Reform of Criminal Evidence System in China

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It is a significant base of the criminal procedure to ascertain the facts of criminal cases by using evidence. Over the past few years, some wrongful convictions have unveiled a series of problems in China's judicial practice, and challenged China's current system of criminal evidence. Accordingly, the reform and improvement of China's system of criminal evidence have become a task of top priority.

I. The legislative mode of criminal evidence

China's legislative mode of criminal evidence, enacted in the Criminal Procedure Law of the People's Republic of China (hereinafter referred to as the Criminal Procedure Law), resembles the legislative mode of the civil law system. In accordance with the Criminal Procedure Law, the chapter of evidence rules includes eight clauses, which involve the categories of evidence, the approaches to collecting evidence, and the qualifications and obligations of the witness. Enacted in general terms, these clauses lack operability. Consequently, relevant judicial interpretations have given further stipulations.

In terms of China's future legislative mode of the system of criminal evidence, there are mainly two opinions: (1) Drawing up a unified code of criminal evidence in light of the common law system; and (2) Focusing on the revision of evidence-related clauses during the course of the re-amendment to the Criminal Procedure Law. As far as we are concerned, with China's legal tradition being in general closer to that of the civil law system, it is rather difficult to draft an independent code of evidence. Therefore, following the present mode of criminal legislation, namely, centering on the revision of the system of criminal evidence during the re-amendment to the Criminal Procedure Law, is conducive not only to attaching equal importance to both China's legislative tradition and actual conditions, but also to pushing forward the smooth re-amendment to the Criminal Procedure Law. China's legislature has intended to adopt the second mode of legislation in the innovation of the system of criminal evidence.

Since the amendment to the Criminal Procedure Law in 1996, the Chinese people's awareness of law has changed with the practice of the policy of the reform and opening up. To some extent, the existing Criminal Procedure Law cannot cater to the needs of the Chinese society or solve the major issues facing the judicial practice. Such being the case, in October 2003, the Standing Committee of the tenth National People's Congress listed the re-amendment to the Criminal Procedure Law into its five-year

legislative plan. According to the recent legislative plan, in October 2007 the 30th meeting of the Standing Committee of the National People's Congress will deliberate the draft re-amendment to the Criminal Procedure Law, which, drawn up by the legislative body, repeatedly sought advice from public security organs, procuratorates, courts, lawyers, and professors of laws. To coordinate with the legislative plan, Prof. Chen Guangzhong organized a team (Prof. Liu Mei served as one of the members) for the project of the re-amendment to the Criminal Procedure Law, which, after three years of hard work, published a book titled *Expert Draft for Re-amendment to the Criminal Procedure Law of the People's Republic of China and Its Annotations* (published by the China Legal Publishing House in September 2006). This book attracted wide attention from the legislature, the judicial circles and the jurisprudential fields. The criminal evidence system was improved as a significant part in this book. For instance, the authors supplemented such essential stipulations in pursuance of the due process of law as the principle of judgment by evidence, the exclusionary rules of illegally obtained evidence, and the guarantee measures of witnesses' appearance in court. Previously, from 2000 to 2003, Prof. Chen Guangzhong organized a project team for the research on criminal evidence law, the result of which was a publication entitled *Criminal Evidence Law of the People's Republic of China (Expert Draft)* (published by the China Legal Publishing House in January 2004). The objective of this project was not to advise the legislature to enact a criminal evidence code, but to try to make contributions to the reform of criminal evidence system during the future re-amendment to the Criminal Procedure Law.

II. The guiding concepts for the reform of Criminal Evidence System in China

We believe that the criminal evidence system in China, which will be reformed, should link with the UN standards and norms in criminal justice, use for reference foreign criminal procedure legislations, and take into account China's national conditions. Hence, the reform of criminal evidence system in China is supposed to pursue the guiding concepts as follows:

1. The organic amalgamation of crime punishment and human rights protection

Crime punishment and human rights protection serve as major objectives of criminal procedure. Crime punishment incarnates the pursuit of

social order. The human rights protection in criminal procedure is, in a narrow sense, viewed as the protection of the rights of the parties concerned, especially the rights of the accused, in two specific aspects: in terms of substantial results, ensuring that the innocent are not punished and that those guilty receive fair punishment in accordance with the law; in terms of criminal procedure, guaranteeing that the parties concerned (especially the accused) and other participants in the proceedings fully exercise their procedural rights.

The combination of crime punishment and human rights protection demonstrates the balance of order, freedom and other values, as is a universally accepted principle of criminal justice. The rules of criminal evidence are established on the basis of the regulation of the relationship between crime punishment and human rights protection.

In Article 33 of the *Constitution of the People's Republic of China*, revised in 2004, there was a supplementary section, "The nation respects and protects human rights," which provides constitutional grounds for the protection of human rights in China's criminal justice. Recently, the Chinese government has put forward the policy of "building a harmonious society," a policy-level support of human rights protection in China's criminal justice. So far, the idea of combining crime punishment with human rights protection has been reflected in China's official documents. For example, on March 9, 2007, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice jointly issued the *Order of Further Handling Cases in Strict Accordance with the Law and Ensuring the Quality of Death Penalty Cases*, in which "adherence to the combination of crime punishment and human rights protection" was clearly listed as a significant principle of handling criminal cases.

2. The dynamic emphasis on both procedural justice and substantial justice

Just like the two wings of a bird, procedural justice and substantial justice are two indispensable aspects of judicial justice, neither being overemphasized to the neglect of the other. In the system of criminal evidence, procedural justice requires the collection of evidence in accordance with legally prescribed proceedings, the open and independent examination of evidence by the court in pursuance of the principle of direct and oral trial, and the sufficient protection of the procedural rights of the participants in the proceedings, especially those of the parties; whereas

substantial justice mainly requests the determination of the facts of criminal cases by using evidence for the purpose of providing basic conditions for the correct application of substantial laws and the impartial handling of cases.

The substantial result of a case is an important standard by which to evaluate the degree of procedural justice. Judicial practice shows that a party who participates in criminal proceedings mainly aims at an impartial judgment (verdict) in favor of him or her rather than the pursuit of procedural justice. It can be seen from this that the value of the criminal procedure is first and foremost to ensure the realization of the substantial value. If a procedure is impartially designed and strictly observed, substantial justice can be achieved under most circumstances. Nevertheless, this does not mean that we agree with the instrumentalism of the procedure. The procedure has its own independent value in that it is an essential component of social justice, representing democracy, rule of law, human rights and civilization, and directly influencing the acceptability of the result of a case; in other words, how a person is treated is as important as what a substantial result he or she receives in a trial.

Therefore, procedural justice and substantial justice are interrelated but different from each other, each having its own independent value and norms for judgment. Where the two contradict each other, the value of the criminal evidence system shall be flexibly assessed under specific circumstances, and it is unnecessary to seek a desperate alternative between procedural justice and substantial justice. The idea of equal emphasis on both procedural justice and substantial justice has been accepted by relevant Chinese judicial organs. According to the aforesaid *Order of Further Handling Cases in Strict Accordance with the Law and Ensuring the Quality of Death Penalty Cases*, the correct substantial result of a case and a fair and lawful criminal procedure shall be both guaranteed. In view of the traditional concept of emphasizing substantial results and despising judicial procedure, which has an unfavorable influence on China's criminal evidence system, we hold the view that on the premise of the dynamic emphasis on both procedural justice and substantial justice, China's future system of criminal evidence should enhance the value of judicial procedure.

3. Giving first priority to justice and attaching equal importance to efficiency

Being fundamental procedural values, justice and efficiency supplement each other and achieve dialectical unity. We maintain that justice is the soul and lifeline of justice, as well as the foremost value pursued by the system of

criminal evidence. Accordingly, the system of criminal evidence should pursue judicial efficiency on the basis of judicial justice, namely, give first priority to justice and attach equal importance to efficiency. China's judicial organs have repeatedly recognized this procedural concept. Xiao Yang, president of the Supreme People's Court of the People's Republic of China, accentuated the adherence to "giving first priority to justice and attaching equal importance to efficiency, which must yield to the quality of cases handled" at the fifth national criminal adjudication meeting.

III. Major issues in the reform of Criminal Evidence System in China

1. The principle of not being compelled to testify against oneself

The universally acknowledged principle of not being compelled to testify against oneself is embodied in international conventions on human rights. For instance, *according to the International Covenant on Civil and Political Rights* (ICCPR), the accused shall not "be compelled to testify against himself or to confess guilt." The Human Rights Committee of the UN holds a negative attitude towards the admissibility (competency) of evidence acquired against the principle of not being compelled to testify against oneself.

On October 5, 1998, the Chinese government signed the ICCPR, which is awaiting the ratification by the Standing Committee of the National People's Congress. To a certain degree, China's current criminal procedure law and criminal law embody the basic spirit of the principle of not being compelled to testify against oneself. In line with Article 43 of the Criminal Procedure Law, "It shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means." Article 247 of the Criminal Law stipulates the crime of extorting confessions by torture and the crime of obtaining testimony by violence. Nonetheless, in terms of legislations and judicial practice, there remain, between China's criminal justice system and the international standards in criminal justice, certain disparities, which require to be improved through legislation.

There are certain disputes as to whether to establish the principle of not being compelled to testify against oneself in the jurisprudential circles and the practice circles in China. According to the mainstream viewpoints, the above-mentioned principle is supposed to be established in the legislation of criminal procedure. We are of the opinion that, on the one hand, the establishment of the said principle is contributive to the prevention of the

extortion of confessions by torture, and is of paramount significance to the protection of the legitimate rights of the accused; on the other hand, as China has signed the ICCPR, which shall come into force in China once it is ratified, the establishment of the said principle will contribute to the connection of China's criminal evidence system with the UN standards and norms in criminal justice.

We believe that the said principle shall be enacted in the Criminal Procedure Law to be re-amended, and that relevant procedural systems shall be reformed as follows: (1) Prescribing that the criminal suspect shall not be compelled to make a statement against his will, and canceling the criminal suspect's duty of "giving truthful answer," which is prescribed in Article 93 of the present Criminal Procedure Law. As to whether the right to silence is included, China's social conditions shall be taken into account. (2) Interrogating the criminal suspect or the defendant in specified time and place in strict accordance with legally-prescribed proceedings. This issue has attracted the attention of China's relevant authorities. Article 11 of the *Order of Further Handling Cases in Strict Accordance with the Law and Ensuring the Quality of Death Penalty Cases* stipulates that criminal suspects in custody shall be interrogated in the very detention houses which detain them. (3) Establishing the system of synchronous sound and videotape recording. In consideration of China's vast territory and imbalance of economic growth, we suggest the progressive practice of the system, which can be first applied during the interrogation involving serious crimes. (4) Establishing the system of the lawyer's right of presence at the interrogation of the criminal suspect. 5) Establishing the exclusionary rules of illegally obtained evidence.

2. Exclusionary rules of illegally obtained evidence

Exclusionary rules of illegally obtained evidence in general indicate those rules according to which the evidence illegally collected by a law enforcement agency and its functionaries shall not be admissible during the criminal trial. In accordance with the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the defendant's oral statement acquired by torture is admissible in court only to those cases pertinent to the extortion of confessions by torture.

China signed the aforesaid convention in 1986, and ratified it in 1988. The *Criminal Procedure Law*, however, merely stipulates that "it shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means." No exclusionary stipulations are made as to whether the evidence collected in violation of the

stipulation is admissible. In 1998, the Supreme People's Court and the Supreme People's Procuratorate respectively issued relevant judicial interpretations, which stipulated that such evidence as the witness's testimony, the victim's statement or the defendant's oral statement collected by torture, threat, enticement, deceit or other means proved to be unlawful via verification should not be admissible. Nonetheless, for lack of the support by the specific rules pertaining to the burden of proof, the standard of proof and operable proceedings, illegally obtained evidence is still used aboveboard to determine a crime in judicial practice. As a result, it is extremely difficult to prevent the extortion of confessions by torture. The recent years witnessed several influential wrongful convictions, which attracted universal social attention, for the defendant's oral statement used to find him or her guilty was obtained by torture.

We hold the view that the "exclusionary rules of illegally obtained evidence" to be established during the reform of criminal evidence system shall include the following:

(1) The absolute exclusionary rules of illegally obtained oral evidence shall be established for the main reasons as follows: i) Illegally obtained oral evidence is an impediment to the due process and the authenticity of the evidence. ii) In practice, the collection of evidence by torture or other illegal means, which has posed a severe, hidden peril of triggering wrongful convictions, should be resolutely brought under control. iii) The criminal evidence system in China is supposed to be linked with international standards and norms in criminal justice, and to use for reference relevant foreign legislations.

In addition, it is necessary to specify the illegal means used to collect oral evidence, which we believe include the following: i) torture or other means causing severe physical pain; ii) intimidating or cheating; iii) keeping the person suffering from fatigue, hunger, or thirst; iv) using medicine or hypnosis; and v) other cruel, inhuman or degrading means. No evidence collected by the above-mentioned illegal means shall be used to initiate a public prosecution or to find guilty.

(2) The relative exclusionary rules of illegally obtained material evidence shall be established for the following reasons: i) Since pluralistic judgments of value exist in the system of criminal evidence, the value of procedural justice cannot be pursued in an absolute manner. The material evidence collected by illegal means, which destroys the due process, is often beneficial to finding the facts of cases. Therefore, whether to exclude evidence of this kind is at the discretion of the judicial personnel under specific circumstances of the cases. ii) The relevant legislations of foreign

countries are supposed to be absorbed. Britain, Canada, Germany and many other countries adopt the relative exclusionary rules of illegally obtained material evidence. Even in the US, which holds an absolute attitude towards the exclusion of illegally obtained material evidence, several exceptions have been established.

Specifically, the relative exclusionary rules of illegally obtained material evidence can be prescribed as follows: It is strictly forbidden to collect material evidence, documentary evidence, and audio-visual materials with the means of illegal search, seizure and illegal entering citizen's house or other unlawful means. It is strictly forbidden to inquest and inspect in violation of the statutory procedure. The admission of the evidence obtained with illegal means mentioned above is on discretion of the People's Procuratorate and the People's Court according to the degree of illegal means and other circumstances of the case.

(3) The burden of proof and the standard of proof for the exclusion of illegally obtained evidence

The burden of proof and the standard of proof involving illegally obtained evidence serve as an important guarantee of practicing the exclusionary rules of illegally obtained evidence. In practice, there are rare cases where illegally obtained evidence is excluded. This is not because there are rare cases involving illegally obtained evidence, but because the current Criminal Procedure Law and relevant judicial interpretations fail to stipulate the burden of proof for illegally obtained evidence. In addition, the standard of "evidence proving illegally obtained via verification," which is too high to reach, lacks operability.

Therefore, we think that the following shall be prescribed: If the criminal suspect or the defendant, or his legal representative, or defender believes that the accusatory evidence is obtained illegally, and presents relevant clue, the investigating organ shall provide reliable and sufficient evidence to prove the legality of such evidence. Having reasonable grounds to believe that such evidence is obtained illegally upon investigation and verification, the People's Procuratorate and the People's Court shall conclude that such evidence is obtained illegally. With respect to the burden of proof, only when the defence alleges that the evidence is obtained illegally and presents relevant clue, shall the investigating organ take the responsibility to prove the legality of this evidence.

As far as the standard of proof is concerned, the procuratorate or the court, which has listened to the opinions from the accused party and the investigating organ and has made necessary investigations, shall confirm the illegality of the evidence collected, as long as it has justifiable reasons for it.

The standard of “reasonable grounds” makes the practice of excluding evidence obtained illegally more feasible.

3. The witness’s appearance in court

The witness’s appearance in court, which conforms to what both procedural justice and substantial justice require, helps to find criminal facts and protect the defendant’s right of confrontation. It has thereof been confirmed by international standards and norms in criminal justice. The principle of direct and oral trial from the civil law system, the rule of hearsay evidence from the common law system, and other relevant principles and rules provide a systematic guarantee for the witness’s appearance in court.

For the time being, the extremely low rate (less than 1%) of the witnesses’ appearance in the Chinese courts has become a thorny problem during the criminal proceedings. Some procurators are afraid that the witness appearing in court is likely to change his or her testimony and thereby affect the success rate of public prosecution. This phenomenon results from the following causes: (1) The systematic defects of relevant laws and judicial interpretations. Article 47 of the current Criminal Procedure Law provides for the witness’s duty to appear in court, but Article 157 of the law stipulates that the written statement of the witness who fails to appear in court is allowed to be read. (2) Relevant laws and judicial interpretations do not enact the responsibilities or consequences for the non-appearance in court by the witness who is supposed to appear in court but fails to do so. (3) The laws concerned lack concrete and effective measures for the protection of witnesses. (4) With criminal investigation still serving as the central part of the criminal procedure, the judge passes judgments mostly by reliance on investigative files.

As far as we are concerned, the legislations pertaining to the witness’s appearance in court shall be consummated as follows:

(1) Specifying the witness’s appearance in court as a general duty of the witness. We suggest that the written statement of the witness who fails to appear in court should not be admissible, except as otherwise provided for by law.

(2) Providing for the exceptions to the witness’s appearance in court, which include the witness’s death, mental disease or other serious diseases, unknown whereabouts, failure to stay in the homeland, and other objective causes for which the witness fails to appear in court. In consideration of procedural efficiency, the complainant and the defender’s having no disagreement with the witness’s written statement is also included.

(3) Providing for the specific circumstances under which the pre-trial written statement of the witness is allowed to be read: i) The witness unable to recall a certain fact of a case needs help; and ii) The testimony raised by the witness in court contradicts his or her pre-trial statement, and cannot be confirmed by other means.

(4) Prescribing the measures for compulsory appearance in court and judicial penalties against the witness who is supposed to appear in court but fails to do so. If the witness refuses to appear in court without justifiable reasons, the court has the right to issue a summons for detention; if the witness refuses to make a statement without justifiable reasons, the court is entitled to impose a fine or detention.

(5) As for the facts found during criminal investigations, the investigator concerned may be notified to serve as a witness in court, and he or she shall not refuse to bear witness.

(6) Formulating concrete and effective measures for the protection of the witness and his or her near relatives, including such pre- and post-trial measures as keeping the witness's information secret, and providing personal protection or temporary dwelling. Furthermore, condition permitting, certain special approaches can be used during the trial, such as using teletestimony and changing the voice of the witness by means of technical equipments.

(7) Prescribing the system of economic compensation for the witness's appearance in court. Specifically, the compensations, including those reasonable expenses paid by the witness, such as the traffic expenses, the accommodation fee and the expenses for delayed work, shall be paid by the public security organ, the procuratorate and the court, respectively, during corresponding periods of criminal procedure.

4. The standard of proof

The standard of proof in criminal procedure refers to the degree reached when the defendant is found guilty by using evidence according to law. The theory on the standard of proof, which involves the defendant's rights to life, liberty and property, as well as epistemology and values, is complicated. In pursuance of the Criminal Procedure Law, the standard for proving that the defendant is guilty is that "the facts of the case are clear and the evidence is reliable and sufficient." Opinions, however, vary from individual to individual in judicial practice. Some believe that the aforesaid legal standard of proof is too high to reach, and thereby suggest that it be replaced by "beyond reasonable doubt." We argue that the standard of proof is inversely proportional to the rate of wrongful convictions—the higher the former, the

lower the latter. Therefore, the current legally-prescribed standard of proof, which generally cannot find those innocent guilty, is an advisable expression in agreement with the customary Chinese language. The key issue lies in how to interpret and utilize it. That "the facts of the case are clear" means that those basic and key facts of the case which are of decisive significance to crime determination and measurement of penalty, other than all the detailed facts, must be clearly found. That "the evidence is reliable and sufficient" requires that the reliable evidence should constitute a complete system of sufficient evidence and that the main fact of the case, namely, the crime was committed by the defendant, must be proved to the degree of a unique or exclusive nature.

In November 2006, Xiao Yang, president of the Supreme People's Court, delivered a speech at the fifth national criminal adjudication meeting. He came up with the guiding principles and fundamental requirements for the present criminal adjudication, including the adherence to the principle of adjudication that "the facts of the case are clear and the evidence is reliable and sufficient." Adherence to the standard of proof that a unique conclusion of a case shall be drawn in accordance with the main facts and key evidence is of tremendous significance to the court's accurate determination of criminal facts and effective prevention of wrongful convictions.

As a result, we maintain that the legally prescribed standard of proof that "the facts of the case are clear and the evidence is reliable and sufficient" will be practiced in China's future system of criminal evidence. However, it must be pointed out that the said standard of proof, which is supposed to be established in a logical sequence, varies from fact to fact in different cases.

(1) The basic and key facts of a case which are of decisive significance to crime determination and measurement of penalty must be proved to the degree of a unique (exclusive) nature. This is especially true in those cases in which the defendants are likely to be sentenced to death, and has been confirmed by international standards and norms in criminal justice. In line with Article 4 of the *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, "Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts." There is no denying the fact that "leaving no room for an alternative explanation of the facts" is an expression of an exclusive nature.

(2) As for the subjective elements in the constitution of a crime, such as the criminal intent, the standard of proof can be lowered appropriately, or even presumed under objective circumstances. The use of presumption has been definitely enacted in the *UN Convention Against Corruption* and the

UN Convention Against Transnational Organized Crime. As far as we are concerned, the subjective elements in the constitution of certain crimes can be presumed for the following reasons: i) A number of criminal suspects or defendants being in a concealed psychological state, it is difficult for the prosecuting organ to prove their subjective elements in the constitution of a crime to an unambiguous degree; moreover, the time limitation of legal proceedings makes the standard of proof more difficult to reach. ii) The aforesaid presumption demonstrates a country's serious attitude towards the crackdown on certain crimes, as conforms to China's current criminal policy of "severity tempered with leniency."

Concluding remarks

The reform of China's system of criminal evidence is in progress steadily. We expect with complete confidence that with the common efforts of the legislature, the judicial organs and the jurisprudential circles, and through the re-amendment to the Criminal Procedure Law, the reform will, to a greater extent, cater to the needs of democracy, rule of law and modernization.