal procedure, it would not be in conformity with the law of epistemology, and would easily lead to misjudged cases.¹²

The fourth characteristic is that the objective of proof is used as the method of proof, which makes the standard less practical. ‘All case facts are clear’ is actually a requirement of the degree of proof, that is, the proof of facts of a case should reach a clear, not vague state. And the requirement of ‘credible and sufficient evidence’ is also an issue concerning the degree of proof. Therefore, ‘clear facts with credible and sufficient evidence’ is the objective of proof. The standard of proof is a standard for the removal of the burden of proof. It surely reflects the objective of proof. In this way, it is not improper to use ‘clear facts with credible and sufficient evidence’ as the standard of proof. However, the proof of facts of a case is a complicated process. A good standard of proof should be practical and operable. It’s not simply an expression of the objective of proof, or the degree of proof. Therefore, the standard of ‘clear facts with credible and sufficient evidence’ is defective — it does not provide an approach to realise the objective of proof. It is self-evident that rational proof activities in any criminal procedure pursue the target of clear facts and credible and sufficient evidence. The problem occurs when it is possible to say that the facts are clear and the evidence is credible and sufficient. The standard of ‘beyond reasonable doubt’ not only points out the objective of proof, but also provides an approach to attain this goal: to prove facts through analysing ‘doubtful points’ and removing reasonable doubt. By contrast, the standard of ‘credible and sufficient evidence’ does not provide an effective way to realise the objective of proof.

The last characteristic of the standard of proof in the Chinese criminal procedure is that it is used as a universal rule, and there is no flexibility in different situations.

11 See Fan Chongyi, ‘My Humble Opinion on Objective Truth — and the Standard of Proof in Criminal Procedure’ (2000) 1 *China Legal Science*.

12 Chen Guangzhong, ‘Objective Truth and Legal Truth in Litigation’ (2000) *Procuratorial Daily*.

‘Clear facts with credible and sufficient evidence’ is the only standard of proof affirmed by the Chinese *Criminal Procedure Law*. This standard is applied universally at all stages of the procedure (including investigation stage, prosecuting stage and trial stage) and in all types of procedures (including summary procedure, general procedure and special procedure). Even in the review of the most severe sentence — death sentence — there is no variation in the standard of proof. However, in the handling of different types of cases and at different stages of the criminal procedure, there should be both uniformity and flexibility in the expression and application of the standard of proof. Such an attitude is in accordance with the rules of criminal procedure and general judicial experience.

Among all the stages of the procedure, investigation and prosecuting are conducted in a relatively closed space. Judicial personnel at these two stages mainly take unilateral actions to collect and evaluate evidence and to judge facts of a case. Speaking from the purpose of the proceeding, the inner conviction has not been completed yet, and all the evidence is still in an unstable and changeable state. Hence, it is an important task both at the end of an investigation and during the prosecuting stage to evaluate the quality of the evidence collected, referring to the standard of sentence, and to assess the possibility of conviction from the evidence collected. At these stages, many countries use such standards as ‘great possibility of conviction’, ‘reasonable grounds for prosecution’, ‘great suspicion of crime’, and so on, to differ from the standard of sentence, or use complementary standards while applying the standard of sentence.

Judging from the severity of cases and types of procedure, there should be differences in the standards of proof between ordinary criminal cases and death penalty cases, between summary procedure and general procedure. In summary procedure, the procedure is simplified, including the production, examination and evaluation of evidence. Moreover, the precondition for the application of summary procedure is that the accused admits his/her guilt. If the courts still use a very strict mode of proof and high standard of proof, it goes against the purpose of summary procedure. The aim of death penalty cases, especially the immediate execution of death penalty cases, is to deprive the right of the accused to life. After execution, the sentence cannot be reversed, and the right cannot be recovered. Hence, in such cases the standard of proof should be the highest, and this should be stipulated by the law.¹³

It cannot be denied that in the long judicial practice, through theoretical interpretation, summary of practical experience and some jurisdictional interpretation, most judicial workers are able to properly understand and apply the standard of ‘clear facts with credible and sufficient evidence’. However, most of them report that this

13 *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, adopted by the United Nations Economic and Social Council resolution 1984/50 of 25 May 1984, states that only when no other explanation can be made, according to clear and convincing evidence, about the guilt of the accused can he be sentenced to capital punishment. Here it does not use the expression of ‘beyond reasonable doubt’, which shows a very strict requirement on the standard of proof in capital cases. In recent years, this has also been the trend in the criminal legislation in China.

standard is too general and very vague; thus, it is impractical. Therefore, they await further interpretation.¹⁴

III. THE STATUS OF 'BEYOND REASONABLE DOUBT' AND ITS RELATIONSHIP WITH THE STANDARD OF 'CLEAR FACTS WITH CREDIBLE AND SUFFICIENT EVIDENCE'

From the hermeneutical angle of view, the standard of proof in the amended Chinese *Criminal Procedure Law* is still 'clear facts with credible and sufficient evidence'. Although 'beyond reasonable doubt' is mentioned in Rule 53 of the law, it is used simply as an interpretation of 'credible and sufficient evidence'. Hence, 'beyond reasonable doubt' in Chinese law is a rule of evidence evaluation, which is different from its status as the standard of proof in Anglo-American law and Japanese law. To understand the status of 'beyond reasonable doubt' in Chinese law, regard must be taken to the following points.

A. The Significance of the Introduction of 'Beyond Reasonable Doubt'

To set a standard for any mental activity that cannot be quantified is obviously of limited value. It is the same with evidentiary standards. The science of evidence is different from experimental science or exact science. The evaluation of evidence is a process of tracing back historical facts according to various kinds of objective traces and subjective memories. It relies on the life experience, including judicial experience, of the fact finder. As is said by Richard A. Posner, it is a kind of cognitive activity applying the approaches of 'practical reason', such as introspection, imagination, the use of common sense, empathising, the application of precedents and custom, respect for authority, intuition, induction, and so on.¹⁵ The standards for fact-finding can only be relative, and even if the standard of 'beyond reasonable doubt' is introduced in the evaluation of evidence, its effect is undoubtedly limited.

However, though its effect is limited, it cannot be denied that it is a positive act to introduce it into Chinese legislation and judicial practice. It is not in the strict sense

¹⁴ Li Gang, a judge who participated in 2006 in the project of the Supreme Court entitled '*A Survey of the Evidence Rules in the Criminal Procedure in Our Country*', wrote that in the about 200 questionnaires among the police, procurators, judges and lawyers, 76% of the respondents required that the present standard of proof be revised. Some judges complained that 'the present standard of proof is not practical, which makes it difficult for judges to grasp it', 'due to the lack of working rules, the present standard of proof lacks uniformity. Judges have different understanding of it in different cases and different districts'. See Li Gang, 'An Empirical Study on the Application of Standard of Proof in Guilty Sentences and a Proposal for the Reconstruction of Such Standard of Proof' (2008) 6 *Journal of Guangxi Administrative Cadre Institute of Politics and Law*.

¹⁵ According to Posner, practical rationality is opposed to the precision research method, and it includes anecdotes, introspection, imagination, common sense, etc. 'With these methods, people who do not believe easily can form an inner conviction on things that cannot be proved through logic or precise observation.' See Richard A Posner, *The Problem of Jurisprudence*, translated by Su Li (Press of The Chinese People's University of Political Science and Law, 1994) 71-4.

an exact ‘standard’, but it can direct the evidentiary thinking and provide the judiciary with a cognitive approach. Specifically, the introduction of ‘beyond reasonable doubt’ to interpret China’s standard of proof is significant in two aspects: one is that it provides diverse perspectives. It requires both external corroboration and internal introspection — to see what impression the evidence system has left on the fact finder so that one can evaluate the evidence properly. Another is that it provides a new way of thinking, which can remedy the defect of impracticability of China’s standard of ‘clear facts with credible and sufficient evidence’. It should be seen that although the objectivity in fact-finding and evidence evaluation is emphasised, it is still a subjective thinking processes. Such standards as ‘clear facts with credible and sufficient evidence’, ‘beyond reasonable doubt’, ‘inner conviction’ and ‘irrefutable facts with conclusive evidence’ are all subjective evaluation and judgment of facts of a case. They all have subjectivity. They have essential differences from experimental science, which can reveal the repeatable and verifiable facts with instruments. As a standard of proof, ‘clear facts with credible and sufficient evidence’ is quite correct and even impeccable. But as is said above, it does not provide a way of thinking, while ‘beyond reasonable doubt’ not only sets a subjective standard, but also provides a way to find, verify and remove doubts. Thus, the introduction of ‘beyond reasonable doubt’ to complement and interpret the standard of ‘clear facts with credible and sufficient evidence’ not only shows the open mind of Chinese legislators, but is also technically significant.¹⁶

B. Application of the Standard of ‘Beyond Reasonable Doubt’

Is this standard applied only to judge the sufficiency of evidence, or is it applied also to judge the credibility and other aspects of evidence? Is it used only in the evaluation of the overall evidence, or is it also used in the evaluation of individual pieces of evidence?

Rule 53, Section 2(b) of the amended *Criminal Procedure Law* stipulates that ‘based on the evidence of the whole case, the decision should be beyond reasonable doubt’. From the hermeneutical angle of view, this rule means that the fact finder should follow the standard of ‘beyond reasonable doubt’ to make a comprehensive judgment of the basic facts of a case (including the constitutive elements of crime and facts for penalty measurement) on the basis of evidence of the whole case. Undoubtedly, such judgment involves both the sufficiency of evidence — whether the evidence collected is sufficient to make a decision — and the objectivity or truthfulness of the evidence evaluated. From the law it is clear that ‘beyond reasonable doubt’ is the interpretation

16 Criminal Law Department of the NPC Law Committee (ed), *Explanation of and Reasons for the Resolution on Amending the Criminal Procedure Law of the People’s Republic of China* (Peking University Press, 2012) 53; it is said that ‘the use of “beyond reasonable doubt” here does not mean the change of standard of proof in our criminal procedure, we simply aim to further clarify the standard of “clear facts with credible and sufficient evidence” from a subjective angle, so that our judicial workers can grasp it better’.

of the standard of ‘clear facts with credible and sufficient evidence’; thus, it is not only a standard of the sufficiency of evidence. From a theoretical point of view, the sufficiency of evidence and the credibility of evidence are inseparable. Sufficiency is based on credibility, otherwise sufficiency is false sufficiency and has no evidentiary significance. Whether in the birth country of this standard, or in any other countries that apply it, ‘beyond reasonable doubt’ is used to judge the sufficiency and credibility of evidence. And the probability judgment that is closely related to this standard is a judgment of the objectivity of evidence and facts of a case.

In addition, although the standard of ‘beyond reasonable doubt’ stipulated in Rule 53, Section 2(b) of the amended *Criminal Procedure Law* does not concern the legality of evidence, this standard can still be used in the judgment of the legality of evidence. It is more applicable in the exclusion of evidence than in the probative activity. On the one hand, the negative standard of ‘allowing no doubt’ is in nature better suited for the exclusionary activity, while the probative activity needs some positive standards (such as establishment of ‘inner conviction’ or ‘clear facts with credible and sufficient evidence’); on the other hand, as the procedure of investigation is generally closed and unilateral, it is very difficult to find sufficient and credible evidence to prove whether a piece of evidence is illegal. If there is a reasonable doubt on the legality of the evidence, it should be excluded. This standard of ‘excluding doubtful evidence’ is more practical. Rule 58 of the amended *Criminal Procedure Law* stipulates that ‘in the court evaluation of evidence, if some evidence is confirmed to have been collected in the illegal ways mentioned in Rule 54, or if the court cannot remove the doubt that it is collected in such illegal ways, such evidence should be excluded’.

The ‘doubt’ here refers to the fact finder’s doubt on the legality of evidence, and it must be ‘reasonable doubt’ instead of groundless doubt.¹⁷ From such stipulation, it can be seen that the standard of ‘beyond reasonable doubt’ can surely be applied in the judgment of legality of evidence.

Judging from the context of the Chinese *Criminal Procedure Law*, ‘beyond reasonable doubt’ is an interpretation of the standard for inculpation. It is based on the evaluation of all the evidence of the case. Therefore, it is actually a standard for a conclusion of the basic facts of the case (elements of crime and elements of penalty measurement). As to the stages of the procedure, the standard is used at the final judgment of the whole facts of the case. However, at previous stages, in the evaluation of any individual piece of evidence, or in the judgment of part of the facts of the case, the standard of ‘beyond reasonable doubt’ can also be applied, because it is not only a standard of proof, but also a method of proof. Furthermore, viewing from the relationship between the part and

17 Criminal Law Department of the NPC Law Committee (ed), *Explanation of and Reasons for the Resolution on Amending the Criminal Procedure Law of the People’s Republic of China* (Peking University Press, 2012) 66. It says that ‘if we cannot rule out the possibility of collecting evidence in illegal ways stipulated in Rule 54, in other words, if the procuratorate cannot prove with credible and sufficient evidence the legality of evidence collection, the court should exclude such evidence’.

the whole, if the judgment of individual facts or evaluation of single pieces of evidence is not ‘beyond reasonable doubt’, the whole case would not reach a conclusion ‘beyond reasonable doubt’. Of course, the premises of and requirements on the judgment of individual facts or evaluation of single pieces of evidence are different from those in the final judgment of the whole case. For example, in the evaluation of single pieces of evidence, both the fact finder’s experience and the corroboration of evidence are relied upon. While in the assessment of all evidence as a whole, the fact finder uses their experience and logical analysis on the basis of evaluation of single pieces of evidence.

C. The Relationship Between ‘Beyond Reasonable Doubt’ and ‘Clear Facts with Credible and Sufficient Evidence’ as Methods of Proof

The standard of ‘beyond reasonable doubt’ can interpret and complement the standard of ‘clear facts with credible and sufficient evidence’. The relationship between the two is mainly reflected in the following two aspects:

First, concerning cognitive direction, the standard of ‘clear facts with credible and sufficient evidence’ aims at constructive confirmation and is a positive standard. It applies to such a situation in which facts need to be proved by evidence. Thus, it is a judgment of the positive probative activity, while ‘beyond reasonable doubt’ aims at deconstructive exclusion, and is a negative standard. It tests evidence by finding and removing doubts. Although it also serves the constructive confirmation of evidentiary facts, the way to accomplish this is negative exclusion instead of positive confirmation. Constructive confirmation and negative exclusion are the two sides of fact-finding — if all reasonable doubts can be removed, fact finders can form an inner conviction, and vice versa. Any rational standard of proof must include these two sides. But in different countries, due to different institutional environments, philosophical basis, habits of thought and some other reasons, the stresses or focuses of their standards of proof may vary.

Second, the standard of ‘clear facts with credible and sufficient evidence’ relies on objective evidence, and stresses on mutual corroboration of evidence, while the standard of ‘beyond reasonable doubt’, although it also rejects arbitrary subjective decisions, relies on the cognitive process of the fact finder; thus, it has a subjective semantic tone.¹⁸ As is said above, from its semantic tone and its application in the long practice, the standard of ‘clear facts with credible and sufficient evidence’ as a standard of proof is characterised by objectivity and mutual corroboration of evidence. The standard of beyond reasonable doubt, on the other hand, in order to avoid arbitrary decisions, is also based on objective

18 Professor Yang Yuguan opines that although the rule of ‘beyond reasonable doubt’ requires that the doubts should be reasonable, it cannot be denied that it is still a pretty subjective standard of proof. Whether the doubts are reasonable and whether such doubts have been removed depend heavily on the subjective judgment of fact finders. See Yang Yuguan and Sun Jun, “Beyond reasonable doubts” and the Improvement of Our Criminal Standard of Proof” (2011) 19(6) *Evidence Science* 655.

evidence, and it, too, admits the significance of mutual corroboration of evidence for the formation of inner conviction and the removal of reasonable doubt. But its focus is the process in which the fact finder forms his/her subjective conviction. 'Doubt' refers to a subjective state in which the cognition of something is uncertain. The act to remove such doubt is a subjective thinking process.

From the analysis above, it can be seen that, as a different mode of thinking and a different standard for fact-finding is applied, 'beyond reasonable doubt' can be of much help to the understanding and application of the standard of 'clear facts with credible and sufficient evidence'. And when they are used together in practice, the two standards can complement each other. They can help analyse and verify evidence from different angles and in different ways, and thus improve the quality of fact-finding.¹⁹

D. Difference between the Standard of 'Beyond Reasonable Doubt' and the Standard of 'Clear Facts with Credible and Sufficient Evidence' in the Degree of Proof

When studying the relationship between the two standards, there is one more point to be clarified: although as methods of proof the two standards are different in orientation, as standards of proof, do they require the same degree of proof and are they interchangeable? Presently, there are mainly two views on this question. One view holds that 'beyond reasonable doubt' and 'clear facts with credible and sufficient evidence' are two different expressions of the same thing. The other view says that there are both coincidences and differences in their requirement of the degree of proof; thus, they are not interchangeable. Although the former view seems to be in a dominant position,²⁰ the author prefers the latter one. The author opines, 'clear facts with credible and sufficient evidence' is the sufficient condition for 'beyond reasonable doubt', while the latter is the necessary condition for the former. In other words, if a fact is clarified with credible and sufficient evidence, its truthfulness is definitely beyond reasonable doubt; if there is a reasonable doubt, the fact is not clarified with credible and sufficient evidence. However, the removal of reasonable doubt does not necessarily mean the facts are clear with credible and sufficient evidence. In most cases, the removal of reasonable doubt can mean 'clear facts with credible and sufficient evidence', but in some cases, it is not so.

19 Wang Shangxin, Director of the Criminal Law Department of the NPC Law Committee, said that "clear facts with credible and sufficient evidence" is the strictest standard of proof. Only that this standard is too general and is hard to grasp in practice. We can combine the Common Law standard of "beyond reasonable doubt" with our present standard of proof so that judicial workers can grasp it more accurately in practice'. See Wang Shangxin, 'A Study on Criminal Legislation' (2002) 4 *Tribune of Evidence* 315.

20 In their lectures and works, most NPC Law Committee members and scholars who participated in the amendment of the *Criminal Procedure Law* think that the difference between these two standards mainly lies in their angles of understanding and practicality, but not in their degrees of proof. See *ibid*.

PROOF IN MODERN LITIGATION

In city A, a case of wilful and malicious injury occurred. In this case, the accused was a male adult, and the victim was a middle-school girl. The accused and the victim were neighbours, and the two families were long at feud. The indictment claimed: one day in the victim's kitchen, with a kitchen knife, the accused cut a wound into the victim's left forearm. The wound was about one centimetre deep. According to the expert conclusion, the act constituted a crime of mitigated injury. There were two major pieces of evidence: one was the statement of the victim, who complained that she was cut by the accused with a kitchen knife. The other was the statement of the accused, who totally denied the charge. Except the accused and the victim, no one else had entered the kitchen; thus, there was no possibility that the victim had been wounded by a third person. At the trial of first instance the accused was sentenced guilty of a wounding crime, and the grounds of the decision was that the victim would not wound herself. In other words, there was not a reasonable doubt that the victim had wounded herself, thus there was only one possibility left: the accused had wounded the victim. At the trial of second instance, however, the accused was found to be not guilty, and the reason was that there was no other evidence to corroborate the victim's statement; thus, the evidence was not credible and sufficient.

At the first instance of this case, the standard of 'beyond reasonable doubt' was applied. The court held that that the girl had wounded herself was not a reasonable doubt, while the long feud between the two families was a reasonable motive of crime; thus, it could be reasonably decided that the accused had wounded the victim. But at the second instance, the court applied the standard of corroboration and held that there was not a second piece of evidence to corroborate the victim's statement. And without mutual corroboration between different evidence, the court cannot claim a fact to be 'clear with credible and sufficient evidence'. Consequently, the accused was found to be not guilty.

In a similar example: Company B applied to a government department for approval of a project. They were well qualified but just could not get the approval. The company heard that they needed to bribe the department leader to get the project approved. After consideration, the company leaders decided to give some money to the department leader (this was corroborated with evidence). The money was prepared by a financial staff member of the company and, together with a company leader, he went to the department leader's home (this was also corroborated with evidence). The company leader entered the government official's house with the money and soon he got out, and told the financial staff member that he had got the thing done. (The government official later denied that he had got any money from the company leader, and there was no evidence for this crucial circumstance.) Soon after, the project was approved (circumstantial evidence).

The project could not get approved before the act of bribery, and was soon approved after the act of bribery. The whole process of taking money to the official's house was

corroborated with evidence, but there was no evidence that the official had accepted the money inside his house. Can the government official be inculpated of acceptance of bribes? The reader heard this case several years ago from Mr Jiang Wei, former director of the Public Prosecution Department of the Supreme People's Procuratorate, and his answer was 'yes'. However, when this question was presented by the author at a judge training class, most of the judges said that they could not make a guilty sentence. The difference in opinion results from their different standards of proof applied. Mr Jiang Wei from the Supreme People's Procuratorate applied the standard of 'beyond reasonable doubt' (generally this standard is supported by the principle of direct and verbal trial, so that the statements of the accused and witness testimony can be well evaluated). While the judges applied the standard of 'clear facts with credible and sufficient evidence', and since the key fact was not corroborated with evidence, they held that a guilty sentence would not meet the standard of 'clear facts with credible and sufficient evidence'.²¹

From the typical examples above it is evident that there are some differences between the standards of 'clear facts with credible and sufficient evidence' and 'beyond reasonable doubt'. The former is a higher and stricter standard than the latter. Such differences result from the fact that 'beyond reasonable doubt' is standard for inner conviction. So long as the fact finder can remove the doubts in his/her mind, he/she can form his/her inner conviction and meet the standard of proof. The inner conviction can be the result of mutual corroboration between evidence, or the result of a single piece of evidence (direct evidence) which is powerful enough²² to lead the fact finder to a conclusion. And the latter situation does not meet the requirement of 'clear facts with credible and sufficient evidence', because this standard not only requires inner conviction beyond reasonable doubt,²³ but also requires the objective corroboration between different evidence. Therefore, in those cases where the final decisions are based on the mutual corroboration of evidence, the degree of proof required by the two standards of proof is the same; but in those cases where the final decisions are based on a single piece of evidence, or where the pieces of evidence cannot corroborate each other, the application of the standard 'beyond reasonable doubt' means a lower degree of proof than the application of the standard 'clear facts with credible and sufficient evidence'.

Some people may disagree with the above analysis of the differences between the two standards, but there is empirical support for this opinion in judicial practice. Often procurators or judges say, 'I believe (do not doubt) that he has committed this crime, but I can't inculpate him with the existing evidence'. The former part of this statement

21 This case was later discussed by Zhang Jun, Jiang Wei and Tian Wenchang. The three had different opinions on this case. See Zhang Jun, Jiang Wei and Tian Wenchang, *A Discussion on Prosecution, Defense and Trial in the Criminal Procedure* (Legal Press China, 2001) 104-7.

22 Take the testimony of a key witness for an example. The credibility of testimony is determined by the witness's experience, status, character, performance when giving testimony, and the logicalness of his/her testimony.

23 The certainty of fact-finding inevitably requires the removal of reasonable doubt.

involves inner conviction or a psychological state of ‘beyond reasonable doubt’, while the latter involves corroboration of evidence and reflects the standard of ‘clear facts with credible and sufficient evidence’. Thus, whether theoretically or practically, the two standards of proof have both coincidence and differences.

IV. INTERPRETATION AND APPLICATION OF ‘BEYOND REASONABLE DOUBT’ IN CHINESE CRIMINAL PROCEEDINGS

After an analysis of the status of the two practical standards of proof, and the relationship between them, the next step is to probe into the application of the standard ‘beyond reasonable doubt’ after the amended *Criminal Procedure Law* has been put into force. The following aspects are fundamental.

Fact finders should be more ‘passive’ in their doubt review so as to improve the quality of fact-finding. Although nowadays the common law standard of proof and the Continental standard of proof are beginning to converge, generally the standard of proof in typical Continental countries such as France and Germany centres on ‘inner conviction’, while the common law standard centres on ‘removing doubts’. The former can be summarised as ‘deconstructing (removing doubts) in the process of construction’, and the latter can be summarised as ‘constructing in the process of deconstruction’. Their point in common is to ‘guarantee and promote construction through deconstruction’. This may be due to the requirement of due process in Continental litigious mode and the stress on combating crime in common law countries. Considering the judicial practice in China, the standard of ‘clear facts with credible and sufficient evidence’ stresses on ‘construction’, and it is more similar to the Continental standard of proof which centres on ‘inner conviction’.²⁴ Because of its stress on ‘construction’ and ‘credibility’, sometimes fact finders may neglect the doubts on evidence and facts.

In the Chinese criminal procedure, the public security organs, procuratorial organs and people’s courts have their division of responsibilities, but they coordinate with each other and constrain each other. Thus, the criminal procedure is in a linear structure and the three types of organs are an integrated body. Influenced by such structure and system, the criminal procedure is centred on investigation and the procuratorial organs are in a superior position to people’s courts. Moreover, China’s longstanding criminal policy stresses on combating crime and ignores the protection of legal interests of

24 Although China, unlike countries such as France and Germany, do not use such subjective expressions as ‘certainty’, ‘inner conviction’, etc. and greatly emphasise the objectivity of judgment, it cannot be denied that any judgment is a subjective understanding of objective things. As a German scholar criticised the judgment of the German Supreme Court in 1927, ‘Judges make decisions not because they know and understand, but because they have a “conviction”. There is no absolutely certain knowledge, but there exists absolutely certain conviction’. See *ibid*, 168. Therefore, the fact-finding of Chinese judges is also based on their ‘inner conviction’, hence there is no essential difference between the standard of ‘clear facts with credible and sufficient evidence’ and ‘inner conviction’.

suspects and defendants. In such a judicial system, the procuratorial organisations and the people's courts usually show a 'sweet understanding' to the evidence collected by the investigative organisation. They show too much trust and too little challenge to the evidence provided by the investigative organisations. Such a judicial system based on the trust in the investigative organisations, together with an evidence system that stresses on inner conviction but ignores doubting, can lead to some unjust sentences. One of the protruding features of such minds of proof is that the evaluation and exclusion of illegal evidence are usually too arbitrary. The court simply accepts the explanation of the prosecuting party and ignores the reasonable doubt presented by the defendant on the legality of evidence.²⁵

As to the prevention and remedy of misjudged cases, the focus was generally on the methods of evidence collection, and a lot of measures to prevent investigative organizations from extorting confessions by torture have been taken. But it is also necessary to improve the fact finder's mind of proof, and fully understand the importance of the questioning of evidence to the quality of case handling.

The latest amendment of China's *Criminal Procedure Law* involves a series of measures to strengthen the protection of human rights, including the improvement of the evidence system. The introduction of the standard of 'beyond reasonable doubt' can not only increase the practicality of the standard of 'clear facts with credible and sufficient evidence', but also improve the fact finder's minds of proof to attach equal importance to inner conviction and the questioning of evidence so as to further avoid unjust cases.

In his analysis of the Japanese Judicial practice, Nakagawa Takahiro pointed out that 'the use of the rule of "beyond reasonable doubt" is maximized in cases of disaffirmation'. Germany has a similar practice. This shows the function of this standard of proof in human rights protection.²⁶ Under the guidance of a criminal policy that attaches equal importance to combating crimes and protecting human rights, it is clear that using the rule of 'beyond reasonable doubt' to interpret the standard of 'clear facts with credible and sufficient evidence' means equal significance between 'construction' and 'deconstruction', such as 'forming inner conviction' and 'removing doubts'. Through multi-dimensional thinking, the quality of fact-finding can be improved. Meanwhile, proper attention should be paid to the test, analysis and removal of doubts in the exclusion of illegal evidence so as to give full play to the role of the standard of 'beyond reasonable doubt' in human rights protection.

25 In the second-instance verdict of the Zhang Guoxi bribery case in Zhe Jiang Province, the retrial verdict of Liu Yong's gangland crimes in Liaoning Province, the first-instance verdict of Xie Yalong bribery case in Liaoning Province, and the verdicts of some other major cases, the analysis of the legality of evidence in their grounds of the decision cannot really remove the reasonable doubt on the legality of evidence collection.

26 Above n 22, 99 and 186.

‘Beyond reasonable doubt’ should be used as a standard of proof as well as a method of proof. In the Chinese *Criminal Procedure Law*, ‘beyond reasonable doubt’ is a standard used to judge whether the facts are clear and whether the evidence is credible and sufficient. This standard should be referred to in the weighing of evidence and in the decision of facts. At the same time, the process of removing reasonable doubt is the process of forming inner convictions; thus, this standard is also a method of proof, or an approach to forming inner conviction.²⁷ In the evaluation of evidence, this approach is embodied in the removal of doubts or removal of contradictions. Where there is a contradiction, there is a doubt. The process of solving contradictions is the process of removing doubts, and the process of forming an inner conviction.²⁸

The steps in removing doubts are: First, find doubts. Examine the evidence and facts to find out doubts and contradictions. Second, test and verify doubts. Use personal experience and the laws of logic to test and verify doubts to see if they are reasonable. If there are contradictions, see what kind of contradictions they are, whether they are fundamental contradictions, whether they can be reasonably explained, whether they can be solved. Third, remove doubts. See whether the doubts and contradictions can be removed through comprehensive analysis and further collection of evidence and thus reach a final decision on facts.

As an interpretation of the standard of proof for conviction, ‘beyond reasonable doubt’ can be applied in various types of cases and different stages of the proceedings. But there can be some flexibility in the application of this standard according to different situations.

The summary procedure starts from the premise that the defendant admits his/her guilt and the main criminal facts be uncontested. The main purpose of this procedure is to simplify the proof process; thus, there is no need to apply the standard of proof in the general criminal procedure. As has been discussed above, there is a difference in the degree of proof between ‘beyond reasonable doubt’ and ‘clear facts with credible and sufficient evidence’. In summary procedure, the standard of ‘beyond reasonable doubt’ can be applied instead of the standard of ‘clear facts with credible and sufficient evidence’. In other words, even if there is not sufficient corroboration of evidence, so long as the existing evidence can prove the facts of a case to the degree of ‘beyond reasonable doubt’, a final decision can be made. However, in death penalty cases, although the standards of ‘clear facts with credible and sufficient evidence’ and ‘beyond

27 Method of evidence evaluation can be regarded as one of the essential methods in the science of evidence. The major features and key points of it are: first, proof goes from external channels to internal channels; second, the modes of proof are introspective; third, the target of evidence evaluation is to reach an inner conviction of the fact finder, i.e. to make the fact finder think his/her conclusion is truthful; fourth, the premise of the probative process is a presumption that people are ‘rational’. See Long Zongzhi, ‘Establishment of “General Science of Evidence” and its Principles’ (2006) 5 *Chinese Journal of Law*.

28 See Long Zongzhi, ‘On Evidentiary Contradictions and Ways to Analyze Contradictions’ (2007) 4 *China Legal Science*.

reasonable doubt' are both applied, the actual requirement of the degree of proof should be the strictest. If probability is used to express such requirements, death penalty cases should have the highest probability, such as the highest degree of understanding that humans can reach. Decisions on fundamental facts of a case, especially facts about the subject of a crime and the objective circumstances of a crime, should reach the degree of 'a hundred percent convinced'.

Similarly, the above mentioned statutory standards of proof are also applied to different stages of the procedure, such as conclusion of investigation, review of indictment, court trial, so as to guarantee the unity of procedure and the quality of case handling. But since the litigious functions of different stages of the procedure and their requirements of evidence are different, there should be some differences in the practical application of the standards of proof. The investigation is a closed and unilateral stage, and the certainty of facts is relatively low; the review of indictment examines the objectivity of evidence and facts, but due to the lack of cross-examination, the certainty of facts is higher than that of the investigative stage but lower than that of the trial stage. Trial is the final stage in the application of proof standards, and the decision on facts of a directly leads to application of law and substantive punishment. Therefore, the requirement of accuracy in fact-finding and certainty of facts is by the highest standard, and case handlers should obey the strictest rule in their application of the standard of proof.

In the application of the standard of 'beyond reasonable doubt', the empirical rules and the Chinese experience should be used in 'removing doubts'. Although there exist varied requirements during the application of the rule of 'beyond reasonable doubt' as has been discussed above, because the essence of its application is judgment by experience and it is based on empirical rules, in judicial practice, the most convenient and effective way is to resort to experience, common sense, general rules and reason. Therefore, even a common citizen with normal ability of thinking and necessary life experience is able to make a reasonable judgment, including reasonable doubt, depending on his/her common sense, general rules, reason and experience. This is the simple way to apply the rule of 'beyond reasonable doubt'.

As a legal concept and legal rule, although it comes from foreign legal ideas, legal rules and legal experience, the understanding and application of it should not be artificially complicated. It should be combined with China's long judicial experience. The judicial experience involves the doubt analysis and contradiction analysis, which have been discussed above. In the past, case handlers would say that there were doubts on certain circumstances of a case, or there were contradictions. Actually, what they meant was that there existed reasonable doubt on the facts of the case. For example, in a case of malicious injury, if the instrument of crime does not match the wound, there is a reasonable doubt on the instrument of the crime or even on the fundamental facts of the whole case. Another example is if the defendant can provide detailed information

of the time, subject, process and method of an illegal interrogation, but the prosecuting organ cannot provide necessary evidence to deny it, there is a reasonable doubt on the legality of the interrogation.

The stipulation of the rule of ‘beyond reasonable doubt’ in China’s law requires the rational examination of doubts and contradictions to be more cautious in proof and fact-finding. However, the basic judgment in fact-finding is still based on common sense, general rules, reason and experience. The combination of the rule of ‘beyond reasonable doubt’ with China’s judicial experience in doubt analysis and contradiction analysis is an effective way to guarantee the quality of adjudication by evidence.

It is necessary to properly interpret the rule. There is still disagreement on whether it is necessary to further interpret the rule of ‘beyond reasonable doubt’ and whether it is possible.²⁹ Surely, it is necessary to further interpret the rule, whether in the form of jurisdictional interpretation or in the form of academic interpretation. This is because the connotation of legal concepts are often multifocal and variable; thus, besides ‘achieving preciseness by defining’, further interpretation will help people understand them. In addition, because China lacks the legal tradition of litigious rationalism, lawyers as well as the personnel of investigative organs, prosecuting organs and people’s courts are poorly educated in legal rationalism and do not understand the concept of ‘reasonable doubt’.

However, in Western countries, ‘rational people’ and various requirements of legal rationality are the premise and basic requirements of behaviour liability law.³⁰ Hence, in Western countries legal workers are usually well educated in legal rationality. For this reason, it is important to further interpret ‘reasonable doubt’ and the removal of it. After the amendment of the *Criminal Procedure Law* was passed in March 2015, a question is constantly asked during the study of the new law in judicial organisations: what is a ‘reasonable doubt’ and how to remove it? This question should be answered through jurisdictional interpretations. It should be admitted that the production and removal of ‘reasonable doubt’ is to essence the use of empirical rules, and jurisdictional interpretations and academic interpretations are of limited value. But a proper interpretation may lead to a better understanding and application of this rule in judicial practice.

As to the interpretation of the rule, China can borrow from foreign interpretations that have been formed in their long judicial practice. The key is to interpret the concept of ‘reasonable doubt’. With reference to foreign experience, the following points need to be noticed in the interpretation of the rule: first, a ‘reasonable doubt’ is based on careful and prudent analysis of all the evidence of the case. Careful and prudent analysis

29 For example, Yi Yanyou holds that “‘beyond reasonable doubt’ is in itself a quite straightforward expression, and any further interpretation may end up making it more complicated and confusing’. See Yi Yanyou, *The System and Essence of Evidence Law* (Peking University Press, 2010) 31.

30 See above n 17, 656.

of evidence can avoid brash and irresponsible questioning. It should be noted that one may have a 'reasonable doubt' on some individual pieces of evidence by intuition or sheer experience.³¹ But concerning the comprehensive judgment of all the evidence of a case, a fact finder can never simply resort to one's 'feelings', but should do it through logical analysis and reasoning. Second, 'reasonable doubt' should be based on concrete evidence so that it is logical and can be tested. Third, 'reasonable doubt' should conform to experience and logic, which is a substantive and basic requirement. Empirical rules are the basis for the application of 'beyond reasonable doubt' as a standard of proof and a method of proof. Besides, logic rules, such as logic consistency, should also be obeyed. Fourth, 'reasonable doubt' should be powerful enough to challenge the decision of facts. It is quite normal if there are some doubts or contradictions in the comprehensive judgment of evidence of the whole case. Sometimes the evidentiary information is too identical and no doubt or contradiction can be found, but, actually, this may be a sign of false evidence.³²

Sometimes the final decision of a case can be made even if there are some doubts or contradictions because such doubts or contradictions cannot shake the fact finder's conviction. Only those doubts that can shake the fact finder's conviction are 'reasonable doubts'. Through jurisdictional interpretation, a fact finder can stipulate: a 'reasonable doubt' mentioned in Article 53, Paragraph 2 of the *Criminal Procedure Law* is based on the careful and prudent analysis of the evidence. It has concrete grounds and conforms to experience and logic rules, and is powerful enough to shake the conviction of the fact finders.

Beside the interpretation of 'reasonable doubt', it is also necessary to further define and explain the 'removal of reasonable doubt'. On the one hand, removal of reasonable doubt should be based on the objectivity of facts and can be tested, so as to avoid arbitrary application of the standard; on the other hand, the removal of reasonable doubt should be thoroughly expounded in the court verdict. In other words, the process of forming an inner conviction should be displayed, so as to guarantee the quality of judgment by evidence.

It is important to interpret the standards of proof and promote their implementation through judicial precedents. Definition and semantic interpretation can guide the direction of thinking, but fact-finding characterised by free evaluation of evidence depends mainly on the application of empirical rules and practical rationality. Therefore, the value of definition and semantic interpretation is limited. As specific examples of the application of empirical rules and practical rationality, judicial precedents are of greater help to the understanding of standards of proof. It is too well known that

31 See Michael D Bayless, *The Principles of Law: A Normative Analysis*, translated by Zhang Wenxian et al (ECPH, 1996) 4-12.

32 See above n 14, 92.

judicial precedents are extremely significant to the establishment and implementation of evidentiary rules in common law countries.

Even in Continental countries, such as Germany and Japan, the significance of precedents to the application of evidentiary rules is also commonly recognised. It can be said that in foreign countries, judicial precedents instead of semantic interpretation guide the application of standards of proof and methods of proof. While in the judicial practice of China it is long held that the judgment of probative value and the use of standards of proof are judgments by experience, they are hard to interpret and usually handled vaguely. Although the system of guiding precedents is tried out in Chinese courts, few precedents concerning evidence law have been put out, and precedents concerning the judgment of probative value and the comprehensive evaluation of evidence are even fewer. To increase the practicality and effectiveness of the standard of 'beyond reasonable doubt', it is necessary to strengthen the guiding precedent mechanism and use judicial precedents of higher courts to help interpret and implement this standard. The stipulation of 'beyond reasonable doubt' reflects the requirement of meticulousness in the probative process, and judicial practice should meet this requirement. The Supreme Court should play a guiding role through putting out guiding precedents, and the academic circles should also help push forward this work.

Proper procedure and evidence law should be used to guarantee the effectiveness of the standard. Experience from abroad shows that the most protruding problem in the application of 'beyond reasonable doubt' as a standard of proof is that it is too abstract and hard to grasp; thus, it is not so effective and practical. Therefore, in addition to necessary interpretation, China needs to combine it with relative procedure and an evidentiary system, so that it can be implemented effectively in practice. To do so, the process of forming inner conviction should be unfolded to the public in the paper of judgment. Criminal trials in China are carried out by professional judges instead of juries, who simply give their conclusions without demonstrating the reasons for such conclusions.

Thus, in China, judges should display their grounds for their inner conviction, including their reasonable doubt and the removal of reasonable doubt. An analysis of evidence should be written in the paper of judgment. Although this is required by the Supreme Court, in practice, the grounds of a decision written in the paper of judgment are mainly about the application of law, while the process of fact-finding is not sufficiently expounded. Since forming an inner conviction is to some extent a subjective process, some judges are afraid that their thinking process would be questioned, and some other are not good at evidentiary analysis; hence, they tend to give sketchy explanations of the process of their inner conviction. Even in some disputed cases, the judges do not cautiously analyse the disputes on evidence, but simply adopt some of the evidence and then pronounce that the evidence for their conclusions is 'credible and sufficient'.

In practice, it is rare to see papers of judgment which thoroughly expound such issues as the forming of inner conviction, the removal of doubts, with evidentiary theories and even epistemological theories. The amended Criminal Procedural Law uses the finding and removal of 'reasonable doubt' as the standard for and an approach to the evaluation of evidence; thus, it imposes new requirements in the forming of inner conviction. To display the process of the formation of inner conviction is an important way to train judges' minds of evidence, cultivate their ability of evidentiary analysis, prevent arbitrary decisions and guarantee the objectivity and testability of judgments.

Another necessary element is that China should establish and improve a mechanism to test the application of the standard of proof and guarantee the rationality and effectiveness of the review of facts. In those countries that have the review of facts, examining how inner convictions are formed and whether there exists reasonable doubt is an important systematic approach to safeguarding the quality of inner conviction and preventing arbitrary subjective decisions of the judges at first instance of trial. This is also the case in China. This approach works closely with the above-mentioned approach of demonstrating the formation of inner conviction in the paper of judgment. The demonstration of the formation of inner conviction can not only make the paper of judgment easily accepted by the litigants and the public, but also help the court to test such inner conviction during the trial on appeal.

In China, the trial on appeal, retrial, and the review of death sentences all review the decisions of facts as well as the application of law, and the mechanism to test inner convictions has already been included in the procedure; thus, one does not need to especially stress on the test of inner conviction in such remedial procedures. Another point to be noticed is that the court should be very cautious in the review of facts in the remedial procedures. The accuracy of fact-determination mainly depends on the correctness of trial at first instance,³³ while the conditions for the evaluation of evidence in the trial at second instance and subsequent procedure are not as good as those at the first instance. Therefore, higher courts cannot think themselves wiser than lower courts simply because of their higher grade of trial,³⁴ and thus neglect the reasonable grounds for a decision at first instance and casually change the original sentence. In addition, courts should be cautious during the assessment of the quality of case handling in their trial management work, because such administrative assessment has even poorer

33 While in many other countries, research of evidence for a great number of cases which expound in detail their analysis of evidence can be easily obtained, in the research of evidence in China, there are hardly any such cases. In practice, judges seldom express and explain their reasonable doubt on the illegally collected evidence. On the one hand, because China's courts do not have independence of jurisdiction, they do not have the courage to challenge the police, the procuratorates and the discipline inspection commissions; on the other hand, they are not willing to exclude such evidence because although the evidence is collected in illegal ways, they believe it to be truthful.

34 See Long Zongzhi, 'Establishing a System of Fact-Finding Centered on the First-Instance Trial' (2010) 2 *China Legal Science*.

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conditions for the test of inner conviction. Such assessment of the reasonableness of the inner convictions of judges can easily lead to the arbitrariness of judgments, which is quite obvious.

THE FOUNDATION AND
OPERATING ENVIRONMENT OF CROSS-
EXAMINATION RULE: A PROPOSAL FOR
REFORMING THE CHINESE RULE

HUA SHANG¹ AND MING LI²

ABSTRACT

As a 'legal engine' which helps to discover the truth, cross-examination plays an important role in fact-finding. Cross-examination requires its operating environment, including the adversary system, the system of witnesses testifying in court, the pre-trial information shielding mechanism and so on. If there is a lack of these preconditions for operation, cross-examination usually takes an 'idling' form. It has already been reflected on the operating practice in some civil law countries. In China, the current Criminal Procedure Law absorbed related contents of cross-examination from common law system countries, established the cross-examination rule and defined the mode and order; but the effect of operating practice is unsatisfactory — the main reasons lie in the fact that China lacks the operating environment of cross-examination. Thus, it is necessary to implement 'equal arm' and strengthen confrontation between the prosecution and

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defence; improve the system of witnesses testifying in court; strengthen the pre-trial information shielding mechanism; and set up the principle of trial centrality.

I. INTRODUCTION

What is cross-examination? *Black's Law Dictionary* defines it as

the questioning of a witness at a trial or hearing by the party opposed to the party who called the witness to testify. The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admission that weaken the testimony. The cross-examination is allowed to ask leading questions but is traditionally limited to matters covered on direct examination and to credibility issues.³

Cross-examination originated in Britain and gradually spread to the United States and other countries. As an important rule, it was widely established and executed. Cross-examination centres on witness's testimony and undermines the fact finder's admission of testimony by questioning the credibility of the witness and bringing out contradictions in testimony. As an important procedure rule, cross-examination plays a significant role in fact-finding, protecting human rights and so on. The effective function of cross-examination requires a series of fundamental environments, such as the adversary system, witnesses appearing in court and the information shielding mechanism before the court trial. In China, legislation has already primarily established the rule of cross-examination, but due to lacking the operating environment, the effectiveness is not satisfactory.

II. FUNCTION OF CROSS-EXAMINATION

A. Serving as a 'Legal Engine' That Helps to Discover the Truth

Judicial decisions should, as much as possible, discover a case's truth. This is a basic requirement for criminal evidence law. To discover the truth, human society has adopted a variety of methods, from divine judgment, regulated proof to free proof, each of which reflects the pursuit for truth. Fact-finding is indispensable from cross-examination, just as Wigmore said, 'Cross-examination is undoubtedly the greatest legal engine ever invented for the discovery of truth'.⁴ In the common law system, countries attach great importance to cross-examination of witnesses and develop a set of effective cross-examination rules. In order to ensure the credibility of witness's testimony, impeachment and rehabilitation of the witness are also important factors in common law countries. In the inquisitorial system, countries also pay attention to the judge's questioning of

³ *Black's Law Dictionary* (Thomson West, 8th edn, 2004), 405.

⁴ John H Wigmore, *Evidence in Trials at Common Law*, 1 Tillers Review (Boston, 1983) 608.

witnesses although real adversarial trials are not available in these countries. Through cross-examination dominated by judges, the review of evidence is achieved to further discover the facts of a case.

B. Serving as a ‘Booster Rocket’ That Helps to Achieve Judicial Justice

Roscoe Pound once said, ‘Factual finding is a difficult process in which so many errors may occur. Wrong factual findings have led to many erroneous judgments’.⁵ In order to reduce erroneous judgments, a rational mechanism for fact-finding must be established. The fact-finding of a case should be based on rational proof procedures, and cross-examination is an important ‘safety valve’ that helps to achieve judicial justice. Cross-examination ensures the neutrality of the fact finders and helps them listen to both sides. In the modern judicial process, the judge plays the role of a neutral referee. If both parties cannot conduct effective cross-examinations, it is difficult for the judges to accurately find the facts of the case. Cross-examination is also an important manifestation of participatory procedures. American scholar Lon Fuller incisively pointed out that ‘the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favour’.⁶ Cross-examination is a confrontation of unfavourable evidence, which suffices to affect the formation of the verdict and reflect the litigant’s rights in the real sense.

C. Serving as a ‘Safety Valve’ to Protect Human Rights

‘If the Government does not take rights seriously, then it does not take law seriously either.’⁷ Cross-examination is an important method for litigants to protect their substantive and procedural rights. Defendants not only have the privilege against self-incrimination, but also some comparatively proactive rights, such as the confrontation right. The confrontation right has already become a constitutional right in some nations. For instance, the Sixth Amendment to the United States Constitution sets forth the defendants’ confrontation right. Similar provisions are found in Article 37(2) of the Constitution of Japan, and these rules request judges to ensure the effective operation of the confrontation right. With the establishment and operation of cross-examination in many countries, some international conventions established a confrontation right successively. For example, Article 14(3)(e) of the *International Covenant on Civil and Political Rights* provides: ‘To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’. And similar provisions are found in the

5 Roscoe Pound, *Social Control through Law* (Transaction Publishers, 1997) 29.

6 Lon Fuller, ‘The Form and Limits of Adjudication’, [1978] 92 *Harvard Law Review* 364.

7 Ronald Dworkin, *Taking Rights Seriously* (Gerald Duckworth & Co Ltd, 1997) 247.

Article 6(3)(d) of the *European Convention on Human Rights* and Article 8 of the *American Convention on Human Rights*.

III. THE OPERATING ENVIRONMENT OF THE CROSS-EXAMINATION RULE

A. The Adversary System

The cross-examination rule is based on the confrontation between the prosecution and the defendant. In the process of examination, witnesses are generally divided into the two groups. If the witness is summoned by the defence to testify, the defence (the defendant or defence attorney) will put questions first, which is known as direct examination. The prosecutor can impeach the witness and check the testimony after direct examination, which is known as cross-examination. The process can also go further. In other words, the defence can inquire into problems related to the cross-examination in order to gain the most litigation interest for the defendant. If the witness is summoned by the prosecutor, the prosecutor has the right to interrogate first, then the defence will query later. The conversion of attacking and defending between adverse parties has become a basic feature of cross-examination in common law system countries.

Cross-examination is in accordance with the adversary system, and the feature of a court trial is an active confrontation between the prosecution and defence. The discovery of the truth often comes from confrontation and contradictions. In the adversary system, the prosecution and defence shall be treated fairly and equally in the litigation, which will prompt the two groups to participate actively and help the case be entirely cleared in the process of confrontation. As academic Jenny McEwan says:

In theory, the adversarial system gives the fact-finder the advantage of utter impartiality arising from his or her ignorance of the case. Although it is not the responsibility of a party to present the tribunal with the truth, only with his or her case, it is argued that the vigorous pursuit of evidence to serve the same interests, when added to that of the opponent, is an effective means of discovering the truth, particularly since the tribunal witnesses the attack by each side upon the evidence of the other.⁸

The defence effectively exercises its litigious right through presentation and cross-examination.

Without the environment for the adversary system, it will be hard for the cross-examination rule to work. In German trial practice,

the cross-examination based on the common law system cannot be employed, which coincides with German documents. Even cross-examination is referred as Fremdkörper. Therefore, Wechselverhör has been formed in the German court trials. That means the chief judge first interrogates and then other participants in the criminal proceeding put questions in turn or supplement other questions.⁹

⁸ Jenny McEwan, *Evidence and the Adversarial Process* (Blackwell Publishers, 1992) 6.

⁹ 林钰雄 [Lin Yuxiong], 《严格证明与刑事证据》 [Strict Proof and Criminal Evidence] (法律出版社 [The Law Press], 2008) 210.

Wechselverhör is not strictly designed to follow the adversary system. Instead, trial participants, under the leadership of the judge, jointly explore and discover the truth of the case. German law does not strictly divide the litigant participants into two different groups of the prosecution and defence, so it is difficult to operate the cross-examination in practice.

In France,

[t]he art of cross-examination has but a spark of life — No one seems to know how to dissect a statement into its component parts, find out hidden contradictions, and cut through equivocations, generalizations, or hearsay to the essence of facts within the witness's own knowledge.¹⁰

In Germany,

[a]lthough the law stipulates that the witness and expert witness nominated by one party concerned can accept the direct examination and cross-examination from both parties, it has never been used. It may be relevant to the role arrangement in the traditional trial: the chief judge may regard the inquiry by the party as usurping his position and even a signal that distrusts his ability to inquire.¹¹

The lack of a litigation environment for the adversary system makes it hard for cross-examination to operate.

B. The System of Witness Testimony in Court

One of the preconditions for cross-examination requires the appearance of the witness in court. Those with personal knowledge in the case should testify in court and accept cross-examination. In this way, the credibility of the witness will be tested, and the judge will review the contents of testimony. But if the witness who is absent from the court trial is replaced with various written testimonies or notes, cross-examination will not be able to play its due role.

In common law system countries, the hearsay rule is one of the important evidence rules. In principle, hearsay is not admissible, but there is a certain number of exceptions. One of the significance of the hearsay rule lies in the fact that it can ensure the witness appearance in court and cross-examination. The Circuit Court in District of Columbia, US, briefly explained the key to the hearsay rule: 'The problem of the hearsay is that it deprives the defendant of his opportunity to cross-examine the witness who gave the controversial statement'.¹² The hearsay rule requires that the witness should testify in court in person, which is required by cross-examination and it is gradually recognised by British and American scholars.

10 ACWright, 'French Criminal Procedure', [1929] 45 LQR 99.

11 Thomas Weigend, *German Criminal Procedures*, trans Yue Liling and Wen Xiaojie, (中国政法大学出版社 [China University of Political Science and Law Press], 2004) 144.

12 *United States v Evans*, 216 F.3d 80, 84 (D.C. Cir. 2000).

In the inquisitorial system countries, the trial principle of directness and verbalism has been proved as one of the most important trial principles. The judge should make a decision based on evidence which was confirmed by himself in the court. The procedure of court trial, especially the proposition and argument of evidence, should be presented verbally. Although they can achieve the same effects through different means, the directness and oral presentation principle and the hearsay rule both order that the witness should appear in court in person. Direct trial and verbal trial are beneficial to finding the fact of the case accurately. The principle of directness and oral presentation has been applied in many Continental law countries, for instance Article 226¹³ and 250¹⁴ of the *Criminal Procedure Law* in Germany, and Article 452¹⁵ in the *Criminal Procedure Law* of France.

To ensure the effectiveness of cross-examination and court investigation, court proceedings should be carried out verbally. And the presentation and argument of evidence should be carried out with statement and inquiry. As Gustav Radbruch pointed out:

The fatal weakness of file doctrine lies in that written record cannot cover the entire statements. All the minute differences and indescribable contents such as abnormal behaviour, nervousness and anger of the defendant, the unwilling pause in presentation and the fluency and rapid reciting beforehand have completely disappeared in the monotonous official record.¹⁶

In a court trial, only when the witness appears in court and makes a presentation and accepts the cross-examination from the opposite party can the judge find the fact of the case accurately on the basis of combining the presentation and overall observations.

C. The Information-Shielding Mechanism before the Trial

Without an effective information-shielding mechanism before the trial, the judge will find it hard to ignore the information provided in the file obtained ahead of the trial. Therefore, it is difficult for cross-examination to work effectively.

The subterranean influence of the file has an important — though seldom acknowledged — bearing on Continental trial practice. Consider some of the manifestations. Since records of prior fact-finding can be used by the presiding judge to stabilize proof-taking at trial — using them as a script to guide witnesses

13 Art 226 of the German *Criminal Procedure Law*: ‘The trial should be carried out on the conditions that the judges, prosecutor and a clerk from the court secretariat should be on the scene incessantly’.

14 Art 250 of German *Criminal Procedure Law*: ‘In the trial the examination should be taken if the proof of facts is established on the perception. The examination is not allowed to be replaced by reading former record of question or written deposition’.

15 Art 452 of French *Criminal Procedure Law*: ‘The witness is required to provide oral testimony. However, as an exception, the witness could testify through written document if permitted by the chief judge’.

16 Gustav Radbruch, *Leading Principles of Law*, trans Mi Jian and Zhu Lin (中国大百科全书出版社 [Encyclopedia of China Publishing House], 1997) 125.

through their testimony, for example — techniques and attitudes necessary to cope with genuinely fresh evidence have little fertile ground on which to develop and be cultivated.¹⁷

With the revision of the *Criminal Procedure Law* of Italy and other countries, the judge has been under strict scrutiny to obtain information from files, which prompts the judge to pay more attention to the application of evidence technology in court trial.

Taking Japan as an example, the courtroom examination usually applied the form of cross-examination (the content following Article 199(2) of Japanese *Criminal Procedure Rule*). Due to the adoption of the indictment-only doctrine, the operation of inquiring with judicial authority has become rather difficult. This issue has great impact on the progress of strengthening cross-examination in judicial practice.¹⁸ According to the findings of Taiwan scholars, Japan still follows the judge inquiry system in *Criminal Procedure Law* in the wake of World War II with the exception of cross-examination. As indictment-only doctrine was used, the judge had no evidence before the trial and failed to inquire. As a consequence, the Criminal Procedure Rule of Japan was amended against cross-examination in 1957 (Showa 32).¹⁹ In line with Japanese legislation and practice, only by establishing an effective information shielding mechanism before the trial and cutting off the judge's dependence on the file can it be ensured that court evidence technology like cross-examination has the possibility to function effectively.

IV. OPERATIONAL PROBLEMS AND COUNTERMEASURES OF CROSS-EXAMINATION RULE IN CHINA

A. Current Situation and Problems

The Amendment of Chinese *Criminal Procedure Law* (1996) absorbed related contents of cross-examination from common law system countries, establishing for the first time the cross-examination rule and defined the mode and order. These rules are employed in *Criminal Procedure Law* (2012) sequentially. However, cross-examination rule in China takes on its own distinctive features because of the difference in tradition of litigation background.

From the perspective of juridical practice, the operation of cross-examination in China has the following problems. First, the order of examination does not apply to a plurality of litigant participants. Chinese *Criminal Procedure Law* and the *Judicial Interpretation of the Supreme People's Court on Criminal Procedure Law* basically established the prosecution-and-defence-dominated court examination; however,

17 Mirjan R Damaska, *Evidence Law Adrift* (Yale University Press, 1986) 72.

18 Xi Yuan Chun Fu, *The Formation and Characteristics of Criminal Law of Japan*, trans Li Haidong (中国法制出版社) [China Legal Publishing House], 1997) 178-9.

19 'Study on the parties to the litigation system of court activities', Annual Report of TaiWan Judicial Research (台北: 司法院秘书处) [Taipei: Secretariat of the Judiciary], 20th Series, 2000) 34-5.

in practice, witness for the prosecution or defence is not strictly defined, and the examination of prosecution and defence is not strictly differentiated either. Second, the disputed point of court examination is indeterminate. The scope of cross-examination is not strictly defined, which may deviate from the disputed point. Third, leading questions are absolutely prohibited, and direct examination and cross-examination are not distinguished. The effect of cross-examination will be weakened without leading questions. Fourth, although the legislation gives both sides equal power of examination, in practice, the defence is more limited.

B. The Causes

The occurrences of the abovementioned problems are for the lack of related legislation seemingly, but the more significant reason behind it lies in the fact that China lacks the basis and the environment for the cross-examination rule.

The first problem is the lack of a sufficient operating environment as in the adversary system. In China, with the continuous deepening of the reform of the trial mode, the trial activities have strengthened confrontation between the prosecution and the defence, and the judge has to assume the identity of the neutral arbiter. While at the same time, compared with the confrontation litigious environment in the common law system, China's trial activities are endowed with a stronger authority principle. First of all, the Chinese judge has larger commanding power in proceedings. The prosecutor, defendant and advocate can question the witness and appraiser, but the premise is that they should get approval from the presiding judge. The presiding judge can control the questioning process from the beginning to the end. Second, Chinese prosecutors are required to assume more obligations of objectivity. Third, China's equal confrontation between two adversaries in trial is not distinctive. In the common law system, litigant participants can generally belong to the prosecution and the defence. Although China's cross-examination is mainly based on the prosecution and defence, it is not strictly divided into two adversaries on the mode and order, and the prosecution witness and the defence witness are not strictly distinguished.

The second problem is that it is difficult for witnesses to appear in court. It is stipulated in Article 190 of the *Criminal Procedure Law* how testimony can be provided in the witness's absence in court, namely, 'written testimonies shall be read out at court'. The provision has also cleared the testifying procedure for witnesses who do not appear in court and therefore reserved a legal space for witnesses who do not appear in court. In practice, witnesses not appearing in court has become China's ordinary judicial phenomenon, and the embarrassing reality is this: ordinary court trials are full of written testimonies and all kinds of notes, and the witnesses are unwilling to testify in court. If witnesses do not appear in court, the premise and basis of cross-examination does not exist, and the cross-examination cannot be conducted, so the fact finder struggles

to directly and comprehensively review the credibility of the witness. In such a case, although it is legally provisioned in the cross-examination procedure, the operational effect is not good. It is almost a mere formality.

The third problem is the pre-judgment caused by the file transfer system before trial. In the amendment of the *Criminal Procedure Law* (1996), in order to reduce the judge's pre-judgment, China changed the regulation on the Procuratorate's transfer of all files to the court before trial; it stipulated that only 'the name-list for witnesses', 'directory of evidence' and 'copies and photos of main evidence' can be transferred. But because of the influence of the inquisitorial tradition, the effect of this legislative amendment is counteracted by two kinds of practical methods: one is that the Procuratorate has the definition power of what main evidence is handed over through judicial explanation of the Supreme People's Procuratorate and therefore changes 'main evidence' into 'key guilty evidence' in practice; and another is that the Procuratorate changes the transfer before the court hearing to the transfer after the court hearing; however, fact finders rely on files having not changed fundamentally, so that the trial functions and the effectiveness of cross-examination are hard to be achieved. In 2012, the *Criminal Procedure Law* restored the system²⁰ for all files transferred before trial, 'which makes China's Criminal Justice System come back to the "original point" in 1979, it also marks that system reform exploration which started in 1996 has failed'.²¹ The recovery of the all-file-transfer-system before trial may cause the judge's dependence on the files in court more than ever before, and the factual investigation in court may become less essential.

The fourth problem is that the prosecution and defence lack necessary training and ability. Cross-examination is an important technical method for factual investigation in court, and its performance effect is related to a great extent to the operator's ability. In China, Taiwan once conducted an empirical study on the cross-examination system design and arranged with the Banqiao Local Court to conduct the pilot project. One of the important research results was that the prosecution and lawyers had inadequate abilities, which affected the performing effect of cross-examination, and they therefore emphasised the need to provide effective training and preparation for cross-examination. The effective operation of cross-examination is only possible when the operators have a high level of ability; however, on China mainland, the judges dominate the court trial, so a court trial is centred on the written testimony and notes, and accordingly, the defendant is incompetent to participate in the trial. The lack of necessary training for

20 'Where a people's procuratorate deems that the facts of a criminal suspect's crime are clear, that evidence is hard and sufficient, and that the criminal suspect shall be subject to criminal liability, it shall make a decision to initiate a public prosecution; and, according to the provisions on trial jurisdiction, initiate a public prosecution in a people's court and transfer the case file and evidence to the people's court'. See art 172 of 《中华人民共和国刑事诉讼法》 [*Criminal Procedure Code of the People's Republic of China*] (People's Republic of China) National People's Congress, 1 July 1979.

21 陈瑞华 [Chen Ruihua], 《案卷移送制度的演变与反思》 [Evolution and Introspection of Files Transfer System], (2012)5 政法论坛 *Political and Legal Forum*.

prosecutors and lawyers has become one of the important factors hindering the effective operation of cross-examination.

C. Countermeasures

In order to effectively solve the abovementioned problems, China's cross-examination rule needs to be improved in the following aspects: the first is to standardise the court inquiry subject and to clear the inquiry order. The second is to further define the nature of the examination, and to allow the use of leading questions in the cross-examination, but restrict the use of leading questions in the direct examination. The third is to scientifically establish the scope of cross-examination. It is suggested to modify Article 189 of the Chinese *Criminal Procedure Law* and Article 213 of the *Judicial Interpretation of the Supreme People's Court on Criminal Procedure Law* to set the scope of direct examination in relation to the case, to limit the scope of cross-examination for witnesses to the matters on testifying in the direct examination and its credibility matters.

In order to ensure the effective operation of China's cross-examination rule, the environment for the adversary system must be further strengthened, and the relevant supporting measures shall also be improved. Only with a good institutional basis and operating environment can China's cross-examination rule be likely to have an actual effect.

The first measure is to implement 'equal arm' and strengthen the confrontation between the prosecution and defence. From the judicial practice at present, the main problem of China's cross-examination rule lies in the lack of an adversary system environment and the related supporting system. As required by the adversary system, both the prosecution and defence shall have equal abilities to realise the equal confrontation, and the 'equal arm' shall enable equal litigation rights. Such a kind of 'equal arm' can ensure meaningful participation of the prosecution and defence in court activities to conduct equal presentation, argument and confrontation as well as avoidance of the verdict against themselves.

The second measure is to improve the system of appearance of witnesses and appraisers. One of the basic preconditions for the operation of cross-examination is that the witness testifies and then accepts cross-examination from the prosecution and defence in court. In the common law system, there is the statement: 'no witness, no litigation'. In order to ensure the effective operation of cross-examination, it is necessary for the witness to appear in court. In 2012, China's *Criminal Procedure Law* improved this point in its amendment, making clear that the witnesses and appraiser have the obligation to appear in court and guaranteed the personal safety and economic compensation of the witness to testify. Besides, the expert auxiliary system was established. However, there are many problems in practice, and the difficulty of ensuring the witness attendance has

not been fundamentally solved;²² therefore, the legislation related to witness attendance still needs to be further implemented.

The third is to strengthen the pre-trial information shielding mechanism. In order to accurately ascertain facts, fact finders must base their decision on the verified evidence in trial instead of files before trial, so pre-judgment must be excluded and shielding mechanism for pre-trial information must be strengthened. It is suggested that two paths are adopted: one which is to abolish the system of all-files-transfer before trial and then implement the ‘indictment-only doctrine’ long-term, to avoid the effect prejudicial information being received before trial and the improper tendencies it may promote. And the other is to separate trial judge and investigating magistrate to reduce pre-judgment by the trial judge at the premise of 2012 China’s recovery of all-files-transfer. The investigating magistrate can read the file and deal with some affairs before the trial, but the trial judge is not allowed to read the file in advance, and thus will only find facts according to the verified evidence in court instead of files before the trial.

The fourth measure is to set up the principle of trial centrality. Pre-trial procedure is the preparation for trial, and the trial is the centre of the whole proceedings. Fact finders shall ascertain facts of the case according to evidence presented and questioned in court, and the evidence obtained before trial shall also need to be fully questioned, cross-examined and judged. The principle of trial centrality has been accepted by most countries under the rule of law, thus effectively promoting the essence of trial and the effectiveness of the cross-examination. In China, the trial procedure, investigatory procedure and prosecution procedure are ranked as the independent litigation stage. In practice, the investigatory procedure plays a more important role in the fact-finding than the trial, and a large number of written testimonies and various notes are shown in court, so that cross-examination and court investigation are hard to be operated efficiently. In order to change the current difficulties, the ‘assembly line’ of investigation, prosecution and trial must be changed and instead focus on the court hearing. This way, fact-finding shall be established on the basis of evidence through court trial and judgment.

V. CONCLUSION

Looking to the future, it is necessary to guarantee the effective operation of cross-examination rule in order to realise the scientific fact-finding in China. The important change to be made is to determine how to optimise the operational environment of the cross-examination rule, especially to further implement the following aspects: implementing ‘equal arm’ and strengthen the confrontation between the prosecution

22 万毅 [Wan Yi], 《评中国新刑事诉讼法证人出庭制度》 [Discussion on Witness Appearing in Court System in China’s New Criminal Procedure Law], in 《第四届证据理论与科学国际研讨会论文集》 [*Proceedings of the 4th International Conference on Evidence Law and Forensic Science*] (中国政法大学出版社 [China University of Political Science and Law Press], Volume 1, 2014) 338.

and defence; improving the system of attendance of witnesses and appraisers; and strengthen the pre-trial information shielding mechanism. Only then, the accuracy in terms of fact-finding in China can be realised.