

## Practical Basis of Evidence Legislation in China

Zhong Zhang<sup>\*</sup>

### Introduction

Evidence system construction has been one of the important tasks of judicial reform. In 2009, *The Third Five-Year Reform Program* put forward specific measures for the evidence system, including improving criminal evidence law, developing rules to review the criminal evidence, unifying standards for admissible evidence; establishing and improving the system for eyewitnesses and expert to present in court and system for their protection, clarifying the scope and procedures for investigation personnel to testify in court; further improving the rules of evidence in civil litigation, etc..<sup>1</sup> After many years, significant achievements has been made in the evidence system, but many provisions relating to the content of evidence rules are crude, logically confusing, even contradictory, and the system of evidence rules yet to be formed. In view of this situation, and in collaboration with the Supreme People's Court, China University of Political Science and Law carried out a research project on "rules of litigation evidence in people's court", to conduct a comprehensive sort on existing rules of evidence in the three procedural laws and relevant judicial interpretations, adhering to the relevance as the main logic line, with value basis on accuracy, impartiality, harmony and efficiency, to complete the program of the three major litigation rules of evidence into one legal document, and to enact a rule of evidence applicable to various judicial cases of the people's courts.

In line with the research for this project, my colleagues and I conducted a four-month investigation on the application of the evidence rules of the people's court in ten courts since September 2013. Besides discussion, interviews, attending the trial and collecting data and materials, we also launched the *China Development Index of Evidence Rules* questionnaire, designed 98 questions, to examine the implementation of the rules of evidence, to understand the existence issues in applying evidence rules. The survey distributed 800 questionnaires, finally recovered 750 ones, and commissioned the Beijing Zero Index Information Consultation Co. Ltd, for questionnaire data analyses.

The survey mainly investigated the "evidence law in action" rather than "evidence law on paper", but for the moment in China, the evidence legislation should be included in the inspection objects. In addition, although some items cannot be specified in the law of evidence, it should be investigated as an object, such as the level of awareness of evidence and professionalism of judges and so on. Through this

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<sup>\*</sup> Zhong Zhang, Associate Professor of Law, Associate Dean of the Institute of Evidence Law and Forensic Science of the China University of Political Science and Law, Research fellow of the Center of Cooperative Innovation for Judicial Civilization.

<sup>1</sup> See, *The Notification of the Supreme People's Court about Print and Distribute < Third Five-Year Reform Program of The People's Court (2009~2013)*.

research, we collected some evidentiary issues related to some newly introduced judicial interpretations and local rules of evidence, including thematic regulations to solve individual problems of evidence, so that we recognize what kind of rules of evidence are contemporary needed in China; by this research, we have a more clear understanding in a number of important issues and problems for the implementation of the evidence law, such as difficulties in lawyers to question evidence, issues of witness absence for testifying in court, and difficulties in exclusion of illegal evidence; through this research, the status of the implementation of evidence rules especially new situations and new problems arising in practice were studied, we mastered which implementations of evidence rules in practice are not good enough, and understood the reasons for these problems, and all these have provided practical basis for evidence legislation in China.

## **I. No Effective Safeguard for Lawyer's Right to Evidence**

### **(A) Lack of safeguards for the right of a lawyer to obtain evidence**

Investigation is an important guarantee for lawyers' effective defense and agency. Although the legislation clearly gives the right to the lawyer to investigate and collect evidence, there are many difficulties and obstacles for lawyers to obtain evidence in practice, as when lawyers gather evidence materials from the relevant units and individuals, often suffer from their refusals. For example, with a dispute in the purchase and sale contract of coal, the survey data show that the possibility for lawyers able to obtain "pictures to prove in the other's warehouses" is less than 70%, and the possibility to obtain "videos recording the coal truck was pulled into the other's warehouse" is even lower, only 52.3%. In criminal proceedings, the situation for lawyers to encounter noncooperation from evidence holders is more serious, with up to 91.2% of possibility.

According to the *Criminal Procedure Law* and the relevant provisions of judicial interpretations, lawyers may apply to the procuratorate or the court to collect evidence if the witnesses do not cooperate with lawyers; the lawyer's application should be agreed when the procuratorate or the court considers it necessary to collect evidence. But this provision for the procuratorate or the court has no substantial constraining force, because there is no clear condition defined to agree or disagree, hence the application is often ignored in practice. The survey shows that there are up to 67.7% of the likelihood for lawyers' applications for evidence collection to be rejected by the procuratorate or the court. Therefore, some lawyers lamented: obtaining evidence for lawyer is harder than climbing up to Heaven!

### **(B) Existence of man-made barriers for lawyers to review files**

To compensate for lawyers' congenital deficiency in capacity on evidence collection, the legislation gives the right of reviewing files to the lawyers. However, there are some unnecessary obstacles for lawyers to review files in practice.

First, the time of reviewing files is limit. Only after the date of case transfer to

the examining prosecution, lawyers can go to the procuratorate to view, excerpt or copy the case files. As we all know, the investigation is the decisive stage for fate of the suspects in China, while at this stage lawyers are not entitled to review files. Even so, the procuratorate and the court would not protect the right of lawyers in practice. The survey shows that only 55.2% of the procuratorate and the court will be in accordance with the law with “very likely” timely arrangements for lawyers to review files.

Second, the scope has been greatly restricted for lawyers to review files. Regarding the problems for lawyers to review files, the *Criminal Procedure Law* has expanded the scope, with the original “litigation documents of the case and technical appraisal materials” changed to “archival materials of the case”. But the survey shows the proportion for the court to “very likely” ensure lawyers review the entire case files is only 35.7%. It means lawyers still only have access to part of the evidential materials even after the modification of the *Criminal Procedure Law* in 2012.

Third, the fees of reviewing files are too high for lawyers. To obtain beneficial evidence materials and information for the defendant, lawyers often need to copy some files. Many local regulations waive the copy fees for legal aid cases, but for others, the court charged very high fees to copy files. Many local courts calculate charges according to 1 Yuan RMB per copy of A4 paper, which is much higher than the market price of 0.1 Yuan RMB; many local courts additionally charge the fees for lawyers to review files ranging from 50 to 100 Yuan RMB for each time. Even many judges believe that the current fees charged for the Lawyers to review files are not reasonable. The survey shows that only 40.3% of the judges who hold totally positive attitude regarding the reasonableness of the cost to review files.

#### (B) The rules of disclose are not implemented

Disclose is the right for one party to initiatively look for evidence and information from the other party, which is a legal action requiring the other party to disclose information.<sup>2</sup> In 2001, the *Rules of Civil Evidence* sets the Chinese-style rules of disclose, including the disclose scope, the disclose time, the presiding person of disclose, the disclose procedure, and the disclose times.<sup>3</sup> Meanwhile, the *Rules of Civil Evidence* sets strict proof limitation and proof invalidation, namely the parties should submit evidence to the court within the limit time, and if not, they will be deemed loss of rights of proof. Because the parties do not understand or misunderstand this article, the rules of disclose are useless.<sup>4</sup>

The *Civil Procedure Law* takes a more flexible approach for handling activities not properly fulfill the obligation of disclose stating: “For the parties submitting overdue evidence, the court shall order the reasons; if the parties refuse to explain the

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<sup>2</sup> Luxuan Bai, *The civil procedure law of the United States*, Economic Daily Press, 1998, p. 78.

<sup>3</sup> Bo Han, *Research on Civil Discovery Procedure*, China Renmin University Press, 2005, p.259.

<sup>4</sup> Weiping Zhang, “Research on the Several Questions of the Proof Limitation in Litigation Evidence System”, *People's Justice*, (9) 2003.

reason or the reason is groundless, the court may not adopt the evidence according to the circumstances of the evidence, or adopt the evidence but with reprimand or fine for the parties”. Compared to the *Rules of Civil Evidence*, the *Civil Procedure Law* adds more selective consequences.<sup>5</sup> Perhaps just because of the overdue leeway of proof, the rules of disclose have not been well implemented in practice. The survey shows that only in 48.4% of civil cases, the court will “very likely” preside over the pretrial exchange of evidence between the parties.

In criminal proceedings, since the legislation does not provide rules of disclose, no problem yet is shown in practice for both parties to disclose to each other. For a long time, defense lawyers actually carry out the “One-way disclose” through the right to review files ,<sup>6</sup> until the modifications of *Criminal Procedure Law* in 2012, with additional provisions of Article 40, namely “relevant suspects defenders shall promptly inform the public security bureau or the procuratorate, when the evidence they collected indicates that suspect was not at the crime scene, had not reached the age of criminal responsibility, or was not criminally responsible by law due to the mental illness”. We believe this one is actually prescribed the scope that the defense should disclose evidence to the prosecuting party.<sup>7</sup> From the survey results, defense lawyers usually take the initiative disclosure of these four kinds of evidence to the public security organ and the People's Procuratorate. For example, 88.1% of judges believe that defense lawyers will inform the public security bureau or the procuratorate when the evidence they collected proved the suspect's not reaching the age of criminal responsibility; also the possibility of disclose from the defense is 84.9% if the evidence proved that the suspect was not at crime scene. These data indicate that the defense is willing to disclose evidence in favor of the defendant to the prosecuting party, which also means that it has the practical basis to establish rules of disclose in China.

## **II. Witness Testifying System needs improvement**

(A) The problem has not been fundamentally resolved for the witnesses refuse to of testify in court.

It is very important that the witness testify in court to clarify facts of the case, to verify the evidence, and to correct judgment. However, due to various reasons, especially the lack of relevant legal systems, for a long time, the appearance rate of witnesses has been very low, which was once regarded as one of the three strange situations of witness system.<sup>8</sup> Although after so many years, the situation has not been fundamentally improved. Data show that the Third Intermediate People's Court of Chongqing Municipality judged a total of 2796 criminal cases in 2010, among

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<sup>5</sup> Bensen Zhang, *Evidence Law*, 2<sup>nd</sup> ed., China University of Political Science and Law Press, 2014, p. 152.

<sup>6</sup> supra note 5, at 148.

<sup>7</sup> supra note 5, at 162.

<sup>8</sup> Zongzhi Long, “Evaluation of Three Strange Situation of Witness system in China”, Guangzhong Chen ed., *Theory and Practice of Procedural Law*, People's Court Press, 2001, p. 378.

which witness testifying in court was involved in 12 cases, and the attendance rate of witnesses was 0.32%.<sup>9</sup>

To deal with the problem of non-appearance of witnesses, *the Criminal Procedure Law* reiterated the obligation of witnesses to testify, and stressed the obligation of witnesses to testify in court as Article 187 stipulates: “If the court considers necessary, the witness should testify in court when the public prosecutor, the parties or counsel, litigation agent disagree on the testimony of witnesses for the case, and the testimony of witnesses has a significant impact on the conviction and sentencing”. In particular importantly, Article 188 establishes the compulsory system of witnesses testifying, namely “with the court notice, the court can force witnesses to testify, as far as the witness has no legitimate reason not to testify, excluding the defendant's spouse, parents and children.” For refusing to fulfill the obligation to testify, this article also provides the appropriate sanctions, including reprimand and detention. Survey data shows that 80.9% of the judges support mandatory attendance of witnesses system and believe that this measure can effectively encourage witnesses to testify.

However, the problem of non-appearance of witnesses has not been fundamentally resolved, despite the establishment of compulsory attendance of witnesses system. The survey shows that in the judges, 26.4% of 750 respondents reflected that for case they heard in the past three years, the attendance of witnesses rated below 5%, and 24.4% of the judges pointed out that the rate ranged from 5% to 20%. It is worth noting that in a lot of major criminal cases, the rate of key witnesses to testify in court is very low as well.

Many reasons can cause witnesses reluctant to testify, some witnesses worry about being in trouble because of the testimony, some have psychological impact of “hating lawsuit” due to the traditional cultural or sensibilities between acquaintances, some worry that they will suffer economical loss due to testifying in court. Of course, the main reason is the fear of retaliation because of their testimony, which takes as high as 94.9%. Notably, there are 32.3% of the judges believed that the resistance coming from the prosecutor and the judges kept the witness from appearing in court. Some prosecutors worry that the witnesses may make statements inconsistent with their pre-trial ones, when defense lawyer ask them questions, which will break the prosecution's evidence system and could eventually lead to failure in prosecution. Some judges reflect, if the witness does not testify, according to available evidence that the prosecution offered, the facts are clear; if let witnesses testify, and make statements inconsistent with their pre-trial ones, on the contrary the facts of the case turn unclear.

(B) The existence of practical difficulties for the policeman to testify

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<sup>9</sup> See, “The Rate of Witness Appearing in court is only 0.32% in Chongqing Third Intermediate People's Court Last Year”, *Legal Daily*, June 14, 2011.

Generally, there are two conditions for the policeman to testify in court: the first is that the policeman testifies as a witness of the case; the second is that the policeman is summoned to testify in court on suspicion of illegally obtaining evidence. Provisions for these two cases were made in the *Criminal Procedure Rules*, of which the second paragraph of Article 187 provides the first case, as “the policeman should testify for criminal fact that he witnessed when performing his duties.” After the implementation of the *Criminal Procedure Law*, a number of cases occurred that the policeman testified in court in practice. As on January 24, 2013, in the court of Haizhu District, Guangzhou City, tried a case of mobile phone theft, including a policeman, two professional team members from the Guangzhou Municipal Public Security Bureau testified, to provide a strong evidence for fact-finding.<sup>10</sup>

The *Criminal Procedure Law* Article 57 provides the second case. In the course of trial, if the prosecutor does not prove the legitimacy of the gathered evidence, he can request the court to notice investigators or other persons concerned to appear in court to explain the situation. The investigators or other personnel may also request to appear in court to explain the situation. Notified by the court, the related persons should testify in court. This has an important role in identifying the facts of the case, maintaining the defendant's right to confront, and preventing and suppressing the acts of torture.

The main problem is the second case in practice. For some policemen, they come to court to testify is tantamount to lowering themselves, because it makes them as an executor to a witness being executed by the state power, and also to accept the lawyer's inquiries, which let investigators be psychologically difficult to accept.<sup>11</sup> Survey data shows that if the defendant and counsel for the defendant propose pretrial confession obtained by the police's torture, and the court notified the policeman by law to testify, only 31.2% of the policemen are “very likely” to appear. In practice, such kind issues are often solved by the investigating authorities with a declaration “the investigators note” to prove the non-existence of illegal evidence, instead of the policeman's testimony, but there are a lot of risks and drawbacks of this approach to not testify.<sup>12</sup>

#### (C) The wide use of witness transcripts obtained in pretrial

Witness statements made outside the courtroom belongs to hearsay. According to the hearsay rule, except some statutory special circumstances, hearsay is inadmissible in court. But there does not have hearsay rule in China, as long as the pretrial transcripts of witnesses verified, they can be adopted to serve for the final decision. The article 59 of the *Criminal Procedure Law* states: “The testimony of the witnesses not appearing in court, expert opinions, the inquest transcripts and other documents

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<sup>10</sup> Yingtuan Liu, “The Police Sometimes has another name that is witness”, *People's Court Daily*, January 30, 2013.

<sup>11</sup> Chongyi Fan, etc., *Development and Apply of Criminal Evidence System*, People's Court Press, 2012, p. 266.

<sup>12</sup> Ruihua, Chen, “On the Investigators' role of the Witness”, *Jinan University Journal*, (1) 2012.

used as evidence should be read out in court.” The article 73 of the *Civil Procedure Law* also provides that “written testimony” can be adopted under some statutory circumstances, which practically approves the admissibility of pretrial testimony transcripts.

Because witnesses often do not appear in court in practice, the burden of proof or cross-examination in court is often not to face the witnesses, but a pile of paper, namely testimony transcripts. Although, “it is ridiculous”,<sup>13</sup> the survey shows that only 10.3% of the judges will unlikely adopt the testimony transcripts. One situation was assumed in the questionnaire: the witness of a case knows that providing pretrial testimony transcripts can replace the testimony in court, thus evade court with only pretrial testimony transcripts. In this regard, 62.1% of the judges might directly use the pretrial testimony transcripts. Another assumption is: there are too many witnesses in a particular case, for eliminating the trouble, the judge therefore use pretrial testimony transcripts of witnesses for all. In this regard, 44.9% of the judges believed that the court may direct or very likely use pretrial testimony transcripts. To confront witnesses is considered a fundamental human right of the accused.<sup>14</sup> Adoption of pretrial testimony transcripts means this right is deprived.

#### (D) Lack of guaranty of witnesses to testify truthfully

Witnesses not only obliged to testify, but also under the obligation to provide truthful testimony. The article 189 of the *Criminal Procedure Law* states: “For the witnesses, judges shall instruct them to give testimony truthfully, and inform them the legal responsibility of intentionally false testimony or concealing evidence”. However in practice, based on objective and subjective reasons, witness testimony is often not accurate to reflect the actual circumstances of the case. In addition to intentionally false testimony or concealing evidence by witnesses, their cognition, memory and expression aspects will affect the testimony authenticity. In other words, even well-intentioned witnesses may also provide false testimony.<sup>15</sup>

Witness testimony has high probative value, however bias or error in the testimony will have a substantial impact on the facts identified.<sup>16</sup> A witness deliberately lying can be held liable in accordance with perjury for false testimony. But if it is inadvertent, what should follow? The survey found that the likelihood of a witness with unclear memory still to testify is up to 67.2%.

As a precaution, many people believe that the witnesses should sign a testifying truthfully guarantee before testifying in court, and even some courts have tried had

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<sup>13</sup> See, “The Criminal Procedure Law: There is a Contradiction between the Privilege against Self-incrimination and the Duty to Tell the Truth”, *New Wealth*, August 31, 2011.

<sup>14</sup> Guangzhong Chen ed., *Expert Artificial Draft of the Criminal Evidence Law of the People's Republic of China (Articles, Explanation and Demonstration)*, China Legal Publishing House, 2004, p. 480.

<sup>15</sup> Jinyou Liu ed., *Evidence Law (New ed.)*, China University of Political Science and Law Press, 2003, p. 115.

<sup>16</sup> Jun Zhang ed., *Understand and Apply of Criminal Evidence Rule*, Law Press, 2010, p. 128.

witnesses make oath by handling the Constitution.<sup>17</sup> But the survey shows that 90.1% of judges believed that the most effective means to assure witnesses to testify truthfully in court is to protect their own interests.

There is also the problem of negative testimony in practice. In one situation, witnesses summoned to appear in court to testify often say, “I don’t see”, “I do not hear”, with a lame excuse. Another situation is the extremely unserious attitude of the witness to testify in court. Survey data shows that 40.8% of judges reflect that it may happen during the trial.

(E) Existence of institutional defects in witness protection

The article 62 of the *Criminal Procedure Law* increased the efforts on witness protection, clearly defines the specific beforehand protection measures, such as non-public real name, address and other personal information and work units, to testify without true appearance and sound of witnesses exposed, to prohibit certain persons’ access to witnesses and their close relatives, specialized personal and residential protection and others. If these measures in practice can be implemented, the witness can give testimony *secretly* in court,<sup>18</sup> which will greatly reduce the risk of retaliation to witnesses and encourage them to lay down their ideological baggage and testify in court. However, in practice, the implementation of these protective measures is not very good. The survey shows that there are 31.9% chances not to disclose the real name, and the address and other personal information of the witness to testify, and only 19.9% chances not to expose the witness appearance and authentic sound and others; only 19.9% chances to prohibit certain persons’ access to witnesses and their close relatives; only 14.5% chances to take special measures for personal and residential protection. For a witness asking protection from the court, the procuratorate or the public security organs, only 18.1% of the witnesses could be protected.

One of particular note is that witness protection measures according to the provisions of article 62 of the *Criminal Procedure Law* is limited to “prior protection,” but there is no requirement on the legislation for the protection of witnesses later, which is the most worry of witness with regard of retaliation. Thus, the legislation should be strengthened with security measures after the witnesses testifying, such as changing the identity of a witness, changing residence and so on.

(F) Urgent requirement of establishing the Privileges for Witness

Criminal proceedings are not just a process to discover facts, but also a process to select values, while the privileges are actually the result of value choice.<sup>19</sup> Its main

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<sup>17</sup> See, “Hand According to the Constitution, Amoy Siming District People’s Court Try out the Oath System of Witness”, *Legal Law*, December 5, 2001.

<sup>18</sup> See, “Clarify no Torture, the Policemen should Testify in Court”, *Legal Evening News*, August 24, 2011.

<sup>19</sup> Jinxi Wang, *Witness’s Statements in Criminal Procedure*, Chinese People’s Public Security University Press, 2002, p. 84.



purpose is to protect the interests of a particular relationship in the world outside the courtroom, and these relationships and interests are considered sufficient important, and worth the judicial proceedings to bear these costs for loss of useful evidence.<sup>20</sup> Nevertheless, the privileges are contrary to the promotion goal of the finding facts after all,<sup>21</sup> thus its scope is clearly defined by its national legislation in general, only slightly different depending on the specific circumstances.<sup>22</sup>

In China, the majority of the judges also considered it necessary to establish the privileges for witness. The survey shows that 79.7% of the judges think that relatives should be given privilege; 87.2% of them support lawyers and clients to have privilege; 82.9% of them advocate that psychiatrists, psychotherapy practitioners and patients have privilege. The article 188 of the *Criminal Procedure Law* basically reflects the requirements of practice, besides testimony obligation, the system provides exceptions to mandatory testimony as “upon the court notice, if the witness does not testify without justifiable reason, the court may force he/she to court, except the defendant's spouse, parents, and children”. In fact, as early as just after the *Draft Amendment to the Criminal Procedure Law* issued, some scholars pointed out that this provision means that close relatives of the accused in case hearing may refuse to testify,<sup>23</sup> which in fact provides “privileges”.<sup>24</sup> We believe that this provision is not to establish privileges, rather than to provide that the defendant's spouse, parents, children will not be forced to testify, but their obligation to testify is not relieved.

It should be noted that the article 188 of the *Criminal Procedure Law* provides the particular relatives are not forced to testify, which is not the same concept that people usually talk about “placing righteousness above family loyalty”. The changes of the *Criminal Procedure Law* will not be as some people say that “will subvert the existing judicial system, which places righteousness above family loyalty”.<sup>25</sup> Generally, the privilege is established for relatives, mainly in order to protect family relationships, ethics and trusts relationship between specific relatives. If the spouse, parents, and children of the accused do not advocate or waive this right of testimony exemption, they can still testify.<sup>26</sup>

### **III. Institutional Barriers Exist for Application of Expert Opinions**

#### **(A) Illegal forensic examinations are very serious**

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<sup>20</sup> Ronald J. Allen, Richard B. Kuhns, and Elanor Swift, *Evidence: Text, Problems, and Cases*, 3rd ed., Translated by Bensen Zhang, etc., Higher Education Press, 2006, p. 905.

<sup>21</sup> Bensen Zhang, *Evidence Law*, China University of Political Science and Law Press, 2009, p. 254.

<sup>22</sup> Chongyi Fan et al., Research Report of Amendment for Criminal Procedure Law, Chinese People's Public Security University Press, 2004, p. 487-88.

<sup>23</sup> See, “Criminal Procedure Law Amends ‘Place Righteousness above Family Loyalty’, Progress or concession Leads Hot Debate”, Xinhua Daily, August 28, 2011.

<sup>24</sup> supra note 18.

<sup>25</sup> supra note 23.

<sup>26</sup> See, “Seven Bright Spot of Criminal Procedure Law Amendment”, Gangming Daily, August 25, 2011.

With the progress of science and technology, more and more facts need to be identified through high-tech means. Some scholars had made a statistical analysis for court decisions in one city, and found currently scientific evidence and examination are involve in almost all criminal cases, and this situation has been increasing year by year.<sup>27</sup> After the scientific evidence became the new “King of evidence”,<sup>28</sup> scientific and normative forensic examination increasingly attracted people's attention. The present research found that the illegal forensic examination is a very widespread problem, seriously impact on the probative value of the expert opinions, and shaken people’s confidence in scientific evidence. The forms of illegal forensic examination as below:

1. Forensic examination institutions initiatively “grab cases” from the court to tout forensic examination service by illegal means, such as false advertising, promising to give back “referral fees”. The survey shows that there are 5.1% of the judges “often” encounter such a situation, and 22.1% of the judges said that such problems occasionally occur.

2. The parties “buy” forensic examination, and the experts do “personal examination”. As the forensic examination supervision and management mechanism is not perfect, forensic examination largely relies on self-regulation of the industry, and there is a lack of rigid regulations. Some practitioners may set aside their judicial position for bribery or personal relationships.<sup>29</sup> The government has been cracking down on provision of examination services for bribery or personal relationships,<sup>30</sup> but such problems can still be common. The survey shows that 50.6% of the judges said there may be provision of forensic examination services for bribery or personal relationships in their cases.

3. Expert opinions may still be adopted even though the experts and the institutions do not have the legal authorization. There are 37.1% of the judges experienced that the experts and the institutions perform forensic examination beyond the scope of their authorization. A more serious problem is that for such kind questionable expert opinions, 38.4% of the judges tend to adopt it.

4. The forensic examination process does not comply with the technical standards and technical specifications of the relevant areas of expertise. Many judges, in the review of expert opinion, often encounter the problem with illegal operations of examination personnel. The probability that submissions do not meet the forensic examination requirements is 55.6%; the probability that the forensic examination

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<sup>27</sup> Jiancheng Wang, “Empirical Study on the Forensic Examination System in China”, *Peking University Law Journal*, (2) 2010.

<sup>28</sup> Jiahong He, “Forward-looking of Evidence Law in China”, *Procuratorial Daily*, September 2, 1999.

<sup>29</sup> Dai Weidong, Liu Juan, Isolating Interference of Interpersonal Relationships and Promote Legal Examination, *People's Court Daily*, November 5, 2011.

<sup>30</sup> Qi Xiaoying, Li Dengbang, Inner Mongolian Judicial Administrative Authority Conducting Thorough Investigation Of Examinations Based On Personal Relationships And Bribery, *Inner Mongolia Morning News*, April 22, 2010.

process is not recorded in real time or signed is 40.1%; the probability that experts shall avoid arousing suspicion but fail to do so is 30.2 %; the probability that expert opinions are non-standard in form, content, signature or seal is 51.0%; and the probability that experts does not comply with technical standards or technical specifications for relevant areas in forensic examination is 42.4 %.

5. The forensic examination institutions or experts deliberately made false examination, but are not necessarily be punished. In accordance with Article 13 of the *Decision of the Standing Committee of the National People's Congress on Administration of Forensic Examination*, if an expert intentionally makes a false examination, which constitutes a crime, he should be investigated for criminal responsibility; If it does not constitutes a crime, the expert should be given a warning under the circumstances, make corrections, and suffer deregistration and other penalties. But the survey shows that possibility of punishment to the institutions and experts for deliberately false examination is only 44.6%, and the proportion of the actual punishment is only 10.7%.

(B) The parties do not have the right to start forensic examination process

In criminal proceedings, the right to start the forensic examination process only lies with public security and judicial authorities. As according to the provisions of Article 144 of the *Criminal Procedure Law*, in order to ascertain the cases, when certain specified problems need to be solved in the cases, people with expertise may be assigned or invited by the public security organs to conduct a forensic examination. In accordance with the provisions of the second paragraph of Article 191, the forensic examination can also be started by the court when surveying evidence. But the parties neither have the right to start the forensic examination process, nor have the right to choose an expert, except they may request additional examination or re-examination when they refuse to accept the expert opinion. This not only breaks the balance between the two parties in adversarial trial, but also leads to deviations from legitimacy of the forensic examination system.<sup>31</sup> In this regard, some scholars have suggested that, "China should introduce the adversarial spirit from the law systems of western countries, to stipulate that both parties shall be free to delegate an expert without approval of the judge."<sup>32</sup> In particular, this voice has been even louder since the "Case of Xinghua Qiu" is taken in 2006.

Relatively, the parties of civil cases have greater autonomous right to start the forensic examination process. The first paragraph of Article 76 of the *Civil Procedure Law* provides the parties not only have the right to request forensic examination, but also to negotiate with the counterpart in determining the expert. However, the *Civil Procedure Law* does not allow the parties to unilaterally start the forensic examination

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<sup>31</sup> Qiuong, Xiong, "The Parties Should be provided the Right of Authorizing Their Own Expert", *Legal Daily*, January 13, 2004.

<sup>32</sup> Chongyi Fan, Yongsheng, Chen, "Justice: The highest pursuit of Judicial Expertise System Reform and Improvement", *Chinese Journal of Forensic Sciences*, (1) 2002.

process.

From the survey, the judge's opinions are also inconsistent on whether to give the parties the right to start the forensic examination process. There are 16.9% of the judges who advocate maintaining the current status; only 14.1% of the judges considered suspects, the accused shall have the right to start completely independent forensic examination process. Most judges have proposed to reform the initiation model of the existing forensic examination starting mode should be reformed, but there are divergences in specific reform proposals. There are 34.7% of the judges believe that both parties only have the right to apply for the forensic examination, and the court has the power to make final decisions; there are 24.1% of the judges believe that public security and judicial authorities' right to decide forensic examination should be restricted on the basis of the existing forensic examination starting mode.

(C) Experts' refusal to appear in court to testify is common

Experts' refusal to appear in court to testify was once considered to be the problem that is "the most prominent and most difficult to solve" in the field of forensic examination in China.<sup>33</sup> The problem has been there for a long time. According to a survey in Jiangsu province, data shows that less than 1% of all the cases had the expert to testify.<sup>34</sup> If the expert does not appear in court, his written opinion will be read.<sup>35</sup> Both the *Decision on Administration of Forensic Examination* and the *Regulations on Evidence of Death Penalty Cases* clearly stipulate experts' obligation to appear in court to testify, but the implementation is not ideal.

To prevent "junk science" from straying into court, the *Criminal Procedural Law* has further improved the expert testimony system. In addition to reaffirm the obligation of experts to testify, it provides the exclusionary rules for expert opinions, forced expert testimony and the corresponding sanctions. If the prosecutor, any parties or their agents have any objections to the expert opinion or the court thinks it is necessary for the expert to appear in court but the expert refuses to appear in court to testify upon the court's notification, the expert opinion may not be used as the basis for a decision on a verdict; if the witness fails to appear in court to testify upon the court's notification without a justified reason, the court can force he / she to appear in court. In serious cases, a detention of ten days or less may apply. Besides, the *Civil Procedural Law* adds experts' obligation to appear in court to testify and legal consequences of experts' failure to do so, including the provision that the expert opinion may not be used as the basis for fact and examination fees shall be returned.

However, it is disappointing that the situation has not fundamentally changed with implementation of the above measures. The survey shows that, in the past three

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<sup>33</sup> Guo Jinxia, *Expert Conclusion Application Problems and Solutions*, China University of Political Science and Law press, 2009, p. 240.

<sup>34</sup> Yongjiu, Pan, "Legal Consideration of the Expert to Testify in Court", Jiashen Liu ed., *theory and practice of Judicial Expertise*, People's Court Press, 2002, p. 132.

<sup>35</sup> *supra* note 11 at 289.

years, the proportion of cases that expert appears in court was only 25.9%; and 36.5% of the judges even said the proportion was less than 5%. As the expert does not appear in court to testify, it is difficult for the court to determine the scientificity, accuracy and reliability of the expert opinions, and thus it is difficult for the science and technology to achieve their evidentiary values in litigation.

Regarding the reasons for low rate of experts testifying, the survey show that the most important reason is imperfect of the legislation. There are 81.6% of the judges believe that inadequate regulation of adverse consequences for experts' refusing to testify results in the problems of non-appearance in court. There are other reasons including the lack of perfect protection of experts and compensation of the experts' costs to testify.

(D) The expert advisor system needs to be improved

To strengthen the cross-examination of expert opinion, to make up for the judge's knowledge deficiency on professional issues, the second paragraph of Article 192 of the *Criminal Procedure Law* additionally provides expert advisor system, namely: "The prosecutor, the parties and counsel, litigation attorneys may apply for a court notice to let people with specified knowledge attend the court, and give comments to the expert opinions". Meanwhile, the Article 79 of the *Civil Procedure Law* also has the same provision. The innovation of this legislation is generally welcomed and supported by judges. The survey shows that, if the parties apply for a court notice to invite expert advisor to court, 70.4% of the judges will make clear approval of the application.

For professional problems in litigation, only the peer experts can raise any substantive problem during cross-examination. The establishment of the expert advisor system to a large extent reflects the needs of developing of judicial practice in China. By questioning the expert and querying the professional problem, this can effectively expose weaknesses of the expert opinion and avoid any one-sided statement. This is beneficial not only to substantiation of expert opinion evidence cross-examination procedures, but also to avoidance of judicial officers' selective listening, thus is good for judges' review and rational authentication of the expert opinion.<sup>36</sup>

However, it must be recognized that the expert advisor system in China is immature. There are only the above-mentioned general provisions, while there are no other workable rules. Selection, qualification, litigation status, rights and obligations of expert advisors and effectiveness of their expert opinions need to be further standardized.

(E) The judge's the over-reliance and bigotry on expert opinion

Compared with other evidence, the expert opinion has the advantage of high

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<sup>36</sup> supra note 5, at 219-20.

technical contents. When submitted as evidence to the court, it is generally considered to be a correct conclusion drawn by an expert through scientific computation by using expertise and precision instruments and even "the product of combination of science and technology with judicial activities".<sup>37</sup> As expert opinions are regarded to be "scientific", there is an excessive expectation of evidentiary value in them. Judges often accept them without review.<sup>38</sup> A survey shows that the rate of court's acceptance of DNA evidence submitted by prosecutor reached 99.65%.<sup>39</sup> As effectiveness of expert opinion is exaggerated and even deified, blind acceptance of expert opinions has become a common phenomenon in the proceedings.<sup>40</sup>

Of course, it is not to say that judges do not make any review of expert opinions, but the review is mostly restricted to formal examination. The survey shows that 81.3% of the judges review the expert opinion mainly to check whether the forensic examination institution or the expert has legal qualification, whether the expert opinion is beyond the examination scope and examination capability of the institution and the experts, whether the expert opinion meets legal requirements and whether the expert opinion is consistent with the fact of the case.

For different expert opinions about one matter, 44.6% of the judges would think that probative value of the expert opinion issued by the forensic examination institution at the higher level is better than that of the expert opinion issued by the forensic examination institution at the lower level. Besides, judges have greater trust in an expert opinion issued by the forensic examination institution or an expert entrusted by the court. If an expert opinion issued by an expert entrusted by the court conflicts with one issued by an expert entrusted by the party concerned, 61% of the judges would adopt the former as a basis for conviction.

An expert is not a rational judge, and an expert opinion is not a rational judgment.<sup>41</sup> It must be recognized that expert opinions do not have a predetermined force, so as other evidence.<sup>42</sup> In fact, as long as the judges can correctly understand and treat the probative value of expert opinion, and not view expert opinion with "color glasses", but with full use of common sense and experience, they can make accurate judgments about probative force of expert opinions.<sup>43</sup>

#### **IV. Exclusionary Rules of Illegally obtained Evidence Failed to Implement**

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<sup>37</sup> Chuandao Wang, "Scientific Evidence will Work Well in the Future Judicial Activity", Jiahong He, ed., Evidence Forum, China's Procuratorial Press, 2002, p. 379.

<sup>38</sup> Liu Xiaodan, *Scientific Evidence*, Chinese Procuratorial Press, 2010, Issue 1.

<sup>39</sup> Chen Xueqian, Rationally Treating Probative Force Of DNA Evidence, *Political and Legal Forum*, 2010, Issue 5.

<sup>40</sup> Zhang Zhong, Shi Meisen, Probative Force of Scientific Evidence, *Evidence Science*, 2012, p. 20.

<sup>41</sup> Chongyi Fan ed., *Criminal Procedure Law*, China University of Political Science and Law Press, revised ed., 2002, p. 164.

<sup>42</sup> *supra* note 19, at 189.

<sup>43</sup> *supra* note 40, at 20.

(A) The problem of illegally obtained evidence by torture and other means remains serious.

Establishment of the exclusionary rules of illegally obtained evidence aims to deprive the investigator's "work achievement" to curb illegal evidence collection behaviors,<sup>44</sup> and to cut off the power source of torture fundamentally,<sup>45</sup> thus it is considered "the only effective way to solve the problem of illegal procedure so far".<sup>46</sup> Data shows that the torture cases all over the country fell by 87% in the first year after the *Criminal Procedure Law* came into effect, compared with the year before.<sup>47</sup>

However, the torture case occurred in Harbin recently shows that the problem of illegal evidence is still quite serious in practice. According to the report in "Xinhua daily telegraph" in March 2013, the court of Harbin Daowai District identified seven cases of torture, that three criminal policemen and four non-police members made electric shock to and poured irrigation mustard oil into the suspects who refused to confession in the course of interrogation several times, and caused one suspect dead. One of them who have been tortured said: "I was caught by them, handcuffed to the iron chair. They clicked the electricity stick to me and asked me the source of drugs. Then they brought an old-fashioned telephone with a handle attached aside and two wires connected out. They tied the wires on my toes and started switching the phone, and I felt twitching and was shocked for seven or eight times."<sup>48</sup>

(B) The exclusion of illegal physical evidence is almost impossible

Different from the one of USA which is the "origin" of the exclusionary rules of illegally obtained evidence, the exclusionary rule in China mainly applies to the illegally acquired confession from the accused and suspects. The exclusion of illegal physical evidence first appeared in the *Provisions for Issues of Illegal Evidence Exclusion in Handling Criminal Cases Issues* in 2010. Article 54 of the *Criminal Procedure Law* has absorbed its relevant provisions, stating: "It should be corrected, or give a reasonable explanation if the collection of physical evidence, documentary evidence does not meet the legal procedure, which may seriously affect the course of justice; If a correction or reasonable explanation cannot be made, the evidence shall be excluded." This means that the exclusionary rule to exclude evidence is limited to physical evidence, and documentary evidence. Illegally obtained expert opinions, records of inspection, identifying transcripts, audio-visual materials, electronic data, etc. are not clearly defined as issues of admissibility. In accordance with the usual

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<sup>44</sup> QiuHong Xiong, "The Milestones in the Development of Criminal Evidence System: Evaluation of the Two Criminal Evidence Rules", *Evidence Science*, (5) 2010, p.569-76.

<sup>45</sup> See, "Extorting Confessions by Torture, How Does it no Repeat?: The Dialogue of Amending the Criminal Procedure Law", *Guangming Daily*, August 25, 2011.

<sup>46</sup> Ruihua Chen, "Theoretical Interpretation of the Exclusionary Rules of Illegally obtained Evidence", *Evidence Science*, (5) 2010, p.552-68.

<sup>47</sup> See, "Torture Case Fell by 87% Last Year", *Beijing News*, June 27, 2010.

<sup>48</sup> See, "Electric Shock and Fill the Mustard Oil, Big Torture Cases are Exposed in Harbin", *Xinhua Daily Telegraph*, September 22, 2014.

facts in the past judicial practice, all of this kind of evidence will be admitted basically by the judge.

Judging from the above provisions of regulations, legislation has set strict conditions to exclude illegal physical evidence: First, the physical evidence and documentary evidence must be obtained in violation of legal procedures; the second is that likely to seriously affect the course of justice; the third is that a correction or reasonable explanation cannot be made. It should be emphasized that these three conditions must be met simultaneously before illegal physical evidence and documentary evidence can be excluded, That is, the illegal physical evidence and documentary evidence cannot be excluded and may be admitted as evidence, if it does not influence the course of justice; if it does not reach the certain severity to affect the course of justice; or if corrections or reasonable explanations can be made, even it reaches the severity to affect the course of justice. Taking it into account that the result of the corrections or explanations will be made for all illegally obtained evidence, the illegal physical evidence and documentary evidence can obtain legitimacy in practice, and would be difficult to be excluded.<sup>49</sup> The exclusionary rules of illegally obtained physical evidence even can become “non-exclusionary rules for illegal physical evidence”.<sup>50</sup>

#### (C) Difficulties exist to start the process of excluding illegal evidence

The *Criminal Procedure Law* provides two methods of excluding illegal evidence: One is to start the exclusion process by official authorities. The second paragraph of Article 54 states: “In the investigation, prosecution and trial, if illegal evidence is found, it should be excluded by law, shall not be used for basis of prosecuted opinions, prosecution decisions and judgments”. For the investigating authorities, to exclude illegal evidence is like to let them find their own unlawful conduct, which is the equivalent of “asking a tiger for its skin”, and basically does not happen in practice.

The second method is to start the exclusion process with the parties’ application to the court. The second paragraph of Article 56 of the *Criminal Procedure Law* states: “The parties and their counsels are entitled to apply to court for exclusion of illegally obtained evidence by law”. At the same time, it also states: “The applicant for exclusion of the illegally obtained evidence should provide clues or materials”. Just because of this provision, to start the exclusion process of the illegally obtained evidence is very difficult. Because under normal circumstances, the suspects or the defendants are in a state of “relative management” in criminal proceedings, there is no condition for them to provide clues of illegal evidence obtained by torture and other

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<sup>49</sup> Bensen Zhang, Lin Chang, The pace of the development of the evidence law in China in 2012, Bensen Zhang, Lin Chang, ed., Report on Evidence and the Rule of law in China (2012) , China University of Political Science and Law Press, 2014, p. 5.

<sup>50</sup> Guangzhong Chen ed., *Definition and Review of the Amending Provisions of the Criminal Procedure Law of the People's Republic of China*, People's Court Press, 2012, p. 73



illegal means.<sup>51</sup>

Our findings basically confirmed the above situation, when the accused applies for exclusion of illegal evidence, not only has 75.3% of judges asked the defense to provide clues or evidence related to alleged illegal personnel, time, place, manner, and content, but also even has 49.6 % of the judges asked the defense to provide reliable and sufficient evidence. Worse even, the defendant provides evidence does not mean that the judge will start illegal evidence exclusion process. The research assumed a scenario: D is accused with intentional homicide, his counsel advocates in court that D was tortured, and shows the court the photos of rope print on D' wrist. The survey shows that only 15.7% of the judges are very likely to start illegal evidence exclusion process.

## **V. Judge's Knowledge of Evidence Law Needs to be enhanced**

### **(A) The judges cannot get formal education of evidence law**

After entering the 21st century, the evidence law developed fast in law schools in China. Not only the team of scholars studying evidence law grows rapidly, but also there are a number of law research institutions with master's degree and doctor's degree programs in evidence law. Unfortunately, currently evidence law has not yet been identified as the core curriculum of law by the Ministry of Education, and only a handful of universities rank it as a required course for the undergraduate. The survey shows that only 63.7% of the judges received college education of evidence law; 15.7% of the judges have never studied evidence law. However, the importance of the evidence law for the judge's is so obvious that the judges also recognized this problem. As such, in the survey, 91.2% of judges believe that Chinese universities need to establish the courses of evidence in a law school.

Even the Universities have established the evidence law courses, for the judges, there are many problems in the education of the evidence law. For example, 81.0% of judges point out the disjunction between the evidence law teaching and the personnel needs of judicial practice. Some judges also reflect the university's teaching concept of the evidence law is behind the time, the teaching method is monotonous; textbook writing style varies, the knowledge system of evidence law is not unified; the instructors lack practical knowledge, and lectures are stiff and rigid. Therefore, 73.9% of the judges suggest that evidence law teaching should be equipped with the "practice-based" teachers.

Regarding of the insufficient education of evidence law for judges, many courts strengthened the evidence law training for the judges during pre- and in-service periods. The survey shows that nearly 90% of judges expressed the hope to obtain knowledge of evidence law through regularly participating in training courses or distance education, but in fact only 22.8% of the judges studied evidence law at the

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<sup>51</sup> Zhong Zhang, "On the Issue of the Certificate of the Confession Illegally obtained", *Evidence Science*, (5) 2010, p.542.

time of orientation, and another 36.4% of the judges participated in evidence law training during employment. In fact, there are many judges rely on usual self-study to master the evidence law, either through studying the case series or corpus published by Supreme Court, as well as by reading domestic and international books or papers to obtain knowledge of the evidence law.

(B) The judges lack of the awareness of the evidence-based adjudication

Due to lack of education and training in evidence law, Chinese judges' knowledge of evidence law is relatively low. As for such a question as "are there provisions for principle of evidence-based adjudication in existing Chinese laws and regulations?" only 27.9% of the judges believe there are clearly defined provisions, 5.5% of the judges are not sure, and even 2.9% of the judges believe that there is no such provisions. When asked which law articles reflects the principles of the evidence-based adjudication, actually 89.9% of the judges gave the answer as on article 53 of the *Criminal Procedure Law*, but in fact this one is about the requirement of "lay emphasis on evidence and give no more credence to confessions".<sup>52</sup>

Due to the judges' lack of knowledge of evidence law, there are deviations and errors in understanding the rules of evidence. There are 36.0% of the judges believing that confession is the key evidence to find the defendant guilty and even 11.8% of the judges believe that conviction can be made solely based on confessions. This is not just a problem of bias in understanding the law, but an obvious mistake. In addition, 12.5% of the judges believe that the defendant shall not be found guilty if there is no confession. This data shows that, in practice, some judges still stick in the old state of mind of ancient China as "the confession is an essential condition to find defendant guilty".<sup>53</sup>

The judge's misunderstanding of the rules of evidence has a direct impact on their consciousness of the evidence-based adjudication. Questionnaires assume such a scenario: Mr. Zhang was sued to the court on suspicion of intentional injury, but in addition to the victim's injury examination, there is no other evidence imputing to the defendant. The survey shows that 18.8% of the judges believe the defendant may be found guilty with many years of experience in handling cases; 35.5% of the judges may sentence the accused guilty under the pressure of the public opinions.

(C) The judges can not accurately grasp the connotation of the standard of proof

In the past decade, the standard of proof is the most controversial issue on evidence theory in China. Because of the provision as "evidence is reliable and sufficient" of the *Criminal Procedure Law* is too abstract, this causes differences and disagreements for people to understand. To solve this problem, the *Criminal Procedure Law* introduces the concept of "beyond reasonable doubt" from the

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<sup>52</sup> Shangxin Wang, Shouwei Li, *Interpretation and Application of the Decision of the Criminal Procedure Law Amendment*, People's Court Press, 2012, p. 49.

<sup>53</sup> Yiyun Chen ed., *Evidence*, 4<sup>th</sup> ed., China Renmin University Press, 2010, p. 41.

common law. In the second paragraph of Article 53, the standard of proof of “the evidence is reliable and sufficient” is interpreted as “beyond reasonable doubt”, namely “integrating whole evidence of the case, the fact-finding is beyond a reasonable doubt”. However, what is “beyond reasonable doubt”? it seems to be a very complex issue, and even Wigmore agrees that the attempt to give a detailed definition to this elusive brain states is unwise.<sup>54</sup>

Nevertheless, Chinese legislatures still try to make a definition to “beyond reasonable doubt” as “For the fact-finding, there is no doubt with evidence or common sense, it is actually convincing”.<sup>55</sup> That is, to make sure that the facts of the case have been proven “the evidence is reliable and sufficient”, the judge should have no reasonable doubt from the inner conviction for the examination of the facts of the case.<sup>56</sup> In fact, this definition does not make the judges have a better understanding of the standard of proof. Survey results show that the judge s’ understanding of the standard of proof did not change substantially due to the amendment of the *Criminal Procedure Law*. There are 80.5% of the judges still believe that criminal proceedings should insist on the principle of “seeking truth from facts, wrongs must be corrected”; 29.0% of the judges believe that the cognizance of criminal facts shall be 100% correct.

Because the judges do not get the means of “beyond reasonable doubt”, the application of the principle of "assuming disputed crimes innocence" has some difficulties. Questionnaires assume a scenario: A dead woman was found somewhere, and the police then brought a man in love with this woman back to the police station. Upon inquiry, the man confessed that he killed the woman. On trial, except for the defendant confession, there is no other evidence imputing to the defendant. Survey results shows that 30.4% of the judges may sentence the defendant guilty.

#### (D) The judgment reasoning is inadequate

Judgment reasoning is an important way to differentiate virtue from evil, prompting the parties to obey the decision and not to prosecute, and also an important way to improve the quality of judgments.<sup>57</sup> For a long time, however the problem of no judgment reasoning is very serious. Such as, some judgments have no reasoning, no specific reasoning, or no normative reasoning;<sup>58</sup> some judgments filled in accordance with the sample of the litigation documents, without individualized explanation of the reasons for the judgment;<sup>59</sup> some judgments are like “the

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<sup>54</sup> J. Wigmore, *A Treatise on the System of Evidence in Trial t Common Law*, 3d ed. (repr. Holmes Beach: Gaunt, 2003), 4:3542(=2497).

<sup>55</sup> *supra* note 52, at 51.

<sup>56</sup> Zhong Zhang, “Amendment of the Criminal Procedure Law and Improvement of the Evidence System”, on Jinxi Wang, ed., *New Development of Criminal Evidence*, Law Press, 2013, p. 1-13.

<sup>57</sup> Liming Wang, “Promote Fair with Judgment Reasoning”, *People's Court Daily*, April 25, 2013.

<sup>58</sup> Shude Liu, “Contemporary Significance of Enhancing the Referee Reasoning”, *People's Court Daily*, December 27, 2013.

<sup>59</sup> Haiqing Peng, “On Reasoning of Criminal Judgment”, *Journal of Xiangtan University*, (5) 2007, p. 30-33.

eight-part essay”, with formatted fact-findings and the basis of evidence adopted, and it hard to see the reasons why the judges make such a judgment.<sup>60</sup>

Sentence doesn't make sense, which means that the judicial system does not listen to reasons, so there is no other place for people to argue.<sup>61</sup> In response to this situation, the first paragraph of Article 152 of the *Civil Procedure Law* added a provision: “Judgment shall specify the verdict and reasons”. According to this provision, to explain the reasons about the adoption and exclusion of evidence, fact-finding and Law-application and others in the judgment has become statutory duties that the judge must fulfill. However, the survey results show that in current judicial practice, the judgment reasoning is far worse with comparison to this requirement. When excluding evidence that has disagreement, only 20.0% of the judges can make a very good reasoning; only 16.7% and 18.8% of the judges can make a very full reasoning for the judgment of the probative force for single evidence and the whole case evidence. If you say “every sentence is an examination paper of judges presented to the community”,<sup>62</sup> then, the data indicates that the Chinese judges are mostly unqualified.

## Conclusion

Evidence system construction is a long-term and arduous task, and a complex social system project. After thirty years of development, the status of the evidence law in the whole Chinese legal system has been preliminarily established.<sup>63</sup> Especially in the 21st century, the evidence law entered a stage of rapid development. Chinese legislation of evidence was indicated to have entered a new course of development with the publication of the *Civil Rules of Evidence* and the *Administrative Litigation Evidence Rules* in 2001 by the Supreme People's Court, and the jointly issued the *Two Criminal Evidence Rules* by the Supreme People's Court, the Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security and the Ministry of Justice in 2010.<sup>64</sup> With the revisions of the *Criminal Procedure Law* and the *Civil Procedure Law* and relevant judicial interpretations promulgated in 2012, the evidence legislation in China has moved up to a new level, and evidence system construction has made new important achievements.

However, provisions of evidence rules in the three procedural laws are still too principle, and lack of maneuverability, which cannot meet the needs of trial practice. Deyong Shen, chief justice and vice president of the Supreme Court pointed out: “The provisions of a number of laws and regulations and judicial interpretations shows

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<sup>60</sup> Shengqiang Wei, “Direct Judgment Argumentation, Emphasis of Rhetoric, and Focus Advancing: Think of Raising the Level of Judgment Made in China”, *Legal Science*, (5) 2012, p. 51.

<sup>61</sup> supra note 57.

<sup>62</sup> supra note 57.

<sup>63</sup> Bensen Zhang, Lin Chang, ed., *Report on Evidence and the Rule of law in China (1978~2008)*, China University of Political Science and Law Press, 2011, p. 1.

<sup>64</sup> Guangzhong, Chen, “The Significant Achievement of the System of Criminal Evidence Law Reform”, *Procuratorial Daily*, June 1, 2010.

some problems such as not well coordinate, not well orderly organized and other issues, which has caused chaos to some extent in using litigation rules of evidence in judicial practice”.<sup>65</sup> Although many years have passed, the situation did not change fundamentally. Now local rules of evidence formulated by nearly a quarter of provincial Higher People's Courts still play a role in practice in China. Local rules of evidence have been introduced, reflecting the urgent need for the rules of evidence in the judicial practice, but these local rules of evidence also have many problems. In addition to problems of the existence of simple repetition, inaccurate and even contradictory language, more importantly, it results in a situation that different places were “legislative” respectively, which seriously affected the uniform application of the evidence law in China. Thus, the uniform of evidence legislation is imperative.<sup>66</sup>

However, the uniform of evidence legislation requires properly handling the relationship between learning foreign legislative experience and basing on Chinese national conditions. In comparison, in the west countries, particularly the common law, evidence legislation developed relatively earlier. There are a lot of contents reflecting the outcomes of the development of human civilization and the common rules of evidence application, and a lot of useful legislative experience can be adopted and draw to our evidence legislation. However, the evidence legislation must fully consider the current situation in China, as to consider the legal traditions and social foundation of China, to consider the tolerance of the public and the quality of judicial officers, and to consider the practical issues that evidence rights of the lawyers cannot be effectively protected, the witness does not appear in court, the system of witness testimony is imperfect, application of expert opinion exists difficulties, exclusionary rules are difficult to implement, judges’ level of evidence law knowledge is not high. Therefore, the scientificity of evidence legislation and its success are not up to how much rules of evidence has absorbed from the United States and other west countries, but up to whether the legislation is based on judicial practice in China, whether the legislation can meet the actual needs of Chinese judges, and whether the legislation can solve practical problems in China.

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<sup>65</sup> See, “Chief Justice: Increasing evidence system reform in China”, <http://news.xinhuanet.com/newscenter/2006-05/30>.

<sup>66</sup> Zhong Zhang, “Study Report of the Uniform Provisions Evidence of the People’s Court”, on Jinxi Wang, Lin Chang ed., *Collection of Theses of the 1<sup>st</sup> International Symposium on Evidence Law and Forensic Science*. China University of Political Science and Law Press, 2009, p. 122.