

**THE THEORY, DESIGN AND REFORM OF THE EXCLUSIONARY RULE:
A COMPARATIVE STUDY BETWEEN CANADA AND CHINA**

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Abstract

The paper analyzes the theory, design and reform of the exclusionary rule of illegal evidence through a comparative study between Canada and China. As a newly created legal mechanism, the exclusionary rule in China has undergone rapid changes since 2010, which calls for a systematic analysis. The experience of the Canadian judicial system, especially the case law regarding the protection of Charter rights, is of great value for reference.

As a policy-oriented rule, the exclusionary rule is based on the distinction between intrinsic and extrinsic values. In Canada, section 24 (2) of the Charter emphasizes the significance of maintaining the reputation of the administration of justice. Similarly, public confidence in judicial system, together with human rights protection, is also highlighted in China. Although the exclusionary rule in both countries can trace its legal basis in the constitutional norm, China's rule is specifically codified in law and judicial reform documents. In addition, it is reasonable to incorporate modern notions such as due process and judicial integrity in the exclusionary rule's theoretical basis, which is particularly beneficial for China's criminal procedural reform.

The main content of the exclusionary rule can be divided into mainly two parts: the scope and standard of illegal evidence, as well as the procedure of excluding evidence. As far as the

scope and standard of illegal evidence is concerned, the paper firstly discusses the hierarchy of rights in criminal proceedings, especially rights relating to the improperly obtained evidence, and then analyzes the paradigm shift from quasi-automatic exclusion to discretionary exclusion in Canada. After that, the focus is placed on the distinction between testimonial evidence and material evidence, exclusion of derivative evidence, and judicial discretion of excluding defective evidence. When it comes to the procedure of excluding illegal evidence, the paper conducts a detailed analysis of the defense's preliminary burden of proof and the prosecution's responsibility for proving the legality of evidence respectively. Then the mechanism of excluding illegal evidence at pre-trial process in China is specifically examined. After that, the paper entertains legal remedy at the appeal process.

Since the exclusionary rule is experiencing dynamic change, the final part of the paper pays attention to its systematic influence on the criminal procedure. Both the judicial maturity effect of the Supreme Court and the real function of local courts are considered. Furthermore, the paper anticipates the future development of the pre-trial procedure, particularly the recent judicial reform in China. Although there may be the ebb and flow with regard to judicial reform, it is clear that the evolution of the exclusionary rule will contribute to the flourishing enterprise of human rights in criminal proceedings, thereby leading to both the advancement of judicial authority and the professionalism of investigation. Shaped by the special political and cultural features in China, the exclusionary rule will also gradually take on a distinctive look in the future.

Résumé:

L'article analyse la théorie, la conception et la réforme de la règle d'exclusion des preuves illégales à travers une étude comparative entre le Canada et la Chine. En tant que mécanisme juridique nouvellement créé, la règle d'exclusion en Chine a connu des changements rapides depuis 2010, ce qui nécessite une analyse systématique. L'expérience du système judiciaire canadien, en particulier la jurisprudence concernant la protection des droits garantis par la Charte, est d'une grande valeur comme référence.

En tant que règle politique, la règle d'exclusion est basée sur la distinction entre valeurs intrinsèques et extrinsèques. Au Canada, l'article 24 (2) de la Charte souligne l'importance du maintien de la réputation de l'administration de la justice. De même, la confiance du public dans le système judiciaire, ainsi que la protection des droits de l'homme, sont également soulignées en Chine. Bien que la règle d'exclusion dans les deux pays puisse trouver son fondement juridique dans la norme constitutionnelle, la règle de la Chine est spécifiquement codifiée dans la loi et les documents de réforme judiciaire. En outre, il est raisonnable d'incorporer des notions modernes telles que la régularité de la procédure et l'intégrité judiciaire dans la base théorique de la règle d'exclusion, ce qui est particulièrement bénéfique pour la réforme de la procédure pénale en Chine.

Le contenu principal de la règle d'exclusion peut être divisé principalement en deux parties : la portée et la norme des preuves illégales, ainsi que la procédure d'exclusion des preuves. En ce qui concerne la portée et la norme des preuves illégales, l'article aborde d'abord la

hiérarchie des droits dans les procédures pénales, en particulier les droits relatifs aux preuves obtenues de manière irrégulière, puis analyse le changement de paradigme de l'exclusion quasi-automatique à l'exclusion discrétionnaire au Canada. . Après cela, l'accent est mis sur la distinction entre la preuve testimoniale et la preuve matérielle, l'exclusion de la preuve dérivée et la discrétion judiciaire d'exclure la preuve défectueuse. En ce qui concerne la procédure d'exclusion des preuves illégales, le document procède à une analyse détaillée de la charge de la preuve préliminaire de la défense et de la responsabilité de l'accusation de prouver la légalité des preuves, respectivement. Ensuite, le mécanisme d'exclusion des preuves illégales lors de la mise en état en Chine est spécifiquement examiné. Après cela, le journal entretient un recours juridique lors de la procédure d'appel.

Puisque la règle d'exclusion connaît un changement dynamique, la dernière partie de l'article s'intéresse à son influence systématique sur la procédure pénale. L'effet de maturité judiciaire de la Cour suprême et la fonction réelle des tribunaux locaux sont examinés. En outre, le document anticipe le développement futur de la procédure préalable au procès, en particulier la récente réforme judiciaire en Chine. Bien qu'il puisse y avoir des flux et des reflux en ce qui concerne la réforme judiciaire, il est clair que l'évolution de la règle d'exclusion contribuera à l'entreprise florissante des droits de l'homme dans les procédures pénales, conduisant ainsi à la fois à l'avancement de l'autorité judiciaire et au professionnalisme des enquête. Façonnée par les particularités politiques et culturelles de la Chine, la règle d'exclusion prendra également progressivement un aspect distinctif à l'avenir.

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Introduction

Traditionally, when it comes to the admissibility of evidence in common law, the main consideration is given to relevance, reliability or probative value of evidence. For example, in Scotland, the classic position in civil cases is that evidence illegally obtained is admissible, if it is relevant to the issue before the court, and in criminal case, illegal seizure of evidence was no bar to its admissibility.¹ If evidence is irrelevant, unreliable or of little probative value, it will generally be ruled inadmissible by court. Although there is so-called confessions rule, which highlights the voluntariness of confession evidence, it can hardly be recognized as the general rule, but the exception in the realm of evidence law. In terms of the manner in which evidence is obtained, it is irrelevant in judges' eyes.

In *Wray*,² the Supreme Court of Canada held that there is no judicial discretion permitting the exclusion of relevant evidence, on the ground of unfairness to the accused. This implies an unfriendly judicial attitude towards the defense. From the perspective of investigators or prosecutors, however, such a loose standard of admissibility is undoubtedly good news. They need not worry about the admissibility of evidence even if they resort to illegal evidence-obtaining activities.

With regard to the illegal means of obtaining evidence, the legal history throughout the world is remarkably similar. Like many common law countries, China has also been heavily burdened

¹ Fraser Davidson, *Evidence* (W. Green and Son, 2007) at 345, 349.

² *R. v. Wray*, [1971], S.C.R. 272 at 54, 62.

by the historical influence of a culture of torture in criminal justice. Nonetheless, it should be noted that although torture was legally permitted in the past, its practical application was strictly regulated according to the law. For example, in Qing Dynasty, the type and size of the tool for torture, as well as the means of torturing suspects, were all clearly stipulated in law. If a suspect was tortured to death, the official who was responsible would be punished accordingly.³Of course, torture has already lost its room in modern legal system. In China, torture and other illegal means of obtaining evidence have been strictly prohibited since the *1979 Criminal Procedure Law*. But in the absence of legal sanctions on illegal evidence-obtaining behaviors, judges will not be inclined to suppress the relevant evidence if they are satisfied with its relevance and reliability. Accordingly, investigators will not take such a broadly-outlined legal prohibition seriously without running the risk of losing a case.

With the advent of the exclusionary rule of illegal evidence (*the exclusionary rule hereafter*), the traditional theory of evidence law has undergone a revolutionary transformation. Originally invented by the Supreme Court of the United States, the exclusionary rule has flourished globally at a rapid speed. This new legal creature, featured by its fresh understanding of the admissibility of evidence, gains its power from diversified value systems, including the due process of law, human rights protection, as well as prevention of errors of justice. Unsurprisingly, mainly due to the diversified policy preferences in different countries, the exclusionary rule has evolved into several distinctive versions. Needless to say, the exclusionary rule in Canada, both its theory and design, is different from that in China. Even

3 Qu Tongzu, *Local Government in Qing Dynasty* (Law Press in China, 2011) at 192-195.

so, the core values encoded in the exclusionary rule are closely connected, which opens the door for comparative analysis between Canada and China.

As Stuart argues, the Supreme Court of Canada has adopted a more sensible, carefully balanced and distinctive approach to the exclusion of unconstitutionally obtained evidence, which ought to be considered in other jurisdictions.⁴ Interestingly, the focus on the good reputation of the administration of justice of section 24(2) of *the Canadian Charter of Rights and Freedoms* (*the Canadian Charter hereafter*) shares similar consideration of the exclusionary rule in China. This institutional similarity lays the foundation for a meaningful comparison between two countries. In addition, the standard of illegal evidence and the procedure of exclusion in Canada are also beneficial for reference when dealing with practical issues in China.

Literature Review

The emergence and development of the exclusionary rule in China is attached to the government's efforts to restrain torture. In the 1990s, the judicial departments put forward several documents⁵, aiming to reduce torture by enhancing professionalism of investigative organs and strengthening accountability in the field of criminal justice. But mainly due to the

4 Don Stuart, "Welcome Flexibility and Better Criteria from the Supreme Court of Canada for Exclusion of Evidence Obtained in Violation of the Canadian Charter of Rights and Freedoms" (2010) 16 Sw. J. INT'L L at 314.

5 In 1992, the Ministry of Public Security issued the Decision on Firmly Preventing Torture by Public Security Officers, in which methods were proposed to deal with torture, including highlighting ethical education, improving the professionalism of officers, launching campaigns to crackdown on torture, and strengthening the responsibility of high-rank officials etc. In 1993, the Supreme Procuratorate and the Ministry of Public Security jointly issued the Notice on Strengthening the Collaboration between the Procuratorate and the Public Security Organs in Handling Torture Cases. In 1995, the Ministry of Public Security issued the Notice on Launching Workshops and Campaigns on Preventing Torture, which required incorporating preventing torture as a key factor in the performance evaluation of local officials and police officers.

shortage of concrete measures and strong resistance from local law enforcement agencies, these reform documents failed to bring about substantial institutional changes in practice.

Since the introduction of the *2010 Provisions on the Exclusion of Illegal Evidence in Criminal Cases (2010 Exclusion Provisions hereafter)*⁶, the exclusionary rule in China has experienced rapid development over the past decade, which has been regarded as the most influential breakthrough in China's recent criminal justice reform⁷. As a judicial reform document, the *2010 Exclusion Provisions* was drafted by the Supreme Court⁸, but jointly endorsed by other judicial departments. Such a consensus-based rule-making process, by its nature, may involve a compromise on important issues. Apart from that, unlike the statutory law enacted by the legislature, the legal authority of the *2010 Exclusion Provisions* may be challenged in practice when it comes to the highly disputed issues⁹.

The potential controversy over the exclusionary rule emerged again during the revision of the *Criminal Procedure Law* in 2012. The legislature held it necessary to incorporate the *2010 Exclusion Provisions* into the law. Nonetheless, when the details of the exclusionary rule in the draft legislation were under deliberation, the previously disputed issues reappeared. Some argued that the *2010 Exclusion Provisions* should be further refined so that its shortcomings

6 In 2010, aiming to push forward the judicial reform project, the Supreme Court, together with the Supreme Procuratorate, the Ministry of Public Security, the Ministry of National Security and the Ministry of Justice, issued the **Provisions on the Exclusion of Illegal Evidence in Criminal Cases**.

7 Fan Chongyi, "On the Dilemma of the Courts to Exclude Illegally Obtained Evidence" (2013) 7 *Journal of Social Sciences* at 45.

8 Interestingly, the judicial reform documents including the *2010 Exclusion Provisions* are drafted not by the legislature, but by the judicial departments. This, however, does not mean the legislature has no role or influence in the judicial reform. When drafting judicial reform documents, the judicial departments shall abide by the text of the law and try not to go against the purpose of the law. If there are serious disputes over the legality of certain reform measures, the judicial departments will seek advice from the legislature. Nonetheless, the legislature seldom takes direct part in the process of judicial reform. Based on the application of the judicial reform documents, the legislature can choose to incorporate the successful measures in the revision of the law.

9 Huang Tao, "The Judicial Document of Chinese Supreme People's Court: Status, Problems and Prospects" (2012) 27 *Legal Forum* at 124-129.

could be effectively remedied¹⁰, while others insisted that no more rules should be added¹¹. In a compromise again, a relatively concise version of the *2010 Exclusion Provisions* was introduced in the *2012 Criminal Procedure Law*, thus leaving many controversial issues unsolved.

In some cases, the disputes over the legality of evidence seriously impede the fairness and efficiency of the trial¹². In a legal system favoring clear-cut provisions, the Supreme Court of China, like its counterpart in Canada, endeavors to improve the exclusionary rule and its application mechanism. In 2017, the Supreme Court, together with other judicial departments, issued the *2017 Provisions on the Strict Exclusion of Illegal Evidence in Criminal Cases (2017 Strict Exclusion Provisions hereafter)*, which is designed to enforce the exclusionary rule in a strict manner.

Against this background, this paper aims to conduct a comparative analysis between Canada and China of the theory and design of the exclusionary rule, intending to figure out the feasible way of making further contributions to this field. It appears that by dividing the exclusionary rule into substantive and procedural elements, we can adopt the theory of the hierarchy of rights to refine the definition and categorization of illegal evidence, while creating a more systematic procedural mechanism to enforce the exclusionary rule. Accordingly, this analysis will elaborate on the key issues such as the rationale of the exclusionary rule, the scope and standard

10 Long Zongzhi, "The Discussions on Several Issues of the Rules and Implementation of the Two Evidence Provisions" (2010) 6 *China Legal Science* at 18.

11 Chen Yongsheng, "The Influence on the Relationship between the Procuratorate and the Police" (2006) 11 *People's Procuratorial Monthly* at 8.

12 Wang Chao, "On the Dilemma of the Courts to Exclude Illegally Obtained Evidence" (2013) 7 *Journal of Social Sciences* at 104-106.

of illegal evidence, the procedure of exclusion, and the overall influence of the exclusionary rule on the criminal justice.

The paper will first examine the nature of the exclusionary rule by highlighting its policy orientation. Based on the distinction between external and internal values, the exclusionary rule in Canada and China is principally designed to maintain judicial integrity beyond traditional internal values such as the reliability of evidence. As a special legal apparatus for protecting constitutional rights, the exclusionary rule is usually based on the constitutional law. This constitutional foundation, in particular the due process clause¹³, reinforces the legitimacy of excluding illegal evidence, even in high profile cases. Apart from judicial integrity or public confidence, which is publicly acclaimed by the *Charter of Canada* and the relevant judicial reform documents of China, the exclusionary rule also has several potential functions, including the deterrence effect, and the collateral remedy for the defense, etc.

The paper goes on to detail the scope and standard of illegal evidence. Although it is generally conceived that human rights are equal in nature, the hierarchy of rights does exist in practice. Some rights, especially those closely related to criminal trial, are more frequently invoked and strictly protected in criminal proceedings. Since many different interests are involved in applying the exclusionary rule, it may be a better choice to maintain the discretionary power of judges in dealing with disputes over the admissibility of evidence, especially in cases involving material evidence. This notion is clearly reflected by shifting the mode of decision from quasi-automatic exclusion to discretionary exclusion of the Supreme Court of Canada. In the similar vein, the distinction between testimonial and material evidence

13 Re Richard M, “The Due Process Exclusionary Rule” (2014) 127 Harvard Law Review at 1885.

is asserted, which fits well with the combination of mandatory and discretionary exclusion. As far as the so-called decision tree is concerned, the multifaceted standard adopted by the Supreme Court of Canada has proven to be sensible and reasonable. Furthermore, it should not be neglected that trial judges' residual discretion needs to be preserved concerning the defective evidence. In China, judges tend to distinguish illegal evidence from defective evidence, and different rules will be applied accordingly (*For a detailed explanation, see Section E of Part II - Judicial Discretion of Excluding Defective Evidence*.)

Another important aspect of implementing the exclusionary rule is its procedure. Taking the exclusionary rule as a legal remedy¹⁴, the procedure of excluding illegal evidence, especially at pre-trial process, is vital for the defense, because the defense can apply for excluding illegal evidence earlier at the investigation or prosecution stage, without anxiously waiting for filing a motion till trial. In this respect, the exclusionary procedure in China, which demands that illegal evidence shall be excluded throughout the whole process, is undoubtedly a creative idea. In addition to providing timely legal remedy, the pre-trial procedure for reviewing and excluding illegal evidence can also function as a deterrent legal device, urging investigators to abide by the due process of law. It should be noted that there are some differences with regard to the exclusionary procedure between Canada and China, such as the onus and the standard of proof. This also means that they can learn from each other in a meaningful way.

Given the significance of the exclusionary rule, this paper will examine its real effect in practice. Some argue that the exclusionary rule does little to discourage police from harassment of ordinary citizens, and when applied at trial, the rule decreases the benefit of the doubt

14 Arnold H Loew, "The Exclusionary Rule as a Remedy" (2014) 46 Tex Tech L Rev at 369.

received by defendants who are most likely to be actually innocent¹⁵. There are also opinions arguing that the current exclusionary rule encourages the police to lie, because some investigators are strongly motivated to fabricate or modify the circumstance in a case in order to justify the violation of legal procedure and therefore avoid key evidence being excluded¹⁶. These arguments should be examined carefully. In China, some judges tend to give great margin of appreciation for investigators, and do not strictly distinguish admissibility of evidence from its probative value¹⁷, which may offset the effectiveness of the exclusionary rule¹⁸.

Since the exclusion of key evidence will frustrate the prosecution, judges may take many factors into serious consideration, and are understandably reluctant to exclude illegal evidence, especially in the high-profile cases. The results of psychological studies highlight why the criminal justice system should not turn a blind eye to the covertly motivated applications of the exclusionary rule, or any legal doctrine that is susceptible to the motivated cognition effect¹⁹. Once a judge has already determined to or not to exclude illegal evidence in advance, what he needs to do next is mainly trying to find reasons for his decision. It would be very difficult for both participants and outsiders of the proceeding to ascertain the underlying motives in a judge's mind. In order to avoid disputes over the evidential ruling, some Chinese judges may choose to encourage both parties to reach a consensus on the admissibility of evidence. These informal procedural mechanisms, coupled with the covert motivation of judges, may have a

15 Tonja Jacobi, "The Law and Economics of the Exclusionary Rule" (2011) 87 Notre Dame L Rev at 585.

16 Melanie D Wilson, "An Exclusionary Rule for Police Lies" (2010) 47:1 Am Crim L Rev at 56.

17 Sun Yuan, *Introduction to the Admissibility of Criminal Evidence* (People's Court Press, 2007) at 14.

18 Sabine Gless, "Germany: Balancing Truth against Protected Constitutional Interest", in Stephen Thaman, *Exclusionary Rules in Comparative Law* (Springer Press, 2013) at 128.

19 Avani MethaSood, "Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule" (2015) 103:6 Geo LJ at 1543-1544.

profound influence on the institutional function of the exclusionary rule. Bearing this in mind, this paper pays attention to judges' role in applying the exclusionary rule as well as the procedural design of regulating judicial discretion. It should be admitted that along with the process of judicial maturity, judges have gradually formed a more balanced and reasonable attitude towards the value of the exclusionary rule. Judicial interpretation, both precedents at common law and guiding cases in China, will play an increasingly important role in practice. The function of local courts, where most procedural disputes arise, also deserves more attention. Lastly, the exclusionary rule's long-term effect on the pre-trial procedure should also be taken into consideration.

In several recent decisions, such as *Hudson v. Michigan*, *Herring v. United States*, and *Davis v. United States*, the U.S. Supreme Court has shown a tendency to severely restrict the exclusionary rule. The main implication of these decisions is that the exclusionary rule should be applied in cases of *substantial* as opposed to simple isolated negligence. Although it is argued that the exclusionary rule is neither dead nor unacceptably constrained²⁰, the changing attitude of the U.S. Supreme Court in these cases has attracted pessimistic prediction about the future of the exclusionary rule²¹. Comparatively speaking, both Canada and China have been persistently promoting the application of the exclusionary rule, without experiencing any violent turbulence in practice. This steady and friendly judicial environment is beneficial for the implementation of the exclusionary rule, particular in China when it is currently undergoing the process of promoting rule of law.

20 Craig M. Bradley, "Is the Exclusionary Rule Dead?" (2013) 102 J. Crim. L. & Criminology at 2.

21 Christopher Slobogin, "The Exclusionary Rule: Is It on Its Way Out? Should It Be?" (2013) 10 Ohio State Journal of Criminal Law at 355-356.

I. The Policy-Oriented Exclusionary Rule

It is generally recognized that a key feature of the exclusionary rule is its policy orientation. Needless to say, it is exactly this feature that distinguishes it from traditional evidence rules, which mainly focus on relevance and reliability. Here comes the question: what makes the exclusionary rule policy-oriented?

The answer can be found in section 24 (2) of the *Canadian Charter*, which stipulates that *Where, in proceedings under section (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.*

Unlike the admissibility of evidence at common law, the aim of section 24 (2) is not to ensure relevance or reliability of evidence, but to maintain the good reputation of the justice system, or put it differently, as in the text, to avoid bringing the administration of justice into disrepute. In other words, even if relevant evidence is reliable, if it was obtained by infringing or denying the suspect's right, and the admission of it would bring the administration of justice into dispute, the evidence shall be excluded. To be specific, the emphasis on constitutional rights (or freedoms) and the reputation of the administration of justice, as well as the idea of balancing all circumstances, evidently signal the policy nature of the exclusionary rule.

Similarly, the exclusionary rule in China pays attention to policy considerations, including protection of human rights and promotion of fair trial, which can be seen in the *2010 Exclusion Provisions*, the *2012 Criminal Procedure Law* and the *2017 Strict Exclusion Provisions*. In the

light of this policy orientation, the exclusionary rule is characterized by Chinese scholars as the policy rule, which means that illegal evidence shall be excluded for policy factors rather than the consideration of reliability.²² Compared with traditional evidence rule, the exclusionary rule is not only inspired by but also based on policy considerations. It should also be noted that policy objectives of the exclusionary rule are not always identical among legal systems.

A. The Distinction between Intrinsic and Extrinsic Values

According to English common law from an early stage, the reliability of evidence is the decisive factor of admissibility. If it is discovered that specific evidence is unreliable, it would be excluded on the basis that its admission would render the trial unfair. This kind of rule scrutinizes the quality of evidence itself, including its relevance, reliability or probative value. When the reliability of evidence is secured, it will pass the test of admissibility. As Crompton J. notes in *R. v Leatham*²³, it matters not how you get it; if you steal it even, it would be admissible in evidence. Similarly, Mellor J. states in *Jones v Owen*²⁴ that it would be a dangerous obstacle to the administration of justice if we were to hold, if evidence was obtained by illegal means, it could not be used against a party charged with an offence.

The intrinsic value of the traditional exclusionary rule, which focuses on the probative value of certain evidence, has its own merits. No one will doubt that irrelevant or unreliable evidence should be suppressed by the court. Otherwise, wrongful convictions cannot be avoided. Nonetheless, sole focus on the intrinsic value has also got its limits, mainly because it does not

²² Sun Yuan, *supra* note 17 at 47.

²³ *R. v Leatham* [1861] 8 Cox C.C. 498.

²⁴ *Jones v Owen* [1870] 34 J.P. 759.

cherish other important values such as human rights, due process of law, and judicial integrity. It should also be noted that in English law, a trial judge has discretion to exclude evidence where its prejudicial effect outweighs its probative value, and it is sometimes possible for illegally obtained evidence to be excluded on this basis.²⁵ This discretion to exclude illegally obtained evidence shows to some extent a potential overlap between prejudicial effect of evidence and its illegality. In discussing the introduction of the modern exclusionary rule, we tend to give credit to the U.S. Supreme Court. However, the contribution of other countries cannot be neglected. As Gless suggests, the German doctrine on exclusionary rules has its origins in a lecture given by Ernest Beling in 1903 entitled *Exclusionary Rule-Limits for the Truth-Finding Process in Criminal Proceedings*.²⁶ Beling's early vision of adhering to the code of criminal procedure and respecting for the rights of individuals constitutes the basic theory of the exclusionary rule in Germany. In a broader sense, the code of criminal procedure in many continental European countries sets up strict rules for gathering evidence and provides for the nullification of the efficacy of evidence-obtaining behaviors if they were performed in violation of the statutory rules.²⁷ Therefore, when compared with the exclusionary rule in common law countries, the exploration in continental Europe manifests a different but equally important pattern. Taking Germany's rule as an example, it clearly shows the dominance of extrinsic values beyond the reliability of evidence.

As Thaman succinctly asserts, the meaning of the exclusionary rule lies in its extrinsic values, rather than the intrinsic emphasis on probative value and credibility.²⁸ The notion of judicial

²⁵ Davidson, *supra* note 1 at 362.

²⁶ Gless, *supra* note 18 at 114.

²⁷ Stephen Thaman, "Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rule", in Stephen Thaman, *Exclusionary Rules in Comparative Law* (Springer Press, 2013) at 407-408.

²⁸ *Ibid* at 428.

integrity embedded in section 24 (2) of the *Canadian Charter* can be seen as such an extrinsic justification for exclusion. First of all, section 24 (2) specifically mentions the rights or freedoms guaranteed by the *Charter* as well as the relationship between the admission of evidence and the repute of the administration of justice. In essence, the term ‘administration of justice’ embraces maintaining the rule of law and upholding Charter rights in the justice system as a whole.²⁹ These are all extrinsic values independent of the reliability or probative value of evidence. In addition, the Canadian courts have moved to a balancing test³⁰, i.e. taking all circumstances into consideration. The object of this balancing process is the effect of admitting the evidence on public confidence in judicial system. Even more, the focus of section 24 (2) is not narrowed down to an individual case itself, but long-term, prospective and societal in nature, which suggests that the judge should be guided by long-term community values³¹. Hence, the Supreme Court of Canada opined that section 24(2) of the *Charter* implicitly overruled the common law practice of always admitting reliable derivative evidence.³² It is exactly the particular attention on extrinsic values of the exclusionary rule that prompts Parfett complain that the advent of the *Charter* has impacted negatively on the truth-seeking function of the trial process.³³

In China, according to the 1979 *Criminal Procedure Law*, courts used to be required to ascertain the truth in criminal cases. It is understandable that under such a procedural framework, judges were generally reluctant to exclude illegal evidence because doing so would

29 *R. v. Grant*, [2009] 2 S.C.R. 353 at para.73.

30 Thaman, *supra* note 27 at 429.

31 Davidson, *supra* note 1 at 366.

32 *Grant*, *supra* note 29 at para. 84.

33 Julianne Parfett, “A Triumph of Liberalism: The Supreme Court of Canada and the Exclusion of Evidence”, (2002) 40 ALTA. L. REV at 305.

inevitably impede their ability to establish the truth. Following the criminal justice reform in the 1990s, however, the revision of the *Criminal Procedure Law* in 1996 removed this active fact-ascertaining legal obligation of judges. Since judges have been relieved from the pressure of actively finding the truth, they can maintain their role as the objective and impartial arbiter, treating evidence from policy considerations rather than simply focusing on its probative value. This does not mean they can neglect the fact of truth, but require that the prosecution shall assume the burden of proof instead, and when the legality of evidence falls in dispute, judges shall decide the admissibility of evidence from the perspective of human right protections and other policy considerations.

Reflecting on several serious wrongful convictions resulted from torture, the *2010 Exclusion Provisions* was introduced, which started a new era in China's evidence rule. From then on, the distinction between admissibility and probative value is legally confirmed. The inadmissibility of illegal evidence is policy-oriented, by highlighting values such as human rights and fair trial, etc. When specific evidence is presented by the prosecution in court, a judge will first examine its admissibility; if it is discovered that the evidence was obtained by illegal means, it will be excluded due to the violation of the extrinsic values of the exclusionary rule. Only when evidence has passed the test of admissibility can its probative value then be evaluated by a judge.

Damaška profoundly suggests that Anglo-American criminal procedure differs from continental criminal procedure in the extent to which it is 'policy-implementing'.³⁴ As a general

³⁴ Mirjan Damaška, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: a Comparative Study" (1973) 121 U Pa LR at 506.

principle, every criminal justice system will embrace diversified policy aims, including crime control and due process, etc. Recognized as an integral part of the criminal procedure, the exclusionary rule also bears the imprint of policy considerations. Meanwhile, the major difference among different countries, taking Canada and China as examples, is the extent to which the relevant policy aims are implemented. This is especially true when it comes to the design and application of the exclusionary rule. In fact, a comparative study of the exclusionary rule can help identify the policy differences between different countries.

It should be noted that although intrinsic and extrinsic values of the exclusionary rule can be conceptually distinguished and separated, they may easily fall into conflict, or compete with each other in practice. On the occasions where evidence is reliable and vital for the prosecution, whether to exclude it or not generally depends on the competition of different values. As a Canadian study shows, where truth seeking is seen by the courts to be more important than the Charter violation, then exclusion rates drop to below chance; where the Charter right is given pre-eminence, exclusion is almost at 100 percent.³⁵

B. The Constitutional Foundation and Its Legalization

Given its potential negative influence on the fact-finding process in criminal cases, the exclusionary rule, as a policy-oriented legal mechanism, needs to establish its legitimacy basis in law, in which the constitutional law is undoubtedly a better bet. In the landmark case of

35 Richard Jochelson, Debao Huang & Melanie J. Murchison, "Empiricizing Exclusionary Remedies - A Cross Canada Study of Exclusion under s.24(2) of the Charter, Five Years after Grant", (2016) 63 CRIM. L.Q at 225.

*Mapp v. Ohio*³⁶, the U.S. Supreme Court asserted that all evidence obtained by searches and seizures in violation of the *Constitution* is, by that same authority, inadmissible in a state court.

By binding it with the constitution, the U.S. Supreme Court not only provides a solid foundation for the exclusionary rule but also avoids unnecessary disputes in a preventive manner. In some cases, however, the constitutional foundation of the exclusionary rule has been challenged, especially in *Davis*³⁷ in which the U.S. Supreme Court nearly abolished the exclusionary rule except in really extreme cases. Even so, it cannot be denied that the exclusionary rule directly concerns the protection of constitutional rights. As Bradley argues, we are still waiting for a case where the police have made a negligent mistake that substantially interferes with a suspect's constitutional rights.³⁸

Based on a comprehensive comparative study of the exclusionary rule between civil law and common law countries (*but Canada is not included*), Thaman concludes that as long as loopholes of using illegal evidence exist, constitutional rights will be routinely violated by state officials.³⁹ Confirming the connection between illegal evidence and constitutional rights, the constitutional foundation of the exclusionary rule remains solid in many common law countries. This is also the case in civil law countries, which generally emphasize the significance of protecting constitutional rights in criminal proceedings. The German Supreme Court, for instance, has found that if the procedural provision which has been violated, does not, or not primarily, serve to protect the defendant, then a prohibition on use will be unlikely.⁴⁰

36 *Mapp v. Ohio*, [1961] 367 U.S. at 643, 655.

37 *Davis v. United States*, [2011] 131 S. Ct. at 2419, 2426.

38 Bradley, *supra* note 20 at 22.

39 Thaman, *supra* note 27 at 409.

40 BGHSt [1992] 38, at 214, 218-222.

Considering the institutional fact that many constitutional rights have been included in the criminal procedure in some countries, the protection of the criminal procedure law itself can to some extent be seen as the implicit requirement of the constitutional guarantee.

As one of the most fruitful areas of litigation concerning the *Canadian Charter*⁴¹, the exclusionary rule in Canada secures its legal basis in the constitutional document. This is helpful for avoiding the challenge of lacking explicit constitutional foundation as that in the U.S. legal system. Therefore, defendants in Canada can seek legal remedy by referring to constitutional rights, and courts can develop the exclusionary rule by interpreting section 24 (2) of the *Canadian Charter*. Mainly based on the constitutional basis as well as the case law system, a specifically designed exclusionary rule, like the relevant sections contained in the *Police and Criminal Evidence Act 1984* in UK, is understandably absent in Canada.

The *Constitution* in China, by contrast, does not touch on the exclusionary rule, while this should be correctly understood by acknowledging the following issues. First of all, unlike many common law countries, the *Constitution* in China is better known as the fundamental legal basis of the whole domestic legal system, which cannot be directly referred to in judicial practice. Secondly, several vital provisions relating to human rights are included in the *Constitution*, which again cannot be directly used in criminal cases for the abstract nature of the *Constitution*. These human rights clauses, although not directly enforceable, have been incorporated in other laws such as the *Criminal Procedure Law*. Therefore, they can be enforced in an indirect way. For example, section 37 of the *Constitution* stipulates that *the liberty of citizens is inviolable.....Unlawful deprivation or restriction of liberty by illegal detention or other means*

41 Parfett, supra note 33 at 300.

is prohibited. Accordingly, the *Criminal Procedure Law* lays down the procedure of pre-trial detention, including the warrant requirement, legal standard and the rights of suspects. In fact, Article 1 of the *Criminal Procedure Law* clearly outlines that this law is enacted in accordance with the *Constitution*. Such a close connection between the *Constitution* and the *Criminal Procedure Law* also raises the status of the *Criminal Procedure Law* to a higher level, acting as the so-called quasi-constitutional law. Lastly, in order to effectively protect constitutional rights encoded in the *Criminal Procedure Law* and strictly implement the *Criminal Procedure Law* itself, the exclusionary rule is delicately designed as a mechanism of legal remedy.

It is pretty obvious that the constitutional exclusionary provision in the *Canadian Charter* can be directly enforced and developed by courts, without the necessity of creating a separate exclusionary rule. While in China, since the *Constitution* itself does not contain a similar provision, it is necessary to devise an independent exclusionary rule to enforce human rights clauses enshrined in the *Constitution* and the *Criminal Procedure Law*. Taken as a whole, although these are two different institutional routes, they can be seen as the functional equivalence with regard to the constitutional foundation in principle and legal application in practice.

Now, we have conducted a very brief analysis of the constitutional foundation and legal design of the exclusionary rule in Canada and in China. Nevertheless, there is another important issue that should be mentioned. As a legal remedy for violating or infringing rights, the exclusionary rule deals with a wide range of official behaviors in criminal proceedings. It should be noted that not all the rights involved in criminal proceedings are constitutional. Apart from constitutional rights, there are also other general procedural rights, as those contained in

the *Criminal Procedure Law* of China. Many would disagree that those rights should be treated equally, since the constitutional rights are always regarded as more important or of higher value than the general procedural rights. In addition, it could even be argued that not all the constitutional rights are equal in nature. When it comes to the criminal justice, some constitutional rights, such as the right to liberty, are more vital for defendants than other rights peripheral or less relevant to the fair trial.

The balancing of different rights is a kind of value judgment, which further reflects the policy nature of the exclusionary rule. Since the weight of different rights is not the same, the mode of remedy for violating or limiting those rights is also different. For evidence obtained by violating unconstitutional rights or technical rules, the mandatory exclusion may be unsuitable. Otherwise, this approach could result in the problematic consequence that true offenders are set free on legal technicalities. This is not in accordance with the original aim of the exclusionary rule, and does little to enhance public confidence in the criminal justice system. Accordingly, the better approach is to limit mandatory exclusionary rules to situations where fundamental or constitutional rights are violated.⁴² More importantly, it should be recognized that the exclusionary rule will occasionally lead to the release or acquittal of suspects, but its institutional aim is not relevant to the decision of guilt or innocence, but the integrity of justice.

For the exclusionary rule, its emphasis on constitutional rights instead of treating all the rights equally has many implications. Firstly, by adhering to constitutional rights, the exclusionary rule gains a universal nature in criminal proceedings. Unless otherwise stipulated, which is rarely in place, the exclusionary rule cannot be set aside for other considerations

⁴² Thaman, *supra* note 27 at 416.

because constitutional rights are involved. Secondly, based on the distinction between constitutional rights and general procedural rights, the exclusionary rule can neither be underrated as a technical one, nor trumped by other general rules. Lastly, acting as a remedy mechanism for violating constitutional rights, the exclusionary rule can be built into the web of the constitution. Under the umbrella of the exclusionary rule, nearly every constitutional right which is relevant to the criminal procedure could find its place. This comprehensive nature of the exclusionary rule also helps strengthen its bond with the constitution.

C. Due Process as a Comprehensive Theoretical Basis

1. Theoretical Value of Due Process

Traditionally, many different policy rationales exist with regard to the legitimacy of the exclusionary rule. With different policy preferences in mind, the framers of the exclusionary rule, either the legislature or the courts, tend to create their own ideal version. It could be argued that policy considerations are intrinsically biased. As policy makers, they can hardly assert that a specific policy preference is perfect and indisputable in a world featured by diversified values. This implies that the existing exclusionary rules, if viewed from the perspective of policy considerations, are inevitably flawed in their theoretical basis. No matter what policy they embrace, there would be some kinds of defects or pitfalls in it.

More importantly, there is inner tension between policy and law. To some extent, policy is always floating, not stable in nature. From this viewpoint, taking policy considerations as the basis of the exclusionary rule runs the risk of not totally conforming to the rule of law. Therefore, it is wise to gradually weaken the policy element of the exclusionary rule, while

strengthening its legal element. This is also one of the reasons why the constitutional foundation of the exclusionary rule is so important, which has been discussed above. Of course, when interpreting the exclusionary rule in practice, policy considerations will be inevitably reintroduced. However, a more balanced approach towards the mix of policy and law in the exclusionary rule may be beneficial for its future development.

In the same vein, it is argued that the prevailing rationales for Fourth Amendment suppression in the United States, including deterrence, equitable restoration, judicial integrity, and judicial review, etc, are all normatively problematic because they rest on an appeal to essentially legislative policy preferences without any basis in conventional legal interpretation.⁴³ The assertion of ‘without any basis in conventional legal interpretation’ may be too extreme to a certain degree. Although the exclusionary rule in the United States is policy-oriented in nature, it does not mean the U.S. Supreme Court ignores legal interpretation. However, this critical comment does correctly pick up the theoretical weakness of the exclusionary rule. To put it simply, if all these rationales can be applied simultaneously, they may not necessarily point to the same direction. This may lead to some legal uncertainty in practice. In addition, when different rationales fall into conflict, a more fundamental rationale will be needed.

If we adopt constitutional rights as the litmus test of the legitimacy of the exclusionary rule, some policy considerations may seem not very persuasive any more. Taking the good reputation of the administration of justice in the *Canadian Charter* as an example, the basic idea of judicial integrity is that the admission of illegal evidence amounts to the judiciary’s implicit

43 Richard M, *supra* note 13 at 1892.

endorsement of the violations of constitutional rights. But an infringement on judicial integrity is not the same as a violation of constitutional rights. On the other hand, judicial integrity will also suffer when relevant evidence is excluded by court, thereby leaving potential criminals unpunished.

In the absence of constitutional rights, policy considerations of the exclusionary rule may appear questionable. But at least in China, constitutional rights are abstract and conservative in essence, which coincides with the inertia of the *Constitution*, and therefore cannot be directly put into practice. The criminal procedure, which adopts constitutional rights as its element, is the main enforcement mechanism of these fundamental rights. Understanding the triangle relationship among constitutional rights, criminal procedure and policy considerations, we can move on to discuss the importance of due process in sustaining basic rights in criminal proceedings. Let us look back to the early days of the Fifth and Fourteenth Amendment Due Process Clauses in the United States, these important clauses aimed to require that deprivations of liberty be authorized in accordance with the codified procedures. It could be argued that this core historical meaning of the Due Process Clauses provides the best foundation for the exclusionary rule.⁴⁴

In fact, the meaning of due process in the sphere of constitutional law experienced a dynamic change in legal history. As Harrison put it, the Due Process Clauses are understood first of all to require that when the courts or the executive act to deprive anyone of life, liberty, or property, they do so in accordance with established law.⁴⁵ Since the introduction of the *Magna Carta*, the

⁴⁴ Richard M, *supra* note 13 at 1907.

⁴⁵ John Harrison, "Substantive Due Process and the Constitutional Text" (1997) 83 V A. L. REV at 493, 497.

due process clause has long been viewed as a commitment to positive law. This view of due process as adherence to positive law persisted well after ratification of the Fourteenth Amendment.⁴⁶ Along with the legal development, normative aspects of due process increasingly took the stage. By judicial interpretation in an active way, due process was construed to embody all the principles implicit in the concept of ordered liberty.⁴⁷ As a result, these new standards gradually evolved into the so-called ‘substantive’ due process.⁴⁸

The prevalence of substantive due process to some extent surpasses the original notion of adhering to positive law, since it raises the status of due process to a higher level, which authorizes the courts to take policy considerations into account rather than simply conforming to the existing rules. This paradigm shift fostered the selective incorporation doctrine, whereby constitutional rights can be admitted into the ambit of the constitutional due process clause, and virtually all constitutional rights have now been found up to snuff.⁴⁹

Although the normative turn of due process is criticized as inconsistent with the original meaning as adherence to positive law, it has contributed to the empowerment of due process in incorporating constitutional rights and policy considerations. This combination of constitutional rights and policy considerations turns due process into a comprehensive theoretical basis of the exclusionary rule. On the one hand, due process in the substantive sense can absorb nearly all fundamental constitutional rights, while at the same time excluding non-constitutional rights from its ambit. The distinction between constitutional rights and other general rights is in line with the special focus on constitutional rights of the exclusionary rule.

46 Richard M, *supra* note 13 at 1909.

47 *Palko v. Connecticut*, [1937] 302 U.S. at 319, 325.

48 *In re Winship*, [1970] 397 U.S. at 358, 382.

49 *McDonald v. City of Chicago*, [2010] 130 S. Ct. at 3020, 3034.

On the other hand, the substantive due process is suitable for embracing policy considerations, mainly because it does not rigidly adhere to positive law. This also coincides with the special remedial nature of the exclusionary rule in that not all violations of the criminal procedure will result in the exclusion of relevant evidence. In other words, only those serious violations of constitutional rights which are embedded in the procedural rule will invoke the exclusionary rule.

The notion of substantive due process dominates at present, but this does not mean the original meaning of due process as a commitment to positive law is totally out-dated. On the contrary, the commitment to positive law is still a valuable virtue. In terms of the exclusionary rule, the object of commitment has changed from the technical rule to the constitutional procedure. From this perspective, the strict application of the exclusionary rule can combine the advantages of both substantive and procedural due process. Therefore, it can be said that the original meaning of due process affords much more than a textually and historically defensible home for the abstract values that motivate the exclusionary rule.⁵⁰ Along with the advancement of the constitutional procedure, adhering to positive law in the current version is equal to the acceptance of substantive due process.

Treating due process as the theoretical basis of the exclusionary rule can help integrate all the existing policy considerations into a comprehensive one. This is particularly useful in dealing with the troublesome situation in the United States. The U.S. Supreme Court has recognized that the Fourth Amendment does not apply at trial and so, by its terms, cannot

⁵⁰ Richard M, *supra* note 13 at 1912.

justify suppression.⁵¹ The inner logic of this argument is that the exclusionary rule is only envisioned for violation of trial rights, like the right to confrontation, and not for pre-trial violation of the Fourth Amendment. This distinction between trial and pre-trial rights, or between obtaining and using evidence, can be used to remove the Fourth Amendment from the arsenal of the exclusionary rule in the traditional framework. However, viewing exclusion as a manifestation of due process⁵², this new framework can incorporate almost all the constitutional rights in the sphere of the exclusionary rule. The Fourth Amendment, together with other constitutional Clauses, will come back again by having a new look as the constitutional elements of due process. Since the notion of due process covers the whole criminal proceeding, the so-called distinction between trial and pre-trial rights, or between obtaining and using evidence, will vanish accordingly.

The comprehensive nature of due process gains its explanatory power in many aspects, including incorporating constitutional rights, adhering to positive law, and balancing policy considerations. Viewing the exclusionary rule as a requirement of due process highlights the constitutional facet of the criminal procedure. All those official behaviors in the criminal proceedings, especially criminal investigations, must abide by the rights-based constitutional procedure. If violations of constitutional rights occur, the exclusionary rule may apply.

2. Due Process Based Exclusionary Rule

Now, let us move on to the exclusionary rule in Canada and China. As a remedial provision, section 24(2) of the *Canadian Charter* is not an independent source of Charter rights but merely

51 *Davis v. United States*, [2011] 131 S. Ct. at 2419, 2426.

52 Richard M, *supra* note 13 at 1913.

provides a remedy for their breach.⁵³Based on the above analysis, this section perfectly reflects all the elements that due process embraces. Firstly, it clearly points to constitutional rights, which is stated as ‘infringed or denied any rights or freedoms guaranteed by this Charter’. Secondly, the rights-based constitutional procedure is implicitly mentioned as ‘evidence was obtained in a manner that infringed or denied any rights or freedoms’. Although this expression does not directly refer to the procedural rule, both the evidence-obtaining process and the manner of collecting evidence are key elements of the pre-trial procedure. Lastly, this section adopts a relatively open-ended policy aim, which takes the repute of the administration of justice into consideration. To be specific, section 24(2) starts from the acknowledgement that damage has already been made to the administration of justice due to violations of constitutional rights, and then seeks to ensure that evidence obtained by the Charter breach will not bring about further damage to the repute of justice.

It should be noted that section 7⁵⁴of the *Canadian Charter* specifically provides the right to life, liberty and security, which has been described as the equivalent of the U.S. due process clause.⁵⁵With regard to the relationship between section 7 and section 24 (2), they are obviously not isolated provisions but closely connected sister clauses. Section 7, together with other constitutional rights, constitute the legal prerequisite of section 24 (2). When section 7 is violated, section 24 (2) will come into play as a legal remedy. This is precisely what the Supreme Court of Canada has chosen to do in practice. As Parfett argues, the Supreme Court, through the exclusionary rule, has established a due process model for the Canadian criminal

⁵³ *R. v. Terry*, [1996] 2 S.C.R. 207.

⁵⁴ Section 7 - Life, liberty and security of person: 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

⁵⁵ Stuart, *supra* note 4 at 315.

justice system.⁵⁶ Although Parfett made this comment in a critical manner, the effort of the Supreme Court of Canada in shaping the exclusionary rule in a due-process model has proven to be a success. Where there is dispute over due process, courts will conduct an investigation on whether evidence was obtained in a constitutional manner and whether individual rights were protected.

Mainly due to the legal tradition of focusing on crime control⁵⁷, China's modern criminal justice has been struggling to transform itself into a due process model. When compared with the *Canadian Charter*, there is no exclusionary rule in China's *Constitution*, but similar due process clauses do exist. Since China takes a different route for designing the exclusionary rule, it would be beneficial to dissect the complex interconnection among the *Constitution*, the *Criminal Procedure Law*, and the exclusionary rule. Unlike the *Canadian Charter*, the *Constitution* of China cannot be implemented directly, but only be enforced by other laws including the *Criminal Procedure Law* in an indirect manner. Therefore, the *Criminal Procedure Law* assumes the responsibility of laying down due process and human rights clauses. Accordingly, the exclusionary rule functions as a legal remedy for violations of procedural rules, namely, the carriers of constitutional rights and due process.

Although the exclusionary rule in China has no direct relationship with the *Constitution*, it can provide remedies for constitutional rights and due process contained in the *Constitution*. Or, seeing the *Constitution* and the *Criminal Procedure Law* as an interconnected functional

⁵⁶ Parfett, *supra* note 33 at 305.

⁵⁷ Herbert L. Packer, "Two Models of the Criminal Process" (1964) 113 U. PA. L. REV. 1.

combination, we can also regard the exclusionary rule as an overall legal remedy servicing the *Constitution* and the *Criminal Procedure Law* simultaneously.

II. The Scope and Standard of Illegal Evidence

The exclusionary rule of illegal evidence, as a relatively independent legal system, is made up of substantive and procedural elements. As far as the substantive element is concerned, it mainly includes two essential parts: the scope and standard of illegal evidence. The scope of illegal evidence is generally divided into two types: testimonial evidence and material evidence respectively. When it comes to the standard of illegal evidence, it involves a series of factors in identifying whether specific evidence belongs to the ambit of the exclusionary rule.

A. Hierarchy of Rights

There are a wide range of rights in the legal system. It appears strange to some extent that rights can be gauged by significance. In the field of international human right law, some scholars argue that notion of core rights presumes a ranking or hierarchy of human rights.⁵⁸ At the same time, the distinction between non-derogable and derogable rights adds weight to the notion of a hierarchy of rights. In practice, when different rights fall into conflict, it is for the courts to determine which right should prevail. Under these circumstances, non-derogable rights will usually be favored against other ordinary derogable rights.

In the same vein, a hierarchy of rights can also be found in criminal proceedings. We have discussed in the first part the difference between constitutional rights and other general

58 Daniel Moeckli, et al, *International Human Rights Law*, 3rd edn (Oxford University Press, 2017) at 142.

procedural rights, which lays the constitutional foundation for the exclusionary rule. The notion of substantive due process is also based on the classification of rights.

In *Collins*,⁵⁹ the Supreme Court of Canada implied a hierarchy of rights by concluding that the right to counsel was a more important right than the right to be free of unreasonable search and seizure. It was held that real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone, but the use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded. By implying a hierarchy of rights and placing the right to counsel at the top of that hierarchy, the Supreme Court of Canada was seeking to protect the right to silence.⁶⁰ Such a special legal arrangement in fact reflects the inter-relationship between different rights.

The same consideration can be found in China's criminal justice. In the *Criminal Procedure Law* of China, there is an independent chapter specifically clarifying the relevant issues with regard to the right to counsel. This chapter is placed ahead of other important procedural provisions, which signals the special status of the right to counsel in maintaining fair trial. More importantly, in nearly every key stage of the proceeding, the right to counsel is generally recognized as the prerequisite of the due process. At trial stage, in particular, the effective defense provided by the counsel is also characterized as the basis of a fair trial. If the right to counsel is violated, the trial will be invalid.

⁵⁹ *R. v. Collins*, [1987] 1 S.C.R. 265 at 48.

⁶⁰ Parfett, *supra* note 33 at 313.

If a hierarchy of rights can be identified in the criminal proceeding, this will have a profound influence on the scope and standard of illegal evidence. First of all, some rights, such as the right to counsel, are labeled as constitutional rights based on their fundamental nature. Other rights in the criminal proceeding, which are created not by the *Constitution* but by the *Criminal Procedure Law*, can be called procedural rights. Within the web of rights in the background of criminal justice, constitutional rights are usually deemed as more important than general procedural rights. Accordingly, the exclusionary rule mainly pays attention to the protection of constitutional rights. This does not mean ordinary procedural rights are unimportant, or not in the ambit of the exclusionary rule. In fact, some procedural rights are also of great significance and have an impact on the fairness of the procedure.

Secondly, the right to counsel has a special position in criminal proceedings, which is generally accepted as the basis of other procedural rights. For example, the right to silence, which is always equal to the privilege against self-incrimination⁶¹, is essentially dependent on the assistance of lawyers. It is not difficult to imagine that without a lawyer in place during interrogation, a suspect can hardly successfully maintain the right to silence. In other words, the right to silence can only be maintained with a lawyer aside insisting that silence. Therefore, the right to counsel is seen as a necessity, not a luxury, for securing an accused's other procedural rights. In the light of its particular value, the violation of the right to counsel will render the trial invalid, which is the most serious procedural sanction, rather than invoking the exclusionary rule, which only deals with the admissibility of evidence.

61 Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005) at 342.

Thirdly, when the right to liberty and the right to property are compared, the former will always prevail. Although the right to property is also recognized as a kind of basic human right⁶², it cannot be given the same legal status as the right to liberty, since the latter involves the most important interest. This is the reason why the criminal procedure and the civil procedure are clearly differentiated, both in legal interests and in design. In terms of the exclusionary rule, the right to property is relatively peripheral. Although illegal search and seizure has some connection with the right to property, it mainly concerns the right to privacy.

Lastly, the distinction between trial rights and pre-trial rights is also acknowledged in legal reasoning. However, from the perspective of due process, both trial rights and pre-trial rights have a profound impact on the fairness of the criminal procedure. The influence of pre-trial rights cannot be confined to the pre-trial stage. In the eyes of the exclusionary rule, if violation of constitutional right occurs, it does not matter whether it is trial right or not.

It should be highlighted that there is no hierarchy of rights in the text of law. Furthermore, in *Dagenais v. Canadian Broadcasting Corp* ([1994] 3 S.C.R. 835 at 75), it was held that a hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. But the jurisprudence in this case mainly refers to the protected rights of two individuals, and principally aims to fully respect the importance of both sets of rights. In addition, even if Charter rights cannot be seen in a hierarchical manner, this does not mean that Charter rights cannot be compared with other rights in the statutory law. In other words, the implied hierarchy of rights is reasonable and

62 Banning, T.R.G.van, *The Human Right to Property* (Intersentia-Hart, 2002) at 36-38.

useful both in theory and in practice, especially when certain rights run into conflict with each other.

To some extent this theory can be seen as an artifact of the judiciary in balancing different legal interests, especially in the sphere of the exclusionary rule. Since the decision on whether to exclude illegal evidence is discretionary in nature, the judiciary has to take policy considerations into account, at the same time avoiding going against the rule of law. For example, according to section 24 (2) of the *Canadian Charter*, if a court decides to exclude disputed evidence, it should be established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute. Simply with this rather broad idea in mind, a court can hardly find any clear guidance in practice. Therefore, the court needs to resort to judicial discretion; if choosing this controversial route, the court has to justify its decision within the existing legal framework. The hierarchy of rights is such an effective theoretical tool that can help justify discretionary judicial decisions.

Focusing on the scope and standard of illegal evidence, the hierarchy of rights has at least two noteworthy implications.

On the one hand, the judiciary can base its decision on its preferred prong of the hierarchy of rights. This policy preference, which is based on the hierarchy of rights, will exert considerable influence on the scope of illegal evidence. If the right of liberty or the right against torture is seen as more important than the right to privacy, then a differential treatment towards illegal testimonial and material evidence may be introduced. This is obviously the case in China. According to the *2010 Exclusion Provisions*, testimonial evidence shall be mandatorily or

automatically excluded if it was illegally obtained by torture; while for material evidence, even if it was illegally collected by violating procedural rules, a court shall balance several factors before making the decision on whether to get it excluded. Likewise, the Supreme Court of Canada is reluctant to exclude evidence gained from violation of the right to privacy, mainly because such violation is usually recognized as unrelated to trial rights, such as the privilege against self-incrimination.

On the other hand, if a dichotomy between mandatory and discretionary exclusion is established either in law or in practice, a hierarchy of rights will be one of the decisive factors regarding the standard of illegal evidence. For those non-derogable rights, such as the right against torture, if they are violated during the investigation, the resulting evidence will fall into the sphere of mandatory exclusion. By contrast, most rights in the criminal proceeding have not got such a special treatment, so the violation of these ordinary rights will generally entail the application of the discretionary exclusionary rule. In China, both mandatory and discretionary exclusion are included in the exclusionary rule, depending on the illegal means and legal interests involved. According to section 24 (2) of the *Canadian Charter*, the decision of a court on whether to exclude evidence is discretionary, which implies the judiciary rather than the legislature is entrusted with authority to apply the exclusionary rule. In addition, since it is required that all circumstances be taken into account before making the final decision, this case-by-case analysis can be better conducted by courts.

The discussion on the hierarchy of rights is by no means of only theoretical value. It is beneficial not only in devising the exclusionary rule, but also in evaluating the effects of the rule. As an empirical study in Canada suggests, section 7 violations have the highest exclusion

rate and section 8 violations have the lowest.⁶³ Case studies in China also show that the majority of the exclusion involves testimonial evidence illegally obtained by torture.⁶⁴ In other words, the graver the violation the more likely exclusion is to occur.

B. From Quasi-automatic Exclusion to Discretionary Exclusion

According to the plain language of section 24 (2) of the *Canadian Charter*, both the requirement of ‘*having regard to all circumstances*’ and the standard of ‘*bring the administration of justice into disrepute*’ can imply the intent of the legislature that the exclusionary rule is discretionary in nature. This presumption has been confirmed by the Supreme Court of Canada in *Strachan* by holding that this provision does not provide an automatic exclusionary rule for unjustifiable limits to the *Charter*.⁶⁵

Like the exclusionary rule in China, the Canadian version of the rule represents a significant departure from the previous theory and jurisprudence. Similar with other jurisdictions which see the admission of improperly recovered real evidence as lying at the discretion of the court⁶⁶, the *Canadian Charter* tries to reach a compromise between the automatic exclusionary rule and the common law rule which permitted admission of the evidence regardless of the manner in which it was obtained.⁶⁷ Compared with the rigid mandatory rule, the discretionary rule can better meet the needs of complex circumstances in the criminal proceeding. In balancing the short-term and long-term influence of excluding illegal evidence, the discretionary rule can leave more room for a court. However, the discretionary rule also has its weakness, because

⁶³ Jochelson et al, *supra* note 35 at 219.

⁶⁴ Liu Jingkun, *The Exclusionary Rule of Illegal Evidence in China* (Springer Press, 2019) at 241-335.

⁶⁵ *R. v. Strachan*, [1988] 2 S.C.R. 980.

⁶⁶ Davidson, *supra* note 1 at 366.

⁶⁷ Parfett, *supra* note 33 at 300.

the flexible standard cannot clearly reflect the hierarchy of rights and judicial attitude towards certain Charter rights violations.

Based on section 24 (2), the Supreme Court of Canada introduced several factors to be considered in evaluating whether the admission of evidence would affect judicial integrity, along with its definition of self-incrimination, therefore contributing to the introduction of a ‘quasi-automatic rule of exclusion’.⁶⁸ This kind of judicial activism in the field of the exclusionary rule, as Paciocco suggests, does not reflect either the intent of Parliament or the wording of the section itself.⁶⁹ By analyzing the changing attitudes of the Supreme Court in last two decades, we can get a better understanding of the theory and practice regarding the exclusionary rule in Canada.

In *Stillman*,⁷⁰ the Supreme Court created a standard for exclusion based upon whether the illegally obtained evidence was conscriptive or non-conscriptive. In fact, this distinction is very creative. The Supreme Court held that if the evidence is characterizes as non-conscriptive, the admission of which will rarely operate to render the trial unfair. By contrast, if the accused was compelled to participate in the creation or discovery of the evidence, the admission of this kind of conscriptive evidence, whether it is material evidence or not, will generally render the trial unfair.

The distinction between conscriptive and non-conscriptive evidence, as well as its relationship with the standard of fair trial, can be traced back to *Collins*. In *Collins*⁷¹, it was

⁶⁸ Ibid at 301.

⁶⁹ D.M. Paciocco, “The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule” (1990) 32 Crim. L.Q at 326.

⁷⁰ *R. v. Stillman*, [1997] 1 S.C.R. 607.

⁷¹ *Collins*, supra note 59 at para. 38.

opinioned that material evidence obtained in a manner that violated the *Charter* will rarely operate unfairly for that reason alone. In other words, if the material evidence has already existed irrespective of the Charter violation, then its admission will not render the trial unfair. However, if the accused is conscripted against himself or herself through a confession or other evidence emanating from him or her, then the use of such evidence would render the trial unfair. The main reason why the conscriptive evidence is inadmissible lies in its connection with the privilege against self-incrimination.

When a broader notion of self-incrimination is adopted, self-incriminatory evidence cannot be limited to confessions any more, but include other evidence emanating from the accused. Following this way of thought, in *Leclair and Ross*⁷², the Supreme Court found that although the identity of the accused pre-existed any Charter breach, the participation in the creation of line-up evidence was self-incriminatory, which affected the fairness of the trial. Since then, the family of self-incriminatory evidence contains confessions, evidence emanating from the accused, and other evidence that requires the accused to take part in its creation.

In *Mellenthin*⁷³, the drugs, clearly as material evidence, were also seen as self-incriminatory because they would not have been discovered but for the rights violation. After *Mellenthin*, the scope of the so-called self-incriminatory evidence was enlarged again, including evidence that could not have been discovered but for the violation of Charter rights.

Finally it came to *Stillman*⁷⁴, in which the Supreme Court stated that to compel an accused to use his body or to provide bodily substances in order to incriminate himself would generally

⁷² *R. v. Leclair and Ross*, [1989] 1 S.C.R. 3, 46 C.C.C. (3d) 129, 139-140.

⁷³ *R. v. Mellenthin*, [1992] 3 S.C.R. 615, [1992] S.C.J.

⁷⁴ *R. v. Stillman*, [1997] 1 S.C.R. 607, 113 C.C.C. (3d) 321, [1997] 1 S.C.R. 607, at 86.

render the trial unfair. The Court reached this conclusion by arguing that the compelled production of bodily parts or substances is akin to a compelled statement in terms of the invasion of the essence of the person. Since the unauthorized seizure of bodily substances violated section 7 of the *Charter* by offending the privilege against self-incrimination, and violation of section 7 inevitably rendered the trial unfair, the illegally obtained bodily substances should be excluded. By inserting material evidence in the sphere of the privilege against self-incrimination, the scope of section 7 of the *Charter* is intentionally enlarged. This results in the phenomenon of quasi-automatic exclusion for the conscriptive material evidence.

Although the distinction between conscriptive and non-conscriptive evidence is creative, and the equalization between conscriptive material evidence and a compelled statement is also informative, this artificial legal chain reflects a misunderstanding of the original concept of self-incrimination. In the early days when the privilege against self-incrimination was recognized, the reason why a compelled statement would render the trial unfair was not mainly due to the violation of the right to privacy, but because of the worry about its unreliability. As Parfett highlighted, the rationale underlying the privilege against self-incrimination does not exist in the context of material evidence.⁷⁵ It was also fiercely criticized by Stuart as overly complex, arbitrary, and rigid, in part because a violation relating to conscripted evidence is not necessarily more serious than a violation relating to non-conscripted evidence.⁷⁶

In the light of the criticism surrounding the *Stillman* quasi-automatic exclusion mode, including its inappropriate removal of the distinction between testimonial and material

⁷⁵ Parfett, *supra* note 33 at 317.

⁷⁶ Stuart, *supra* note 4 at 325.

evidence,⁷⁷ the Supreme Court abandoned the conscriptive versus non-conscriptive dichotomy in *Grant*.⁷⁸ This reflects the candid attitude of the Supreme Court in maintaining judicial integrity. Since the *Stillman* mode cannot be accepted as suitable any more, it would be a better choice to substitute it with a new rule.

The Supreme Court's return to the discretionary exclusion was welcomed by many scholars. As stipulated in section 24 (2), the Canadian exclusionary rule is expressly discretionary. This principle also means that constitutional rights do not have to be watered down by judges for fear of an overreaching exclusionary rule.⁷⁹ The discretionary rule, although not as tough as the mandatory rule, is more capable of accommodating the constantly changing situations. It should not be neglected that the exclusionary rule is policy-oriented, so the automatic exclusion always runs the risk of being arbitrary or rigid, which cannot easily coexist with the flexible requirements of fair trial. In other words, trial fairness is better conceived as an overarching systemic goal than as a single element analysis.⁸⁰

The changing judicial philosophy from quasi-automatic exclusion to discretionary exclusion in Canada is well worth an in-depth analysis. Due to the limit of theme, the main points are summarized as follows. It is neither a random change, nor an arbitrary decision. Actually, this conversion to the original regime of the *Charter* sufficiently shows that the Supreme Court focuses on the practical effects of the exclusionary rule, rather than adhering to any abstract notion. Therefore, even if the Supreme Court reversed its earlier judgment, it will not

77 Troy Riddell, "Measuring Activism and Restraint: An Alternative Perspective on the Supreme Court of Canada's Exclusion of Evidence Decisions under Section 24(2) of the Charter" (2016) 58 CANADIAN J. CRIMINOLOGY & CRIM. JUST. at 100.

78 *Grant*, supra note 29 at para. 104.

79 Don Stuart, supra note 4 at 321.

80 *Ibid* at 325.

significantly impact its authority. In addition, by carefully seeking for the suitable way of implementing the exclusionary rule in a trial-and-error manner, the Supreme Court can dynamically adjust its rationale so as to meet the needs of protecting Charter rights effectively.

C. Distinction between Testimonial Evidence and Material Evidence

In *Grant*, the Supreme Court of Canada changed its rationale from quasi-automatic exclusion to discretionary exclusion. But this return to discretionary mode is limited to material evidence, mainly as a reflection on the over-expansion of self-incriminatory evidence. The same rationale cannot equally apply to testimonial evidence. For testimonial evidence obtained by offending the privilege against self-incrimination, a quasi-automatic exclusion is still suitable.

Similarly, the exclusionary rule in China also treats testimonial evidence and material evidence differently. A comparative study on the distinction between testimonial evidence and material evidence in Canada and China will be informative in acknowledging the similarities and differences between these two countries. When it comes to testimonial evidence obtained by torture or other illegal means violating the privilege against self-incrimination, compulsory exclusion is generally preferable. Comparatively speaking, discretionary exclusion for illegal material evidence is more feasible, although the factors considered by the judiciary may be different between two countries, dependent on the diversified policy considerations.

1. Testimonial Evidence

Under the confessions rule at common law, involuntary confessions are inadmissible. If a confession is found to be involuntary, it will be excluded directly. Only those voluntary

confessions surviving scrutiny under the confessions rule can reach the ambit of section 24 (2). In terms of the application of section 24 (2), the mode of exclusion is the same for testimonial and material evidence. There is no distinction between testimonial and material evidence in the text of section 24 (2). But in the eyes of the Supreme Court, while there is no absolute rule excluding Charter-infringing statements under section 24(2), the three lines of inquiry supports the general, although not automatic, exclusion of statements obtained in violation of the Charter.⁸¹

More importantly, if it is found that a confession was obtained in violation of section 7 of the Charter (*the privilege against self-incrimination*), a court will generally reach a conclusion that the reliability of the confession is outweighed by abusive or coercive behavior, or that it is unreliable. Both of these considerations will call for exclusion.⁸² To summarize, for testimonial evidence such as confessions, the general rule of exclusion, although not directly declared as automatic, is adopted by the Canadian courts.

The exclusionary rule of confession evidence in China, which aims to constrain torture and other illegal interrogation means, is mandatory in nature. Traditional China's criminal justice was long plagued by torture. Under torture, suspects were forced to confess, and wrongful convictions followed. According to an empirical study, of 50 wrongful convictions surveyed in China, 47 (94%) involved false confessions, and from the perspective of courts, admitting false confessions obtained by torture is the main cause of wrongful convictions.⁸³ In order to constrain torture, as early as in 1979, the *Criminal Procedure Law* in China emphasized that

81 *Grant*, supra note 29 at para. 92.

82 *R. v. Hart*, [2014] 2 S.C.R. 544.

83 He Jiahong, He Ran, "Empirical Studies of Wrongful Convictions in Mainland China" (2012) 80 U. Cin. L. Rev at 1277.

torture and threat, inducement, deception as well as other illegal means of obtaining evidence shall be strictly prohibited. But without a clear-cut legal consequence, such a prohibition can hardly be automatically put into practice.

As the outcome of the judicial reform in the 2010s, the *2010 Exclusion Provisions* came into place, which was targeted specifically at evidence obtained by torture. Section 1 of the *2010 Exclusion Provisions* states that confessions obtained by torture and other illegal means, as well as testimony of witnesses and statements of victims collected by violence, threat or other illegal means, are illegal testimonial evidence. Section 2 of the *2010 Exclusion Provisions* further stipulates that if illegal testimonial evidence is identified by legal procedure, it shall be excluded. Although three kinds of testimonial evidence, namely, confessions of suspects, testimony of witnesses and statements of victims, are equally mentioned, it is undoubtedly the confessions that take the central stage.

It is pretty clear that a mandatory exclusion mechanism for illegal testimonial evidence has been established in the *2010 Exclusion Provisions*. For confessions obtained by torture, a court has no discretionary power but to exclude them compulsorily. The mandatory exclusion for tortured confessions contains several policy considerations: ⁸⁴firstly, when confessions were obtained by torture, their credibility is damaged, and the legitimacy of the procedure is also violated; secondly, the exclusionary rules for confession evidence in Germany, France and some common law countries are all mandatory rules; lastly, China has signed and approved the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or*

⁸⁴ Chen Guangzhong et al, *Annotations and Comments on the Revised Articles of the Criminal Procedure Law of the People's Republic of China* (People's Court Press, 2012) at 69-70.

Punishment, which also requires the mandatory exclusion of confession evidence. To some extent, several high-profile wrongful convictions, which happened in the first decade of the 20th century, were regarded as the catalyst of the exclusionary rule.

When the *criminal Procedure Law* was revised in 2012, the core clauses of the 2010 *Exclusion Provisions* were incorporated in the law. At this stage, one key issue in applying the exclusionary rule is how to accurately define the content of torture. Looking at the definition of torture in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,⁸⁵ there are basically three elements: the consequence of a certain act (*severe pain or suffering, whether physical or mental*), the intention (*intentionally*) and the purpose (*mainly obtaining information or a confession*). In terms of the types of torture, or what kinds of acts can be identified as torture, the detailed guidance is absent. This leads to many controversies in practice.

Along with the enhanced regulation of the detention center in China recently, traditional means of torture such as beating suspects are not frequently used any more, but “non-violent” means, particularly sleep deprivation, often appear during the interrogation. However, the 2012 *Criminal Procedure Law* remains silent about the definition of torture, leaving this highly controversial issue unsolved. In addition, since the introduction of the 1979 *Criminal Procedure Law*, several non-torture investigative means including threat, inducement and deception have been blacklisted in the law. Due to the lack of clear rules, it is ambiguous

85 Article 1 of the Convention stipulates: For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

whether confessions obtained by threat, inducement and deception shall equally be excluded as tortured evidence.

In terms of these legal issues, the Supreme Court of Canada, under the common law system, can choose to put forward its interpretation of law by creating a binding precedent. By contrast, the Supreme Court of China, within a different legal regime, can achieve the same aim not by hearing a criminal case and making a precedent directly, but by drafting judicial interpretations. Therefore, in order to clarify the definition of torture, a specific provision was designed in the *2013 Opinions on the Mechanism of Preventing Wrongful Convictions in Criminal Cases (2013 Opinions on wrongful convictions hereafter)* drafted by the Supreme Court, which states that confessions obtained by sleep deprivation and other forms of maltreatments such as starvation shall be excluded. Acting as a form of judicial interpretation, the 2013 Opinions can be cited by local courts as the legal basis of judgment, therefore supplementing the general rules in the law.

In a recent round of judicial reform, the *2017 Strict Exclusion Provisions* was introduced, one aim of which is to solve the controversies relating to the identification of illegal confession evidence. According to section 2 of the *2017 Strict Exclusion Provisions*, torture is generally divided up into two categories, with one being violent means such as assault or illegal use of constraint equipment, and the other being means of maltreatment. This categorization is helpful for clarifying the definition of torture, but falls short of a clear enumeration of different forms of maltreatments. Despite this, since sleep deprivation and other forms of maltreatments have already been outlined in the *2013 Opinions on wrongful convictions*, if these judicial interpretation are taken as a whole, it can be argued that all the maltreatment means listed in

the *2013 Opinions on wrongful convictions* shall also be included in the sphere of maltreatment in the *2017 Strict Exclusion Provisions*. When it comes to the seriousness of torture, the basic requirement stipulated in the *2017 Strict Exclusion Provisions* is that certain types of torture can directly compel the suspects to confess against their will due to unbearable suffering. This means that there should be a causal relationship between the act of torture and the following confessions. In addition, the act of torture has to be severe enough to coerce the suspects to make confessions. According to the categories of torture, such coercion will involve not only physical violence but also psychological pressure.

Another major issue relating to confession evidence is the legal treatment of other illegal means besides torture. According to the *Criminal Procedure Law*, torture and threat, inducement, deception as well as other illegal means are all strictly prohibited. It can be seen that, torture, the most serious illegal method, is specifically highlighted, and that threat, inducement and deception are recognized as belonging to another category. But in fact, threat is very similar to torture, because both of them share the common trait of coercion. Comparatively speaking, coercion is not contained in inducement and deception, at least not in an obvious way.

Following the compromise of the *2010 Exclusion Provisions*, the *2012 Criminal Procedure Law* avoids touching on the tricky issue of whether confessions obtained by threat, inducement and deception shall be excluded. After the revision of *2012 Criminal Procedure Law*, controversies inevitably ensued. It was argued that the existing mode of the exclusionary rule can be characterized as broadly prohibiting illegal means, but strictly excluding illegal evidence, which implies that although threat, inducement and deception are strictly prohibited in law,

confessions obtained by these illegal means are not necessarily excluded.⁸⁶ From this critical perspective, there is clearly a legal gap between the categories of illegal means stipulated by the law and the scope of illegal evidence specified by the exclusionary rule.

In other words, only those illegal means specifically clarified in the exclusionary rule can be taken as the basis of identifying illegal evidence. Contrary to this opinion, a different view was that, recognizing the prohibition on illegal means (*including threat, inducement and deception, of course*) in the *Criminal Procedure Law* as the comprehensive legal basis, evidence collected by violating this legal prohibition shall be excluded accordingly.⁸⁷ Otherwise, the strict prohibition on illegal means will be regarded as merely a meek recommendation, and the *Criminal Procedure Law* itself will also be seen to be taking a soft line on the violations of legal procedure. When the authority of legal procedure is challenged without corresponding sanctions, the legitimacy of the whole criminal justice system would suffer.

Pushed by the appeal for a step forward, the *2017 Strict Exclusion Provisions* finally adopts threat as another illegal means besides torture that renders the following confessions inadmissible. According to section 3 of the *2017 Strict Exclusion Provisions*, the types of threat mainly involve resorting to violence or causing serious damage to the legitimate rights of the suspects or their close relatives. Like torture, the seriousness of illegal threat should reach a level of compelling the suspects to confess against their will due to unbearable suffering. For

86 Li Shouwei, "On Issues of the Exclusionary Rule of Illegally Obtained Evidence" (2014) 2 Chinese Criminal Science at 58-60.

87 Luo Guoliang, "The Burden of Proof on the Legality of Evidence in the Exclusionary Rule of Illegal Evidence" (2006) 6 Chinese Criminal Science at 72-73.

confessions obtained by threat, they shall be mandatorily excluded. This conforms to the overall mandatory exclusion of testimonial evidence.

In terms of inducement and deception, they were selectively neglected again in the 2017 *Strict Exclusion Provisions*, mainly because it is rather difficult to make a clear line between illegal inducement, deception and legitimate investigative tactics. As many investigators point out, interrogation techniques will always include psychological tactics, such as game theory or prisoner's dilemma, which have close connection with inducement and deception. Although a mandatory exclusion of confessions obtained by inducement and deception is not feasible at present, it is still possible to conceive a discretionary exclusion mechanism. In this respect, section 24 (2) of the *Canadian Charter* can be an alternative approach. If the admission of confessions obtained by inducement and deception will render the trial unfair, they should be excluded in consideration of all the circumstances.

Till now, we can get a general understanding of the exclusionary rule of testimonial evidence in China, especially its outstanding characteristic of the enumeration of illegal means. By enumerating illegal means individually and concretely, the exclusionary rule can provide clear guidance for legal practitioners, thereby avoiding unnecessary misunderstanding and ambiguities. However, the existing list of illegal means in law is very limited. In order to meet the complex needs of judicial practice, there is a special phrase called 'other illegal means' after the enumeration of typical ones.

Based on the principle of effective interpretation, the definition of 'other illegal means' shall apply the same legal standard as torture and threat, which means a new kind of illegal means

will contain two basic elements: violation of legal procedure and infringement on human rights. Accordingly, the *2017 Strict Exclusion Provisions* adds such a new illegal means to the domain of the exclusionary rule, section 4 of which states that confessions obtained by illegal detention and other illegal restrictions on personal freedom shall be excluded. This provision adheres to the notion of human rights protection embedded in the exclusionary rule. To be specific, if investigators compel the suspects to confess by detaining them in an illegal manner, the following confessions shall not be admitted.

2. Material Evidence

In many countries, such as the United States where the exclusionary rule was originally created, the main purpose of inventing this rule is to protect constitutional rights against unreasonable search and seizure.⁸⁸ As a result, the majority of the rules or precedents are targeted at illegally obtained material evidence.⁸⁹

A strikingly different policy priority, however, can be seen in the exclusionary rule of China. From the perspective of judicial reform, the question of how to effectively prevent wrongful convictions always dominates policy discussions. It is unquestionable that false testimonial evidence such as confessions rather than truthful material evidence is the main culprit of wrongful convictions. Besides that, although procedural justice plays an increasingly important role in China's criminal justice, judicial deference to substantial justice, with its deep-rooted legal history and cultural background, cannot be simply ignored. This means that material

⁸⁸ Calabresi, G, "The Exclusionary Rule" (2003) 26 Harvard Journal of Law and Public Policy at 111-118.

⁸⁹ Bradley, *supra* note 20 at 3.

evidence, even if obtained illegally, can hardly be excluded, especially in high-profile criminal cases.

As a result, the majority of the clauses with regard to the exclusionary rule in China, both in law and in judicial interpretations, were dedicated to testimonial evidence, leaving only one or two clauses on material evidence. Taking the *2010 Exclusion Provisions* as an example, 13 complicated clauses with mandatory exclusion were spent on testimonial evidence. By contrast, only one simple clause was reserved for the discretionary exclusion of material evidence, which stipulates that if physical or documentary evidence is obtained by violating legal procedure and therefore may affect the fairness of the trial, it shall be subject to correction or reasonable explanation, otherwise it shall be excluded. Both the *2012 Criminal Procedure Law* and the *2017 Strict Exclusion Provisions* simply duplicate the same rule.

Looking at two decisive factors of illegal material evidence in detail, violation of legal procedure can be easily identified, while its influence on the fairness of the trial is relatively difficult to assess. Moreover, there is no clear guidance on how to evaluate the influence of illegal evidence-obtaining behaviors on the fairness of the trial. Accordingly, it is rare for courts to exclude physical or documentary evidence obtained by violating legal procedure. In other words, the exclusionary rule of illegal material evidence has not been effectively put into practice.⁹⁰

In essence, the main difficulty in excluding illegal material evidence in China lies in the flexible approach of discretionary exclusion, which is not inappropriate of its own, but largely

90 Long Zongzhi, *Study on China's Criminal Evidence Rules* (China Procuratorial Press, 2011) at 11-12.

depends on the authority of the judiciary.⁹¹ For most Chinese courts, they generally prefer mandatory exclusion to discretionary exclusion, primarily because the latter requires more detailed guidance and more importantly, more judicial authority. To be specific, if a court falls short of judicial authority, it would be difficult for it to deal with the pressure of excluding illegal evidence and the following consequence of acquittal. Therefore, many courts are reluctant to apply the discretionary rule, but favor the mandatory rule with clear-cut details. Thus, the judiciary in China, particularly the Supreme Court, should try to create more detailed guidance in identifying and excluding material evidence. For this part, the experience of the Canadian judicial system can be a good example. As a Canadian empirical study shows, the percentage of excluding material evidence is lower than that of testimonial evidence by just a small margin (63.8% for material evidence and 77.7% for testimonial evidence).⁹² These statistics reflect the high-quality performance of the exclusionary rule with regard to illegal material evidence.

In Canada, material evidence (*or physical evidence*) used to be divided into bodily evidence and non-bodily evidence. Bodily evidence refers to evidence obtained from the accused physically, such as DNA evidence. In *Stillman*⁹³, it was held that the admission of conscriptive bodily evidence obtained by unjustifiable Charter limitation would affect trial fairness. This near-automatic exclusionary rule for bodily evidence was finally replaced by a new standard established in *Grant*. Therefore, the distinction between bodily evidence and non-bodily evidence is not as important as before.

91 Liu Jingkun, “Why Is It Difficult to Exclude Illegal Evidence”, *The Court’s Daily* (15th July, 2014) A2.

92 Jochelson et al, *supra* note 35 at 219.

93 *R. v. Stillman*, [1997] 1 S.C.R. 607.

In *Grant*, the Supreme Court adopted a flexible, multi-factored approach as required by the wording of section 24(2).⁹⁴ According to section 24 (2), there are three preconditions relating to the exclusion of material evidence: (1) the applicant's rights or freedoms as guaranteed by the *Charter* must have been unjustifiably limited or denied; (2) the evidence must have been obtained in a manner that unjustifiably limited or denied a guaranteed right or freedom; and (3) having regard to all the circumstances, the admission of the evidence in the proceedings must be capable of bringing the administration of justice into disrepute.⁹⁵ This three-avenue conceptual framework, as well as the following judicial explanations, is of great value to the exclusionary rule of illegal material evidence in China.

The first avenue concerns the seriousness of the Charter violation, which in fact is an objective approach. In evaluating whether the admission of the evidence would impact judicial integrity, courts need to examine the seriousness of illegal official acts at first. If they find the Charter violation to be serious but fail to dissociate from that, the reputé of the administration of justice would suffer. The concern about the seriousness of Charter violation does not aim to deter the police, but to preserve judicial integrity and public confidence in the due process of law. Accordingly, the more severe or deliberate the investigative acts that led to unjustifiable Charter violation, the greater the need for the courts to exclude the relevant evidence so as to maintain public confidence.

As stated in *Grant*, the seriousness of the violation is based on the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by

⁹⁴ *Grant*, supra note 29 at para. 103.

⁹⁵ *Grant*, supra note 29 at paras. 118-110.

the Charter.⁹⁶ In *Tsekouras*⁹⁷, the Ontario Court of Appeal held that to determine the seriousness of the infringement under this line of inquiry, a court must look to the interests engaged by the right infringed and examine the extent to which the violation actually impacted on those interests. There are certain indicators with regard to the seriousness of the Charter violation. For example, in terms of section 8 violation, a lack of reasonable and probable grounds is an indicator of seriousness. If state authorities can show reasonable and probable grounds, the seriousness of an unjustifiable Charter limit could be reduced, which will accordingly affect the decision on whether to exclude the evidence.⁹⁸ Similarly, a lack of exigent circumstance as the justification for warrantless search will also be an indicator of seriousness.⁹⁹ If there are extenuating circumstances, such as preventing the disappearance of evidence, they may attenuate the seriousness of the Charter breach. Since the assessment of seriousness involves many factors, it shall be determined on a case-by-case basis.

In the United States, the Supreme Court, when dealing with the exclusionary rule, takes the subjective element of violating the Fourth Amendment seriously.¹⁰⁰ The same consideration is shared in Canada. The existence of the investigators' good faith is an important factor in balancing the seriousness of Charter violations, but not in a decisive manner. The true value of good faith lies in the police's honest belief. This does not mean that any honest belief, however unreasonable, will preclude the rejection of evidence under section 24(2).¹⁰¹ In addition, negligence or willful blindness cannot be equated with good faith.¹⁰² If the Charter violation

⁹⁶ *Ibid* at 73.

⁹⁷ *R. v. Tsekouras*, [2017] ONCA 290.

⁹⁸ *R. v. Fearon*, [2014] 3 S.C.R. 621.

⁹⁹ *R. v. Paterson* [2017] 1 S.C.R. 202.

¹⁰⁰ Bradley, *supra* note 20 at 1.

¹⁰¹ *R. v. Harris*, (1987), 35 C.C.C. (3d) 1 (Ont. C.A.).

¹⁰² *R. v. Buhay*, [2003] 1 S.C.R. 631.

reflects part of a larger pattern of disregard for Charter rights¹⁰³, such a pattern of abuse, if judicially clarified, will generally prompt a court to reach a decision of exclusion.

In China, courts will generally take the seriousness of constitutional rights violation into account in balancing whether to exclude material evidence. However, the factors mentioned above, especially the subjective element of the police, are not clearly stipulated in the exclusionary rule, nor commonly considered by courts. Since it is important to analyze the level of seriousness in order to justify the exclusion of material evidence, the case law in Canada can be really beneficial.

The second inquiry requires an evaluation of the extent to which the Charter violation actually impacted the interests protected by the right involved. Similar to the seriousness of the Charter infringement itself, its impact on the accused's interest also has different levels of seriousness, ranging from minor technical breach to profoundly intrusive violations. In *Grant*, it was held that the more serious the impact on the accused's protected interest, the greater the risk that admission of the evidence may bring the administration of justice into disrepute.¹⁰⁴ Consequently, the decision on the admissibility may signal to the public whether the Charter rights are of little actual avail to the citizen.¹⁰⁵ Since many constitutional rights may be impacted individually or simultaneously, the first step is to figure out which right or rights were undermined. After that, a court can move on to examine the degree to which the violation impacted on the accused's interests.

103 *R. v. Strachan*, [1988] 2 S.C.R. 980, 46 C.C.C. (3d) 479.

104 *Grant*, supra note 29 at para. 76.

105 *R. v. Stanton*, (2010), 254 C.C.C. (3d) 421.

In the sphere of material evidence, the most frequently encountered situation is an unreasonable search in violation of section 8 of the *Canadian Charter*, which may infringe on the interests of privacy, and more broadly, human dignity. If the intrusion on privacy and dignity is identified, a further analysis on the extent of this impact is needed. Generally speaking, if an unreasonable search intrudes on an area of a higher expectation of privacy, it would be more serious than one which does not. Therefore, a violation of the privacy of a person's body can be seen as more serious than that of his office. In the same vein, an illegal search of a personal computer is one of the most intrusive invasions of privacy that can be imagined.¹⁰⁶

In modern days, excessive government intrusion on people's privacy is commonly conducted via electronic devices. Along with the development of information technology, it becomes more convenient and effective for investigative organs to engage in electronic surveillance so as to gather incriminating clues or evidence. Against this background, whether an electronic conversation is illegally accessed through the accused own device or through the device of a co-interlocutor does not really matter in terms of the admissibility of the evidence. In other words, the participation of other people in an electronic conversation does not dilute the impact of an illegal search.¹⁰⁷

Like the inevitable discovery exception established by the U.S. Supreme Court,¹⁰⁸ whether the evidence could have been obtained without the unjustifiable violation should be taken into consideration. In *Grant*, it was held that although discoverability is not determinative in

106 *R. v. Morelli*, [2010] SCC 8.

107 *R. v. Marakah*, [2017] SCC 59.

108 *Nix v. Williams*, [1984] 467 U.S.431.

admissibility, it plays a useful role in allowing the court to assess of the causal connection between the *Charter* breach, the resultant evidence and the impact on the accused's rights.¹⁰⁹

As far as China's exclusionary rule of material evidence is concerned, the extent of illegal search's influence on constitutional rights is not specifically emphasized. This does not conform to the purported rationale of protecting constitutional rights of the exclusionary rule. If courts really dedicate to enforce the exclusionary rule, especially regarding material evidence, the seriousness of the impact on the accused's interests should be seriously considered. Again, the case law in Canada is of great relevance.

The third line of inquiry highlights society's interest in the adjudication of the case on its merits. In *Grant*, the Supreme Court suggested that Canadian society generally expects that a criminal allegation will be adjudicated on its merits, which requires a trial judge to ask whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion.¹¹⁰ By exercising their discretionary power, judges, when applying the exclusionary rule, should consider not only the negative impact of admitting the evidence on judicial integrity, but also the impact of failing to admit the evidence. If relevant and reliable evidence was excluded, this decision may undermine the truth-seeking function of the criminal trial, and accordingly render the trial unfair from the perspective of the public. This is exactly the troublesome situation that Chinese judges have to face in practice.

However, the concern for truth-seeking is only one consideration in applying the exclusionary rule. According to section 24 (2), a court is required to consider all the

¹⁰⁹ *Grant*, supra note 29 at para. 122.

¹¹⁰ *Ibid* at 79.

circumstances, rather than the reliability of the evidence alone. Although the illegally obtained material evidence may contribute to the ascertainment of the truth and the adjudication of a case on its merits, this issue must be weighed against factors pointing to exclusion in order to balance the interests of truth with the integrity of the justice system.¹¹¹ By making such a value judgment, a court must inquiry whether the exclusion of evidence exacts too great a toll on the truth-seeking goal of the criminal trial.¹¹²

In this respect, the value or importance of evidence needs to be considered. If the evidence is not important at all, its exclusion will not fall into dispute generally. As is shown in an empirical study, evidence that is unessential to the Crown's case is often excluded at high rates, even when it is labeled reliable.¹¹³ At the same time, if the reliability of evidence is questionable, then its exclusion is almost inevitable, especially when it forms the basis of the prosecution. Otherwise, the admission of such unreliable evidence will run a high risk of resulting in wrongful conviction. In fact, Chinese courts also tend to exclude questionable evidence or evidence of minor importance, since there can hardly be any serious dispute over the exclusion. On the other hand, the exclusion of highly reliable and important evidence may impact negatively on the ascertainment of truth, or in the context of section 24 (2), on the repute of the administration of justice. Mainly in this scenario, courts are required to balance different policy considerations before making a decision on the admissibility of evidence.

The seriousness of the offence may also be an important consideration, which is surely the case in China, but it has the potential to cut both ways. If the exclusion of reliable material

111 *R. v Mann*, [2004] 3 S.C.R. 59.

112 *R. v Kitaitchik*, [2002], 166 C.C.C. (3d) 14 (Ont. C.A.).

113 Jochelson et al, *supra* note 35 at 226.

evidence hinders the prosecution of a serious crime, it may have an immediate impact on public reaction to the justice system. However, this short-term public attitude should not outweigh the long-term reputé of the justice system. Based on the requirement of section 24 (2), while the public has a heightened interest in seeking a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach.¹¹⁴ This is the main reason why we call for an independent and impartial judicial system.

In China, courts generally have to resist great social pressure in excluding illegal evidence or delivering a judgment of acquittal. In order to effectively prevent wrongful convictions, the judiciary is required to adhere to the rule of law without being negatively influenced by social pressure. Nonetheless, since material evidence is reliable and crucial to conviction, the courts will find it difficult to justify the exclusion within the traditional truth-seeking legal and cultural framework. This means that the exclusion decision will be highly likely confronted by the unsatisfied victim of the case and the public. In some extreme cases, the procuratorate may also challenge the exclusion decision of the court. In a justice system where the appeal for substantial justice seems to hold sway, it is understandable that the exclusion of material evidence will put a court in a catch-22 situation. However, only by abandoning the notion “the ends justify the means” can the exclusionary rule survive. Looking forward, when human rights protection and procedural justice gradually turn out to be the dominating ideas in the justice system, it would be generally accepted that if the admission of illegal material evidence would render a trial unfair, then the evidence should be excluded even if the offence is serious.

¹¹⁴ *Grant*, supra note 29 at para. 84.

Furthermore, the smooth functioning of the exclusionary rule can make a judicial system much stronger in the long run because it can avoid unfair convictions, which may also seriously undermine the legitimacy of criminal justice. If we take constitutional rights seriously in criminal proceedings, then, violation of procedural rules and disregard of constitutional standards should be not ignored. When the admissibility of evidence falls in dispute, seriousness of violation of rights rather than seriousness of offence is decisive, and in the same vein, reliability and importance of evidence is not determinative. From the perspective of judicial proof, the admissibility of evidence is the prerequisite of its probative value, and the boundary between them should not be blurred. As for the dispute over admissibility, constitutional rights and procedural justice should always prevail. Only when the admissibility has been confirmed by a court, the probative value of evidence can be examined next.

As Stuart asserts, there must be a sanction for serious Charter breaches even if the evidence is reliable and crucial to the Crown's case.¹¹⁵ Otherwise, if the application of the exclusionary rule is restrained by the seriousness of the crime, the *Charter* will cease to provide effective protection in those so-called serious cases. In *Marakah*,¹¹⁶ after finding that the police violated the *Charter* in seizing text messages, the Supreme Court concluded that the evidence should be excluded pursuant to section 24(2) of the *Charter*. The main reason of exclusion is that it is important not to allow society's interest in adjudicating a case on its merits to trump all other considerations.

115 Stuart, *supra* note 4 at 327.

116 *R. v. Marakah*, [2017] S.C.C. 59.

Following the three lines of inquiry discussed above, the final step is a balancing work. In *Nolet*,¹¹⁷ the Supreme Court of Canada emphasized that the task for courts is to achieve a balance between individual and societal interests with a view to determining whether the administration of justice would be brought into disrepute by admission of the evidence. As was held in *Grant*, no overarching rule governs how the balance is to be struck. However, the preceding analysis creates an informative decision tree, which coincides with the requirement of section 24(2). In fact, this balancing process involves the assignment of weight to various interests often at odds with each other.¹¹⁸ As Gorman sees it, the key factors in the balance are the seriousness of the violation against the importance and reliability of the evidence.¹¹⁹ According to Thaman, true balancing of various considerations should occur only where the violation is not properly characterized as fundamental.¹²⁰

In *Grant*, this balancing test is recognized as an objective one, which inquires whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.¹²¹ In *Collins*¹²², the Supreme Court rejected the use of public opinion polls as proof of whether or not the admission of the tainted evidence would bring the administration of justice into disrepute. The Court further held that a reasonable person is usually the average person in the community, but only when that community's current mood is

117 *R. v. Nolet*, [2010] 1 S.C.R. 851.

118 *R. v. Tsekouras*, [2017], 353 C.C.C. (3d) 349 (Ont. C.A.).

119 Wayne K. Gorman, "The Admission and Exclusion of Unconstitutionally Obtained Evidence in Canada", (2018) 54 CT. REV at 115.

120 Thaman, *supra* note 27 at 408.

121 *Grant*, *supra* note 29 at para.30 .

122 *Collins v. The Queen*, [1987], p. 17 C.C.C., p. 281 S.C.R.

reasonable.¹²³ This standard is seen as lower than the community shock test.¹²⁴ Paciocco commented that the effect of this approach was not to look to what the community's values are in determining when evidence should be excluded, but rather to ask judges to decide what the community's values should be.¹²⁵

Adopting an objective standard in assessing the impact of admitting illegal evidence on judicial integrity is helpful for courts to reduce social pressure in excluding the evidence. This also reflects such a judicial attitude that a judge will think like a reasonable person, and although whether to exclude the evidence is a question of law, the judge will take the community's reasonable value into consideration. This way of thought mirrors the judicial tradition of relying on the public in China. According to the *Criminal Procedure Law* of China, it is an important principle to rely on the people during the criminal proceeding. By incorporating public confidence as the rationale of the exclusionary rule, and taking the community's reasonable value as the standard of excluding illegal evidence, such a legal framework can help the courts to greatly relieve the burden of justifying their decisions, especially in serious cases. It should be noted, however, the community's reasonable value is not a static thing, but a theoretical one, which means that by resorting to this objective standard, a judge has to conduct an analysis about the exact meaning of the community's reasonable value. In this respect, policy considerations will be introduced again.

Moving on to the exclusionary rule in China, the mode of exclusion with regard to material evidence is discretionary, which is different from the mandatory exclusion of confessions. To

¹²³ *Ibid.*

¹²⁴ Gerard E. Mitchell, "The Supreme Court of Canada on the Exclusion of Evidence in Criminal Cases under Section 24 of the Charter" (1988) 30 CRIM. L.Q. at 171.

¹²⁵ Paciocco, *supra* note 69 at 320.

be specific, if material evidence was obtained by violating legal procedure, and thus may affect the fairness of the trial, it shall be subject to correction or reasonable explanation in the first place. If the violation cannot be corrected or given a reasonable explanation, the resulting material evidence shall be excluded accordingly. Not surprisingly, the prosecutor will always submit a written explanation to the court trying to justify the violation.

It should be noted that in China, an independent judicial review mechanism over search and seizure has not been established by law. This means that investigative organs can decide to conduct search and seizure of their own discretion. Without knowing beforehand whether there is reasonable cause to conduct search and seizure, the court can hardly refute the written explanation about the violation of procedural rules provided by the prosecutor. Furthermore, the judiciary is also constrained by the legal principle of mutual cooperation between the court, the procuratorate and the police. Therefore, although courts have the discretion to exclude illegal material evidence, they are generally reluctant to do so without clear guidance. In order to activate the exclusionary rule of illegal material evidence, it is really necessary to further clarify the decisive factors that need to be considered by courts in exercising their discretionary power. The Canadian version of discretionary exclusion, in this respect, is a feasible model to follow.

D. Exclusion of Derivative Evidence

Derivative evidence generally refers to evidence indirectly obtained as a result of a violation of constitutional rights. In *Silverthorne*,¹²⁶ the U.S. Supreme Court held that the essence of

126 *Silverthorne Lumber Co. v. United States*, [1920] 251 U.S. 385.

provisions forbidding the acquisition of evidence in a certain way is not merely that evidence so acquired shall not be used before the Court but that it shall not be used at all. Based on the fruit of poisonous tree doctrine, the reach of the exclusionary rule is not confined to evidence discovered as a direct consequence of a constitutional violation.¹²⁷ In other words, both direct and derivative fruits of unconstitutional official conducts will fall into the ambit of the exclusionary rule.

In terms of material evidence collected as a result of the information obtained by torture, the fruit of poisonous tree doctrine has been adopted in principle. In *Gäfgen v. Germany*, for instance, the European Court of Human Rights held that if the admission of material evidence as a direct result of torture or inhuman treatment has rendered the trial unfair within the meaning of *the European Convention for the Protection of Human Rights and Fundamental Freedoms*, the doctrine of the fruit of the poisonous tree shall apply without reserve under the *Convention*.¹²⁸

In *Stillman*,¹²⁹ the Supreme Court of Canada recognized derivative evidence as a subset of conscriptive evidence, and more particularly, conscriptive material evidence. As noted above, prior to *Grant*, if the disputed evidence was classified as conscriptive, it was necessary to proceed to determine whether the admission of the evidence would render the trial unfair. The same rule applies to the derivative evidence. However, this approach has been rejected by the Supreme Court in *Grant*, according to which if evidence would have been discovered in any

127 Mark Cammack, "The United States: The Rise and Fall of the Constitutional Exclusionary Rule", in Stephen Thaman, *Exclusionary Rules in Comparative Law* (Springer Press, 2013) at 13.

128 Sauer, H., & Trilsch, M, "European Convention on Human Rights-Threat of Torture against a Criminal Suspect in Order to Save the Life of the Child Victim-Loss of Victim Status under Article 3-Fruit of the Poisonous Tree Doctrine under Article 6" (2011) 105 *The American Journal of International Law* at 313-319.

129 *R. v. Stillman*, [1997] 1 S.C.R. 607.

event, the accused's conscription did not truly cause the evidence to become available.¹³⁰ Although discoverability cannot be a determinative factor of admissibility, it still remains useful in assessing the actual impact of the Charter violation on the accused's interests. Along with the change in case law in Canada, the exclusionary rule of material evidence can be equally applied to derivative evidence.

In China, the exclusionary rule of material evidence itself is highly debatable, therefore, it can be imagined that if the fruit of poisonous tree doctrine was adopted, it would engender considerable controversy. As a result, although preventing torture is the driving force of enacting the exclusionary rule, whether the material evidence obtained as a direct result of torture should be admitted or not remains unclear. This important issue has been selectively ignored from the *2010 Exclusion Provisions* to the *2017 Strict Exclusion Provisions*. This big gap can to some extent reflect the awkward situation of the exclusionary rule. For courts, when dealing with the admissibility of derivative material evidence, they will tend to apply the discretionary rule of illegal material evidence directly, which implies that such derivative evidence can hardly be excluded.

It has been acknowledged that successive confessions can also be regarded as a kind of derivative evidence. To acquire coherent and detailed confessions, investigators will routinely conduct several interrogations in a sequential manner. As a result, many successive confessions will be piled in the case file. If investigators, under great pressure to solve a case, choose to torture suspects into making confessions, the admissibility of confession evidence will fall into dispute. It is obvious that if each piece of the confessions was obtained by torture, they shall

¹³⁰ *Grant*, supra note 29 at para. 121.

be excluded altogether. But this seems to be unusual in practice. More often than not, investigators may try to secure the first confession by torture. After that, by taking advantage of the ongoing psychological impact on suspects, they can obtain successive confessions during the follow-up interrogations without repeatedly resorting to torture. Or, they may implicitly threaten to torture if a suspect refuses to cooperate in the following interrogations, rather than really do so again. Therefore, even if the follow-up interrogations seemingly adhere to the standard procedure, the psychological impact of the previous torture on suspects still persists. For most suspects, they are well aware of the dilemma that if previous confessions were withdrawn, they will almost definitely be tortured again. This means that the following confessions are generally involuntary in nature, and thus shall not be admitted.

If successive confessions obtained as the direct result of torture are not excluded, the purpose of deterring or sanctioning procedural violations cannot be achieved.¹³¹ Considering the relationship between original confessions obtained by torture and follow-up ones collected under psychological pressure, the aforementioned doctrine of the fruit of the poisonous tree can also be applied. According to the *1984 Police and Criminal Evidence Act* in UK, when earlier confession has been excluded under section 76 (2) or section 78 (1), successive confessions might be equally excluded under section 78 (1).¹³²

Aiming at curbing investigators' incentive to resort to torture, the *2017 Strict Exclusion Provisions* in China introduced the rule of excluding successive confessions. Article 5 states that successive confessions obtained under the influence of torture, shall be excluded, together

131 Yan Zhaohua, "The Exclusion of the Successive Confession" (2013) 2 *Modern Law Science* at 125-128.

132 Peter Mirfield, "Successive Confessions and the Poisonous Tree" (1996) *Criminal Law Review* at 566-567.

with original confessions obtained by torture. By taking all the confessions as a whole, this new rule pays attention to the ongoing psychological pressure of torture on the suspect. However, in some circumstances, the influence of torture could be effectively removed, and then suspects might voluntarily confess during the follow-up interrogations. In light of this fact, certain exceptions should be added to the exclusionary rule of successive confessions.

From the viewpoint of voluntariness, there are mainly two kinds of exceptions that have been attached to the exclusionary rule of successive confessions in China. One exception is to change investigators automatically after excluding illegal confessions by investigative organs. Upon receiving the complaint of torture filed by a suspect, if earlier confessions have been discovered as being obtained by torture, the investigative organ can decide to exclude these confessions *ex officio* and then assign other investigators to conduct follow-up interrogations. During the following investigations, if the newly assigned investigators strictly abide by the legal procedure, and the suspect chooses to voluntarily confess again, these successive confessions can be deemed legal and thus admissible. Based on the same rationale, the other exception is concerned with changing procedural stages in the criminal proceedings. When a case enters prosecution or trial stage, a defendant is entitled to challenge the admissibility of his earlier confessions. If he chooses to confess to prosecutors or judges again instead of expressing his dissent, these successive confessions made during prosecution or trial stage will be regarded as voluntary. Therefore, even if earlier confessions have been excluded as illegal evidence, these successive voluntary confessions can be admitted.

E. Judicial Discretion of Excluding Defective Evidence

At common law, judges are generally endowed with the discretion to exclude technically admissible evidence when its prejudicial effect outweighs its probative value. This residual discretion constitutes an additional barrier for the admissibility of evidence. Therefore, to be successfully admitted, evidence has to simultaneously survive at least three layers of the legal filter: the rules of relevance and materiality, the exclusionary rules, and the judge's residual discretion.

According to Tanha, there are four kinds of discretions to exclude evidence that can be employed by trial judges.¹³³ Within Tanha's theoretical framework, the first three kinds of discretion are just different forms of the common law discretion. The last one, which is labeled "constitutionalized common law discretion"¹³⁴, deserves more attention. This discretion finds its origin in section 11(d) of the *Charter*¹³⁵ and the Supreme Court's decision in *Harrer*¹³⁶. It permits a trial judge to exclude improperly obtained evidence, even in the absence of a Charter breach, in order to ensure a fair trial.

Since section 24 (2) of the *Charter* mainly focuses on violations of Charter rights, it is not sufficient to ensure a fair trial in all circumstances. Thus, the so-called constitutionalized common law discretion can function as a meaningful and necessary supplement. It not only

133 Robert Tanha, "The Trial Judge's Four Discretions to Exclude Technically Admissible Evidence at a Criminal Trial" (2012) 36 MAN. L.J. at 188-189.

134 Peter McWilliams et al, *Canadian Criminal Evidence* (Aurora: Canada Law Book, 2008) at 5-19.

135 Any person charged with an offence has the right: d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

136 *R v Harrer*, [1995] 3 SCR 562, 128 DLR (4th) 98.

expands the former common law duty placed on a judge to ensure a fair trial, but also elevates it to constitutional stature independent of the Charter's exclusionary provisions.¹³⁷

It can be argued that trivial misconducts will not merit the remedy of exclusion as stipulated in section 24 (2) of the *Charter*, especially when they were inadvertent, or merely of a technical nature.¹³⁸ In other words, excluding evidence essential to substantiate the charge where the violation of the *Charter* was trivial or, at least not serious, can bring the administration of justice into disrepute.¹³⁹ This judicial attitude conforms to the discretionary nature of the exclusionary rule.

In China, the scope of the exclusionary rule of illegal evidence is also confined to the serious violation of constitutional rights or important procedural rules. Therefore, in order to deal with trivial misconducts or minor violations of legal procedure, judges will generally turn to the discretion of excluding defective evidence. Defective evidence, as an important legal concept in China's evidence rule, mainly refers to evidence with technical flaws in its evidential form or collecting procedure.¹⁴⁰ Such defective evidence cannot be directly admitted at trial due to its defects in admissibility, but it shall not be identified as illegal evidence either. Meanwhile, it is inappropriate to exclude defective evidence indiscriminately because not all the evidential defects have substantive effect on the truthfulness of evidence.

For defective evidence, the *2010 Provisions on the Examination of Evidence in Death Penalty Cases (2010 Evidence Provisions hereafter)*¹⁴¹ creates the so-called conditional

137 Tanha, *supra* note 133 at 178.

138 *R. v. Greffe*, [1990] 1 S.C.R. 755.

139 *R. v. Belnavis*, [1997] 3 S.C.R. 341.

140 Chen Ruihua, "The Remedial Rule on the Flawed Evidence" (2012) 2 *Jurists Review* at 66-68.

141 The 2010 Provisions on the Exclusion of Illegal Evidence in Criminal Cases was enacted and issued together with the 2010 Provisions on the Exclusion of Illegal Evidence in Criminal Cases. They are generally mentioned as the Two Evidence

exclusionary rule. For example, Article 9(2) of the *2010 Evidence Provisions* stipulates that, if the procedure of collecting physical or documentary evidence has any of the following defects, the evidence cannot be admitted unless a correction or a reasonable explanation can be provided: a) the transcripts of investigation, examination or search and seizure attached to physical or documentary evidence do not bear the signature of investigators, holders or witnesses, or the features, quantity, quality, name or any other information of the evidence has not been clearly stated; b) it has not been clearly stated whether the photo, videotape or reproduction of physical evidence or the duplicate or photocopy of documentary evidence has been verified as identical with the original; c) for the photo, videotape or reproduction of physical evidence or the duplicate or photocopy of documentary evidence, there is no explanation from the producer on the place where the original evidence is located, or even if there is an explanation, it does not bear the producer's signature; or d) there are other defects of the procedure of collecting physical or documentary evidence. Such defective evidence shall be excluded if a correction or a reasonable explanation cannot be provided.

On the one hand, the conditional exclusionary rule does not directly deny the admissibility of defective evidence because the defects of evidence may not be serious enough to negate its probative value. On the other hand, it shows concerns about the curability of evidential defects because some defects may essentially influence the reliability of evidence. In the normative sense, defective evidence can be regarded as evidence with conditional admissibility, primarily depending on whether a correction or a reasonable explanation of its reliability can be provided.¹⁴² If its defects can be corrected or justified by a reasonable explanation, defective

Provisions.

¹⁴² Zongzhi, *supra* note 90 at 257.

evidence can be admitted; otherwise, it shall be excluded due to the high risk of unreliability. Comparatively speaking, the exclusionary rule of illegal evidence focuses on violations of constitutional rights or procedural rules, rather than technical defects of evidence.

In order to regulate judicial discretion to exclude defective evidence, the following distinction between illegal evidence and defective evidence shall be highlighted.¹⁴³

Firstly, the degree of violating the law is substantially different. Illegal evidence always involves infringement on constitutional rights by violating procedural rules. Although defective evidence also involves violation of legal procedure, such violation is relatively minor, without infringing on constitutional rights. This is the essential difference between illegal evidence and defective evidence.

Secondly, the mode of exclusion is intrinsically not the same. If illegal evidence is identified, it will be excluded according to law (*of course, for different types of illegal evidence, mandatory or discretionary exclusion can be applied respectively*). Defective evidence can be corrected or justified by a reasonable explanation, which means that if the defect was cured, the probative value of evidence would be confirmed. Therefore, the discretionary exclusion of defective evidence is conditional, to a great extent depending on the curability of the evidence's defects.

Thirdly, different procedure will be applied for examining illegal evidence and defective evidence. When a dispute over illegal evidence occurs, a court will conduct a special investigation on the legality of evidence. Taking confession evidence as an example, the

¹⁴³ Jingkun, *supra* note 64 at 41-42.

defense is required to provide relevant clues or materials regarding the existence of illegal evidence-obtaining means, while the prosecution can present evidence to prove the legality of evidence. After investigation, if the court confirms or cannot rule out the possibility that the evidence was obtained illegally, the evidence shall be excluded. By contrast, when it comes to defective evidence, the defects of evidence are relatively obvious, without the need of conducting a special investigation.

In practice, some judges may confuse illegal evidence with defective evidence, thus resulting in the abuse of discretion. If illegal evidence was improperly regarded as defective evidence and then admitted by so-called correction or reasonable explanation, it would nullify the exclusionary rule. On the other hand, if defective evidence was wrongfully treated as illegal evidence, it would expand the scope of the exclusionary rule of illegal evidence. Therefore, the legal boundary between illegal evidence and defective evidence shall not be obscured.

III. The Procedure of Excluding Illegal Evidence

A major difference of the exclusionary rule between Canada and China lies in the procedure of excluding illegal evidence. In Canada, there is not a specifically designed procedure for seeking a section 24 (2) remedy. When a dispute over illegal evidence arises, a trial judge is empowered and must be able to control the trial proceedings to ensure fairness to all parties and preserve the integrity of the trial process.¹⁴⁴ This flexible procedural regime, which is firmly based on the long-term tradition of due process, will not bring about extra challenge or burden to judges.

¹⁴⁴ *R. v. Loveman*, [1992], 8 O.R. (3d) 51 (Ont. C.A.).

However, the exclusionary rule of illegal evidence is totally a new legal system in China, accompanied with many controversies and misunderstandings. Compared with Canada's legal system, the procedure for the remedy of rights in China used to be very limited in criminal proceedings. Before the introduction of the exclusionary rule, disputes over the legality of evidence or other procedural issues were generally dealt with by courts in a very simple manner. Therefore, in order to provide clear guidance for the prosecution and the defense, a detailed procedure of excluding illegal evidence has been designed.

A. The Defense's Preliminary Burden of Proof

Mainly as a flexible requirement, in Canada, if the defense wants to seek a remedy according to section 24 (2), the practice of giving early notice to the Crown appears to be appropriate.¹⁴⁵ To ensure the fairness of trial, judges will always take constitutional rights seriously. Although in some cases, a court may refuse to entertain a section 24 (2) application due to insufficient notice, where the *Charter* rights are at stake, a trial judge will be expected not to foreclose an inquiry into an alleged violation.¹⁴⁶

When it comes to the standard of proof for the defense in seeking legal remedy, the Canadian courts adopt the standard of a balance of probabilities. As stipulated in section 24 (2), the applicant shall prove on a balance of probabilities that 'it is established' that a Charter right has been unjustifiably limited, and the admission of the evidence would bring the administration of justice into disrepute.¹⁴⁷ More importantly, in *Strachan*, it was held that a strict causal nexus

¹⁴⁵ *R. v. Kutynek*, [1992], 12 C.R. (4th) 152 (Ont. C.A.).

¹⁴⁶ *R. v. Loveman*, [1992], 8 O.R. (3d) 51 (Ont. C.A.).

¹⁴⁷ *Collins*, supra note 59 at para. 49.

between the limitation of the *Charter* and the obtaining of evidence is not necessary.¹⁴⁸ The underlying rationale is that a strict causal requirement would preclude much of the material evidence from section 24 (2)'s application, since there is often no direct causal relationship between an unjustifiable limit of the right to counsel and material evidence. This would limit the ability of courts to exclude illegal evidence.

However, the simple presence of a temporal link is also not determinative, because the obtaining of evidence may be too remote from the *Charter* violation.¹⁴⁹ Therefore, an examination of the overall relationship, which considers the temporal link and the strength of the connection between the impugned evidence and the Charter violation, is a suitable choice.¹⁵⁰ According to Parfett, by eliminating the need for a causal connection between the breach and the evidence, the Supreme Court chose to expand the amount of evidence that could be brought within the protective ambit of section 24(2).¹⁵¹ This comment clearly reflects a restrictive view about the exclusionary rule. Nonetheless, the judicial attitude of not limiting remedial rights cannot be simply equal to the expansion of illegal evidence. The core requirement of the exclusionary rule still remains to be maintaining judicial integrity.

In China, courts will not automatically scrutinize the legality of evidence, so it is the defense's responsibility to challenge the admissibility of evidence at trial. Accordingly, the preliminary burden of producing clues or materials relating to the violation of constitutional rights or procedural rules is imposed on the defense. In order to avoid baseless or unnecessary challenge to the admissibility, the *2010 Exclusion Provisions* emphasizes that before filing a

148 *R. v. Strachan*, [1988], 2 S.C.R. 980.

149 *Grant*, supra note 29 at para. 178.

150 *R. v. Goldhart*, [1996], 2 S.C.R. 463.

151 Parfett, supra note 33 at 319.

motion to exclude illegal evidence, it is a prerequisite for the defense to present clues or materials regarding illegal evidence-obtaining behaviors, including persons, time, location, means, and details involved.

Similar with the requirement of notifying the Crown early in Canada, section 4 of the *2010 Exclusion Provisions* highlights that the defense shall make the application of excluding illegal evidence before the opening of the trial so as to give the prosecution enough time to prepare for the response. Nevertheless, the defense is not required to directly notice the prosecution, but to submit the application together with the relevant materials to the court. Upon receiving the defense's application, the court will deliver a copy of application to the procuratorate before trial. This pre-trial procedure is very important for both parties to prepare well for the trial.

With regard to the standard of proof relating to the application, there is no clear provision in the *2010 Exclusion Provisions*. It depends on whether a judge will harbour suspicion about the legality of evidence thereof. If the judge generates suspicion following the defense's application, a special investigation on the legality of evidence will be conducted. Based on the materials provided by the applicant, if no suspicion about the admissibility of the impugned evidence arises, the court will dismiss the application accordingly. After that, the defense can file a motion again with further clues or materials, which will be re-examined by the court. However, if no substantial new clues or materials are provided, the court will directly dismiss the new application. This procedural repetition shows the necessity of clarifying the standard of proof for the application. From this perspective, adopting a standard of a balance of probabilities may seem reasonable. But in the light of the fact that many defendants cannot receive legal assistance, and even if some defendants have got lawyers, it is also difficult for

their lawyers to obtain materials concerning the illegal investigative means, this seemingly reasonable standard may be too high for them to file an application. Therefore, the *2010 Exclusion Provisions* introduces a rather flexible standard for application, which only requires the submission of clues or materials instead of high-quality evidence, and considering the weakness of human rights protection at investigation stage, courts will always take the defense's application seriously and scrutinize the clues or materials *ex officio*. In some cases, even if the material concerning the illegal investigative means submitted by the defense is relatively weak, the court will still strictly examine the legality of evidence if it is discovered that the disputed evidence is the key evidence in the case or there are other clues in the case file implying the possibility of torture or other illegal means.

In the past, some judges used to confuse the admissibility with the probative value of evidence. In order to avoid such confusion, section 5 of the *2010 Exclusion Provisions* requires that if the admissibility of evidence is challenged by the defense at trial, the court shall conduct a special investigation on the legality of evidence, before moving on to the cross-examination stage. This procedure can be recognized as 'the trial on the legality of evidence' before 'the trial on the fact'. However, if the defense fails to apply for excluding illegal evidence before trial, but chooses to file a motion during trial, the court will usually postpone the investigation on this issue mainly because the prosecution has not got the opportunity to make preparations.

B. The Proof of Legality of Evidence by the Prosecution

In Canada, although the defense assumes the burden of proof for the application of excluding illegal evidence, the onus may shift to the Crown. For example, when a section 10 (b) violation

is involved, and the denial of the right to counsel is established, the Crown has to show that the accused would have acted in the same manner had the section 10 (b) violation not occurred.¹⁵²In other words, when the application has reached a *prima facie* standard, the Crown will have to take the responsibility of proving the admissibility of evidence.

In a similar way, the prosecution in China is burdened with the legal responsibility of proving the legality of evidence. According to section 7 of the *2010 Exclusion Provisions*, if a court, upon the defense's application, has suspicion about the legality of confessions, the prosecutor shall prove the admissibility of the impugned evidence by providing written records or videotape recordings of interrogations, etc. In essence, the burden of proof concerning the legality of evidence can find its legal basis in the burden of proof concerning the fact of the alleged crime.¹⁵³In criminal proceedings, the prosecution bears the burden of proof as to whether the accused is guilty. Accordingly, as the basis of proving the fact of the alleged crime, any incriminating evidence, if its admissibility is challenged by the defense, shall be proved to be admissible by the prosecution. In this respect, the fact concerning the admissibility of evidence can be seen as the collateral factual element of the alleged crime.

Following the framework of the *2010 Exclusion Provisions*, section 57(1) of the *2012 Criminal Procedure Law* expressly provides that during the court's investigation on the legality of evidence, the prosecution shall prove the legality of evidence. This distribution of the burden of proof also takes the participant's actual ability of producing evidence into serious consideration. In China's criminal proceeding, the prosecution dominates the pre-trial process,

¹⁵² *R. v. Bartle*, [1994] 3 S.C.R. 173.

¹⁵³ Luo Guoliang, "On the Burden of Proof for the Legality of Confessions in the Exclusionary Rule of Illegal Evidence: Taking the Distribution of Burden of Proof in the Criminal Proceeding as a Starting Point" (2006) 6 *Journal of Law Application* at 36.

with strong capacity to monitor investigation and collect evidence. The defense, by contrast, usually falls short of the feasible ways to find exculpatory evidence. Some scholars also correctly pointed out that torture and other illegal evidence-obtaining activities were often committed in a secret manner during investigation, so that it is realistic and reasonable for the prosecution to prove the legality of evidence.¹⁵⁴ This also conforms to the equality of arms principle between the prosecution and the defense.

Section 7 of the *2010 Exclusion Provisions* provides that the prosecution can take many measures to prove the legality of evidence. Firstly, written records or videotape recordings of interrogations can be submitted. These original records can reflect the process of collecting confessions. Secondly, the prosecutor can ask the court to summon witnesses who were present during the investigation to testify in court. In some cases, the on-duty official or other witnesses in the detention center may be on the scene, who can testify what really happened during the interrogation. Thirdly, the court can also summon the interrogators to testify in court. The investigators can elaborate on the process of interrogation and give a reasonable explanation for clues or material provided by the defense. These approaches for proving the legality of evidence were confirmed by section 31 of the *2017 Strict Exclusion Provisions*.

To prevent torture from happening, section 123 of the *2012 Criminal Procedure Law* introduces the requirement of conducting videotape recording of the interrogation process. For major cases, the whole process of interrogation shall be videotaped simultaneously. As the silent witness, videotape recordings have turned out to be the critical evidence of showing the

¹⁵⁴ Chen Guangzhong ed, *Research on the Application of the Exclusionary Rule of Illegal Evidence in China* (Peking University Press, 2014) at 19.

legality of confessions. Characterized as objective, real, and comprehensive in nature, videotape recordings usually prevail over written records. In the light of its significant value in judicial proof, the Ministry of Public Security specifically puts forward a guideline on the rules of conducting videotape recording of the interrogation process. If the videotape recordings of custodial interrogations are not synchronized or complete, they cannot be used to prove the legality of confession evidence.

As far as the standard of proof for the legality of evidence is concerned, the *2010 Exclusion Provisions* sets up the same standard as conviction for the prosecution. To be specific, section 11 provides that if the prosecution cannot provide evidence to prove the legality of pre-trial confessions, or the evidence provided is not accurate and sufficient, the impugned confessions cannot be used as the basis of judgment. In criminal proceedings, confessions used to be and will continue to function as vital incriminating evidence. In some cases, the whole structure of evidence system is mainly based on confessions. If confessions are found to be illegal and thus excluded, the remaining evidence will become too weak to sustain the criminal charge. Therefore, the prosecution will manage to prove the legality of confessions.

If the standard for admissibility was lowered, the risk of wrongful convictions would increase accordingly. This will go against the exclusionary rule's original aim of preventing errors of justice. In the majority of wrongful convictions, such as Du Peiwu Case, and She Xianglin Case, the admission of false confessions obtained by torture is the main cause.

¹⁵⁵ Although the legality of confessions in those cases were in doubt, and the prosecution did not provide enough evidence to prove the legality of the impugned evidence, the courts still

155 Yi Yanyou, "Exclusionary Rules in China" (2015) 29 COLUM. J. Asian L at 9-11.

failed to exclude tortured confessions and thus errors of justice followed. If we recognize the inner relationship between the fact relating to the legality of evidence and the fact of the alleged crime, then the same standard of proof shall apply.

Compared with the *2010 Exclusion Provisions*, section 58 of the *2012 Criminal Procedure Law* adopts another approach with regard to the standard of proof. It provides that after investigation on the legality of evidence, if the circumstance of obtaining evidence by illegal means is confirmed or cannot be eliminated, the impugned evidence shall be excluded. It was argued that this provision contains two separate and coexisting standards for the legality of evidence, that is, the standard of ‘confirmed’ and the standard of ‘cannot be eliminated’.¹⁵⁶ These two standards are actually two sides of the same coin. On the one hand, if the defense has already provided enough materials to prove that the disputed evidence was obtained by torture or other illegal means, the court can directly confirm the illegality of evidence. On the other hand, if upon the defense’s application of excluding illegal evidence, the prosecution fails to provide enough evidence to prove the legality of disputed evidence, then the court will decide that the possibility of illegally obtaining evidence cannot be ruled out. Therefore, both scenarios concern the responsibility and capacity of the prosecution to prove the legality of evidence. In the end, the court conducts a comprehensive analysis of the materials provided by the defense and the evidence presented by the prosecution, and makes a final decision on the legality of evidence.

¹⁵⁶ Guangzhong ed., *supra* note 154 at 25-26.

C. The Mechanism of Excluding Illegal Evidence at Pre-trial Stage

In many countries, such as the United States, the exclusionary rule is simply applied at trial stage.¹⁵⁷ The same arrangement can be seen in Canada, which reflects the trial-centered structure in criminal proceedings. By contrast, China's exclusionary rule applies not only at trial but also at pre-trial stage. When illegal evidence is discovered at pre-trial stage, it is the procuratorate that assumes the responsibility of excluding it. The procedural model of excluding illegal evidence throughout the criminal proceeding can be viewed as an outstanding feature of the exclusionary rule in China.¹⁵⁸

According to the *2012 Criminal Procedure Law*, if it is discovered at investigation, prosecution or trial stage that any evidence is illegally obtained, the impugned evidence shall be excluded accordingly. However, the procedure on how to exclude illegal evidence at pre-trial stage is not clearly outlined in law. This legal gap is filled by judicial interpretations. Needless to say, highlighting the requirement of excluding illegal evidence at pre-trial stage can greatly contribute to the enhancement of procedural justice and the right to defense to a great extent. When it comes to the potential costs, the investigative organs are actually not required to do extra work but to strictly abide by the legal procedure so as to minimize disputes over the legality of evidence at pre-trial stage.

At criminal investigation stage, investigators, who may be the wrongdoers, generally have no personal incentive to exclude illegal evidence. Considering this tricky situation, an independent legal mechanism is needed. Based on the functional structure of pre-trial

¹⁵⁷ Calabresi, *supra* note 88 at 112.

¹⁵⁸ Jingkun, *supra* note 64 at 115.

procedure, there are mainly two kinds of mechanisms that can be adopted in terms of the exclusionary rule.

On the one hand, the procuratorate can exclude illegal evidence upon request at the investigation stage. According to section 55 of the *2012 Criminal Procedure Law*, upon receiving an accusation of illegally obtaining evidence, the procuratorate shall conduct a formal verification. If it is confirmed that the impugned evidence was illegally obtained, the procuratorate shall put forward an opinion of correction. As the legal supervision organ established by the *Constitution*, the procuratorate assumes the legal responsibility of supervising criminal investigation, among which the scrutiny over the legality of evidence is a very important task. In the light of the institutional fact that judges will not participate in the pre-trial process, the procuratorate to some extent plays the role of judges in regulating the pre-trial procedure. Since prosecutors will not generally take direct part in the criminal investigation, they rely heavily on the defense's application to discover clues or materials relating to illegal investigative activities.

In order to provide timely legal remedy for the defense, the *2017 Strict Exclusion Provisions* sets up the procedure of excluding illegal evidence upon request at pre-trial stage. Section 14 points out that the defense can file an application to the procuratorate for excluding illegal evidence. The procuratorate shall verify the relevant material provided by the defense and make a written conclusion accordingly. During the verification process, the procuratorate may interview the suspect, listen to his lawyer's opinion, and urge the investigative organ to submit a written explanation or the relevant material about the legality of evidence. If the illegality of evidence is confirmed, the procuratorate shall put forward an opinion of correction to the

investigative organ. Upon receiving the opinion of correction, the investigative organ shall exclude illegal evidence identified by the procuratorate, and the evidence excluded shall not be used as the basis of prosecution.

On the other hand, the legal review organ within the police department can also scrutinize the legality of evidence and exclude illegal evidence *ex officio*. It is undoubtedly unrealistic to anticipate the investigative organ itself to exclude illegal evidence automatically. Investigators are more likely to cover up illegal means of obtaining evidence, especially regarding the critical evidence in a case. According to section 114 of the *2012 Criminal Procedure Law*, when the criminal investigation is finished, the legal review organ within the police department shall verify the evidence collected in the case, with the aim to discover potential evidential flaws or illegal investigative activities. The legal review organ remains relatively independent of the investigative organ, therefore playing an active role in examining the legality of evidence. In an effort to enhance the legal responsibility of these legal review organs, section 15 of the *2017 Strict Exclusion Provisions* provides that if the criminal investigation has been finished, the legal review organ shall scrutinize the legality of evidence and exclude illegal evidence accordingly; if the case cannot meet the standard of proof after excluding illegal evidence, it shall not be filed for prosecution. In some cases, if investigators are found to collect evidence by illegal means, they will often be reprimanded in accordance with the law, and other investigators will be assigned to resume the investigation.

Apart from criminal investigation, arrest review and prosecution review are all vital stages before trial. These two legal functions are currently assumed by the procuratorate. At arrest review and prosecution review stages, the procuratorate shall scrutinize the legality of evidence.

Although there was no clear legal provision concerning the procuratorate's responsibility to exclude illegal evidence, it was widely accepted that in order to enhance its legal supervision function, the procuratorate shall exclude illegal evidence at arrest review and prosecution review stages.¹⁵⁹Section 3 of the *2010 Exclusion Provisions* stipulates that illegal evidence shall be excluded by the procuratorate at arrest review and prosecution review stages, and shall not be used as the basis of arrest and prosecution. Section 54(2) of the *2012 Criminal Procedure Law* reiterates the obligation of the procuratorate to exclude illegal evidence at arrest review and prosecution review stages.

Although the *2012 Criminal Procedure Law* confirms that the procuratorate shall exclude illegal evidence at arrest review and prosecution review stages, the procedure of accomplishing this important task is absent. Due to a lack of formal procedure, there are considerable difficulties in implementing the exclusionary rule at arrest review and prosecution review stages.¹⁶⁰In order to activate the exclusionary rule at these stages, it is important to inform the suspect of the right to file an application to exclude illegal evidence.¹⁶¹Accordingly, section 16 of the *2017 Strict Exclusion Provisions* provides that at arrest review and prosecution review stages, the suspect shall be informed of the right to petition to exclude illegal evidence, and the relevant procedural rights as well as the legal consequence of making confessions. If the defense files a motion to exclude illegal evidence at arrest review or prosecution review stage, the procuratorate shall conduct verification and make a written conclusion. Illegal evidence identified by the procuratorate shall be excluded and not be used as the basis of arrest and

159 Zhang Jun, *Understanding and Application of the Criminal Evidence Rule* (Law Press of China, 2010) at 307.

160 Zongzhi, *supra* note 90 at 440.

161 Guangzhong ed., *supra* note 154 at 38.

prosecution.

Based on its legal supervision function, if the legality of impugned evidence cannot be proved by the existing materials, the procuratorate shall conduct thorough verification *ex officio*.¹⁶² For example, if there is any indication of torture in a case, the procuratorate shall inform the investigative organ to provide all the written records and videotape recordings of the interrogation process, physical examination records in the detention center, interview records prepared by custodial supervisors, and a written explanation about the legality of evidence. In addition, if the suspect is found to be injured during investigation, the procuratorate shall verify the cause and severity of the injury and bring the suspect to hospital for physical examination if necessary.

It should be noted that if illegal evidence-obtaining means are discovered at arrest review or prosecution review stage, the procuratorate will not directly exclude illegal evidence, but put forward an opinion of correction to the investigative organ. This special arrangement embodies the legal principle of mutual check and balance between the procuratorate and the investigative organ. In practice, the procuratorate will generally provide two categories of opinions, depending on the circumstances involved. With regard to less serious scenarios, such as a violation of technical rules, an oral opinion of correction will be delivered. By contrast, if serious violations of constitutional rights are discovered, the procuratorate shall put forward a written opinion of correction. For example, if the procuratorate finds that investigators resort to torture during interrogation, a written opinion of correction is necessary.

¹⁶² Wang Shangxin, Li Shouwei, *The Interpretation and Application of Decision on Revision of Criminal Procedure Law* (People's Court Press, 2012) at 54.

Based on the above analysis, the procuratorate actually dominates the procedure of supervising criminal investigation and providing legal remedies to the defense at pre-trial stage. It goes without saying that the earlier the dispute over the admissibility of evidence is resolved, the better the fairness of the trial is secured. However, since some defendants cannot provide clues or materials relating to illegal investigative means until trial starts, and the procuratorate may choose to ignore or reject the defense's application at pre-trial stage, it is necessary to establish a mechanism of resolving the admissibility issue before trial so as to avoid unnecessarily interrupting the smooth progress of the trial.

As a newly created mechanism in the *2012 Criminal Procedure Law*, the pre-trial conference plays an increasingly important role in resolving admissibility disputes before trial. Although dubbed as a conference rather than a formal procedure, it functions as an effective arrangement for preliminary negotiation between both parties regarding a wide variety of procedural issues, mainly concerning but not limited to the admissibility of evidence. Nonetheless, since little is said in law about its procedural design as well as the legal effect of conclusions made thereof, the pre-trial conference has to face up to many controversies in practice, which greatly hampers its expected contributions.

In an attempt to strengthen its institutional function, section 25 of the *2017 Strict Exclusion Provisions* systematically refines the procedure of pre-trial conference, especially in terms of its relationship with the exclusionary rule. First of all, upon receiving the defense's motion to exclude illegal evidence before trial starts, a court shall convene a pre-trial conference, summoning both parties to the court. This mechanism can help regulate a judge's discretion as to whether to hold a pre-trial conference in a specific case. Secondly, both parties can express

their opinions about the admissibility of evidence, and a consensus can be reached accordingly. This reflects the pre-trial conference's legal orientation as a platform for negotiation. After negotiation, the defense, confronted with the strong evidence relating to the admissibility issue presented by the prosecution, can choose to withdraw its motion from court. By contrast, the prosecution may decide to exclude the disputed evidence considering the persuasive materials submitted by the defense and the reasonable suspicion about the legality of evidence.

By preliminarily resolving procedural disputes, including the dispute over the legality of evidence, the pre-trial conference can be beneficial for courts to focus on substantial disputes in a case at trial.¹⁶³ Furthermore, if both parties fail to reach a consensus on the legality of evidence, the court will not directly make a decision on this issue during the pre-trial conference. This is mainly because the dispute over the legality of evidence tends to be a key controversy between the prosecution and the defense, which not only concerns the admissibility of the impugned evidence but also has a strong influence on the final decision of the case. Therefore, the unresolved dispute over the admissibility issue will be left to the trial stage.

As mentioned before, some judges may be unwilling or unable to distinguish the admissibility from the probative value. In this regard, section 26 of the *2017 Strict Exclusion Provisions* emphasizes that at trial stage, the dispute over admissibility shall be resolved before the relevant evidence can be submitted to enter into the cross-examination procedure. As the prerequisite for cross-examination, the procedure for determining admissibility is independently constructed and specifically placed before the cross-examination procedure. In other words, if the impugned evidence is identified as illegal evidence, it will be excluded from

¹⁶³ Jingkun, *supra* note 64 at 135-136.

trial process, losing the opportunity of getting its probative value considered by cross-examination.

D. Legal Remedy at the Appeal Process

In Canada, a trial judge's decision to exclude or not to exclude evidence under section 24(2) is recognized as a question of law, which is appealable, but only until the trial has been completed.¹⁶⁴ This means that if a court has made a decision on the admissibility issue during trial, both parties are not allowed to seek remedy by filing an interlocutory appeal. In *Cole*, it was specifically stressed that orders excluding evidence should be final, since revisiting such a decision over the course of a trial would interfere with the accused's ability to know the case to meet.¹⁶⁵

In terms of the application of section 24 (2), it is intrinsically a weighing or balancing work, which should be undertaken by trial judges within the framework of a specific case. Generally speaking, appellate courts will not interfere with the fact-driven discretionary decisions of trial courts. If a trial judge has taken proper factors into consideration, the appellate court should accord considerable deference to his or her ultimate determination.¹⁶⁶ This margin of appreciation, however, also has its limits. If the trial judge did not consider the right factors, or made an unreasonable finding of fact or legal error in applying section 24 (2), the issue should be reopened.¹⁶⁷ In addition, an appellate court may reverse the trial court's decision when the legal principles were abused or the findings of fact were unreasonable.

¹⁶⁴ *Mills v. The Queen*, [1987], at 495-500 C.C.C., at 958-64 S.C.R.

¹⁶⁵ *R. v. Cole*, [2012] 3 S.C.R. 34.

¹⁶⁶ *Grant*, supra note 29 at para. 86.

¹⁶⁷ *R. v. Goncalves*, [1993] 2 S.C.R. 3.

The appellate court's deference towards the trial court's decision on the admissibility rests on several institutional premises. Firstly, there is a separation of power between the trial court and the appellate court, with the former focusing on factual issues and the latter paying attention to legal remedies. Since the trial court has an advantage in ascertaining the fact of the case, the appellate court will as a principle not touch on factual issues. Secondly, courts in Canada, even at the local level, always enjoy high authority in securing constitutional rights and the due process of law. As far as the application of section 24 (2) is concerned, its key policy consideration is to maintain the repute of the administration of justice. This judicial-friendly constitutional culture can help relieve the social pressure that courts usually have to cope with. Lastly, the appellate court is very professional in scrutinizing whether the trial court has abused its discretion, so as to maintain its remedial function in criminal proceedings.

In China, the institutional environment for human rights and the design of the criminal procedure are significantly different from those in Canada. As a result, the legal remedy mechanism at the appeal process in China has several distinctive features, which of course has a profound influence on the application of the exclusionary rule.

Generally speaking, both the prosecution and the defense can seek remedies if they disagree with the trial court's decision on the admissibility of evidence. Similar to the Canadian practice, both parties are not allowed to file an appeal directly to the appellate court during trial. Section 12 of the *2010 Exclusion Provisions* states that if the defense claims that pre-trial confessions were obtained by illegal means, while the trial court admits the impugned evidence as the basis of judgment without reviewing its legality, then the appellate court shall review the legality of the evidence. This provision clarifies the legal responsibility of the appellate court in reviewing

the admissibility of evidence when the trial court failed to do so, but it does not refer to the defense's right to appeal against the judgment of the trial court relating to the admissibility issue. Therefore, whether the defense has a legal right to appeal against the judgment on the admissibility issue of the trial court remains unclear. In addition, if the defense files an appeal against the admissibility of evidence, whether the procuratorate can produce new evidence to prove the legality of the impugned evidence is also ambiguous. Unfortunately, the *2012 Criminal Procedure Law* does not provide any clue on these issues either. According to judicial interpretations of the Supreme Court, if the trial court did not review the exclusion motion filed by the defense and took the impugned evidence as the basis of judgment, or the prosecution and/or the defense disagreed with the trial court's decision on the admissibility issue and accordingly made an appeal, or the defense did not find clues or materials relating to the illegal investigative means until at the appeal stage, the appellate court shall review the legality of the impugned evidence. In the light of the legal gap at the appeal process, the *2017 Strict Exclusion Provisions* lays down several rules regarding the legal remedy issues, which are discussed as follows.

Firstly, the prosecution and the defense can appeal against the decision on the admissibility of evidence after trial. Due to a lack of interlocutory appeal procedure, if both parties want to seek remedy for the admissibility decision, they have to wait for the final judgment of the trial court.¹⁶⁸ There are only some very general provisions on the right to appeal in the *Criminal Procedure Law*. If the defendant disagrees with the judgment, or the procuratorate finds any error in the judgment, they can file an appeal. Although it is not clearly stipulated whether both

¹⁶⁸ Jingkun, *supra* note 64 at 174-175.

parties can appeal solely on the admissibility issue, they can somewhat incorporate their opinions about admissibility in the overall reasons for appeal. When an appeal is accepted by the appellate court, both parties can elaborate on their opinions on the admissibility of evidence on appeal. And then, the appellate court will examine their arguments and make a final decision on the legality of evidence. As the remedial procedure, there are mainly three scenarios that usually appear at the appeal process.

One scenario is that the defense's application for excluding illegal evidence has been dismissed by the trial court. After receiving the judgment of the trial court, the defense may file an appeal and continue to challenge the admissibility of the impugned evidence. For this, the appellate court shall review the legality of evidence together with the trial court's decision. If the appellate court has no suspicion about the legality of the impugned evidence but finds that the decision of the trial court is reasonable, it can directly dismiss the defense's motion. By contrast, if the appellate court has a reasonable suspicion about the legality of evidence, possibly because there is no sufficient evidence to prove the legality of evidence, it can conduct investigation on the admissibility issue akin to the trial court, and then make a final decision.

Another scenario also concerns the dismissal of the defense's application by the trial court, but on appeal, the appellant provides new clues or materials relating to the illegal investigative means. Since the factual basis of the admissibility issue has changed, if the appellate court has a reasonable suspicion about the legality of evidence, it can convene a pre-trial conference before trial. If both parties cannot reach a consensus during the pre-trial conference, the appellate court shall conduct investigation on the legality of evidence during the appeal process and then make a final decision.

The third scenario involves the decision of excluding illegal evidence by the trial court upon request or *ex officio*, and then the procuratorate challenges this decision on appeal. If the appellant court finds that the trial court's decision is solid and reasonable, it can reject the challenge of the procuratorate. However, if it is discovered that the decision of the trial court is unreasonable, or the procuratorate provides new evidence in the second instance, the appellate court shall conduct investigation on the admissibility issue and deliver its judgment accordingly.

Secondly, some defendants may file a motion to exclude illegal evidence for the first time on appeal. Although the defense is encouraged to challenge the admissibility of evidence as early as possible, at least before the commencement of trial, this is not a compulsory requirement in the light of the complex situations in practice.¹⁶⁹ For example, some defendants cannot find clues or materials until at the appeal process. Therefore, it is not prohibited for the defense to challenge the admissibility on appeal, even if they did not file an application in the first instance.

It should be noted that some defendants may take the exclusionary rule as a tactics for seeking further lenient treatment in the second instance. To be specific, they choose to remain silent on the admissibility issue during the first instance so as to achieve a favorable sentence. After that, they begin to challenge the legality of evidence on appeal, aiming to get a more lenient sentence by prompting the appellate court to exclude impugned evidence. Sheltered by the prohibition of *reformatio in peius*, those defendants need not worry about a worse consequence in the second instance. Although this may constitute an abuse of process, at least

¹⁶⁹ Jingkun, *supra* note 64 at 130-131.

a loophole in law, the exclusionary rule takes a benevolent attitude in consideration of protecting human rights. However, if an appellant cannot provide a reasonable explanation about why he did not file an application in the first instance, the appellate court tends to adopt a strict standard to examine his new application on appeal.

For an application of excluding illegal evidence filed on appeal for the first time, it will bring about a significant influence on the form of trial for the appellate courts. In the past, the majority of cases in the second instance were dealt with in a written form, without open trials being conducted. The revision of the *2012 Criminal Procedure Law* expands the scope of open hearing in the second instance. If the appellant challenges the fact or evidence established by the trial court, which may have a substantial influence on the conviction or sentence, the case shall be heard by an open trial. Since the controversy over the admissibility of key evidence will often influence the factual basis of the case, this means that if the appellant challenges the legality of evidence on appeal and accordingly raises objection on the fact of the case, the appellate court will have to conduct an open hearing.

This chain reaction actually reflects an intrinsic shortcoming of the appeal procedure in China. Unlike some countries such as the UK, China's appeal procedure imposes little restriction on its triggering mechanism. As long as a defendant disagrees with the judgment of the trial court, he or she can directly file an appeal, without any legal requirement for the reasons of appeal. At the same time, there is no similar separation of power between the trial court and the appellate court, which is vividly manifested by the requirement that the appellate court shall conduct a comprehensive review of all the issues involved in the first instance, especially not confined to the reasons of appeal. Such a broad requirement may be meaningful

for the appellate court to supervise the function of lower courts, but also beneficial for the protection of human rights to some extent. Nonetheless, considering the limited resources of the judicial system, it would be a better choice to create a more professional and focused appeal procedure.

Thirdly, the procuratorate shall diligently fulfill the burden of proof concerning the legality of evidence. According to the *Criminal Procedure Law*, the procuratorate is required to transfer all the case file and evidence to the court before trial, and to present all the admissible evidence during trial. In some cases, the defense files a motion to exclude illegal evidence, together with clues or materials. The trial court has a reasonable suspicion about the legality of evidence and then conduct investigation on the admissibility issue. However, the procuratorate, due to some tactics considerations, fails to provide enough evidence to prove the legality of the impugned evidence. For example, in the Zhang Guoxi Case, which is labeled as the first case concerning the exclusionary rule in China¹⁷⁰, since the procuratorate was reluctant to provide videotape recordings of the interrogations to prove the legality of confessions, the trial court excluded the disputed evidence and accordingly made a judgment favorable to the defense. Recognizing this serious consequence, the procuratorate decided to appeal, and then presented all the evidence relevant to the legality of the impugned evidence to the appellate court. In the end, the appellate court admitted the relevant evidence, confirming the legality of the impugned evidence again. This practice will undoubtedly have a negative impact on the stability and authority of the original judgment.¹⁷¹

170 “Not to Combat Crimes by Committing Crimes: The First Case to Exclude Illegal Evidence”, <http://news.ifeng.com/c/7faGUTUXaGH>, August, 31th, 2011.

171 Jingkun, *supra* note 64 at 178.

In order to prompt the procuratorate to assume its legal responsibility, section 38 (3) of the *2017 Strict Exclusion Provisions* stipulates that during the investigation on the legality of evidence in the first instance, if the procuratorate fails to provide evidence to prove the legality of evidence, and the trial court excludes the impugned evidence, the procuratorate is not allowed to present the relevant evidence again on appeal, except that the relevant evidence is discovered after the first instance. Therefore, upon the notice of the trial court to prove the legality of evidence, the procuratorate shall collect and submit all the relevant evidence to the court in a timely manner. Otherwise, the court will make a decision on the legality of evidence based on the existing evidence, and the procuratorate has to face up to the unfavorable legal consequence.

Lastly, the appellate court shall provide effective legal remedy for defendants by strictly implementing the exclusionary rule. Compared with the Canadian trial courts, local courts in China have been heavily troubled by the legal authority deficit. In a legal system featuring substantial justice, China's trial courts always find it difficult to adhere to the due process of law or provide legal remedies for violations of rights. Although there are also some empirical studies, the practical application of China's exclusionary rules does not seem optimistic.¹⁷²

Recognizing this unfavorable legal environment, the appellate court shall adopt an active role in protecting human rights, rather than simply deferring to the judgment of the trial court. In other words, if the trial court was unwilling or unable to maintain procedural justice or protect human rights, the appellate court shall correct legal errors in the first instance, thereby securing the repute of the administration of justice. From this perspective, the legal requirement

¹⁷² Yanyou, *supra* note 155 at 55.

that the appellate court shall conduct a comprehensive review of all the issues involved in the first instance may be reasonable to a certain degree.

As for the solutions of the appellate court with regard to the admissibility disputes on appeal, there is no clear provision in the *Criminal Procedure Law*. According to section 40 of the 2017 *Strict Exclusion of Provisions*, if the trial court did not examine the defense' application of excluding illegal evidence, and directly admitted the disputed evidence as the basis of judgment, thereby rendering the trial unfair, the appellate court shall vacate the judgment and remand the case for retrial. It can be seen that the mechanism of remanding the case for retrial is confined to an extreme situation. If the trial court simply ignores the defense's application, this undoubtedly constitutes a violation of due process. In the light of this serious violation of legal procedure, the appellate court can directly remand the case for retrial, without the necessity of conducting an open hearing any more. At the same time, if the trial court's omission did not affect the fair trial, for example, the impugned evidence was not used as the basis of judgment, it would be unnecessary to remand the case for retrial. In other words, only when the trial court's decision on the admissibility of evidence affects the substantive rights of both parties shall the appellate court choose to remand the case for retrial.¹⁷³

If it is discovered that the trial court did not exclude the relevant evidence which should have been excluded, the appellate court can choose to exclude the impugned evidence after investigation. This is the routine practice in the second instance. After excluding illegal evidence, if the appellate court finds that the remaining evidence is still sufficient to prove the fact of the case, and the conviction and sentence are also accurate and suitable, it can reject the

173 Michael Graham, *Federal Rules of Evidence* (West Group, 1996) at 4.

appeal and uphold the original judgment. Otherwise, if the appellate court discovers that the remaining evidence is not sufficient to prove the fact of the case, it can vacate the original judgment and remand the case for retrial. In addition, if the appellate court identifies that the fact of the case is accurate, but the application of law is wrong or the sentence is unsuitable, it can choose to correct the original judgment.

IV. The Systematic Influence of the Exclusionary Rule

The Canadian exclusionary rule pays attention to the broad impact of admitting illegal evidence on the long-term reputation of the justice system. Based on a philosophy concerning judicial integrity, a court would consider the effects of associating itself with state official malfeasance.¹⁷⁴ Taking the integrity of the judicial system as its aim, the court system, especially the Supreme Court, dedicates to the maintenance of due process and the protection of constitutional rights.

Similarly, the exclusionary rule in China greatly changes the way of thought of the legal community, promoting the shift of judicial philosophy from substantive justice to procedural justice. In a broader sense, this paradigm shift also reflects the ongoing influence of the judicial reform and the revision of the criminal procedure law. The introduction of the exclusionary rule adds new elements to the evidence law, and more importantly, it significantly transforms the whole structure of the criminal procedure by embracing constitutional rights and the due process of law.

In the last part, we will discuss the systematic influence of the exclusionary rule on the

¹⁷⁴ Paciocco, *supra* note 69 at 340.

criminal proceedings. If its effects in Canada are better described as an indirect manner, then China's exclusionary rule have brought about a remarkable and comprehensive influence on the criminal procedure.

A. Judicial Maturity of the Supreme Court

In *Herring*, Chief Justice Roberts of the U.S. Supreme Court said that to trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.... The exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.¹⁷⁵ This influential judgment, to some extent, can be regarded as a clear retreat from the traditional judicial activism of the Supreme Court. Despite this restrictive trend, there is still some hope for the exclusionary rule.¹⁷⁶ In fact, if we take a historical view of the exclusionary rule's fluctuating fate in America, maybe it can be argued that it has just reached a status of judicial maturity.

The so-called judicial maturity can be seen as a balanced status of the exclusionary rule, mainly achieved by a rational reflection of the Supreme Court. If the rigid dichotomy between judicial activism and restraint is abandoned, we can better understand that the Supreme Court always wants to strike a reasonable balance between different policy considerations with regard to the exclusionary rule. As Riddell argues, the Supreme Court has to respond to criticism in the media, and more importantly, in the legal profession, about its exclusionary rule

¹⁷⁵ *Herring v. United States*, [2009] 555 U.S., 129 S. Ct. 695.

¹⁷⁶ Bradley, *supra* note 20 at 3.

jurisprudence.¹⁷⁷ Shaped by different ideas in a diversified society, the Supreme Court can form a reasonably balanced judicial rationale about the exclusionary rule.

The process of reaching judicial maturity is clearly shown in the changing jurisprudence of the exclusionary rule in Canada. Aiming to strengthen constitutional rights, the Supreme Court originally created the *Collins/Stillman* test, which sets up a near automatic exclusionary rule for conscripted evidence. Although the distinction between conscriptive and non-conscriptive evidence is creative in nature, but also beneficial for the remedy of Charter violations, it attracted widespread criticism from both jurists and legal scholars. Considering the problems raised by criticism, the Supreme Court abandoned the previous distinction, and adopted a three-prong standard in *Grant* which conforms to the requirement of Section 24 (2) of the *Charter*. This transformation of legal jurisprudence, however, does not significantly influence the application of the exclusionary rule. An empirical study shows that exclusion rates seem to be higher than recorded in the pre-*Grant* era, implying that the *Grant* reformulation has not been utilized as a means of rolling back civil liberties.¹⁷⁸

If we try to generalize the main features of judicial maturity, there are at least two outstanding points that can be summarized from the experience of Canada. One is the open-minded attitude towards comments, suggestions or even criticism from the legal community. In this respect, the Supreme Court of Canada did not turn a blind eye to the criticism, but took the opinions of legal scholars seriously and changed the unsuitable precedent in an active way. This judicial attitude can help to cultivate a healthy environment for the court system. Another

¹⁷⁷ Riddell, *supra* note 77 at 98.

¹⁷⁸ Jochelson et al, *supra* note 35 at 232.

factor is the stable judicial performance along with the changing jurisprudence. If the underlying policy considerations fluctuate violently, it may distort judicial practice and thus cause unnecessary confusion. Bearing this in mind, when deciding to adopt a new jurisprudence in *Grant*, the Supreme Court of Canada still strives to best protect the values and interests behind Charter rights. This contributes to the effective application of the exclusionary rule, thereby maintaining public confidence in the judicial system.

Before examining the judicial philosophy of China's Supreme Court, it is necessary to analyze the attitude of the legislature firstly, because the design of the exclusionary rule is largely shaped by the *Criminal Procedure Law*. Due to great controversies, many important issues, such as the extent of illegal evidence and the principle of the fruit of poisonous tree, were not covered in the *2010 Exclusion Provisions*. Many scholars expected that those issues can be effectively resolved during the revision of the *2012 Criminal Procedure Law*.¹⁷⁹ However, the legislature took a passive attitude towards the refinement of the exclusionary rule, simply leaving the controversial problems unsettled. In this important field, only limited progress has been made in the *2012 Criminal Procedure Law*.

The main reason why the legislature failed to meet the public expectation is not a mysterious one. As is known to all, the process of legislation is usually filled with negotiation and balance. Since there are heated disputes over the exclusionary rule, it is understandable that the legislature tends to avoid these issues unless a consensus can be reached. In addition, the Supreme Court will draft judicial interpretations with regard to the enforcement of the *Criminal Procedure Law*. The legislature, therefore, can count on the Supreme Court to make further

¹⁷⁹ Guangzhong et al., *supra* note 84 at 2.

improvements in the exclusionary rule by negotiating with other judicial departments after the revision of law. Although China is generally characterized as a country of statutory law system, judicial interpretations rather than the law itself actually dominates the administration of justice.¹⁸⁰

Actually, the introduction and advancement of the exclusionary rule is primarily driven by the Supreme Court in China. From the *2010 Exclusion Provisions* to the *2017 Strict Exclusion Provisions*, the Supreme Court had been continued to push the exclusionary rule forward, trying to enhance the standard of human rights protection in criminal proceedings. To some extent, the incorporation of the exclusionary rule in the *Criminal Procedure Law* in 2012 can also be recognized as a by-product of the endeavors of the Supreme Court in judicial reform. By constantly refining the exclusionary rule, the Supreme Court has gradually reached the status of judicial maturity.

First of all, the Supreme Court carefully strikes a balance between substantive justice and procedural justice, between crime control and human rights protection, and between legal theory and judicial practice. During the drafting of new rules, the Supreme Court will seek advice from legal experts, and engage in rational negotiation with other judicial departments. Although there is still some room for improvement, the current version of the exclusionary rule represents a reasonable and effective attempt in promoting human rights and procedural justice within the existing political and judicial framework.

Secondly, how to strictly enforce the exclusionary rule remains to be the focus of the

180 Jingkun, *supra* note 64 at 4-5.

Supreme Court. Recognizing that the *2010 Exclusion Provisions* was a product of compromise, the Supreme Court endeavors to promote further reform as well as strict enforcement of the exclusionary rule. After a long and tenuous process of negotiation, the *2017 Strict Exclusion Provisions* was eventually introduced.¹⁸¹ As the most successful judicial reform project in last decade, the exclusionary rule has been widely accepted by the whole legal community. The endeavors of the Supreme Court in strengthening human rights and preventing errors of justice prove an optimistic outcome.

Lastly, the Supreme Court also tries to find other useful approaches to implement the exclusionary rule. In 2010, the Guiding Case System was introduced by the Supreme Court. As a striking feature of ancient legal system in China, the parallel application of statutory law and case law, which is different from the common law system, had its own advantage of integrating these two distinctive sources of law in a harmonious manner.¹⁸² By reviving the guiding case system, the potential weakness or ambiguities in the statutory law can be remedied to some extent. When it comes to the exclusionary rule, the Supreme Court has published dozens of guiding cases for reference. These cases can help to answer many unsettled issues in the text of the exclusionary rule. Judicial maturity is a process of dynamic balance. In China, the exclusionary rule is still a new legal device, and along with the ongoing judicial reform, it has many aspects that need to be improved. Based on due process and human rights, the Supreme Court can make a steady progress by making full use of judicial interpretations and guiding cases.

¹⁸¹ Jingkun, *supra* note 64 at 6-10.

¹⁸² Hu Yunteng, Yu Tongzhi, "On the Major and Controversial Issues of the Guiding Case System" (2008) 6 Chinese Journal of Law at 3.

B. The Function of Local Courts

Crimes do not happen in a legal vacuum, but in the local community. Therefore, victims and the communities of both victims and perpetrators all have an interest in the criminal justice process.¹⁸³ Since the Supreme Court hears very few cases, the vast majority of decisions concerning whether evidence should be excluded occur at the trial court level.¹⁸⁴ In other words, although the exclusionary rule is created by the Supreme Court, it is actually the local courts that determine its real effect in practice.

In terms of the function of local courts, trial judges are usually experienced in fact finding, and more importantly, they have the advantage of directly dealing with factual issues in a case, so the appellate court in Canada tends to show deference to their decisions on the admissibility of evidence. In addition, they are generally more familiar with public attitudes towards the judicial system in the local community than judges in higher courts. Since the admissibility of evidence involves a complex balancing of multiple interests, especially the conflict between victim's rights and accused's rights, it belongs to the ambit of trial judge's discretion.

As far as the decisions on admissibility in different levels of court are concerned, an empirical study in Canada shows that 70.1% of provincial court trial decisions and 61.5% of superior court trial decisions lead to the exclusion of evidence.¹⁸⁵ This data reflects that provincial courts tend to exclude evidence more than superior and appeal courts. The high rate of exclusion in Canada's local courts signals the effective enforcement of the exclusionary rule.

183 Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (University of Toronto Press, 1999) at 24.

184 Riddell, *supra* note 77 at 102.

185 Jochelson et al., *supra* note 35 at 228.

Comparatively speaking, the exclusion rate in China is very low. Due to a lack of a nationwide empirical study, there is no clear picture of the overall application of the exclusionary rule. However, the difficulty in excluding illegal evidence, especially in high-profile cases, is universally acknowledged by trial judges.¹⁸⁶ Since local courts play a vital role in enforcing the exclusionary rule, the reasons why they are unwilling or unable to suppress illegal evidence should be taken seriously.

First of all, some trial judges are not very familiar with the policy orientation of the exclusionary rule. For them, it is still not an agreeable arrangement to set potential criminals (although they cannot be directly regarded as true criminals based on the principle of presumption of innocence) free due to the violations of procedural rules by the police. Persuading them to readily accept the idea of due process and human rights protection in a short time is not an easy task. In addition, the exclusionary rule itself is also at its primary stage, with many ambiguous provisions which may bring about controversies in practice. Therefore, trial judges generally tend to avoid disputes over the legality of evidence, or treat them in a relatively technical way. For example, in response to the application of excluding illegal evidence submitted by the defense, some judges may consciously or unconsciously turn the admissibility issue into the probative value evaluation.

Secondly, the application of the exclusionary rule depends on the discretion of trial judges, which puts their limited authority to the test. In China, the majority of the defense's applications concern the legality of confessions, but in the majority of cases, confessions are the vital if not the only incriminating evidence. Therefore, excluding illegal confessions is equal to deliver a

¹⁸⁶ Jingkun, *supra* note 91.

judgment of acquittal to some extent. This is especially true when it comes to material evidence, because in many cases, material evidence will be the key evidence for the prosecution. Due to many reasons, it is very rare for trial courts to acquit a defendant in practice. According to the annual report from the Supreme Court in 2020, among nearly 1.297 million criminal cases tried in the first instance in 2019, only 637 defendants were acquitted.¹⁸⁷ Considering the inner relationship between exclusion and acquittal, the low rate of excluding illegal evidence will not be surprising any more.

Lastly, the smooth application of the exclusionary rule is also dependent on the ancillary procedural arrangements. In determining whether the circumstance of illegally obtaining evidence exists, a court will have to conduct investigation on the fact of investigative activities. Nevertheless, most of the investigative activities including interrogations are conducted in a secret manner, which means that it is difficult to reconstruct what really happened in the police station. Although it is legally required to conduct videotape recording about the interrogation process, this legal requirement has not been strictly implemented in practice, largely due to the reluctance of investigators to do so. Furthermore, the initiation of the exclusionary procedure relies heavily on lawyers, but the percentage of legal assistance in ordinary case is not very high, let alone the problem of ineffective defense.¹⁸⁸

It should be noted that along with the ongoing judicial reform, many problems mentioned above have been gradually resolved. For example, a comprehensive legal assistance project has been introduced by the Department of Justice, which aims to provide legal assistance for all

187 “The Annual Report of the Supreme Court in 2020”, <https://www.chinacourt.org/article/detail/2020/06/id/5253643.shtml>.

188 Chen Ruihua, “Reconsiderations on Effective Defense” (2017) 6 Contemporary Law Review at 3.

the suspects and defendants in criminal cases.¹⁸⁹ This will greatly contribute to human rights protection as well as the implementation of the exclusionary rule.

More importantly, the incorporation of the exclusionary rule has greatly transformed the traditional trial procedure. As required by the *2017 Strict Exclusion Provisions*, if the defense files a motion to exclude illegal evidence, the trial court shall conduct an independent investigation on the legality of evidence, before proceeding to entertain the cross-examination procedure. To some extent, by incorporating the exclusionary rule into trial procedure, judges can gain more authority than before because they are entitled to scrutinize the legality of evidence, rather than simply accepting evidence from the prosecution. Although some judges are inclined to treat the defense's application of excluding illegal evidence in a technical manner, the possibility of exclusion can still prompt the prosecution to pay more attention to human rights protection.

In a recent round of judicial reform, the function of local courts is increasingly strengthened. In 2016, the Supreme Court, together with other judicial departments, issued an important judicial document, i.e. the *2016 Provisions on the Trial-Centered Criminal Procedure Reform (2016 Trial-Centered Reform Provisions hereafter)*. The *2016 Trial-Centered Reform Provisions* is designed to transform traditional investigation-centered procedure into trial-centered procedure so as to enhance the function of trial courts to prevent errors of justice. One of the key arrangements in this reform is to strictly enforce the exclusionary rule,¹⁹⁰ which directly leads to the enactment of the *2017 Strict Exclusion Provisions*. Seeing the exclusionary

189 Bai Ping, "The Aim of Comprehensive Coverage of Legal Assistance Station Has Been Accomplished", http://www.moj.gov.cn/subject/content/2018-03/09/344_16691.html.

190 Shen Deyong, "On the Trial-Centered Procedural Reform" (2015) 3 China Legal Science at 5.

rule under the background of the trial-centered procedural reform, its long-term effect on the trial procedure needs further exploration. If we take the criminal procedure as a whole, the influence of exclusionary rule on local courts is not just confined to changes in trial procedure, but inevitably extends to the reform in pre-trial procedure.

C. The Future Development of the Pre-trial Procedure

In Canada, the Supreme Court repeatedly stresses that section 24 (2) of the *Charter* is not a remedy for police misconduct.¹⁹¹ In view of this judicial attitude, Penney critiqued that the exclusionary framework is not mindful enough of rationales of deterrence against police malfeasance and misfeasance.¹⁹² However, the Supreme Court's opinion does not mean a court will turn a blind eye to the Charter breach. In fact, police conduct is a factor to be considered in determining whether the admission of the evidence would bring the administration of justice into disrepute.¹⁹³ In other words, if investigative organs seriously violated the Charter rights, judicial condonation of these violations would be seen as a further disrepute to the administration of justice.

Although deterrence is not clearly mentioned in the *Charter* or the Supreme Court's judgments, it is widely recognized as a valid justification for excluding illegal evidence. From this perspective, the remedy of exclusion has proved to be an effective way to hold investigative organs accountable, even in an indirect way. As Stuart argues, compared with alternative remedies, such as civil suits, the exclusionary rule is a more efficient response to systemic

¹⁹¹ *Collins*, supra note 59 at para. 57.

¹⁹² Steven Penney, "Taking deterrence seriously: excluding unconstitutionally obtained evidence under Section 24(2) of the Charter" (2004) 49 McGill Law Journal at 105.

¹⁹³ *R. v. Harrison*, [2009] 2 S.C.R. 494.

problems of police abuse or ignorance of their powers.¹⁹⁴

Another advantage of implicitly adopting deterrence is that it will be much easier to argue for exclusion because it is not required to establish that exclusion will in fact deter police in the future.¹⁹⁵ In applying the exclusionary rule, trial courts tend to link police misconduct to the integrity of the justice system. However, it was argued by Parfett that exclusion of evidence has not been shown to have any appreciable effect on police conduct.¹⁹⁶

In China, the exclusionary rule is specifically designed to apply throughout the whole criminal procedure. Apart from its influence on the trial process, the exclusionary rule also promotes the fundamental reform of the pre-trial procedure. As far as the criminal investigation is concerned, there are several notable reform measures that should be considered.

First of all, the privilege against self-incrimination is ultimately acknowledged by the *Criminal Procedure Law*. Article 14(3) (g) of the *International Covenant on Civil and Political Rights* stipulates that everyone charged with a criminal offence shall not be compelled to testify against himself or to confess guilt. This provision is generally accepted as one of the basic requirements of a fair trial. In the past, suspects in China's criminal proceedings were not protected by this privilege. At least partly as the influence of the exclusionary rule, section 50 of the *Criminal Procedure Law 2012* in China provides that no one shall be compelled to testify against himself. The establishment of the privilege against self-incrimination has a profound influence on the investigation procedure. This new provision can not only be used as the underlying principle of the exclusionary rule, but also paves the way for the introduction of the

194 Don Stuart, *supra* note 4 at 331.

195 *Ibid* at 320.

196 Parfett, *supra* note 33 at 322.

right to silence. At present, if a suspect chooses to confess, he or she is required to tell the truth; however, if a suspect wants to remain silent, despite the absence of the right to silence, investigators shall not compel him or her to confess.

Secondly, the procedure of conducting videotape recording of custodial interrogation has been gradually strengthened in practice. According to the *2012 Criminal Procedure Law*, for crimes involving life imprisonment or death penalty, or other serious crimes, all the interrogations shall be videotaped in a complete and synchronized manner. In 2014, the *Provisions on Videotape Recording of Interrogations* was issued by the Ministry of Public Security, which set forth detailed guidance on how to conduct videotape recording over the interrogation process. For example, interrogations under all kinds of circumstances, including in the detention center, the suspect's residence or on the crime scene, shall be videotaped. The police agencies shall appoint designated personnel other than investigators to keep the videotape recordings. With the ongoing reform of the detention center, the detention center will be independent of the investigative organs so as to avoid illegal investigative activities during the custodial interrogation. In order to maximize the function of videotape recordings, it should be further required that if interrogations are not videotaped as required, the relevant confessions shall be excluded as illegal evidence.

Thirdly, several innovative reform measures regarding investigation procedure were outlined in the *2016 Trial-Centered Reform Provisions*. According to section 3 of the *2016 Trial-Centered Reform Provisions*, investigative organs shall design practical guidance on evidence collection for different categories of criminal cases. The main aim of this measure is to provide a detailed and feasible guidance for investigators so as to avoid key evidence being neglected

or illegally obtained. Accordingly, investigators shall abide by all the rules and regulation included in the legal guidance, otherwise, the admissibility of evidence may result in controversy. In addition, section 3 of the *2016 Trial-Centered Reform Provisions* extends the requirement of videotape recording to other evidence-collecting activities as well. To be specific, for serious crimes, especially crimes involving the deceased victim, the process of crime scene investigation, search and identification shall be videotaped. This procedural requirement can help to maintain an objective recording of major forms of investigative activities, thereby eliminating unnecessary evidential disputes.

Fourthly, the procuratorate's supervision over criminal investigation has been enhanced to a great extent. Section 5 (2) of the *2016 Trial-Centered Reform Provisions* stipulates that for serious crimes, the legality of interrogations shall be reviewed by the procuratorate before the end of criminal investigation. In 2020, the Supreme Procuratorate, together with other law enforcement departments, issued the *Opinions on the Reviewing Mechanism over the Legality of Interrogations before the end of Criminal Investigation in Major Cases*. To be specific, for serious crimes, the prosecutors designated in the detention center shall interview suspects to ascertain whether confessions were obtained by torture or other illegal means. The whole interviewing process shall be videotaped. If it is discovered that confessions were obtained by torture or other illegal means, the procuratorate shall notify the investigative organ to exclude illegal evidence. This procedural mechanism can strengthen the procuratorate's legal supervision over interrogations so as to identify and exclude illegal evidence as early as possible.

Lastly, the newly established quasi plea bargaining procedure contributes to the reduction of

evidential disputes. Section 173 of the *2018 Criminal Procedure Law* introduces the procedure of pleading guilty with lenient punishment. This procedure is based on the earlier judicial reform program, i.e. speedy adjudication procedure, which was originally initiated in 2014 and proved to be effective in saving judicial resources.¹⁹⁷ As an ancillary procedure of the trial-centered procedural reform, the procedure of pleading guilty with lenient punishment aims to simplify the criminal process of cases without procedural and evidential disputes. At prosecution stage, prosecutors shall interview the suspect. If the suspect chooses to plead guilty, he or she will be notified of legal rights and relevant provisions relating to the procedure of pleading guilty with lenient punishment. For suspects who voluntarily confess and agree with the sentence recommendation as well as the simplified trial procedure, they need to sign a legal document confirming their consent in the presence of their lawyers or on-duty lawyers. After that, the simplified trial procedure applied accordingly. In essence, the procedure of pleading guilty with lenient punishment, which is based on the suspect's written consent and involves limited discretion of the prosecution, is different from the plea bargaining system in the United States. Even so, it can actually be seen as a quasi plea bargaining between prosecutors and suspects, though in a tacit way. By offering a relatively lenient sentence recommendation, prosecutors may exert influence on suspect's procedural choice. If a suspect chooses the procedure of pleading guilty with lenient punishment, it would be much easier for prosecutors to achieve the aim of successful prosecution, because all major disputes in the case including evidential disputes will be avoided altogether. For efficiency's sake, prosecutors will be inclined to persuade suspects into the procedure of pleading guilty with lenient punishment.

197 Wang Jiancheng, "On the Criminal Speedy Adjudication Procedure Based on the Orientation of Efficiency" (2016) 34 *Tribune of Political Science and Law* at 119–124.

The long-term effects of this new legal system need to be further explored.

Conclusion

In China, since the introduction of the exclusionary rule in 2010, the mechanism of imposing procedural sanctions on illegal behaviors of obtaining evidence has been established. For suspects, if they were tortured by investigators during interrogation, they can seek legal remedy by challenging the legality of evidence. However, the implementation of the exclusionary rule has to face many challenges. Due to the ambiguity of the rule itself, the resistance from investigative organs, and the difficulty of acquittal in high-profile cases, the overall performance of the exclusionary rule is not very optimistic.¹⁹⁸ Along with a new round of judicial reform, the strict enforcement of the exclusionary rule has been placed on the agenda again. In a criminal justice system with high conviction rates,¹⁹⁹ it is very necessary to embrace the notion of human rights protection and procedural justice, so that the risk of wrongful convictions can be controlled to a reasonable extent. In this regard, the importance of the exclusionary rule should never be neglected.

Although the exclusionary rule of illegal evidence in China is a new feature of the criminal proceeding, it has made rapid developments in the past ten years. The rule interacts with the Criminal Procedure Law frequently and profoundly. By gradually incorporating new ideas and new requirements, the main aspects of the exclusionary rule, including the extent of illegal evidence and the exclusionary procedure, evolve along with the criminal justice reform.

198 Dai Changlin, "The Research on the Difficult Issues in the Implementation of the Exclusionary Rule of Illegal Evidence" (2013) 9 *People's Judicature* at 23-28.

199 Li Li, "High Rates of Prosecution and Conviction in China: The Use of Passive Coping Strategies" (2014) 42 *International Journal of Law, Crime and Justice* at 273.

Based on this comparative study between Canada and China, it is clear that many ideas and mechanisms in Canada are beneficial for refining the exclusionary rule in China. At the same time, it is also clear that China's legal system has generated many creative reform measures, which may be equally helpful for improving Canada's exclusionary rule.

In summary, the exclusionary rule in China still has some room for improvements, and the ongoing reform is also in eager anticipation. As a litmus test of human rights protection and procedural justice, the exclusionary rule will exert more influence on judicial practice, and continue to make progress along with the trial-centered criminal procedural reform.

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