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Emerging judicial autonomy and procedural due process in the PRC? An empirical study of China's exclusionary rule

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ABSTRACT


Drawing upon a quantitative empirical analysis spanning ten years of judicial decisions, this paper assesses the implementation of an exclusionary rule in the People's Republic of China (PRC). It tests the effectiveness of the relevant articles of the Chinese Criminal Procedure Amendment of 2012 (providing for exclusion of illegally obtained evidence). It considers 1,558 trial court decisions, appeals, and remands concerning the nascent exclusionary rule, compared to exclusion practices prior to the amendment's enactment. It considers trends in use, types of cases, types of remedies afforded, and the basis for exclusion. The data disclose that the initial negative assumptions of many scholars and stakeholders were largely groundless, as this cause of action has become commonly used, resulting in significant numbers of retrials, reversals, and partial reversals. This paper also draws upon a literature search of Chinese law scholars to develop a set of rational categories for assessing early pessimism over the legislation's viability. Principally, this consists of four core legal objections: exclusion conflicts with the PRC's absence of rights against self-incrimination; lack of constitutionally mandated exclusionary protections; generic lack of judicial autonomy; and the lack of legal counsel. The empirical data offer a clear picture that these factors have failed to meaningfully impede the operation and functioning of the Chinese Criminal Procedure Amendment, and perhaps surprisingly, after more than six years, exclusion is now an intrinsic part of the PRC criminal justice landscape. This paper concludes that, despite reversals of liberal policies within political bodies of the PRC, what emerges in the judiciary is an otherwise counterintuitive growth of judicial autonomy, professionalism, and deference to procedural due process.

KEYWORDS

Chinese Criminal Procedure Amendment; exclusionary rule; judicial autonomy

I. Introduction

In the People's Republic of China (PRC), the judiciary is bifurcated in trial and appeal divisions, with the Supreme People's Court (SPC) serving at the top.¹ While the SPC undertakes constitutional interpretation,² *inter alia*, controlling interpretive authority

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¹ Teng Biao, 'Rights Defense and New Citizen's Movement' in Sarah Biddulph and Joshua Rosenzweig (eds), *Handbook on Human Rights in China* (Edward Elgar Publishing 2019) 610; Cornelis Hendrik (Remco) van Rhee and Yulin Fu, 'Introduction' in Cornelis Hendrik (Remco) van Rhee and Yulin Fu (eds), *Supreme Courts in Transition in China and the West: Adjudication at the Service of Public Goals* (Springer 2017) 16; Rachel E Stern, *Environmental Litigation in China: A Study in Political Ambivalence* (Cambridge University Press 2013) 229.

² Wendy Ng, *The Political Economy of Competition Law in China* (Cambridge University Press 2018) 164; Taisu Zhang, 'The Pragmatic Court: Reinterpreting the Supreme People's Court of China' (2012) 25 *Columbia Journal of Asian Law* 1, 7.

resides with the Standing Committee to the National People's Congress (SCNPC),³ a non-judicial political body.⁴ Thus, there is no conventional checks-and-balances mechanism in this system.⁵ This has led to the logical conclusion that the judiciary has limited autonomy in deciding cases and interpreting constitutional and statutory provisions.⁶ Lack of autonomy can be realized by direct action undertaken by the SCNPC, or indirectly by courts that proactively self-police to pre-emptively observe political necessity in their decision making, and issue rulings demonstrably consistent with the SCNPC's perceived political objectives. At the grassroots level, indirect bars to judicial autonomy more frequently arise from local, well-connected prosecutors' and/or police offices.⁷ One decidedly politicized criminal justice issue in the PRC is the provision for exclusion of illegally obtained evidence.⁸ This paper argues that the PRC judiciary has assumed a surprising level of autonomy with respect to this issue, despite political trends in other governance bodies that would intuitively foster contrary assumptions. There has neither been direct SCNPC correction nor demonstrable proactive political self-policing by PRC courts on this matter.

In the early 21st century, the PRC had instituted a series of policy and legislative reforms to modernize its police procedures⁹ and its judiciary.¹⁰ These reforms had been stimulated, in part, by a series of highly publicized criminal cases and resulted in important changes to the Chinese Criminal Procedure Law.¹¹

One illustrative case causing public disillusionment was the Zhao Zuohai matter, in which a decapitated body was found in a well.¹² The deceased was known to have had a quarrel with Zhao Zuohai, who was questioned and ultimately confessed to the murder.¹³ He was convicted and received a death sentence, thereafter commuted to life.¹⁴ He was convicted primarily on the evidence of his own confession¹⁵ yet, ten years later, the alleged victim reappeared in the village.¹⁶ Zhao had been tortured into confessing to the murder of someone who wasn't dead.¹⁷ In a second case involving a headless corpse, She

³ Yan Lin and Tom Ginsburg, 'Constitutional Interpretation in Lawmaking: China's Invisible Constitutional Enforcement Mechanism' (2015) 63 *The American Journal of Comparative Law* 467, 468.

⁴ Stefan H C Lo and others, *The Hong Kong Legal System* (2nd edn, Cambridge University Press 2020) 94.

⁵ Chang Wang and Nathan Madson, *Inside China's Legal System* (Chandos Publishing 2013) 6.

⁶ Kwai Hang Ng and Xin He, *Embedded Courts: Judicial Decision-Making in China* (Cambridge University Press 2017) 169; Xin He, 'Why Did They Not Take on the Disputes? Law, Power and Politics in the Decision-Making of Chinese Courts' (2007) 3 *International Journal of Law in Context* 203, 203.

⁷ Jianfu Chen, *Chinese Law: Context and Transformation: Revised and Expanded Edition* (Brill Nijhoff 2016) 1012.

⁸ Jingkun Liu, *The Exclusionary Rule of Illegal Evidence in China: Theory, Case, Application* (Law Press China 2019).

⁹ Hualing Fu, 'Zhou Yongkang and the Recent Police Reform in China' (2005) 38 *The Australian and New Zealand Journal of Criminology* 241, 241.

¹⁰ Ronald C Keith and others, *China's Supreme Court* (Routledge 2014) 189.

¹¹ Liu, *The Exclusionary Rule of Illegal Evidence in China: Theory, Case, Application* (n 8) 1; Sida Liu & Terence C Halliday, 'Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law' (2018) 34 *Law & Social Inquiry* 911, 911; Lijuan Xing, 'The Rhyme of History: A Transition of Legal Culture in China Crowned by the Criminal Procedure Law 2012' (2015) 23 *Asia Pacific Law Review* 31, 33.

¹² Edward Wong, 'China: Murder Victim Turns Up Alive, and a Prisoner Becomes a Free Man' *The New York Times* (10 May 2010) <<https://www.nytimes.com/2010/05/11/world/asia/11briefs-murder.html>> accessed 11 January 2021.

¹³ Chin-fu Hung, 'China's Changing State-Society Relations in the Internet Age' (2012) 3 *International Journal of China Studies* 363, 367.

¹⁴ Shen Bin, "'Basis of Popular Opinion" Contributing to the Zhao Zuohai Case of Injustice' (Dui Hua: Human Rights Journal, 2 June 2010) <<http://www.duihuahrjournal.org/2010/06/zhao-zuohai-case-provokes-responses-on.html>> accessed 11 January 2021.

¹⁵ Hung (n 13).

¹⁶ *Ibid.*

¹⁷ Jiahong He, 'Wrongful Convictions and the Exclusionary Rules in China' (2014) 9 *Frontier of Law in China* 490, 497.

Xianglin was tortured for more than ten days¹⁸ before confessing that the corpse belonged to his wife and that he had murdered her.¹⁹ Once again it was a case of mistaken identity of the deceased, as She Xianglin's wife came back to the village after he had served 11 years in prison.²⁰

In an incident known as the 'hide-and-see case', a prisoner was discovered dead while in the custody of police.²¹ Presumably, he was the victim of overzealous police interrogation techniques.²² When questioned about the cause of death, the police stated that he had been playing 'hide and seek' with other prisoners and hit his head as he was trying to hide.²³ This excuse failed to quell public opinion, which concluded that the police had committed an extrajudicial killing.²⁴

In the 2000s, a spate of well-publicized cases brought attention to police misconduct and incompetence, underscoring defects in the PRC's criminal justice system.²⁵ At the heart of the problem was the frequent use of confessions as the primary basis for convictions.²⁶ The aggressive interview culture of the police,²⁷ combined with the courts' willingness to rely on unsupported verbal evidence,²⁸ led to widespread popular disillusionment with criminal justice in the PRC.²⁹ Public uproar over the above cases generated government interest in reform.³⁰ These reforms have been described as a striking development in a single-party authoritarian state.³¹ They have included pervasive changes consisting of a series of government-instituted legal, legislative, and policy modifications.³² Eventually, they included the enactment of an amendment to the PRC Criminal Procedure Law (effective January 2013) that included a limited exclusionary rule at Articles 54 and 58.³³ This rule would exclude, *inter alia*, all statements coerced through police misconduct.³⁴

¹⁸ Yuwen Li, *The Judicial System and Reform in Post-Mao China: Stumbling Towards Justice* (Routledge 2016) 128.

¹⁹ Lan Rongjie, 'A False Promise of Fair Trials: A Case Study of China's Malleable Criminal Procedure Law' (2010) 27 UCLA Pacific Basin Law Journal 153, 186.

²⁰ Michael McConville, *Comparative Perspectives on Criminal Justice in China* (Edward Elgar Publishing 2013) 92.

²¹ Zhiqun Zhu, *The People's Republic of China Today: Internal and External Challenges* (World Scientific Publishing Co 2011) 116.

²² Yungeng Xie, *Report on Chinese Social Opinion and Crisis Management* (Social Science Academic Press 2019) 70.

²³ *Ibid.*

²⁴ Shiru Wang, *Cyberdualism in China: The Political Implications of Internet Exposure of Educated Youth* (Routledge 2017) 6.

²⁵ Randall Peerenboom, 'Judicial Independence in China: Common Myths and Unfounded Assumptions' (2008) 11/2008 La Trobe Law School Legal Studies Research Paper 18 <<https://ssrn.com/abstract=1283179>> accessed 11 January 2021.

²⁶ Na Jiang, *Wrongful Convictions in China: Comparative and Empirical Perspectives* (Springer 2016) 64.

²⁷ Kuo-Hsing Hsieh, *The Exclusionary Rule of Evidence: Comparative Analysis and Proposals for Reform* (Ashgate Publishing 2014) 113.

²⁸ Shiyuan Huang, 'Chinese Wrongful Convictions: Causes and Prevention' (2002) 80 University of Cincinnati Law Review 1219, 1227.

²⁹ *Ibid.*, 1219.

³⁰ Jianlin Bian and Shu Xie, 'Forty Years of Reform and Opening Up: The Birth and Development of China's Criminal Justice System' (2019) 14 Frontier of Law in China 73, 81.

³¹ Margaret K Lewis, 'Controlling Abuse to Maintain Control: The Exclusionary Rule in China' (2010) 43 New York University Journal of International Law and Politics 629, 635.

³² Lin Li and others, *China's Rule of Law Index 2017* (Springer 2018) 10.

³³ Jianfu Chen, *Criminal Law and Criminal Procedure Law in the People's Republic of China: Commentary and Legislation* (Martinus Nijhoff Publishers 2013) 86.

³⁴ *Ibid.*

II. Research question

The introduction of an exclusionary rule in the PRC is highly contentious.³⁵ To capture the heart of this controversy and identify hurdles to the effective implementation of exclusion in the PRC, a survey of stakeholders was undertaken by the author.³⁶ In this qualitative survey of 56 early and mid-career PRC judges in November 2012 and November 2013, the author found that 98.2 per cent frankly stated that there were improvements that needed to be made in the PRC criminal justice system.³⁷ The judges were given an open-ended essay question asking if a US-style exclusionary rule could be implemented in the PRC. The judges had been provided with basic instruction in US criminal procedure law and the US exclusionary rule. Though a majority believed the introduction of an American-designed exclusionary rule would not be suitable for transplant into the PRC, a supermajority of 78.6 per cent believed that such an amendment to the PRC Criminal Procedure Law would lead to wider human rights protections, while 21.4 per cent had no opinion.³⁸ Yet, virtually all the judges foresaw problems in the implementation of the exclusionary rule into PRC criminal law.

Among the issues raised by the Chinese judges regarding the implementation of Articles 54/58 was inconsistency with Chinese popular and cultural tradition.³⁹ Some argued that Chinese people are more interested in substantive justice than procedural due process protections such as the exclusion of compelling but illegally obtained evidence.⁴⁰ Five of the judges surveyed made this point,⁴¹ while four judges indicated that illegally obtained evidence is frequently used as a means of crime control,⁴² with exclusion endangering social harmony and the delicate balance between individual rights and the functioning of a well-organized society.⁴³ Two judges opined that exclusion is impractical in a country that is still struggling with economic hurdles,⁴⁴ while four respondents made the point that, as China is a country with a high crime rate and inadequate police resources,⁴⁵ imposing further restrictions would only result in fewer convictions and more crime.⁴⁶ Still, others asserted that because China is a civil law jurisdiction with an inquisitorial legal system — in which judge, procuratorate (prosecutor), and police work together to achieve efficiency — the trappings of an adversarial process, such as an exclusionary rule, would not function effectively.⁴⁷ Two judges indicated that because the Chinese system is inquisitorial, the exclusionary rule would prove to be difficult to implement under Chinese law.⁴⁸ These are all important points, but they are socio-legal issues and therefore outside the scope of this paper.

³⁵ Zhiyuan Guo, 'The First Step of the Long March: Implementing the Exclusionary Rules in China' (2017) 25 *Asia Pacific Law Review* 48, 63.

³⁶ CJ database, Chinese judges/stakeholders, on file with author.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Zhiyuan Guo, 'Torture and Exclusion of Evidence in China' (2019) 1 *China Perspectives* 45, 48.

⁴⁸ CJ database (n 36).

However, four pragmatic legal concerns emerged in the Chinese judge survey. Each of these concerns bears upon the lack of judicial autonomy. The judges concluded that exclusion conflicts with the PRC's absence of the right against self-incrimination (16 judge comments made this point⁴⁹); that without constitutional protections, the Criminal Procedure Amendment would be ineffective (nine judge comments made this point⁵⁰); that the lack of judicial autonomy would prevent the exclusionary rule from functioning (18 judge comments made this point⁵¹); and that the lack of legal counsel in a supermajority of cases would render the Criminal Procedure Amendment ineffective (eight judge comments made this point⁵²). Clearly, lack of judicial autonomy was the leading basis for the stakeholders' pessimistic assessment. Presumably, constraints would be imposed not only through direct intervention, but also indirectly via the pressure on judges to self-correct as a functional necessity, owing to the fact of local Chinese Communist Party (CCP) officials heading up police forces and prosecutor's offices. In addition, the lack of constitutional authority (for exclusion) serves to underpin a lack of autonomous arguments, as an absence of constitutional authority tends to diminish the legal basis for and importance of exclusion, and provides justification for indirect bars to autonomy as judicial self-correction. This self-correction can be taken at either the trial court level or on appeal. The other two major concerns (i.e. lack of right against self-incrimination, and lack of legal representation) also hinge on lack-of-autonomy assumptions as both provide fertile pretexts for judicial decision making consistent with perceived local and SCNPC political objectives. Certainly, with lack of self-incrimination rights, exclusion requests can be framed as a legal conflict between the legal obligation to give testimony and exclusion. This provides built-in legal *bona fides* for denying exclusion requests. Thus, all four concerns centre on lack of judicial autonomy, either indirectly through self-correction or directly via SCNPC action or local CCP representatives.

On the other hand, other stakeholders opine on the importance of exclusion because when prevailing police powers are overbroad and vague, they are more predisposed to abuse, resulting in more faulty convictions.⁵³ These commentators contend that the PRC criminal justice system is in grave need of reform⁵⁴ and that its failures serve to erode public confidence.⁵⁵ Since there is only a rudimentary and/or non-binding uniform law of evidence, the threat of false convictions is high.⁵⁶ Indeed, according to Chinese legal scholar Wang Minyuan, a prevailing police attitude is evidenced by the maxim 'try whatever it takes to make him [the accused] speak'.⁵⁷ Moreover, the typical situation of courts' lacking sufficient power or independence (from CCP officials, members of the police, and the procuratorate), gives free licence to overzealous police.⁵⁸ This, of course,

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Xifen Lin, Chen Cheng and Wang Yanyan, 'Regulating the Power of Chinese Police Through the Exclusionary Rule — an Empirical Study' (2019) 29 *Policing and Society* 1109, 1110.

⁵⁴ Kam C Wong, *Police Reform in China* (CRC Press 2012) 328.

⁵⁵ *Ibid.*

⁵⁶ Jiahong He, *Back from the Dead: Wrongful Convictions and Criminal Justice in China* (University of Hawaii Press 2016) 51.

⁵⁷ Xiangde Ji and others, *Commentary on the Latest Criminal Procedure Amendment* (China University of Political Science and Law 2012) 49.

⁵⁸ Yuwen Li, *The Judicial System and Reform in Post-Mao China: Stumbling Towards Justice* (Routledge 2016) 127. This point is also reflected in the comments from the Chinese judge survey noted above, CJ database (n 36).

points to indirect bars to judicial autonomy from local officials, who can potentially place pressure on judges to refrain from exclusion because local CCP power brokers are police, prosecutors,⁵⁹ or other political allies. Thus, frequently the very official or their representative is the target of misconduct claims and so obviously has a stake in the outcome. Highlighting police misconduct or prosecutorial incompetence or malfeasance through public exclusions of the evidence places judges on precarious political ground, and most would follow the safer path and overrule exclusion motions.

Nonetheless, scholars observe that more steps need to be taken to curb illegal police behaviour and exclude unreliable evidence.⁶⁰ The judicial ability to follow the path of least resistance is made easier by institutional legal restraints and extrajudicial pressure placed on defence counsel,⁶¹ and by a lack of legal representation for most criminal defendants.⁶² One 2012 survey found that only 2.5 per cent of defendants in Beijing criminal cases were represented by counsel.⁶³ Presumably, the numbers are even lower outside the large urban centres. Other authorities in 2012 as well as later in 2020 concluded, in a rather vague finding,⁶⁴ that legal representation in criminal cases in the PRC was below 30 per cent.⁶⁵ The PRC has addressed the issue of lack of legal representation in criminal cases by initiating studies and other reform efforts.⁶⁶ One effort is the 2017 Notice of the Supreme People's Court and the Ministry of Justice on Expanding the Scope of the Pilot Program of Full Coverage of Defence by Lawyers in Criminal Cases,⁶⁷ which found significant areas of concern and was expanded in 2020.⁶⁸ This pilot initiative aims to increase representation⁶⁹ but will take many years to accomplish.⁷⁰ In the meantime, most criminal defendants continue to lack legal counsel. With a supermajority of *pro se* defendants, not steeped in 'Miranda rights' popular culture, many stakeholders believed the Amendment would be relegated to oblivion.⁷¹ Thus, trial judges would not be forced

⁵⁹ Xifen Lin and others, 'Regulating the Power of Chinese Police Through the Exclusionary Rule — an Empirical Study' (2019) 29 *Policing and Society* 1109, 1122; Wendy Ng, *The Political Economy of Competition Law in China* (Cambridge University Press 2018) 165.

⁶⁰ See, e.g., Criminal Procedure Law of the People's Republic of China (hereinafter 'Criminal Procedure Law of the PRC (1997)'), adopted at the Second Session of the Fifth National People's Congress on 1 July 1979 and amended pursuant to the Decision on Amending the Criminal Procedure Law of the People's Republic of China, adopted by the Fourth Session of the Eighth National People's Congress on 17 March 1996, Art 38 <<https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814279.pdf>> accessed 11 January 2021; Criminal Law of the People's Republic of China (hereinafter 'Criminal Law of the PRC'), adopted at the Second Session of the Fifth National People's Congress on 1 July 1979 and amended at the Fifth Session of the Eighth National People's Congress on 14 March 1997, Art 306, according to defence lawyer Tian Wenchang <<https://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm>> accessed 11 January 2021.

⁶¹ *Ibid.*

⁶² McConville, *Comparative Perspectives on Criminal Justice in China* (n 20) 293.

⁶³ Mu Ping, 'In Twenty Thousand Criminal Cases, Lawyers Represented [Defendants] in Only 2.5% of Cases' ('慕平: 两万刑诉案律师仅代理2.5%') (Beijing News, 9 March 2012) <http://epaper.bjnews.com.cn/html/2012-03/09/content_322845.htm?div=-1> accessed 11 January 2021.

⁶⁴ Vague because it did not set out what the actual representation rate was.

⁶⁵ Changyong Sun and Suhao Chen, 'Attorney-Client Privilege in Mainland China's Criminal Proceedings' in *The Right to Counsel and the Protection of Attorney-Client Privilege in Criminal Proceedings* (Lorena Bachmaier Winter, Stephen C Thaman and Veronica Lynn [eds] 2020) 75.

⁶⁶ Ni He, *Chinese Criminal Trials: A Comprehensive Empirical Inquiry* (Springer 2014) 66; McConville, *Comparative Perspectives on Criminal Justice in China* (n 20) 293; Hong Lu and Terance D Miethe, *China's Death Penalty: History, Law and Contemporary Practices* (Routledge 2007) 65.

⁶⁷ Huibin Li, 'Beijing's Social Governance in 2017: Overview, Challenges, and Suggestions' in *Analysis of the Development of Beijing (2018)* (Beijing Academy of Social Sciences ed, Social Sciences Academic Press 2019) 128.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ See generally, CJ database (n 36).

to make hard political decisions on exclusion, because *pro se* defendants wouldn't know to raise exclusion as an issue. In the few cases with counsel, defence attorneys would often be intimidated into not raising exclusion under threat of official retaliation,⁷² and especially considering the perceived futility when the trial judge lacks autonomy and is likely to engage in political self-correction. In *pro se* cases, it is exceedingly improbable that judges would open an enquiry on police or prosecutorial misconduct *sue sponte* without compelling reasons. Pervasive lack of legal counsel means exclusion will seldom be raised and the court won't have the matter before it. Thus, the scepticism of the Chinese judge stakeholders was objectively, if not logically, grounded.

Chinese legal scholar Chan Wai Dung reasoned that since China has signed (though not ratified) the International Covenant on Civil and Political Rights (ICCPR),⁷³ providing for freedom from coerced confessions and guaranteed to protect human rights in its Constitution of 2004 (Art 33),⁷⁴ the Criminal Procedure law should be consistent with those obligations.⁷⁵ However, there is no requirement that illegally obtained evidence be excluded within the ICCPR.⁷⁶

In assessing the efficacy of the implementation of an exclusionary rule in the PRC, this paper will, as its research question, assess the effectiveness of Articles 54/58 by reviewing the relevant trial court decisions, appeals, and remands concerning the exclusionary rule and the consequences of those actions. Drawing upon a lengthy quantitative empirical analysis spanning ten years of judicial decisions in the PRC, this paper concludes that the pessimism of the scholars and Chinese judges surveyed in 2012/13 was largely groundless, as the exclusionary rule has become widely used and resulted in significant numbers of retrials, reversals, and partial reversals. Principally, this paper addresses judicial autonomy by considering the four core objections voiced by the Chinese Judge stakeholders: (i) exclusion conflicts with the PRC's absence of rights against self-incrimination; (ii) lack of constitutional protections; (iii) generic lack of judicial autonomy; and (iv) the lack of legal counsel. This paper concludes that these factors have failed to significantly impact the operation and functioning of Articles 54/58 and that, after more than six years of practice, exclusion is now an intrinsic and arguably effective part of the PRC criminal justice landscape. It further concludes that drawing on this data, judicial autonomy in this respect is emerging in the PRC in a way that seemed unlikely a decade ago.

This paper will initially review the historical development of the relevant criminal justice instruments in the PRC and the specific modern reform of rules prohibiting torture or the introduction of illegally obtained evidence, leading up to and including Articles 54 and 58 of the 2012 PRC Criminal Procedure Amendment and accounting for the 2018 Amendment. It will then set out the parameters and methodology of a seven-year quantitative empirical study covering ten years of Chinese criminal appeals, trials, and retrials, relying on the recently developed case-tracking system in the People's Republic of China. Thereafter, it will discuss and evaluate the results of the study and draw

⁷² Na Jiang (n 26) 67.

⁷³ See generally, International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171 (ICCPR).

⁷⁴ Na Jiang, *China and International Human Rights: Harsh Punishments in the Context of the International Covenant on Civil and Political Rights* (Springer 2014) 34.

⁷⁵ *Ibid.*

⁷⁶ CJ database (n 36).

conclusions on the extent and current character of exclusion in the PRC and its implications for judicial autonomy.

III. Historical development and modern reform

With the death of Mao Zedong in 1976⁷⁷ and the enactment of the 1982 constitution⁷⁸ under the leadership of Deng Xiaoping,⁷⁹ the PRC began reforming its economic and legal policies.⁸⁰ Moreover, the introduction of aspects of a free market economy,⁸¹ greater international collaborations (including commitment to both trade and human rights treaties),⁸² and the allowance of more frank journalism⁸³ began a process of modernizing China's legal system, directed at achieving stasis with modern standards.⁸⁴ This resulted in a multitude of new legislation, amendments, and eventually a rudimentary case-tracking system.⁸⁵

In the arena of criminal law, the PRC has witnessed robust changes both in its statutory law⁸⁶ and policy considerations.⁸⁷ Among these developments was the departure from the 1979 Criminal Procedure Law⁸⁸ provision, incorporating a presumption of guilt of the accused as reversed in the 1996 Criminal Procedure Amendment.⁸⁹ This amendment also outlawed coerced confessions,⁹⁰ though it provided only limited exclusion of coerced evidence or other remedies for violations.⁹¹ The year 2010 saw the enactment of the Evidence Rules (the Death Penalty Evidence Rules, the Evidence Exclusion Rules),⁹² which provided for the possibility of exclusion of oral testimony obtained under torture⁹³ and ostensibly placed the burden of proving voluntariness on the prosecutor.⁹⁴ Moreover, the Criminal Law of the PRC not only prohibited the use of torture but provided for enhanced penalties for officials who carried it out.⁹⁵ The prohibitions on torture extended to the implementation of a host of additional administrative and

⁷⁷ Lawrence Sullivan, *Leadership and Authority in China* (Lexington Books 2012) 1895, 265.

⁷⁸ Qianfan Zhang, *The Constitution of China: A Contextual Analysis* (Hart Publishing 2012) 48.

⁷⁹ *Ibid.*

⁸⁰ Stanley Lubman, 'Bird in a Cage: Chinese Law Reform After Twenty Years', 20 *Northwestern Journal of International Law & Business* 383, 383 (1999–2000).

⁸¹ Khalid Manzoor Butt and Sarah Sajid, 'Chinese Economy Under Mao Zedong and Deng Xiaoping' (2018) 25 *Journal of Political Studies* 169, 170.

⁸² John Wong, *The Political Economy of Deng's Nanxun: Breakthrough in China's Reform and Development* (World Scientific Publishing 2014) 139; Zhang, *The Constitution of China: A Contextual Analysis* (n 78) 197.

⁸³ Christopher Sterling, *Encyclopaedia of Journalism* (Sage Publication 2009) 290.

⁸⁴ Carlos W H Lo, 'Deng Xiaoping's Ideas on Law: China on the Threshold of a Legal Order' (1992) 32 *Asian Survey* 649, 650.

⁸⁵ Nina Hachigian and Lily Wu, *The Information Revolution in Asia* (Rand 2003) 80.

⁸⁶ Jianfu Chen, *Criminal Law and Criminal Procedure Law in the People's Republic of China* (Martinus Nijhoff 2013) 3.

⁸⁷ Li Lin, *The China Legal Development Yearbook, Volume 2* (Koninklijke Brill 2009) 156.

⁸⁸ Chen, 'Regulating the Power of Chinese Police Through the Exclusionary Rule — an Empirical Study' (n 53).

⁸⁹ Zhenhui Wang, 'The Development and Main Reform of Criminal Procedure Law in China' (2015) 4 *Chinese Studies* 20, 21.

⁹⁰ Hong Lu and Terrance D Miethe, 'Confessions and Criminal Case Disposition in China' (2003) 37 *Law & Society Review* 549, 550.

⁹¹ *Ibid.*

⁹² Jingkun Liu, *The Exclusionary Rule of Illegal Evidence in China: Theory, Case, Application* (Law Press China 2019) 38.

⁹³ Rules Concerning Questions About Exclusion of Illegal Evidence in Handling Criminal Cases (2010), Art 2 <<https://www.cecc.gov/resources/legal-provisions/rules-concerning-questions-about-exclusion-of-illegal-evidence-in#body-chinese>> accessed 11 January 2021; China's New Rules on Evidence in Criminal Trials (2011) 43 *NYU Journal of International Law and Politics* 739, 743.

⁹⁴ *Ibid.*

⁹⁵ Criminal Law of the PRC (n 60), Art 238/245.

regulatory norms,⁹⁶ including the People's Police Law of the PRC,⁹⁷ Provisions on the Supreme People's Court,⁹⁸ the Supreme People's Procuratorate,⁹⁹ and the Ministries of Public Security,¹⁰⁰ State Security,¹⁰¹ and Justice (2010).¹⁰² Finally, in 2012 the Criminal Procedure Amendment was enacted.¹⁰³

A. 2012 Criminal Procedure Amendment

In 2012, the Supreme People's Congress passed the second Criminal Procedure Amendment, which took effect in January 2013.¹⁰⁴ This legislation provides increased protection through, *inter alia*,

- (i) victim's rights and compensation for the wrongfully accused; (ii) greater access to counsel;
- (iii) judicial impartiality; (iv) notification of family members (disappeared persons protection);
- and (v) the emerging exclusionary rule (providing a remedy for exclusion of coerced confessions).¹⁰⁵

The 2012 Criminal Procedure Amendment has been criticized because it took no action on the issues of, *inter alia*, compelling witnesses to testify,¹⁰⁶ the potential liability of defence counsel for presenting evidence on behalf of their clients,¹⁰⁷ and the failure to allow the accused access to counsel before questioning.¹⁰⁸ Additionally, the amendment has been criticized for its failure to adequately exclude other evidence obtained through involuntary confessions, commonly known as *fruits of the poisonous tree*.¹⁰⁹

As a matter of formal lawmaking, changes to the 2012 amendment (from the 1996 amended version) relevant to exclusion are primarily reflected in nine articles: 43, 54–58, 171 (formerly 140), 172 (formerly 141), and 242 (formerly 204). The 2012 amendment is designed to implement exclusion, with more specific provisions calculated not only to prohibit the illegal coercion of evidence,¹¹⁰ but also to establish the means of exclusion and the obligations of the relevant actors in the process.¹¹¹

⁹⁶ See generally, *ibid.*

⁹⁷ Kam C Wong, *Chinese Policing: History and Reform* (Peter Lang Publishing 2009) 171.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ Jianlin Bian, 'Legislative Progress in Chinese Criminal Proceedings System: The Second Amendment to the Criminal Procedure Law of China' (2012) 7 *Frontiers Law of China* 175, 176.

¹⁰⁴ Criminal Procedure Law of the People's Republic of China (hereinafter 'Criminal Procedure Law of the PRC (2013)'), adopted at the Second Session of the Fifth National People's Congress on 1 July 1979; amended for the first time in accordance with the Decision on Amending the Criminal Procedure Law of the People's Republic of China, adopted at the Fourth Session of the Eighth National People's Congress on March 17 1996; amended for the second time in accordance with the Decision on Amending the Criminal Procedure Law of the People's Republic of China, adopted at the Fifth Session of the 11th National People's Congress of the People's Republic of China on 14 March 2012 <<https://www.cecc.gov/resources/legal-provisions/criminal-procedure-law-of-the-peoples-republic-of-china>> accessed 11 January 2021.

¹⁰⁵ Joshua Rosenzweig and others, 'The 2012 Revision of the Chinese Criminal Procedure Law: (Mostly) Old Wine in New Bottles', Chinese University of Hong Kong (17 May 2012) <<https://www.law.cuhk.edu.hk/en/research/crj/download/papers/2012-CRJ-OccasionalPaper-CPL.pdf>> accessed 11 January 2021.

¹⁰⁶ Criminal Procedure Law of the PRC (2013) (n 104), Art 60.

¹⁰⁷ *Ibid.*, Art 42.

¹⁰⁸ Joshua Rosenzweig and others (n 105) 49.

¹⁰⁹ *Ibid.*, 14.

¹¹⁰ Criminal Procedure Law of the PRC (2013) (n 104), Art 54.

¹¹¹ *Ibid.*, Arts 54, 56, 58, 182, 242, and 282.

Article 43 ‘strictly’ prohibits the ‘extortion [of] confessions by torture, gather[ing] evidence by threat, enticement, deceit, or other illegal means, or forc[ing] anyone to commit self-incrimination’.¹¹² Some Chinese scholarship suggests that this ‘provides a new protection against any force towards anyone to commit self-incrimination by written law’.¹¹³ Article 54 (and Article 58) specifically provides for the remedy of exclusion (‘shall be excluded’) for offending evidence discovered during the investigation, review by prosecution or at trial, and that it shall be excluded in a request for application for prosecution, at trial, or as a basis for sentence.¹¹⁴ The 2012 amendment requires that investigations be conducted (when relevant) by the Procuratorate (Article 55)¹¹⁵ and/or by the trial judge (Article 56),¹¹⁶ and places the burden of proof on the people’s procuratorate to establish the legality of the questioned evidence (Article 57).¹¹⁷ Article 56 also provides for the right of a concerned party to apply for exclusion.¹¹⁸

During the course of investigation of allegedly tainted evidence, both the trial court (Article 57) and the Procuratorate (Article 140) shall have the right to call relevant witnesses including security personnel.¹¹⁹ Article 204 (2) and (4) provide for the competence of retrying cases if the convictions are based on evidence that should have been excluded.¹²⁰ The Criminal Procedure Law was subsequently amended again in 2018, but without relevant changes to exclusion provisions.

¹¹² Ibid, Art 43; the Supreme People’s Court’s Interpretation on the Application of the PRC Criminal Procedure Law (hereinafter ‘Interpretation of Criminal Procedure Law of the PRC (2013)’), adopted at the 1,559th meeting of the Adjudication Committee of the Supreme People’s Court on 5 November 2012, entered into force 1 January 2013, Art 95 <<https://www.chinalawtranslate.com/en/spccplinterp2013>> (最高人民法院关于适用《中华人民共和国刑事诉讼法》的解释) accessed 11 January 2021.

¹¹³ Chen Weidong and Cheng Lei, *Amended Articles of PRC Criminal Procedure Law Amendment: Comprehension and Application* (China Legal Publishing House 2012) 80.

¹¹⁴ Criminal Procedure Law of the PRC (2013) (n 104), Art 54: ‘Confessions extorted from a criminal suspect or defendant by illegal means such as torture, testimony of witnesses and statements of victims collected by violent means, threat or other unlawful means shall be excluded. Physical evidence or documentary evidence that is not collected according to statutory procedures and is therefore likely to materially damage judicial justice shall be subject to correction or reasonable explanations, and shall be excluded if correction or reasonable explanations are not made. Evidence that shall be excluded as found during investigation, examination before prosecution and trial shall be excluded in accordance with the law, and shall not serve as the basis for making prosecution opinions, prosecution decisions and judgments.’

CPC 2013 Art 58: ‘Evidence shall be excluded if court investigation has confirmed or is unable to rule out that there have been circumstances of gathering evidence by illegal means as set forth in Article 54 herein.’

¹¹⁵ Criminal Procedure Law of the PRC (2013) (n 104), Art 55: ‘Where a people’s procuratorate receives any reports, accusations or tip-offs on any circumstances involving unlawful gathering of evidence by investigators, or discovers that any investigator involves such conduct, the people’s procuratorate shall carry out investigation and verification thereof. If said conduct constitutes a crime, the persons concerned shall be subject to criminal liability in accordance with the law.’

¹¹⁶ Ibid, Art 56: ‘During a court hearing, where a judge is of the opinion that evidence may have been gathered by unlawful means as stipulated in Article 54 herein, a court investigation shall be launched as to the legality of the evidence gathering means. The party concerned, his/her defender and the agent *ad litem* shall be entitled to apply with the relevant people’s court for exclusion of the evidence gathered by unlawful means in accordance with the law. Those who apply for exclusion of the evidence gathered by unlawful means shall provide relevant clues or materials.’

¹¹⁷ Ibid, Art 57: ‘A people’s procuratorate shall bear the burden of proof as to the legality of the evidence gathering means during the court investigation thereof. Where there exists no evidentiary support for the legality of the evidence gathering means, the people’s procuratorate may request the people’s court concerned to notify relevant investigators or other personnel to appear before the courtroom to make explanations. The people’s court may, at its own discretion, notify relevant investigators or other personnel to appear before the courtroom to give explanations. Relevant investigators or other personnel may also take the initiative to request an appearance before the courtroom for an explanation. Relevant personnel shall also appear before the courtroom if so notified by the people’s court.’

¹¹⁸ Ibid, Art 56.

¹¹⁹ Ibid, Arts 57 and 140.

¹²⁰ Ibid, Arts 204(2) and (4).

IV. Ancillary administrative documents

The 2012 Criminal Procedure Amendment was envisioned to build upon two provisions issued jointly by the Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security, and the Ministry of Justice in June 2010.¹²¹ These provisions are the Provisions on Several Issues Concerning the Examination and Judgment of Evidence in Death Penalty Cases¹²² (hereinafter 'Evidence in Death Penalty Cases Rule'), and the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases¹²³ (hereinafter 'Exclusion of Illegal Evidence Rule'). Insofar as the 2012 amendment was adopted by the National People's Congress,¹²⁴ it has been formalized as law instead of administrative provision,¹²⁵ giving it more binding status than previous provisions.¹²⁶

The 2012 changes from the older provisions consisted of greater specificity,¹²⁷ expanding the scope of evidence subject to exclusion,¹²⁸ transfer of the burden of proof,¹²⁹ and additional procedural safeguards.¹³⁰

Article 54 of the 2012 Criminal Procedure Amendment altered the Exclusion of Illegal Evidence rule to change the language of 'obtained' to 'gathered', and 'other illegal methods' to 'other illegal means'.¹³¹ Scholars suggest that this makes the provision more precise¹³² and extends the ambit of evidence, allowing for relevant parties to exclude more evidence.¹³³ More importantly, with regard to the exclusion of documentary or physical evidence, the language was changed from 'by obviously breaching the statutory procedure' to 'not gathered under the statutory procedure',¹³⁴ implying a lower threshold of proof for exclusion of this type of evidence.¹³⁵ Pragmatically, this also extends the quantum of evidence subject to exclusion from verbal evidence (i.e. coerced

¹²¹ Chen and Cheng, *Amended Articles of PRC Criminal Procedure Law Amendment: Comprehension and Application* (n 114) 74.

¹²² Notice of the Supreme People's Court, the Supreme People's Procuratorates, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice on Issuing the Provisions on Several Issues Concerning the Examination and Judgment of Evidence in Death Sentence Cases and the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases (2010) <<http://lawinfochina.com/Display.aspx?lib=law&Cgid=134374&EncodingName=big5>> accessed 11 January 2021.

¹²³ *Ibid.*

¹²⁴ The Decision of the National People's Congress on Amending the Criminal Procedure Law of the People's Republic of China (hereinafter 'Decision on Amending Criminal Procedure Law of the PRC (2012)'), adopted at the Fifth Session of the 11th National People's Congress of the People's Republic of China on 14 March 2012, enacted into force 1 January 2013 <https://www.pkulaw.com/en_law/e2a1759e436edd66bdfb.html> accessed 11 January 2021.

¹²⁵ J Chen, *Chinese Law: Towards an Understanding of the Chinese Law, Its Nature and Development* (Kluwer Law International 1999) 101.

¹²⁶ Chen and Cheng, *Amended Articles of PRC Criminal Procedure Law Amendment: Comprehension and Application* (n 114) 74.

¹²⁷ Decision on Amending Criminal Procedure Law of the PRC (2012) (n 125).

¹²⁸ *Ibid.*, S 18.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ Criminal Procedure Law of the PRC (2013) (n 104), Art 54.

¹³² Ye Qing, 'A Discussion on the Provisions of the Exclusionary Rule Against Illegally Obtained Evidence in China's Criminal Procedure Law' (2015) *Journal of Eastern-European Criminal Law* 9, 15. For the contrary view, see Joachim Herrmann, 'Chinese Criminal Procedure Reform of 2012: How Much Reform Did It Bring?' (2013) 1 *Peking University Law Journal* 163, 166.

¹³³ Chen and Cheng, *Amended Articles of PRC Criminal Procedure Law Amendment: Comprehension and Application* (n 114) 81.

¹³⁴ Criminal Procedure Law of the PRC (2013) (n 104), Art 54.

¹³⁵ *Ibid.*, Art 56; Ye Qing, 'A Discussion on the Provisions of the Exclusionary Rule Against Illegally Obtained Evidence in China's Criminal Procedure Law' (n 133) 15.

confessions) to tangible evidence,¹³⁶ thus broadening the scope of the type of evidence subject to exclusion. It also broadens the scope or type of illegal police conduct for exclusion (i.e. breach of statutory provisions).¹³⁷

Some scholars suggest that under the Exclusion of Illegal Evidence rule, the burden of proof lies with the defendant under Article 6 as read in conjunction with Article 13.¹³⁸ However, Article 56 of the 2012 Criminal Procedure Amendment squarely places the burden of proof on the prosecution,¹³⁹ though the defendant still bears an evidentiary burden (i.e. 'clues and materials') to trigger the prosecutorial burden.¹⁴⁰

Additional procedural safeguards in the 2012 Criminal Procedure Amendment include the allowance for pre-trial review of questioned evidence¹⁴¹ (Article 182) and a provision for retrial based on tainted evidence allegations before the court of second instance review¹⁴² (Article 242). These procedural safeguards depart from the earlier rules¹⁴³ while following the previous safeguards during interrogation as stipulated above. This has been described as a move from a mere post-processing mechanism with limited police misconduct deterrence and prevention potential to a pre-processing system that aims to control defendants' rights during criminal investigations and consummate the system of evidence.¹⁴⁴

V. Methodology and data overview

The present research has compiled a database containing 1,558 criminal cases recorded between 2009 and 2019¹⁴⁵ involving claims of 'illegal evidence'¹⁴⁶ within defendants' confessions,¹⁴⁷ allegedly obtained by authorities by way of coercion¹⁴⁸ and/or force,¹⁴⁹ with which the courts¹⁵⁰ had dealt in arriving at judicial decisions. The current data compilation is directed at the critical evaluation of whether Chinese judges and courts have complied with the new amendments of the evidence exclusionary rule since its introduction in 2013.¹⁵¹ This requires a particular level of sonification in data collection so that evaluations could be derived from data that were, in fact, comparable or could be

¹³⁶ Criminal Procedure Law of the PRC (2013) (n 104), Art 54.

¹³⁷ Chen and Cheng, *Amended Articles of PRC Criminal Procedure Law Amendment: Comprehension and Application* (n 114) 88.

¹³⁸ *Ibid.*, 108.

¹³⁹ Criminal Procedure Law of the PRC (2013) (n 104), Art 56.

¹⁴⁰ Chen Ruihua, *Visible Justice* (2nd edn, Peking University Press 2013) 161.

¹⁴¹ Criminal Procedure Law of the PRC (2013) (n 104), Art 182.

¹⁴² *Ibid.*, Art 242.

¹⁴³ See Exclusion of Illegal Evidence Rule (n 124), Art 12; see also Chen and Cheng, *Amended Articles of PRC Criminal Procedure Law Amendment: Comprehension and Application* (n 114) 115.

¹⁴⁴ Chen and Cheng (n 114) 75.

¹⁴⁵ ER database, exclusionary rule in the PRC, on file with the author; collection period: 1 January 2009 to 30 June 2019. Later updates revealed an additional 28 cases to date (30 November 2019).

¹⁴⁶ Illegal evidence in China is not limited to illegally obtained confessions but also includes illegitimate evidence collected by other means. A simple search without the keywords 'coercion' or 'by force' would yield a far larger number of cases not concerning the use of unwarranted collection methods regarding the new exclusionary rule: see Criminal Procedure Law of the PRC (2012) (n 104), Ch 5, Arts 50–60.

¹⁴⁷ ER database (n 146).

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

statistically analysed when required. As such, the compilation of data has been categorized according to the following topologies: (i) adjudication year, (ii) adjudication category,¹⁵² (iii) adjudicated province, (iv) relevant offences, and (v) court level.¹⁵³ In addition, decisional data including final judicial outcomes regarding convictions or acquittals in relation to each case's decisional reasoning, based on whether confessional evidence had been excluded or not,¹⁵⁴ by judges per individual judgments, were recorded. Cases so recorded are arranged in relation to their final outcomes to prevent re-counting and the inadvertent augmenting of the actual number of cases collected, from the overall count of 1,558 cases.¹⁵⁵

A. Data collection source

Although China has improved on the transparency of its judicial decisions where judgments of cases can be accessed publicly,¹⁵⁶ the level of sophistication of such databases is not currently available and is unlikely to have been compiled by the Chinese authorities, despite the two most popular databases having some basic categorizations for quick access to particular searches.¹⁵⁷ China Judgements Online¹⁵⁸ is well recognized as the default platform since its official launch by China's Supreme People's Court in July 2013.¹⁵⁹ However, as case searches on this platform do not consolidate their respective litigation history and only display a case's final outcome, we have relied on the privately developed platform Litigation Searches¹⁶⁰ to compile the present database. Upon comparison, there are some discrepancies in the number of cases under the same search parameters,¹⁶¹ and it is acknowledged as a possible limitation of the present compilation that continued cross-checks and/or consolidation are required for increased accuracy and data validity. Despite such limitations, Litigation Searches was employed as the sole sourcing database for the current research, based on recommendations by researchers at China Justice Observer as well as their own reliance on the platform.

¹⁵² This is separated into (i) First Trials, (ii) Appeals, and (iii) Retrials.

¹⁵³ This is separated into (i) Basic People's Courts, (ii) Intermediate People's Courts, and (iii) Higher People's Courts.

¹⁵⁴ This is coded in the construction of the database per a list of commonly cited reasonings, such as whether the acceptance or denial of a claim of confessional evidence having been illegally obtained could be attributed towards interview, and not limited to the following: (i) CCTV/audio recordings, (ii) investigators' testimonies, (iii) health reports between transfers, and (iv) insufficient rebuttal evidence by defendants.

¹⁵⁵ ER database (n 146).

¹⁵⁶ See Meng Yu and Guodong Du, 'Similar Judgments for Similar Cases: Forces Driving Chinese Courts to Promote AI', China Judicial Observer (19 January 2019) <<https://www.chinajusticeobserver.com/a/similar-judgements-for-similar-cases-forces-driving-chinese-courts-to-promote-ai>> accessed 11 January 2021.

¹⁵⁷ See China Judgements Online <<http://wenshu.court.gov.cn>> accessed 11 January 2021; Litigation Searches <<https://www.itlaw.com/bj>> accessed 11 January 2021.

¹⁵⁸ Ibid, China Judgements Online.

¹⁵⁹ See Guodong Du and Meng Yu, *You Can View Almost All the Chinese Court Judgements Online for Free*, China Judicial Observer (8 June 2018) <<https://www.chinajusticeobserver.com/a/you-can-view-almost-all-the-chinese-court-judgments-online-for-free>> accessed 11 January 2021.

¹⁶⁰ See Litigation Searches <<https://www.itlaw.com/bj>> accessed 11 January 2021. Developed privately by legal practitioners in Beijing, the platform was recommended by the staff at China Justice Observers as a better alternative as it consolidates data by final decisions and also sources data directly from China Judgements Online.

¹⁶¹ China Judgements Online shows more hits on the same search criteria. See search research <<http://wenshu.court.gov.cn/website/wenshu/181217BMTKHNT2W0/index.html?pagelid=0a3cfb785fe2a660a047450ceaf2d514&s8=02&s6=00&flj=中华人民共和国刑事诉讼法%20第五十六条>> accessed 11 January 2021.

B. Collection parameters

The principle that confessions obtained through acts of coercion, threats or violence must be excluded from admissible evidence is well understood under common law; such confessions are also excluded from admission under the latest amendments to the PRC's Criminal Procedural Code.¹⁶² Our search for data began with a Chinese keyword search ('illegal evidence'), resulting in 11,880 cases found.¹⁶³ This is overly augmented by other forms of illegal evidence such as illegal searches or unauthorized surveillance. Thus, for the present research, we limited our search parameters by adding the following keywords: (i) criminal,¹⁶⁴ (ii) defendant,¹⁶⁵ (iii) coerced confession,¹⁶⁶ and (iv) forced/threatened confession.¹⁶⁷ This was designed to be consistent with the wording of Article 52 of the Procedural Code,¹⁶⁸ in which the prosecution, judiciary, and investigatory personnel are prohibited from the use of torture, threats, enticement, deception, or other illegal means in forcing a confession from the defendant. Article 56 specifically articulates that such interrogative methods would render confessions illegal and bound to be excluded to ensure judicial fairness, unless an explanation could be provided by the relevant collection parties.¹⁶⁹ As such, the narrowed search results of our research will present a collection of 1,558 cases, all of which are only relevant to illegally obtained confessions.

C. Article 236 (Part II [Section 3] — appeal cases)¹⁷⁰

In the case of appeals, the appellant court could adjudicate in accordance with Article 236 of the Chinese Criminal Procedure Code in reaching three possible decisions: (1) If satisfied that the first trial decision had been based upon correctly applied facts and law and that the penalty awarded was reasonable, the court has the discretion to sustain the original decision and deny the appeal. (2) Upon erred legal application or incorrectly awarded penalty as so considered, the court has the discretion in deciding differently, conditional on

¹⁶² Criminal Procedure Law of the People's Republic of China (hereinafter 'Criminal Procedure Law of the PRC (2018)'), adopted at the Second Session of the Fifth National People's Congress on 1 July 1979; amended for the first time in accordance with the Decision on Amending the Criminal Procedure Law of the People's Republic of China, adopted at the Fourth Session of the Eighth National People's Congress on 17 March 1996; amended for the second time in accordance with the Decision on Amending the Criminal Procedure Law of the People's Republic of China, adopted at the Fifth Session of the 11th National People's Congress on 14 March 2012; and amended for the third time in accordance with the Decision to Amend the Criminal Procedure Law of the People's Republic of China, adopted at the Sixth Session of the Standing Committee of the 13th National People's Congress on 26 October 2018), C 5, Arts 50–60 <https://www.pkulaw.com/en_law/5a06769be1274052bdfb.html> accessed 11 January 2021.

¹⁶³ See search results <<https://www.itlaw.com/search?searchMode=judgements&sortType=2&conditions=searchWord%2B非法证据%2B1%2B非法证据&conditions=caseType%2B2%2B1%2B刑事&searchView=text>> accessed 11 January 2021.

¹⁶⁴ Limited to criminal litigation.

¹⁶⁵ This is added so that it relates to confessions, as the Chinese translation of confessions (not limited to 招供, 供词, 自白) is not always used or consistent in decisions and would therefore limit search results in an inaccurate fashion.

¹⁶⁶ Translated from 诱供, this could also be understood in its English translation as confessions enticed, tempted, or obtained by deception.

¹⁶⁷ Translated from 威胁 and/or 逼供, this is also the wording used under the relevant provisions: see Criminal Procedure Law of the PRC (2018) (n 163), Art 56.

¹⁶⁸ Criminal Procedure Law of the PRC (2018) (n 163), Arts 52–60.

¹⁶⁹ The Chinese wording of the Criminal Procedure Law of the PRC (2018) (n 163), Art 56 is as follows: 采用刑讯逼供 (forceful interrogations) 等非法方法收集的犯罪嫌疑人, 被告人供述和采用暴力 (violence), 威胁 (threats) 等非法方法 (unlimited to such means) 收集的证人证言, 被害人陈述, 应当予以排除收集物证. 书证不符合法定程序, 可能严重影响司法公正的, 应当予以补正或者作出合理解释; 不能补正或者作出合理解释的, 对该证据应当予以排除 (should be excluded).

¹⁷⁰ Criminal Procedure Law of the PRC (2018), *supra* note 163, Pt 3, Ch 3 (中华人民共和国刑事诉讼法 2018, 第三编, 第三章 第二审程序).

the material facts having been adequately considered and accurately applied by the trial courts. Included are complete 'reversals'¹⁷¹ leading to acquittals,¹⁷² and changes in the severity of penalties awarded.¹⁷³ Such changes in awarded penalties are universally referred to as 'partial reversals'¹⁷⁴ in the present research. In particular, newly awarded penalties must not exceed the severity as prescribed by the preceding decisions in such 'partial reversals'.¹⁷⁵ (3) Regarding cases involving insufficient or unclear¹⁷⁶ prosecution evidence, upon further investigation by appellate courts, original decisions could be rescinded and a rehearing by the previous court, in accordance with the procedural rules of the first trial, could be ordered.¹⁷⁷ However, rehearing decisions could not be subjected to another rehearing and would be a matter considered by a higher appellate court. This is often seen as confusing as it seemingly produces cases in which litigations would be inconsistent, with the maximum two-times appeal rule¹⁷⁸ commonly misunderstood. Rather, as rehearing decisions are not considered appeals, each decision could be reverted back to a

¹⁷¹ Criminal Procedure Law of the PRC (2018), *supra* note 163, Arts 250 and 262.

Art 250: 'The Supreme People's Court reviewing a death sentence shall make a ruling to approve or disapprove the death sentence. If the death sentence is disapproved, the Supreme People's Court may remand the case for retrial or render a new sentence.' ('第二百五十条最高人民法院复核死刑案件,应当作出核准或者不核准死刑的裁定。对于不核准死刑的,最高人民法院可以发回重新审判或者予以改判。')

Art 262: 'After receiving an order from the Supreme People's Court to execute a death sentence, a people's court at a lower level shall deliver the convict for execution within seven days. However, under any of the following circumstances, the people's court at a lower level shall suspend execution and immediately report it to the Supreme People's Court for a ruling:

- (1) It is discovered before execution that the sentence may be erroneous;
- (2) Before execution, the convict exposes any major crimes of others or has other major meritorious acts, and the sentence may be changed; or
- (3) The convict is pregnant.

If the reason for suspension of execution as set forth in item (1) or (2) of the preceding paragraph disappears, the sentence may be executed only after the president of the Supreme People's Court signs and issues another order to execute the death sentence upon a request. If execution is suspended for the reason as set forth in item (3) of the preceding paragraph, a request shall be submitted to the Supreme People's Court for modifying the sentence in accordance with the law.'

(第二百六十二条下级人民法院接到最高人民法院执行死刑的命令后,应当在七日以内交付执行但是发现有下列情形之一的,应当停止执行,并且立即报告最高人民法院,由最高人民法院作出裁定:

- (一) 在执行前发现判决可能有错误的;
- (二) 在执行前罪犯揭发重大犯罪事实或者有其他重大立功表现,可能需要改判的;
- (三) 罪犯正在怀孕。

前款第一项,第二项停止执行的原因消失后,必须报请最高人民法院院长再签发执行死刑的命令才能执行;由于前款第三项原因停止执行的,应当报请最高人民法院依法改判。)

¹⁷² ER database (n 146).

¹⁷³ This is subject to Criminal Procedure Law of the PRC (2018) (n 163), Art 237, where the new penalty awarded cannot exceed that of the trial court's decision. Art 237: 'A people's court of second instance which hears a case appealed by a defendant or his or her legal representative, defender, or close relative shall not aggravate the criminal punishment on the defendant. In a case remanded by the people's court of second instance to the original trial court for retrial, the original trial court shall not aggravate the criminal punishment on the defendant, unless there is any new crime and the people's procuratorate has initiated a supplementary prosecution.' ('第二审人民法院审理被告人或者他的法定代理人,辩护人,近亲属上诉的案件,不得加重被告人的刑罚。第二审人民法院发回原审人民法院重新审判的案件,除有新的犯罪事实,人民检察院补充起诉的以外,原审人民法院也不得加重被告人的刑罚。')

¹⁷⁴ This could be misleading where such term might lead one to believe such decisions to proceed from the court's reluctance to openly admit to the use of coercion or force. Yet, it is important to note that invoking a change in decision by the appellate court, as per Art 236 of the Procedural Code, requires that the applicable facts be accurately and reasonably applied in a manner found to be satisfactory by the appellate court. As such, not all reversals or partial reversals indicate a causal relationship between such decisions and the presence of 'illegal evidence'.

¹⁷⁵ Criminal Procedure Law of the PRC (2018), *supra* note 163, Art 237.

¹⁷⁶ This includes lack of clarity, erred applications, and/or unreasonable or questionable evidence obtained by the prosecution.

¹⁷⁷ This is not the same as a retrial.

¹⁷⁸ Criminal Procedure Law of the PRC (2018), *supra* note 163, Art 244: 'A sentence or ruling of a people's court of second instance, or a sentence or ruling of the Supreme People's Court shall be final. ('第二审的判决,裁定和最高人民法院的判决,裁定,都是终审的判决,裁定。')

preceding court to be reheard or even retrialled.¹⁷⁹ An order of retrial would require the appellate court to consider whether the original court as per Article 238 had: (i) applied the code inconsistently according to the first trial's procedural requirements,¹⁸⁰ (ii) committed acts of circumvention,¹⁸¹ (iii) violated the defendant's procedural rights, leading to inequitable decisions,¹⁸² (iv) formed an illegitimate adjudication panel,¹⁸³ or (v) permitted other procedural injustices, affecting a fair trial.¹⁸⁴

D. Retrials

The main difference between the concept of rehearing¹⁸⁵ and retrial¹⁸⁶ resides upon procedural variations. Though not part of appeals in general, the call for a rehearing by reason of insufficient or unclear facts begins with an appeal application. The call for a retrial is limited to cases where judgments have been enforced and penalties carried out. This requires that the defendant apply to a higher-level court when the given time limitation for lodging a rehearing (appeal) has expired.¹⁸⁷ The difference is of largely procedural importance.

VI. Findings

One reason behind the scepticism expressed by Chinese judge stakeholders and other Chinese scholars was the lack of pervasive legal representation in the PRC in criminal

¹⁷⁹ Criminal Procedure Law of the PRC (2018), *supra* note 163, Art 236: 'After hearing an appellate case against a sentence of a people's court of first instance, the people's court of second instance shall handle it as follows:

- (1) If the original sentence is correct in fact finding and application of law and is appropriate in sentencing, the people's court of second instance shall render a ruling to dismiss the appeal and uphold the original sentence;
- (2) If the original sentence is correct in fact finding but erroneous in application of law or is inappropriate in sentencing, the people's court of second instance shall modify the original sentence (*modify the original sentence on appeal*); or if the facts are unclear or evidence is insufficient in the original judgment, the people's court of second instance may modify the original sentence after the case facts are ascertained; or render a ruling to revoke the original sentence and remand the case to the original trial court for retrial (*retrial*).

Where a defendant or the people's procuratorate appeals after the original trial court renders a sentence for a case remanded for retrial under item (3) of the preceding paragraph, the people's court of second instance shall render a sentence or ruling in accordance with law and may not remand the case again to the original trial court for retrial.' ('第二百三十六条第二审人民法院对不服第一审判决的上诉、抗诉案件, 经过审理后, 应当按照下列情形分别处理:

- (一) 原判决认定事实和适用法律正确, 量刑适当的, 应当裁定驳回上诉或者抗诉, 维持原判;
- (二) 原判决认定事实没有错误, 但适用法律有错误, 或者量刑不当的, 应当改判; (上诉后改判);
- (三) 原判决事实不清楚或者证据不足的, 可以在查清事实后改判; 也可以裁定撤销原判, 发回原审人民法院重新审判 (重审)。

原审人民法院对于依照前款第三项规定发回重新审判的案件作出判决后, 被告人提出上诉或者人民检察院提出抗诉的, 第二审人民法院应当依法作出判决或者裁定, 不得再发回原审人民法院重新审判。)

¹⁸⁰ Criminal Procedure Law of the PRC (2018) (n 163), Art 238(1): 'the provisions of this Law regarding open trial are violated' ('违反本法有关公开审判的规定的').

¹⁸¹ Criminal Procedure Law of the PRC (2018) (n 163), Art 238(2): 'the disqualification provisions are violated' ('违反回避制度的').

¹⁸² Criminal Procedure Law of the PRC (2018) (n 163), Art 238(3): 'a party is deprived of statutory procedural rights or such rights of a party are restricted, which may affect a fair trial' ('剥夺或者限制了当事人的法定诉讼权利, 可能影响公正审判的').

¹⁸³ Criminal Procedure Law of the PRC (2018) (n 163), Art 238(4): 'the composition of a trial organization is illegal' ('审判组织的组成不合法的').

¹⁸⁴ Criminal Procedure Law of the PRC (2018) (n 163), Art 238(5): 'statutory procedures are otherwise violated, which may affect a fair trial' ('其他违反法律规定的诉讼程序, 可能影响公正审判的').

¹⁸⁵ Translation of the Chinese term '重审'.

¹⁸⁶ Translation of the Chinese term '再审'.

¹⁸⁷ Zhengxu Tang (唐正旭), *Procedural Arrangement of Rehearing and Retrial Under the Consideration of Procedural Benefits* ('程序利益视野下再审发回重审的程序配置'), China Court (3 April 2018) <<https://www.chinacourt.org/article/detail/2018/04/id/3255309.shtml>> accessed 11 January 2021.

cases. This would render Articles 54/58 largely inert since there would be insufficient lawyers to advise and file claims for suppression either in the court of first instance, on appeal, or on remand for retrial. The commentators argue that, without legal assistance, the quantity of challenges to illegally obtained evidence would not meaningfully differ from the very low numbers seen before the enactment of the 2012 Criminal Procedure Amendment, and judges would not be obliged to make challenging rulings relating to exclusion. The objective findings show that this is not the case.

Prior to the effective date of the amendment (1 January 2013), criminal defendants could challenge illegally obtained evidence under the Exclusion of Illegal Evidence Rule¹⁸⁸ or the Evidence in Death Penalty Cases rule.¹⁸⁹ Figure 1 shows the rate of increase in filings during the four-year period of 2009–2012, as compared to year by year according to venue (trial court, appeals court, and retrial). The difference is profound. Rising from a four-year total of 12 claims (average of three per year) made at the trial court before the enactment of Articles 54/58, the claims jumped to 27 for a single year in 2013, and then to an average of 143.2 per year during the years 2014–2018 or a total of 743 cases. The relatively low number of cases brought in 2013 can be attributed to the amendment being newly legislated. Another way to view this is that, for the four years prior to the amendment coming into force and its first experimental year (or the five-year period of 2009–2013), an average of 7.8 claims were filed annually in courts of first instance, while for the following five years (2014–2018), an average of 143.2 cases were filed per year, representing a 1,835 per cent increase. It is also noteworthy that for the last five years (2014–2018), the number of claims has remained relatively constant year over year, showing that no unrelated external factors affected the outcome. These numbers strongly suggest that the defence strategy of exclusion has taken root in the PRC and become a sustainable defence mechanism. These data provide weighty evidence that lack of legal counsel played no injurious role in the use of this ordinance.

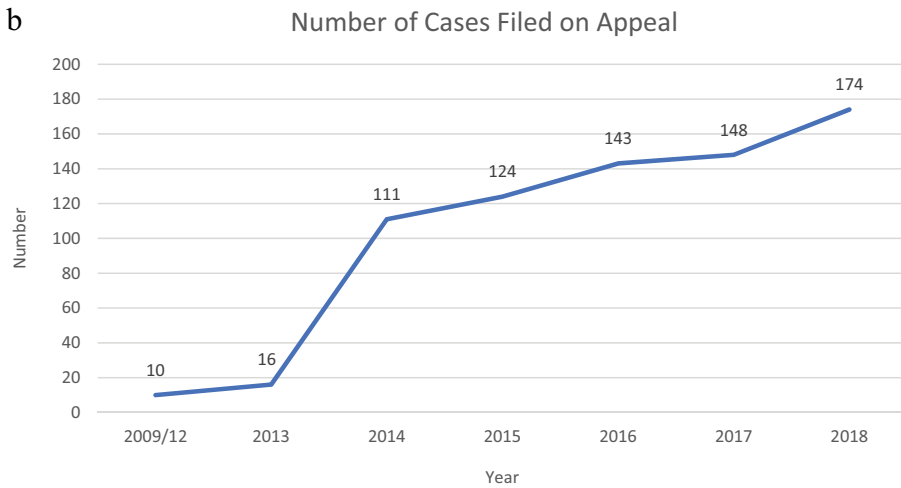
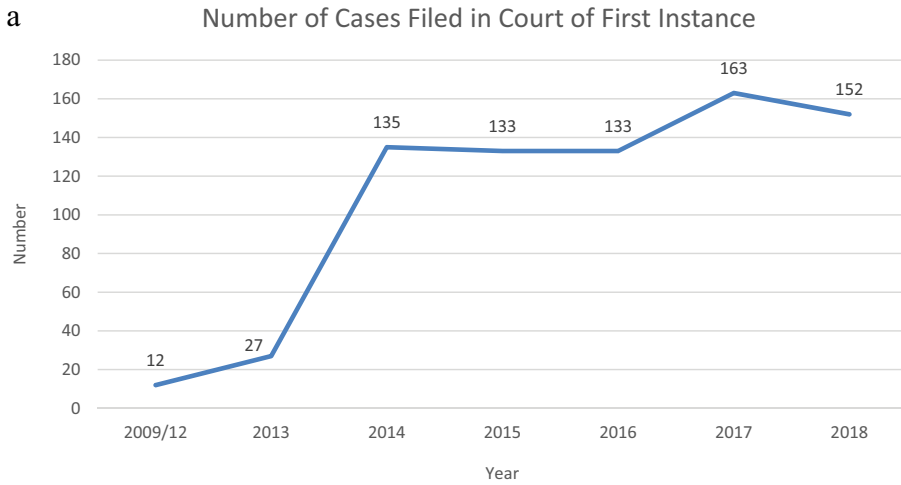
The increase is more momentous in appellate claims. Appeals calling for exclusion jumped from a total of 10 for the combined years of 2009–2012 (or an average of 2.5 per year) to 16 for 2013 to an average of 140 per year in 2014–2018. This represents an upsurge of exclusion filings from 2009–2013 to 2014–2018 of 2,692 per cent.

Perhaps surprisingly, while there are no data available as to whether these claims were made *pro se* or with the benefit of counsel, either way, the substantial increase clearly establishes that lack of legal representation is no bar to invoking Articles 54/58 for legal defence.

Moreover, the surge in filings provides evidence that the lack of protections against self-incrimination, failure to provide constitutional protections (instead of only statutory protections), and lack of judicial autonomy were also no bar to the filing of claims under Articles 54/58. It is likely that the lack of protections against self-incrimination attends a conclusion that it is a stimulating factor in police abuse rather than a relevant factor in denying exclusion of the evidence or a legal justification for police action. Police are not authorized to use abusive practices to force statements even without the suspect's protection against self-incrimination. Yet intuitively, police tend to use more force when witnesses (especially suspects) are required to give testimony and fail to provide adequate information (in the

¹⁸⁸ Exclusion of Illegal Evidence Rule (n 124), Art 5.

¹⁸⁹ Evidence in Death Penalty Cases Rule (n 123), Art 12.



c

Average Yearly Increase		
Years	First Instance	Appeal
2009–2013	7.8/year	5.2/year
2014–2018	143.2/year	140/year
Increase	1,835%	2,692%

Figure 1.

judgment of the officer). Judges may traditionally have been more lenient, as a matter of human nature, with regard to the admissibility of evidence involving aggressive police interrogation when the witness has a legal duty to answer and is being recalcitrant or evasive. However, since the enactment of the Criminal Procedure Amendment, judges have been allowing suppression motions to go forward in courts of first instance and on appeal. Additionally, PRC judges are excluding evidence in 27 per cent of exclusion orders on the basis of procedural irregularities (see Figure 5b), which reflects significant sensitivity to harsh interrogation measures, despite the lack of protections against self-incrimination and local pressure applied by police and prosecutors. This figure also signals a noteworthy stance taken by PRC judges on procedural due process considerations.

The data indicate that judges in courts of first instance and on appeal are allowing exclusion cases to go forward in far greater numbers than under the previous administrative rules, despite the lack of a constitutional provision for authority. Exclusion under administrative rules saw very few cases (as seen above), but under the statutory provision of the Criminal Procedure Amendment, its use has risen considerably. This leads to the conclusion that administrative provisions without sufficient express language (such as the Evidence in Death Penalty Cases rule and the Exclusion of Illegal Evidence rule) are viewed by the Chinese judiciary as discretionary, while statutory law is seen as mandatory, or at least mandatory in exclusion cases. Thus, enactment of constitutional provision would have a very little practical effect on the operation of the PRC exclusionary rules beyond the authority already provided under the Criminal Procedural Amendment.

The data also indicate an exercising of greater judicial autonomy in police abuse cases. To agree to hear the motion, the trial judge or appeal judge will have to give a degree of credence to the allegations of the defendant. This is due in part to the burden a motion presents to the prosecution. If the case goes forward, the prosecutor will carry the burden of proof for showing that the evidence was legally obtained.¹⁹⁰ Given the highly politicized position of judges in many PRC courts, there is a natural reluctance to impose this chore on prosecutors or to allow motions where police officers are accused of irregularities or abuse that can rise to the level of criminal misconduct.¹⁹¹ In this light and given the (implicit and explicit) pressures brought to bear on the bench, the number of exclusion actions going forward under Article 54/58 is startling. Indeed, in at least two cases reviewed, the judge made an express finding of torture,¹⁹² while in another, the court made a prophylactic rule designating time limits for sleep deprivation during interrogation.¹⁹³

Furthermore, additional indicia of growing judicial autonomy can be found in the seriousness and political nature of the charges that attracted exclusion. In any judicial theatre, some cases are more subject to politicization than others.¹⁹⁴ Convictions for

¹⁹⁰ Exclusion of Illegal Evidence Rule (n 124), Arts 7–10.

¹⁹¹ Zhuang Hui-Yun, *Idealism and the Abuse of Power: Lessons from China's Cultural Revolution* Ch 5 (Ashgate Publishing 2010).

¹⁹² These decisions were handed down in 2017 and 2018 in Jiangsu Province on charges of gang fights and criminal assault, where the court made a finding of violent torture and sleep deprivation: see ER database, *supra* note 146.

¹⁹³ There were several cases that dealt with sleep deprivation and specifically how long a period of sleep deprivation would attract an exclusion order; in one case, the limit was set at 24 hours. This court decision was handed down in 2014 and was handled at the trial level (Basic People's Court) on a corruption charge in Zhejiang Province: see ER database (n 146).

¹⁹⁴ Richard Berk, *Criminal Justice Forecasts of Risk: A Machine Learning Approach* (Springer 2012) 89. For contrary view, see (n 20) 196.

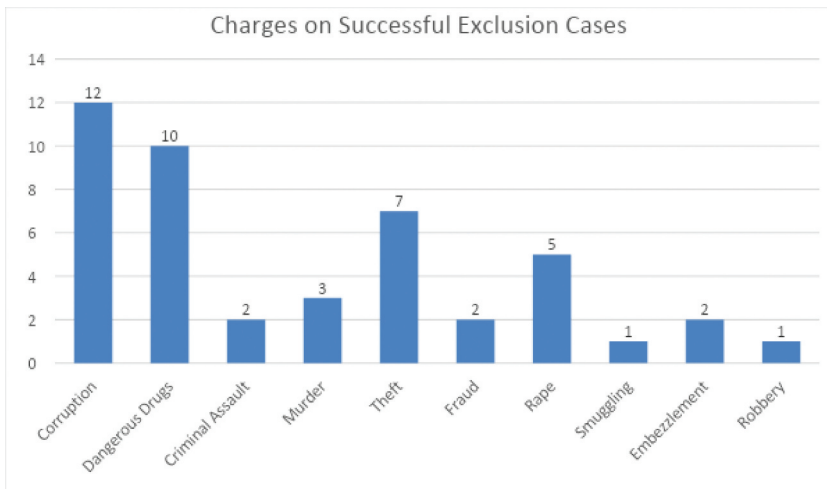


Figure 2.

serious crimes are more politically sensitive than lesser offences,¹⁹⁵ and courts, whether in liberal or authoritarian systems, have more pressure brought to bear on them for convictions.¹⁹⁶ Pressure is keenly felt when a conviction is overturned on appeal or compelling evidence is excluded at trial, on procedural due process grounds.

In the PRC, the central government is also particularly sensitive to corruption charges¹⁹⁷ as part of its ongoing decades-long anti-corruption policy.¹⁹⁸ Yet, in cases that have merited exclusion of the evidence, many involved corruption charges and serious crimes: see Figure 2.

Of the 45 successful exclusion cases identified, the most common charge was corruption, with 12 cases meriting exclusion. In addition, there were 10 dangerous drug cases, which can attract the death penalty in the PRC.²⁰⁰ There were also nine cases of serious crimes including three murder cases, five rape cases, and one robbery case — all carrying a possible death sentence.²⁰⁰ Thus, the politically sensitive charge of corruption accounted for 26.6 per cent of cases where exclusion was granted, while serious crimes accounted for an additional 42.2 per cent of cases, totalling 68.8 per cent of cases. The remaining 31.2 per cent of cases were largely property crimes such as theft or fraud, except two cases involving criminal assault. Thus, there is no objective evidence that judgments on claims for exclusion were politically vetted in any systematic way, as the nature of the charges in the successful cases would suggest the opposite. The fact that judges, at the trial level or appellate

¹⁹⁵ Ibid.

¹⁹⁶ Berk, *Criminal Justice Forecasts of Risk: A Machine Learning Approach* (n 195) 89.

¹⁹⁷ Chris Rowley and Marie Dela Rama, *The Changing Face of Corruption in the Asia Pacific: Current Perspectives and Future Challenges* (Griffith University 2017) 171.

¹⁹⁸ Ibid.

¹⁹⁹ See Figure 2; Criminal Law of the People's Republic of China (hereinafter 'Criminal Law of the PRC (1997)'), adopted at the Second Session of the Fifth National People's Congress on 1 July 1979; revised at the Fifth Session of the Eighth National People's Congress on 14 March 1997 and promulgated by Order 83 of the President of the People's Republic of China on 14 March 1997; Art 232 <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/5375/108071/F-78796243/CHN5375%20Eng3.pdf>> accessed 11 January 2021.

²⁰⁰ See Figure 2; *ibid.*, Arts 236 (rape) and 263 (robbery).

a

Orders Excluding the Evidence				
	Appeal (Motions/Granted)	First Instance (Motions/Granted)	Retrial (Motions/Granted)	Total
2009/2012	10/0	12/0	2/1	24/1
2013	16/0	27/1	6/0	43/1
2014	111/2	135/3	2/0	248/5
2015	124/3	133/4	6/0	263/7
2016	143/5	133/5	1/0	277/10
2017	148/6	163/9	6/2	317/17
2018	174/6	152/1	4/1	330/8

b

Exclusion Rate			
	Appeal (Cases/Exclusions)	First Instance (Cases/Exclusions)	Retrial (Cases/Exclusions)
2009–2012	0% (10/0)	0% (12/0)	50% (2/1)
2013–2018	3% (716/22)	3% (743/23)	15.7% (19/2)
2016–2018	3.6% (465/17)	3.3% (448/15)	27.2% (11/3)

Figure 3.

level, were able to grant suppression applications for such politically sensitive or otherwise serious cases suggests an increasing autonomy of the judiciary in the PRC, at least on this issue. Moreover, lack of constitutional authority and lack of privilege against self-incrimination similarly failed to bar these claims, despite their political or legal ramifications.

Perhaps of greater importance to the issues of judicial autonomy and calls for (higher) constitutional authority are the actual results of exclusionary challenges. Prior to the enactment of the Criminal Procedure Amendment, in the four years 2009–2012, there was only one grant of exclusion of the evidence.²⁰¹ This was on retrial and there were no exclusions ordered in trial courts or appeals courts.²⁰² In this case, the exclusion of the evidence resulted in reversal of the charges in a corruption case. In 2013, the first effective year of the amendment, there were no grants of exclusion in appeals courts or in retrials but one order in the court of first instance: see Figure 3. For appeals and remands, the

²⁰¹ See Figure 3A.

²⁰² ER database (n 146).

Criminal Procedure Amendment would not have been in effect long enough to expect significant activity in 2013. For trial courts, the newness of the amendment in 2013 would naturally skew the results downwards.

However, in the years 2014–2018, there were 23 cases of exclusion orders in trial courts out of 743 motions, or a 3 per cent exclusion rate. On appeal, there were an additional 22 cases of exclusion orders out of 716 appeals, coincidentally also a 3 per cent success rate. On remand, retrials in 2013–2018 include three cases excluded out of 19, or a 15.7 per cent success rate: see [Figure 3b](#). Though probative, remand cases would naturally be skewed upwards as the court has been ordered to review the exclusion issue by the appeals court, which presumably would not have ordered a remand unless a certain threshold of uncertainty was reached on appeal.

In the last three years of the study, 2016–2018, the success rate for appeals requesting exclusion rose to 3.6 per cent, with 17 successful claims out of 465. At trial over the years 2016–2018, the success rate was 3.3 per cent, with 15 successful claims out of 448 motions. On remand, retrials over the last three years had a 27.2 per cent exclusion rate, with three successful motions to exclude out of 11 cases: see [Figure 3b](#).

Though these numbers may seem modest, exclusion of the evidence is an extraordinary remedy²⁰³ and rarely granted in any legal system,²⁰⁴ particularly civil law jurisdictions like the PRC.²⁰⁵ The foothold exclusion has achieved in the PRC, a country ostensibly more interested in substantive justice than procedural justice, is noteworthy. These figures show that exclusion of illegally obtained evidence is not only becoming a common trial and appellate tactic but is also being taken more seriously by trial and appellate courts. In gross numbers, the cases that granted exclusion of the evidence in the last five years (trial court, appellate court, or on remand) are 47 compared to two cases during the previous five years, or an increase of 2,350 per cent. Whether this is due to the increase in the number of filings or not is largely irrelevant to the issue of the sustainability of the exclusionary rule in the Chinese legal landscape, and raises the question as to whether exclusion is popularly perceived as a viable remedy.

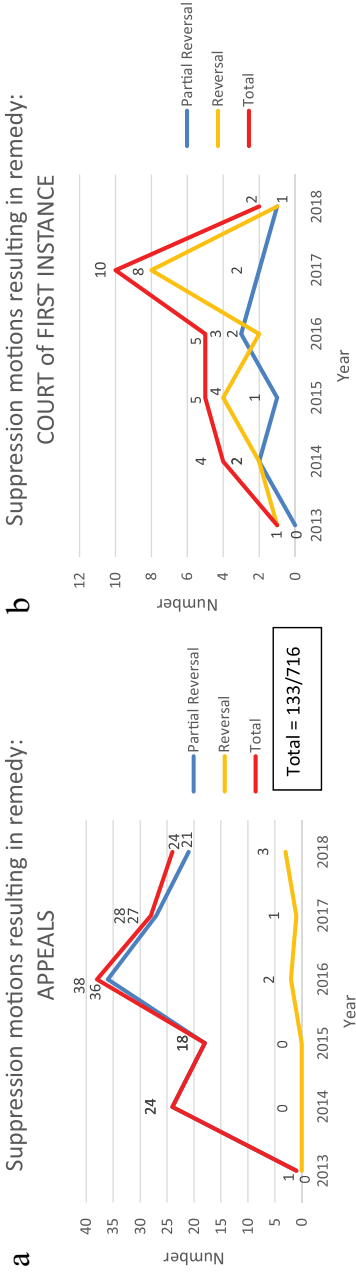
Pointedly, the impact of Articles 54/58 cannot accurately be measured only in terms of grants of exclusion. Of additional significance are the results of cases calling for exclusion even when exclusion is not granted. According to the data set collected, there are seven possible outcomes in motions to suppress. First, evidence is excluded and acquittal (trial court) or conviction (appellate court) overturned; second, evidence is excluded and conviction or verdict sustained; third, evidence is excluded and there is a partial reversal (appellate or remand), resulting in sentence reduction; fourth, evidence is partially excluded but with a conviction and with sentence reduction; fifth, evidence is partially excluded and conviction or verdict is sustained; sixth, evidence is not excluded and conviction or verdict is sustained; or seventh, evidence is not excluded but the case is partially reversed nonetheless, resulting in sentence reduction.

The added benefits of Articles 54/58 are most evident in appeals where claims for exclusion resulted in partial reversals, even when the evidence was not excluded in total or in part. Throughout the period 2013–2018, these claims accounted for 127 partial

²⁰³ J B Dawson, 'The Exclusion of Unlawfully Obtained Evidence: A Comparative Study' (1982) 31 *International and Comparative Law Quarterly* 513, 548.

²⁰⁴ *Ibid.*

²⁰⁵ Stephen C Thaman, *Exclusionary Rules in Comparative Law* (Stephen C Thaman ed, Springer 2013) 410.



Suppression motions resulting in remedy:

Appeals			
	Partial Reversal	Reversal	Total
2013	1	0	1
2014	24	0	24
2015	18	0	18
2016	36	2	38
2017	27	1	28
2018	21	3	24
Total	127	6	133/716

Suppression motions resulting in remedy:

Court of First Instance			
	Partial Reversal	Reversal	Total
2013	0	1	1
2014	2	2	4
2015	1	4	5
2016	3	2	5
2017	2	8	10
2018	1	1	2

Figure 4.

c

Suppression motions resulting in remedy:			
Remand			
	Partial Reversal	Reversal	Total
2013–2018	5	3	8

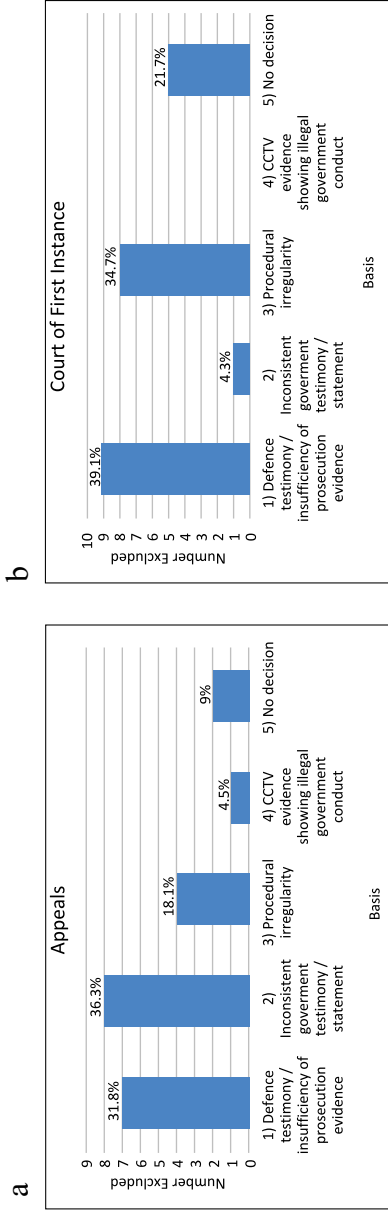
d

Suppression motions resulting in remedies, 2013–2018		
Total		
	Full or Partial Reversal / Acquittal	Relief
Appeals	133/716 cases	18.57% remedy
First Instance	9/743 cases	1.2% remedy
Remand	8/19 cases	42.1% remedy
Total	150/1,478 cases	10.1% remedy

Figure 4.

reversals in addition to six complete reversals, providing for relief in 133 cases out of 716 or an 18.57 per cent success rate. Partial reversals essentially mean sentence reductions in the Chinese jurisprudential nomenclature.

Additionally, in exclusion cases on retrial during the period 2013–2018, there were three complete reversals and five partial reversals, whether there was a grant of exclusion or not. Courts of first instance are more difficult to assess because it is impossible to determine, on the record, the impact the exclusion issue had on the sentence ultimately ordered — though it presumably had some impact as this would be consistent with the practice in the appeals courts. Thus, the overall number of discernible sentence reductions in courts of first instance is low. However, in courts of first instance, there were nine acquittals in exclusion cases during the period 2013–2018; in an additional 18 cases, a partial or full exclusion was ordered but the defendant(s) was/were convicted notwithstanding the ruling on exclusion. This suggests that the latter 18 cases probably attracted lower sentences than if there had been no exclusion. Nonetheless, not including these 18 cases, the total number of litigants who received some relief from the filing of their motions or appeals to suppress during 2013–2018 in trial courts, on appeal or retrial, was 150 or 10.1 per cent of the total cases: see [Figure 4a–d](#). This success rate rises to 10.9 per cent or 101 successful cases out of 924 for the period 2016–2018. This is a significant

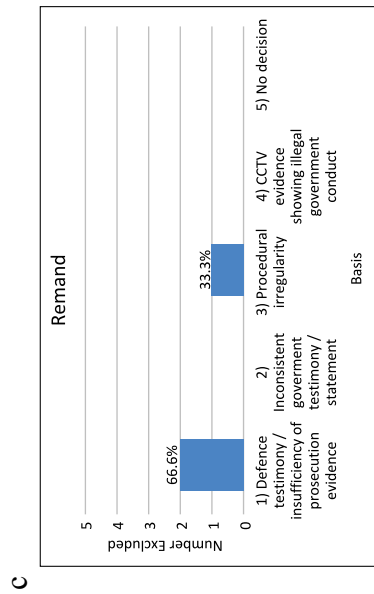
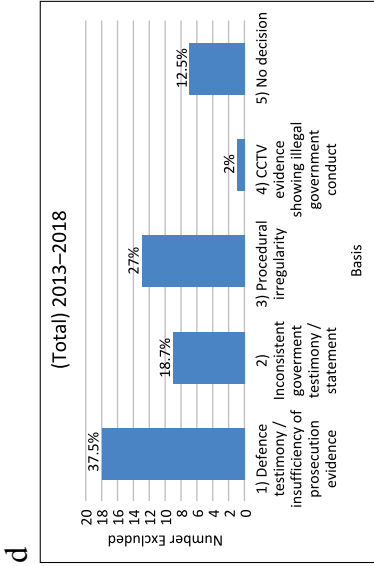


Basis for excluding evidence, 2013–2018

Appeals		
Basis	Number Excluded (Out of 22)	Proportion
1) Defence testimony / insufficiency of prosecutorial evidence	7	31.8%
2) inconsistent government testimony / statement	8	36.3%
3) Procedural irregularity	4	18.1%
4) CCTV evidence showing illegal government conduct	1	4.5%
5) No decision	2	9%

Court of First Instance		
Basis	Number Excluded (Out of 23)	Proportion
1) Defence testimony / insufficiency of prosecutorial evidence	9	39.1%
2) Inconsistent government testimony / statement	1	4.3%
3) Procedural irregularity	8	34.7%
4) CCTV evidence showing illegal government conduct	0	0%
5) No decision	5	21.7%

Figure 5.



All cases, 2013–2018

Basis	Number Excluded (Out of 48)	Proportion
1) Defence testimony / insufficiency of prosecutorial evidence	18	37.5%
2) Inconsistent government testimony / statement	9	18.7%
3) Procedural irregularity	13	27%
4) CCTV evidence showing illegal government conduct	1	2%
5) No decision	7	12.5%

Remand

Basis	Number Excluded (Out of 3)	Proportion
1) Defence testimony / insufficiency of prosecutorial evidence	2	66.6%
2) Inconsistent government testimony / statement	0	0%
3) Procedural irregularity	1	33.3%
4) CCTV evidence showing illegal government conduct	0	0%
5) No decision	0	0%

Figure 5.

number, particularly as only a single case received relief in 2009–2012, before the enactment of the Criminal Procedure Amendment.

This weighty rate of success, both in numbers of exclusions ordered and/or general relief provided, undercuts arguments that the PRC's lack of freedom from self-incrimination precludes its effective operation of the exclusionary rule. The rising trend of its use and effectiveness under Articles 54/58 over the last six years indicates that this is no bar to its operation in the PRC. Moreover, the success rate of appeals in particular, at 18.57 per cent, clearly obviates arguments that only a constitutional provision could adequately implement exclusion in the PRC.

One potential interpretation of the data is that with so many partial reversals (and therefore sentence reductions) in exclusion cases, whether they attract exclusion (full or partial) or not, the courts are providing relief to deserving cases without offending police (making findings of police misconduct) or prosecutors (findings of incompetent representation). That is, courts may avoid making findings of police misconduct for exclusion purposes while granting relief on other grounds such as insufficiency of the evidence, notwithstanding the admission of the challenged evidence. Moreover, judicial officers are also prone to avoid faulting prosecutors in the PRC.²⁰⁶ Again, this touches on the issue of judicial autonomy and the fact that, in the CCP, judicial officers are normally accorded a lower position than police chiefs or prosecutors.²⁰⁷

Objectively speaking, however, the evidence does not fully support this hypothesis, at least to the exclusion of naming and shaming police and prosecutors. While many cases are partially reversed, with sentence reductions for stated reasons other than exclusion (e. g. other cogent evidence), many cases (approximately one third) frankly make findings of police misconduct or prosecutorial error: see Figure 5a–d. Of 48 cases involving courts of first instance, appeals courts, or retrials where exclusion or partial exclusion was ordered, seven courts did not explain their finding (two appeals court, five courts of first instance), with the remaining cases falling into four groupings: (i) insufficient prosecutorial rebuttal evidence, (ii) inconsistent government statements, (iii) finding of procedural irregularity, or (iv) CCTV evidence showing illegal police activity. A large majority of cases gave simple reasoning for their decision (85.4 per cent); of those cases, almost all fell into one of the first three categories (97.5 per cent). If judges were avoiding shaming police and prosecutors, then there would have been a larger number of 'no decision's given, i.e. fewer judges would have provided the reasons laid out in the first three categories.

Insufficient prosecutorial rebuttal evidence occurs when the defence has made a *prima facie* case for illegal police behaviour and the prosecution fails to meet its burden as required in Article 57 of the Criminal Procedure Law of the PRC (2012).²⁰⁸ Once the defence has met the relatively low threshold of evidentiary burden,²⁰⁹ the prosecution carries the burden of proof.²¹⁰ The other bases are self-explanatory, but nearly every case points to a failure of the police or the prosecution to adequately carry out their duty in a legal or professional manner. Such failures include

²⁰⁶ Yu Mou, *The Construction of Guilt in China: An Empirical Account of Routine Chinese Injustice* (Bloomsbury Publishing 2020) 184.

²⁰⁷ *Ibid.* See also McConville, *Comparative Perspectives on Criminal Justice in China* (n 20) 105.

²⁰⁸ Criminal Procedure Law of the PRC (2012) (n 104), Art 57.

²⁰⁹ Providing enough evidence to activate the prosecution's burden; see Ira Belkin, 'China's Tortuous Path Towards Ending Torture in Criminal Investigations' (2011) 24 *Columbia Journal of Asian Law* 273, 289.

²¹⁰ Criminal Procedure Law of the PRC (2012) (n 104), Art 56.

unjustified sleep deprivation,²¹¹ inconsistent police testimony, procedural irregularity, coercion (including arrests of family members),²¹² and torture (including beatings, electric shocks, sleep deprivation, cold, and hunger).²¹³

On the other hand, rationales for sustaining a verdict or convicting, notwithstanding the exclusion, include CCTV evidence,²¹⁴ testimony by healthcare professionals that the petitioner was uninjured (in cases of alleged physical injury),²¹⁵ superior credibility of police testimony,²¹⁶ and inconsistent statements by the petitioner,²¹⁷ among others.

In some cases, the tribunal excluded all or part of the evidence obtained by coercion but still convicted on other credible evidence.²¹⁸ This potentially raises the spectre of *fruits of the poisonous tree*. There is an inference that much of the 'other credible evidence' was collected as a result of the illegally obtained evidence, typically coerced statements, due to the PRC's heavy reliance on oral testimony and the legal compulsion of testimony which applies to all witnesses and suspects. In the case of defendant admissions and confessions, it is a standard investigation practice to question the accused concerning other tangible or physical evidence,²¹⁹ which police will collect to corroborate the confession. This can be introduced as 'other credible evidence' to sustain a conviction, even if the oral testimony of the defendant (e.g. the confession) is excluded. Based on the relatively sparse case summaries in the PRC case-tracking system, it is impossible to determine how frequently *fruits* evidence is used for convictions, but cases of exclusion (complete or partial) which nonetheless result in conviction on other evidence are suspect. In cases such as these, it is preponderant that courts (especially appeals courts) will exclude the tainted evidence, allow the *fruits* evidence to sustain a conviction, but grant a partial reversal and sentence reduction.

VII. Conclusion

There are a number of legal and cultural challenges to the effective operation of the exclusionary rule in the PRC. The law provides no protection from self-incrimination, which can lead to false confessions and damning admissions.²²⁰ The right to counsel is

²¹¹ Several cases turned on the issue of sleep deprivation, with one court ruling that 20 hours was not sufficient for remedy, while another court in Zhejiang Province ruled that 24 hours was sufficient for exclusion: see ER database (n 146).

²¹² ER database (n 146).

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ Physical evidence obtained not according to statutory procedures only requires 'correction or reasonable explanations' to escape exclusion: see Criminal Procedure Law of the PRC (2012), Art 54; see F Q Liu, 'Interrogation in Criminal Investigation: the Whole Function and Its Difference at Different Stages — an Empirical Research' ('侦查中的讯问: 整体功能与阶段差异——基于实证的研究') (2008) 101 *Journal of Fujian Police Academy* 26, in Wei Wu and Tom Vander Beken, 'Police Torture in China and Its Causes: A Review of Literature' (2010) 43 *Australian & New Zealand Journal of Criminology* 557, 561.

²²⁰ Michael V Profit, 'Refusing to Be One's Own Witness: How the Privilege Against Self-Incrimination Differs in China, France, and the United States' (2016) 8 *Elon Law Review* 155; Decision of the National People's Congress on the Amendment of the Criminal Procedure Law of the People's Republic of China, promulgated by the National People's Congress, Beijing Municipality, on 14 March 2012, enacted into force 1 January 2013 <<http://lawprofessors.typepad.com/files/130101-crim-pro-law-as-amended-en.pdf>> accessed 11 January 2021.

not procedurally guaranteed as a safeguard²²¹ to protect the interests of the accused. Unrepresented defendants might fear challenging evidence would lead to harsher sentences,²²² and legal challenges can potentially lead to sanctions against defence counsel²²³ (in the minority of cases where counsel is retained or appointed²²⁴). There is no provision for suppressing *fruits* evidence.²²⁵ These challenges are especially salient because of the comparatively skewed and diminished status of judges in the PRC criminal justice system, who are frequently under unconscionable political pressure to deny such motions.²²⁶ Moreover, there are several cultural barriers to an exclusionary rule in the PRC.²²⁷ A populist belief holds that substantive justice trumps procedural justice,²²⁸ meaning that the guilty should be punished even if the evidence to convict them was illegally obtained.²²⁹ In a system that could be described as paternalistic,²³⁰ innocent suspects expect to be tortured and will sometimes confess to crimes to avoid being tortured into false confessions.²³¹

Most of these factors, our general research question as to how effectively the exclusionary rule has taken root in the PRC, and the issue of judicial autonomy can be addressed according to the four critiques laid out by the stakeholders in our early qualitative survey. Namely, a lack of adequate legal counsel or judicial autonomy, and an absence of constitutional protections for suppression or protection from self-incrimination. In each challenge, the quantitative results from the dataset provide a compelling picture of these issues and an exclusionary rule that has been accepted by the Chinese legal community in a way few predicted on the effective date of the Chinese Criminal Procedure Amendment. For it to develop into a more operative legal tool, there are still other obligatory lawmaking priorities such as, *inter alia*, suppressing *fruits* evidence, legislating freedom from self-incrimination, and enhanced right to counsel protections. However, these innovations are still some time off in the PRC.

Specifically, analysis of the dataset can be distilled to disclose that exclusion has become a mainstay of Chinese criminal justice, with an increase of 1,835 per cent in filings in the court of first instance over the last five years compared with the previous five years.²³² That number increases to 2,692 per cent in appeals.²³³ The success rate of these motions and appeals is

²²¹ Criminal Procedure Law of the PRC (2013) (n 163), S 2 Interrogation of Criminal Suspects, Ch 2 Investigation, Pt 2 Filing a Case, Investigation and Initiation of Public Prosecution <<https://www.cecc.gov/resources/legal-provisions/criminal-procedure-law-of-the-peoples-republic-of-china>> accessed 11 January 2021; see Wei Wu and Tom Vander Beken, 'Police Torture in China and Its Causes: A Review of Literature' (2010) 43 Australian & New Zealand Journal of Criminology 557, 565 (studies also demonstrate that the CPL permits lawyers' involvement at the stage of police investigation, but neither the CPL nor any supplementary regulations contain sufficient procedural safeguards to ensure that the lawyers discharge their duties properly).

²²² See Ralph A Thaxton Jr, *Force and Contention in Contemporary China: Memory and Resistance in the Long Shadow of the Catastrophic Past* (Cambridge University Press 2016) 56.

²²³ Na Jiang (n 72) 67.

²²⁴ Ira Belkin, 'China' in *Criminal Procedure: A Worldwide Study* (Crag M Bradley ed, 2nd edn, Carolina Academic Press 2007) 91, 104; Margaret K Lewis, *Controlling Abuse to Maintain Control: The Exclusionary Rule in China* (2011) 43 NYU Journal of International Law & Politics 629, 665.

²²⁵ Rosenzweig and others, 'The 2012 Revision of the Chinese Criminal Procedure Law: (Mostly) Old Wine in New Bottles' (n 106).

²²⁶ Jue Jiang, *Criminal Reconciliation in Contemporary China: An Empirical and Analytical Enquiry* (Edward Elgar Publishing 2016) 213.

²²⁷ CJ database (n 39).

²²⁸ Bin Liang, *The Changing Chinese Legal System, 1978—Present: Centralization of Power and Rationalization of The Legal System* (Routledge 2018) 166.

²²⁹ *Ibid.*

²³⁰ Jeffrey C Kinkley, *Chinese Justice, the Fiction: Law and Literature in Modern China* (Stanford University Press 2000) 12.

²³¹ Thomas W Simon, Chuan Feng and Leyton P Nelson, *China's Changing Legal System* (Palgrave Macmillan 2016) 171.

²³² See Figure 1C.

²³³ *Ibid.*

noteworthy, with a 3.6 per cent exclusion rate in appeals, 3.3 per cent rate in trial courts, and 27.2 per cent in retrials.²³⁴ Of all the cases filed, 18.57 per cent of appeals attracted some remedy (full or partial reversal),²³⁵ with the proportion rising to 42.1 per cent for retrials.²³⁶ The courts granted exclusion in serious and politically charged cases 68.8 per cent of the time,²³⁷ with corruption charges accounting for 26.6 per cent of exclusion cases²³⁸ and serious crimes another 42.2 per cent.²³⁹ Judges were not intimidated from naming and shaming police and prosecutors or granting exclusion for procedural irregularities. Procedural irregularities accounted for 27 per cent of the exclusions ordered,²⁴⁰ while exclusions ordered for inconsistent government testimony or the prosecution's failure to meet their burden accounted for 56.25 per cent.²⁴¹

There are chiefly two devices by which judges could defeat exclusion of the evidence. Firstly, they could simply refuse to hear exclusion motions at the court of first instance or on appeal. Refusal to entertain exclusion motions would preclude counsel, *pro se* defendants and courts from raising politicized issues. It would also shield (politically well-connected) prosecutors and police from embarrassment or even potential criminal sanction.²⁴² Finally, it would avoid forcing the prosecution to prove admissibility by disproving taint,²⁴³ which is often proving a negative. In most cases, refusal would meet with popular support because exclusion is commonly seen as a procedural remedy²⁴⁴ in a community that is more interested in substantive guilt.²⁴⁵ Moreover, refusal is often easily effected as most criminal cases have no defence attorneys.²⁴⁶ Refusal can be justified on the grounds of futility thanks to a plethora of other legal impediments such as lack of constitutional basis²⁴⁷ or conflicting with the Chinese obligation to give testimony.²⁴⁸ Refusal to hear motions would also relieve the court from making prophylactic rules on its application, a cumbersome process in a civil law system. Thus, refusal to hear motions for exclusion of the evidence is the path of least resistance. Yet the data reveal a radical upwards departure of new cases heard on exclusion.²⁴⁹ Nor is this only attributable to the

²³⁴ See Figure 3B.

²³⁵ See Figure 4D.

²³⁶ *Ibid.*

²³⁷ See Figure 2.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ See Figure 5A.

²⁴² Criminal Procedure Law of the PRC (2018) (n 163), Art 57.

²⁴³ *Ibid.*

²⁴⁴ CJ database (n 36).

²⁴⁵ *Ibid.*

²⁴⁶ Xinhua News, 'Yu Ning: Several Suggestions on Improving the Lawyer Participation Rate in PRC's Criminal Cases' ('于宁: 关于提高我国刑事案件律师参与率的几点建议') China Court (11 March 2012) <<https://www.chinacourt.org/article/detail/2012/03/id/474649.shtml>> accessed 11 January 2021; Shang Lunsheng, 'The Significance of Total Coverage of Defence Lawyers in Criminal Cases' ('刑事案件律师辩护全覆盖的划时代意义'), PRC Lawyer (中国律师网) (24 October 2017) <<http://www.acla.org.cn/article/page/detailById/21517>> accessed 11 January 2021; re death-penalty cases, see Lu Zhang and Haimin Luo, 'Summary for Annual PRC Criminal Procedural Law Seminar 2019 (2020) 3 Justice of China 99; re PRC government policy changes on this matter, see Notice of the Supreme People's Court and the Ministry of Justice on Expanding the Scope of the Pilot Program of Full Coverage of Defence by Lawyers in Criminal Cases (2018) <<http://lawinfochina.com/display.aspx?id=29926&lib=law&EncodingName=big5>> accessed 11 January 2021.

²⁴⁷ CJ database (n 36).

²⁴⁸ Criminal Procedure Law of the PRC (2018) (n 163), Art 62.

²⁴⁹ See Figures 3A and 3B.

amendments' recent enactment *per se*, since relevant administrative rules,²⁵⁰ in place prior to their coming into force, were comparatively underused.

Secondly, having heard the motion, courts could simply deny them all. Exclusion orders are an extraordinary remedy in virtually all countries,²⁵¹ so judicious expectations would dictate that only a trifling percentage would be granted, even with a fully independent and professional judiciary. In this light, the figures of 3.3 to 27.2 per cent for successful exclusion orders²⁵² and a whopping 18.57 to 42.1 per cent for cases that incurred some remedy (including sentence reduction), in appeals and retrials, respectively,²⁵³ are highly noteworthy. Plainly, judges are not denying exclusion motions *pro forma*. The autonomy judges have assumed in these cases is also evident in the types of cases that attract exclusion, such as serious cases including capital cases,²⁵⁴ and politically charged cases such as corruption cases.²⁵⁵ These cases collectively make up the majority of exclusion grants.²⁵⁶

Instead, increasingly judges in the PRC are naming and shaming police and prosecutors in instances of misconduct or incompetence.²⁵⁷ In official publicly disclosed legal rationales for granting exclusion motions, judges have called out police misconduct and the failures of prosecutors.²⁵⁸ Police misconduct accounted for 47 per cent of the 87.5 per cent of cases that disclosed legal rationales for exclusion.²⁵⁹ These bases consisted of inconsistent government testimony (18 per cent),²⁶⁰ giving rise to claims of deception; illegal government conduct (2 per cent),²⁶¹ which could potentially attract criminal charges against the police officers involved; and procedural irregularity (27 per cent),²⁶² suggesting professional incompetence. Failures of the prosecutors account for 37.5 per cent of the 87.5 per cent of cases, which disclosed legal rationales for exclusion, undermining the competence of prosecutors. Prosecutorial incompetence can be recognized as bringing disingenuous cases or being unable or unprepared to prove admissibility of questioned evidence.

Though only seen through the prism of the single legal facet of exclusion of illegally obtained evidence, judicial autonomy has taken root in the PRC, according to an extrapolation of the data. Despite countervailing political trends, increasingly judges are acting in accordance with legal principles and professionalism rather than out of overriding political pressure. Of course, all judicial systems are influenced by politics²⁶³ to some degree. However, based on the figures in our dataset, the degree of external influence exerted on Chinese courts seems to be waning and PRC judges are increasingly flexing their independent, decision-making muscles to arrive at judgments based more on evidence and procedure and less on political pressure.

²⁵⁰ See n 123.

²⁵¹ J B Dawson, 'The Exclusion of Unlawfully Obtained Evidence: A Comparative Study' (1982) 31 *International and Comparative Law Quarterly* 513, 548.

²⁵² See Figure 3B.

²⁵³ See Figure 4D.

²⁵⁴ See Figure 2.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ See Figure 5A.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ See, e.g., Brian L Porto, *May It Please the Court: Judicial Process and Politics in America* (2nd edn, CRC Press 2008).

It appears that the decades-long PRC judicial modernization reforms, undertaken at the end of the 20th century and beginning of the 21st century,²⁶⁴ are bearing fruit when it comes to the professionalism of judges. Besides demonstrating increased autonomy, judges are progressively relying on procedural due process rather than simply resorting to pretextual bases for non-exclusion; nor does lack of counsel or the lack of rights against self-incrimination bar this remedy. Additionally, lessons from the Chinese Criminal Procedure Amendment elucidate that the threshold effective bar for structural legal enforceability is set at perhaps more than an administrative provision but less than a constitutional mandate, at least for exclusion. In these ways, the amendment serves as a catalyst for the evolution of mounting judicial autonomy, professionalism, and deference to procedural due process in PRC courts.

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²⁶⁴ Jianlin Bian and Shu Xie (n 30) 73.

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