

EXCLUSIONARY RULE OF ILLEGAL EVIDENCE UNDER CHINA'S CRIMINAL PROCEDURE LAW AND RECOMMENDATIONS FOR VIETNAM

VU THI QUYEN

PhD Candidate, Law School, Institute of Technology, China

Ho Chi Minh City University of Law, Vietnam

Email: vtquyen@hcmulaw.edu.vn

Abstract

The exclusion of evidence aims to protect individuals from illegal evidence-collection activities of competent authorities, thereby protecting their legitimate rights and interests. In the judicial reform in recent years in China, the exclusion of evidence has gained great attention from experts, lawmakers, and authorities. This paper explores the process of making and developing the Chinese criminal procedure law on evidence exclusion. On that basis, the author compares and proposes recommendations to enhance Vietnamese criminal procedure law on relevant issues.

Keywords: evidence law, exclusionary rule, evidence exclusion, illegal evidence, Chinese criminal procedure law

Received: 19 June 2024

Revised: 05 August 2024

Accepted: 05 September 2024

Evidence collection is a crucial activity of procedural authorities to handle criminal cases. Like other procedural activities, the collection of evidence must comply with the criminal procedure law, to ensure not only the rights of individuals and organizations but also the legality of evidence, thereby warranting the provable value of what is collected. Thus, if the authorities violate the law in the course of collecting evidence, that evidence should be excluded. The rationale behind the rule of exclusion of evidence is the expectation that law enforcement will refrain from engaging in such methods if they know that the resulting physical and testimonial evidence will be excluded.¹ In other words, this rule will limit the risk of abuse from the procedural authority and protect human rights in criminal procedure.²

In China, the use of coercive methods to obtain testimonies, particularly confessions from suspects in criminal cases, often results in wrongful convictions with serious consequences.³ Practically, China has made great efforts to prevent

1 Gless, S., & Richter, T. (Eds.). (2019). *Do exclusionary rules ensure a fair trial?: A comparative perspective on evidentiary rules*. Springer. <https://doi.org/10.1007/978-3-030-12520-2>, p. 5.

2 Vo, M. K., & Nguyen, P. A. (2023). The doctrine of the principle “fruits of poisonous trees” in U.S. criminal justice and recommendations for Vietnam. *Journal of Legislative Studies*, 5(477), 1-12, p. 49.

3 Since the mid-1990s, Chinese academics have created a vast literature on police torture in the process of criminal interrogation. Chinese scholars have acknowledged the widespread use of ‘torture’ — physical or psychological coercion — by law enforcement in general, and by the police in criminal investigations in particular. Even though there are no national statistics on this matter, all reported wrongful convictions were caused by the extraction of confessions by torture. There is a consensus among legal academics that torture and coerced false confessions are among the major causes of wrongful convictions in China. See more Zhi, Y. G. (2019). Torture and exclusion of evidence in China. *China Perspectives*, (2019-1). <https://doi.org/10.4000/chinaperspectives.8742>; Wei, W., & Tom, V. B. (2010). Police torture in China and its causes: A review of literature. *The Australian and New Zealand Journal of Criminology*, 43(3), 557-579. <https://doi.org/10.1375/acri.43.3.557>

torture in criminal proceedings. However, the anti-torture legislation did not make much progress until 2010, when the Exclusionary rule of illegally obtained evidence was enacted, and a systematic reform was conducted through the Criminal Procedure Law amendment in 2012. In recent years, building and improving the law on evidence in criminal procedure, especially the exclusion of evidence, is one of the important parts of judicial reform in China, aiming to limit illegal activities of criminal authorities, thereby protecting human rights in criminal proceedings.⁴

In Vietnam, although there are a large number of studies on evidence in criminal procedure law, scholars have not focused on the exclusionary rule. Moreover, even though the 2015 Criminal Procedure Code sets out conditions for evidence, the concept of exclusion of evidence has not yet been officially recognized. This is considered one of the limitations of Vietnamese criminal procedure law, leading to limitations in practical application. It is evident that China and Vietnam share significant similarities in their legal systems, as well as in their cultural and social contexts. Consequently, an examination of China's exclusionary rule and its development could offer valuable insights for improving the Vietnamese criminal procedure law in this area.

1. Exclusionary rule of illegal evidence under the criminal procedure law of China

One of the most pressing issues in China's criminal justice system is the use of torture and coerced confessions, as evidenced by numerous wrongful conviction cases.⁵ It has been stated that "although confessions obtained through torture are not always false, wrongful convictions are invariably the result of torture".⁶ Several factors contribute to this practice, including China's traditional legal culture which emphasizes substantive justice over procedural justice, as well as the country's high crime rate.⁷ Since several wrongful convictions identified so far have involved instances of coercion or false confessions,⁸ China is determined to root out torture from police interrogations and has taken a series of measures to prevent torture in the criminal process. To better understand China's exclusionary rules, a careful observation of their history is necessary.

4 China Embassy (2012). Judicial Reform in China. http://zw.china-embassy.gov.cn/eng/zgj/201210/t20121009_6408791.htm

5 Jiahong, H. (2016). *Back from the dead: Wrongful convictions and criminal justice in China*. University of Hawaii Press. <http://www.jstor.org/stable/j.ctvsvfg5>

6 Cui, M. (2003). Holding back interrogational torture. *Journal of Zhejiang Police College: Public Security Science Journal*, 76, pp. 24-29; Zhi (2019), *supra* note 3, p. 45.

7 Mark, D. K. (2021). A comparative analysis of the criminal exclusionary rule in the People's Republic of China with the United Kingdom. *Asian-Pacific Law & Policy Journal*, 23(1), 1-34, p. 69.

8 While no national statistics are available on this issue, reports of wrongful convictions have often involved confessions obtained through coercion. Legal scholars generally agree that coerced confessions are a significant factor contributing to wrongful convictions in China. See Zhi (2019), *supra* note 3, p. 45.

1.1. *Before the 1979 Criminal procedure law*

Before 1979, China faced the practice that the guilty plea of the accused was highlighted. The importance of guilty pleas in China came from its criminal procedure history, rooted in ancient autocratic regimes. In Chinese history, torture was a part of ordinary criminal procedure and was regularly employed to investigate and prosecute crimes before the courts throughout Chinese history, from the Zhou dynasty (1066–256 BC) to the Qing dynasty (1644–1912).⁹ Furthermore, torture was legalized, well-regulated, and had to be conducted according to the scope, frequency, and tools explicitly provided for in ancient Chinese codes.¹⁰ In other words, torture was regarded as a lawful means of evidence collection in ancient China, and that notion has lingered in China's legal culture.

1.2. *China's exclusionary rules under the 1979 Criminal procedure law*

In 1979, 30 years after the Communist Party won national power from the Nationalists and established the People's Republic of China, its first Criminal Procedure Law (CPL) was promulgated. This is also the first time that the use of torture and other illegal means to gather evidence has been prohibited in China. Article 32 of the 1979 CPL prescribes: "Torture, threat, inducement, deception and other forms of illegal methods of obtaining evidence are prohibited". The Criminal Code, which took effect in 1980, also creates the crime of torture in Article 136.¹¹ Nevertheless, it was unclear whether such rules meant that evidence obtained through illegal methods would be excluded or not, because there were no provision on excluding evidence. In practice, there were many violations of Article 32 without consequences, such as the cases of *Nie Shubin*¹² and

9 Zhi (2019), *supra* note 3, p. 45.

10 For example, under the Tang Code, the defendants may be beaten no more than 200 times during up to three interrogations held at least twenty days apart. But when the defendants can endure the torture without confessing, the judge will apply the same torture to the accuser. If the tortured accusers admit to having made a false accusation, they will receive the same punishment as the defendant if he is convicted. See more Johnson, W. (Trans.). (1979). *The Tang Code: Volume One: General Principles*. Princeton University Press.

11 Article 136 of the China Criminal Code 1979 prescribed that: "Torture is strictly prohibited. Any state officer who extorts confession from a criminal by torture shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. If he causes injury or disability to the victim by using corporal punishment, he shall be convicted and given a heavier punishment in accordance with the provisions of the crime of assaulting."

12 Nie Shubin was charged with raping and strangling a female worker on the farm near his house. He was convicted and executed in 1995, after making over a dozen of inconsistent confessions to the police through suspicious interrogations. In 2005, a career murderer was accidentally arrested by the police and confessed to the raping and murder of which Mr. Nie previously was convicted. Mr. Nie was finally exonerated in 2016. No police officer took responsibility for Mr. Nie's wrongful conviction and execution. This case became a landmark case in the modern history of criminal justice in China, not just because of the tragedy of wrongful execution of a young man, but also because of the long and tortuous road for righting wrongs in the system. See Jiahong, H. (2021). A case study on shortage of evidence in wrongful convictions in China. *The International Journal of Evidence & Proof*, 25(1), 1–15. <https://doi.org/10.1177/136571272098393>, p. 37.

She Xianglin.¹³ Even though it was not effective in practice, Article 32 of the 1979 CPL was a remarkable milestone in China's progress toward abolishment of torture and introduction of exclusionary rules into its criminal procedure.

1.3. China's exclusionary rules under the 1996 Criminal Procedure Law

On 12 December 1986, China signed the 1984 United Nations Convention Against Torture and ratified it on 4 October 1988. Under the requirements of the Convention, strict prohibition of obtaining evidence by illegal means is one of the important aspects of the progress of China's 1996 CPL on the evidence system.¹⁴ Article 43 of this law provides that: "It is strictly forbidden to commit torture in order to collect confessions as well as to collect evidence by means of intimidation, enticement, deception, or other unlawful means." However, there is still no provision in this law that directly regulates the exclusion of illegally collected evidence.

In 1998 and 1999, the Supreme People's Court and the Supreme People's Procuratorate respectively issued two separate judicial interpretations, stipulating that all confessions or witness testimony obtained through torture, threat, inducement, or deception shall not be used when prosecuting or convicting the defendant. Similarly, in the Rules for Criminal Procedure promulgated in 1999, China's Supreme People's Procuratorate also prohibits the collection of evidence by unlawful means, and testimonies and confessions collected illegally were not used as grounds for making a criminal charge. It can be said that the above two judicial interpretations had made more progress than the 1996 CPL of China.¹⁵

Despite that, these two documents could not be applied as expected, actually becoming "law in the paper".¹⁶ The reason was that they did not mention how and when to exclude illegally obtained evidence. Understandably, no single case ended up excluding illegal evidence under

-
- 13 She Xianglin was charged with murdering his wife after a quarrel, and a body claimed by the police to be his wife was discovered one month later in a nearby water pond. After a sleepless 5-day interrogation with brutal torture, Mr. She confessed to the murder and was later sentenced to 15 years in imprisonment. After serving almost 11 years of his term, his wife mysteriously came back in 2005. One police officer involved in Mr. She's investigation committed suicide after the exoneration trial, while no other officers were punished. See Jiahong, H. & Ran, H. (2013). Empirical studies of wrongful convictions in Mainland China. *University of Cincinnati Law Review*, 80(4), 849-895. <https://www.uc.edu/law/review/volume-80/issue-4/article-11>
 - 14 Baosheng, Z. (2014). Reflecting on development of evidence law in China. *The Foundations of the Law of Evidence and Their Implications for Developing Countries*, A Conference at Northwestern Pritzker School of Law, 21-22 November 2014. <https://www.bu.edu/ilj/files/2015/03/Baosheng-Zhang-Reflecting-on-Development-of-Evidence-Law-in-China.pdf>
 - 15 Na, J., & Rong, H. (2019). Comment on legal framework for evidence taking in China. *Forensic Research & Criminology International Journal*, 7(1), 12-14. <https://doi.org/10.15406/frcij.2019.07.00258>, p. 12.
 - 16 Jiang, N. (2019). The potential to secure a fair trial through evidence exclusion: A Chinese perspective. In Gless, S., & Richter, T. (Eds.), *supra* note 1, p. 186.

these two judicial interpretations.¹⁷ In practice, acts of torture aimed at forcing defendants to confess were still widespread, and courts still required defendants' guilty pleas as solid evidence for their convictions. One of the noticeable wrongful convictions in China in 2010 was of a 57-year-old man named Zhao Zuohai who was sentenced to death in 1999 for murdering a fellow villager named Zhao Zhenshang. The police believed that Zhao Zuohai was the culprit because someone saw the two arguing before the victim disappeared in 1997. When a headless body was found, the police arrested Zhao Zuohai and tortured him for weeks, until he admitted to killing the victim. However, more than 10 years later, the presumed dead Zhao Zhenshang suddenly returned to the village.¹⁸ In May 2010, Zhao Zuohai was found wrongfully convicted and released after 11 years of detention. The widely reported incident sparked public outrage over police torture forcing the accused to confess, especially since this was not the first wrongful conviction in which "the dead came back to life", as seen in the *She Xianglin* case.

The public criticism at Zhao Zuohai's wrongful conviction and exoneration was considered a "catalyst"¹⁹ that led to a flood of national legislations and policies regarding excluding illegally obtained evidence emerged in China and eventually pushed the practice to an unprecedented level,²⁰ forcing the Chinese authorities to introduce guidelines to prevent torture in the criminal procedure. On 25 June 2010, the Rules Concerning Questions about examining and judging evidence in death penalty cases and especially the Rules concerning Questions about exclusion of illegal evidence in handling criminal cases (hereinafter the 2010 Rules on the Exclusion of evidence) were issued jointly by authorities. The 2010 Rules on the Exclusion of evidence is significant because, for the first time, the government has set forth detailed, concreted procedures on the handling of evidence allegedly obtained through illegal means.²¹ Many observers argue that this joint regulation is a remarkable breakthrough in China's judicial history, as for the first time not only confession through torture will be excluded, but also the defendant will not have to prove the torture, which in most cases is beyond the capability of the defense.²² Such specific regulations have brought the evidence-exclusion mechanism closer to case-solving practices in China.

17 Weimin, Z., & Rongjie, L. (2019). Exclusionary rule of illegal evidence in China: Observation from historical and empirical perspectives. In Gless, S., & Richter, T. (Eds.), *supra* note 1, p. 310.

18 Ji, B. (2010). Innocent man spent 11 years in jail. *Global Times*. <https://www.globaltimes.cn/content/529982.shtml>

19 Zhi (2019), *supra* note 3.

20 Weimin & Rongjie (2019), *supra* note 17, p. 311.

21 Zhi (2019), *supra* note 3, p. 50.

22 Weimin & Rongjie (2019), *supra* note 17, p. 312.

1.4. China's exclusionary rules under the 2012 Criminal procedure law

In the revision in 2012, China's CPL adopted much of the 2010 Rules on the Exclusion of evidence. A total number of five articles regarding the exclusion of illegal evidence were added to this 2012 CPL. For the first time, the Law has officially stipulated the provision on the exclusion of illegal evidence. Accordingly, Article 54 of the 2012 CPL states: "Criminal suspects or defendants' confessions gathered by the use of torture to extract confessions or other illegal methods or witness testimony or victim statements gathered by the use of illegal methods such as violence or threats, shall be excluded." In addition, the 2012 CPL recognizes the People's Procuratorates' burden of proof to verify the legitimacy of evidence. Moreover, the party and their defenders or litigation representatives can enjoy the right to apply to courts for evidence exclusion. With the 2012 CPL, the evidence exclusion system was formed with more actors involved in initiating modes, preliminary examination, formal investigation, burden or standard of proof, and remedy means.²³

Following the promulgation of the 2012 CPL, series of interpretations were issued to add details, such as how to define illegal evidence and exclude illegally obtained evidence in judicial practice. For example, the Supreme People's Court's Interpretation on the Application of the 2012 Criminal Procedure Law reserves Section 8 with 9 articles for detailed instructions on excluding illegal evidence.

1.5. China's exclusionary rules under the 2018 Criminal procedure law

In 2018, China's CPL was revised and this version has taken effect recently. However, compared to the 2012 CPL, the 2018 CPL has no further changes to evidence exclusion. Legislators have tried to concretize procedures to exclude illegal evidence. The steps from filing a petition, investigating the legality of evidence, and excluding evidence are all mentioned in the Law. The concretization of the Law as well as guiding documents²⁴ has created conditions for regulations to become effective in practice. Highlights of the exclusion of evidence under Chinese criminal procedure law are as follows:

First, the principle of exclusion of evidence applies not only to oral evidence (the confession of the accused or the testimony of witnesses or victims) but also to physical evidence. Material evidence can also be excluded if collected illegally (Article 56 of the 2018 CPL). This is an extension of the scope of application of the exclusion of evidence in the 2012 CPL. Before that, in law, from 1996 onwards, China only brought up illegal evidence such as testimonies and confessions without mentioning material evidence. The

²³ Jiang (2019), *supra* note 16, p. 12.

²⁴ Guiding documents for the 2018 CPL include Provisions on the Procedures for the Handling of Criminal Cases by public security organizations (2019), Rules of Criminal Procedure of the People's Procuratorate (2019), Interpretation on the Application of the "Criminal Procedure Law of the PRC" (2021), and others.

focus on testimony comes from China's traditional ideology fixating on oral evidence more than material one, which also stemmed from the country's procedural practice when the use of torture was popular and a sore point for the judiciary.

However, China's 2018 CPL is still considered to focus more on oral evidence, such as testimonies and confessions. Measures to collect illegal oral evidence are specifically and repeatedly mentioned, including torture, coercion, enticement, and deception. As for material evidence, legislation has set strict conditions to exclude illegal physical evidence: First, it must be obtained in violation of legal procedures; second, it might seriously influence judicial fairness; third, a correction or reasonable explanation cannot be made.²⁵ It should be emphasized that these three conditions must be met simultaneously. For example, if corrections or explanations are made for illegally obtained physical evidence, such evidence can still be admitted instead of being excluded. So, the exclusionary rules become "non-exclusionary rules for illegal physical evidence".²⁶ This is because Chinese legislations believe that illegal verbal evidence is more unreliable than illegal physical evidence. Wrong confessions can lead to wrong convictions, which then affect the accuracy of the case; however, material evidence, even if obtained illegally, is still valid as proof and does not affect the accuracy of the case.²⁷ This is a sharp difference between the exclusion of evidence under China's criminal procedure law and the criminal procedure laws of some other countries, such as the United States.²⁸

Second, China's CPL only stipulates the exclusion of evidence collected directly from unlawful means without mentioning evidence collected indirectly through those means. For instance, investigators rely on the testimony of the accused to search for where documents related to the offense were hidden. Then, if an accused's testimony is obtained through torture, it is illegal and excluded under the law. So, are the relevant documents collected through such illegal testimony admissible or not? China's CPL does not mention this matter. Because Chinese law emphasizes the substantive truth of the

25 Article 56 of China's 2018 CPL.

26 Zhong, Z. (2014, November 21). Practical basis of evidence legislation in China. *Conference paper submitted to The Foundations of the Law of Evidence and Their Implications for Developing Countries*, Northwestern University School of Law. <https://www.bu.edu/ilj/files/2015/03/Zhong-Zhang-Practical-basis-of-evidence-legislation-in-China.pdf>

27 Zhao, Y. (2019). Constructing the exclusionary rule of illegal evidence in China. *Advances in Social Science, Education and Humanities Research*, 402, 117-124. <https://doi.org/10.2991/assehr.k.200205.027>, p. 122.

28 U.S. law on the exclusion of evidence emphasizes the legality of evidence, including testimony and physical evidence. Accordingly, materials, documents, and other evidence collected by illegal measures such as searches and arrests of illegal people are excluded. Case example: Supreme Court of the United States (1914). *Weeks v. United States*. <https://supreme.justia.com/cases/federal/us/232/383/>

case rather than procedural fairness, the exclusion principle only applies to evidence collected directly through unlawful means.²⁹ In other words, there is no acknowledgment of the “fruit of the poisonous tree” doctrine³⁰ in China’s criminal justice system.

Third, the procedure for excluding evidence under Chinese law can be initiated in two ways: by the competent authority or by the petition of a participant in the proceedings. Firstly, the authority to exclude evidence is provided for all three agencies, namely the Investigating Agency, the Procuracy, and the Court in any stage of handling the cases. If the Procuracy receives information or detects that investigators collect evidence with illegal means, it must conduct investigation and verification (Article 57 of the 2018 CPL). In cases where the judge deems that there are grounds to believe that the evidence was illegally collected, the judge shall investigate the legality of the evidence. The burden of proof will then lie with the procurator (Article 58 of the 2018 CPL). The investigating agency also can detect its own unlawful acts and exclude evidence, which is argued to be no different from “asking a tiger for its skin”, and hardly happens in practice.³¹ In addition, the procedure for excluding evidence can also be initiated at the request of the parties in the proceedings, the defendants, and legal representatives. Accordingly, these objects may be applied to the Court to exclude illegal evidence accompanied by documents and evidence to support their claims (Article 58 of the 2018 CPL). In this case, the Court will also investigate the legality of the evidence.

Fourth, the burden of proving the legality of evidence might be on the procuratorate or participants, depending on the initiation of evidence exclusion as described above. Regarding the procuratorate’s burden of proof, if the judge finds that there are grounds to believe that evidence has been collected through illegal means, the procurator is responsible for explaining and proving. The prosecutor may also ask the investigator or other relevant person to verify the legitimacy of the evidence. This provision is understandable because the procuracy is the authority that performs the accusatory function on behalf of the state. The procuratorate’s accusation is based on evidence, hence it is responsible for the legality of such evidence. On the other hand, the burden of proving that the evidence is illegal will fall on the participants in the proceedings if they apply to the Court to exclude evidence. For instance, the accused can produce images to prove that investigators have used torture or coercion against them. Such regulations hold the participants in the proceedings accountable for their

29 Weimin & Rongjie (2019), *supra* note 17, p. 307.

30 Fruit of the poisonous tree doctrine: The doctrine draws its name from the idea that once the tree is poisoned (the primary evidence is illegally obtained), then the fruit of the tree (any secondary evidence) is likewise tainted and may not be used.

31 Zhao (2019), *supra* note 27.

claims before the Court. However, this is also a difficulty for the participants because they cannot always present evidence to support their claims. Therefore, this provision of China's 2018 CPL is considered as one of the barriers to the application of the evidence exclusion provision in practice.

2. Exclusion of evidence under Vietnam's 2015 Criminal procedure code

Vietnam and China are two neighboring countries sharing the inquisitorial legal system that emphasizes combating crime. Like China, many ancient Vietnamese codes also recognized torture as an investigative measure to collect testimony and handle criminal cases.³² Recently, while Vietnamese criminal procedure law stipulates that confession of the accused can only be considered as evidence if it is consistent with other evidence, and defendants cannot be convicted based solely on his/her confessions,³³ procedural authorities in Vietnam still place great importance on confessions as key evidence. In practice, several well-known wrongful convictions in Vietnam have resulted from the use of torture to extract confessions.³⁴ Therefore, preventing and eliminating torture in criminal proceedings remains a critical goal for Vietnam. Moreover, both China and Vietnam are signatories of the Convention against Torture and other cruel, inhuman or degrading treatment or punishment (CAT). However, while China has made significant efforts to develop exclusionary rules, this principle remains unclear in Vietnamese criminal procedure law.

Vietnam's 2015 Criminal Procedure Code (the 2015 CPC) does not use the term exclusion of evidence but does stipulate the concept of evidence, thereby if it does not fulfill conditions in the definition, it shall not be considered evidence. Article 86 of Vietnam's 2015 CPC states:

Evidence are *de facto*, collected as per the order and procedures prescribed by this Code, used as a basis to determine whether or not a crime has been committed, the person who committed the crime, and other valuable facts for the settlement of the case.

Under this article, what is collected shall simultaneously fulfill three conditions to become evidence: objective (*de facto*), relevant (valuable for the settlement of the case), and legality (collected by the means and procedures provided by the Code). Before using evidence in cases, the authorities are responsible for fully, objectively, and comprehensively examining and

32 For example: Under Article 11, 12 Chapter "Trial", National Criminal Code of Le Empire, the officials who interrogate prisoners may first examine the prisoner's statements; if they examine the statements again and again, and still cannot decide on the crime, and need to use interrogational torture, they must form a council of judges, and then use torture. The interrogational torture of a prisoner must not be more than three times; the beating with the cane must not exceed 100. See Gillespie, J., & Nicholson, P. (Eds.). (2005). *Asian socialism and legal change: The dynamics of Vietnamese and Chinese reform*. ANU Press; Gillespie, J., & Chen, A. H. Y. (Eds.). (2010). *Legal reforms in China and Vietnam: A comparison of Asian communist regimes*. Routledge.

33 Article 98 of Vietnam's 2015 CPC.

34 Such as the cases of Nguyen Thanh Chan and Huynh Van Nen.

evaluating all evidence collected.³⁵ The lack of any condition makes what is collected not considered evidence and held no probative value in the case. Thus, information, materials, circumstances, and others collected by illegal means shall lack the third condition of legality provided by Article 86 of the 2015 CPC and shall not be admitted as evidence.

Furthermore, Article 87.2 of the 2015 CPC stipulates: “That is objective but not collected as per the order and procedures prescribed by this Code has no legal value and cannot be used as a basis to resolve criminal cases.” This Article puts even more emphasis on the legality of evidence. Accordingly, the lawmaker directly affirms that the things collected by illegal measures will not be recognized as having a provable value in the case. Thus, if the authorities want to ensure the probative value of evidence, they must apply measures in accordance with the provisions of the law. Although the term “exclusion of evidence” is not directly used, Article 87.2 of the 2015 CPC is considered as a provision on the exclusion of evidence, aiming to prevent illegal acts of competent agencies when collecting evidence.

In addition to mentioning the legality of evidence, Vietnam’s 2015 CPC also pays attention to its objectivity. The testimony of the participants in the proceedings (victims, witnesses, civil plaintiffs, civil defendants, and persons with related rights and obligations) cannot be used as evidence if they cannot clearly state how they know that information. The reason is that the inability to explain why such information is known will raise questions about the accuracy and objectivity of the information, also making it difficult for the authorities to verify. This provision also is considered an “exclusion of evidence” provision, relating to objectivity rather than legality of evidence.

It can be seen that although Vietnam has already mentioned the exclusion of evidence in some aspects, it has not yet officially recognized the exclusionary rule in criminal procedure law. Even though it strictly prohibits some torture activities, requires competent authorities to follow orders and procedures when collecting evidence, and provides means to protect the accused’s rights, such as the right to remain silent and the right to have defense counsel..., it is not enough to prevent illegal activities of authorities when collecting evidence. It is similar to China’s 1996 CPL which prohibits acts of torture but did not officially admit exclusionary rule and was almost not practically effective.

Moreover, until now there is no specific guidance about illegal evidence in Vietnam’s CPC. Article 88 of the 2015 CPC on collection of evidence in criminal cases provides: “Competent procedural authorities to collect evidence, are entitled to perform activities of evidence collection as per this

35 Article 108 of the Vietnam’s 2015 CPC.

Law”. It can be understood that legal evidence collection measures are those prescribed by this Code, and *vice versa*, collection evidence measures which are not provided by this Code or provided by this Code but carried out without following procedure are illegal. In general, Vietnamese criminal procedure law strictly prohibits activities like torture, extortion of deposition, corporal punishment, or any treatments violating a person’s body, life, and health,³⁶ therefore statements and confessions obtained by these means are illegal. Besides, the competent authorities shall also comply with the procedure law while conducting other collection evidence measures such as search, seizure, impoundment of documents and items, crime scene examination... Violations while conducting these collection activities are grounds for additional investigation, reinvestigation, or retrial.³⁷ However, Vietnamese criminal procedure law does not clearly regulate how to deal with evidence collected with illegal means, so is it excluded or not? For example, investigators search the accused’s house and seize some documents. Assuming that there is no warrant and the house search is illegal, then the court or procuracy could return the case file to the investigation body to correct this violation, but what to do with the previously seized documents because returning the case file cannot make illegally seized documents legal? It can be said that Vietnam’s 2015 CPC aims at correcting violations of competent authorities rather than eliminating “poisonous fruits” even when that correction is not really effective.

3. Comparative analysis of evidence exclusion in Vietnam and China’s criminal procedure laws: Recommendations for legal reform in Vietnam

One of the similarities between these Vietnam’s 2015 CPC and China’s 2018 CPL is that both do not fully recognize the doctrine of the “fruit of the poisonous tree”. Both documents only mention the exclusion of evidence that is collected directly through unlawful means, but not indirectly collected secondary evidence. Provisions of the Chinese CPL have led competent investigating agencies to take measures to legalize testimonies and confessions of the accused. For example, after collecting the confession of the accused in the first interrogation through torture, the police continue to conduct subsequent interrogations, which is legal, to obtain more statements and confessions of the accused. In this case, testimony collected through the first interrogation is excluded because torture is unlawful, but testimony and confessions during subsequent interrogations are considered legitimate. The issue is that testimony given during the initial interrogation can influence subsequent interrogations.

36 Article 10 of Vietnam’s 2015 CPC.

37 Article 245, 280 of Vietnam’s 2015 CPC.

If the accused pleads guilty in the first interrogation, they may be more likely to repeat this plea later, particularly if they are unaware that the initial confession may be deemed inadmissible under the law.³⁸ Additionally, the accused may fear torture or other mistreatment, which could pressure them into continuing to plead guilty despite their initial confession being excluded. Thus, in this case, the failure to exclude secondary evidence obtained through illegal means suppresses the point of the provision on the exclusion of evidence, because it does not limit the violation of law by the authorities. This is one of the limitations that both Chinese and Vietnamese criminal procedure law should overcome.

Notably, China's 2018 CPL represents an advancement over Vietnam's 2015 CPC in that, while Vietnam's 2015 CPC only specifies that evidence collected through illegal means is not recognized, China's 2018 CPL provides detailed procedures for excluding such evidence. Nevertheless, these provisions face significant challenges in enforcement. As previously analyzed, despite the 1996 CPL in China and its accompanying guidelines prohibiting torture and excluding illegal confessions as evidence, these regulations were often ineffective in practice. It was only with the introduction of more detailed guidance that their practical impact improved. Meanwhile, Vietnam's 2015 CPC does not address illegal evidence or provide specific procedures for its exclusion, resulting in provisions that remain largely "principles" and need further development.

Thus, from the above analysis and comparison, the author suggests two recommendations for Vietnam's criminal procedure laws as follows:

First, Vietnam should exclude evidence collected not only directly but also indirectly from unlawful measures. The expansion of the scope of the exclusion of evidence in Vietnam's CPC is necessary in order to eliminate the motivation for procedural violations in evidence collection activities, ensuring criminal investigation activities comply with the law. In addition, this expansion is possible because Clause 2, Article 87 of the 2015 CPC already provides quite clearly the exclusion of illegal evidence.

Second, Vietnam needs more specific regulations on the orders and procedures for excluding evidence, on matters such as who has the right to request the exclusion of evidence, the time of request, the process of examining and verifying the legality of evidence, the obligation to prove the legality of evidence, and many others. Effectively specifying the procedure for excluding evidence will facilitate this regulation to come into practice and promote its value. ●

38 Daum, J. (2017). *Exclusive focus: Why China's exclusionary rules won't stop police torture*. China Law Translate. https://www.chinalawtranslate.com/en/exclusion-china/#_edn2

References

- [1] Cui, M. (2003). Holding back interrogational torture. *Journal of Zhejiang Police College: Public Security Science Journal*, 76
- [2] Gillespie, J., & Chen, A. H. Y. (Eds.). (2010). *Legal reforms in China and Vietnam: A comparison of Asian communist regimes*. Routledge
- [3] Gillespie, J., & Nicholson, P. (Eds.). (2005). *Asian socialism and legal change: The dynamics of Vietnamese and Chinese reform*. ANU Press
- [4] Gless, S., & Richter, T. (Eds.). *Do exclusionary rules ensure a fair trial?: A comparative perspective on evidentiary rules*. Springer. <https://doi.org/10.1007/978-3-030-25666-6>
- [5] Jiahong, H. (2021). A case study on shortage of evidence in wrongful convictions in China. *The International Journal of Evidence & Proof*, 25(1), 1-15. <https://doi.org/10.1177/136571272098393>
- [6] Jiahong, H. (2016). *Back from the dead: Wrongful convictions and criminal justice in China*. University of Hawaii Press
- [7] Jiahong, H. & Ran, H. (2013). Empirical studies of wrongful convictions in Mainland China. *University of Cincinnati Law Review*, 80(4), 849-895
- [8] Johnson, W. (Trans.). (1979). *The Tang Code: Volume One: General Principles*. Princeton University Press
- [9] Mark, D. K. (2021). A comparative analysis of the criminal exclusionary rule in the People's Republic of China with the United Kingdom. *Asian-Pacific Law & Policy Journal*, 23(1), 1-34
- [10] Na, J., & Rong, H. (2019). Comment on legal framework for evidence taking in China. *Forensic Research & Criminology International Journal*, 7(1), 12-14. <https://doi.org/10.15406/frcij.2019.07.00258>
- [11] Vo, M. K., & Nguyen, P. A. (2023). The doctrine of the principle "fruits of poisonous trees" in U.S. criminal justice and recommendations for Vietnam. *Journal of Legislative Studies*, 5(477), 1-12.
- [12] Wei, W., & Tom, V. B. (2010). Police torture in China and its causes: A review of literature. *The Australian and New Zealand Journal of Criminology*, 43(3), 557-579. <https://doi.org/10.1375/acri.43.3.557>
- [13] Zhao, Y. (2019). Constructing the exclusionary rule of illegal evidence in China. *Advances in Social Science, Education and Humanities Research*, 402, 117-124. <https://doi.org/10.2991/assehr.k.200205.027>
- [14] Zhi, Y. G. (2019). Torture and exclusion of evidence in China. *China Perspectives*, (2019-1). <https://doi.org/10.4000/chinaperspectives.8742>

Author Contribution

The author solely contributed to the study conception and design. The author read and approved the final manuscript.

Declarations

Conflict of Interest: The author declares no competing interests.

Disclaimer: All claims expressed in this article are solely those of the author and do not necessarily represent those of the author's affiliated organizations, or those of the publisher, the editors and the reviewers. Any product that may be evaluated in this article or claim that may be made by its manufacturer is not guaranteed or endorsed by the publisher.