Journal of Studies in Social Sciences
ISSN 2201-4624
Volume 6, Number 1, 2014, 97-115

The Deep Dilemmas of the New Criminal Evidence Rules in China

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Abstract: To solve the low rates of witness testimony in court, coercion, and other problems, the National People's Congress (NPC) created large-scale modifications in the criminal evidence rules when amending the Criminal Procedure Law (CPL) of the People's Republic of China (P.R.C) (1996 Revision) in 2012. Although the new criminal evidence rules have made remarkable progress from the legal text, they will be confronted with some deep dilemmas in judicial practice. If China could not take effective measures to deal with these dilemmas, the revised criminal evidence rules would neither be thoroughly executed nor really resolve the above mentioned problems.

Key Words: New criminal procedure law; Criminal evidence rules; Legislative progress; Application dilemmas

1. Introduction

In modern criminal procedure, criminal evidence rules are universally regarded as the basis and core of criminal procedure in theoretical circles because the facts of a case must be shown through presentation of evidence. Although criminal evidence rules play an important part in modern criminal procedure, criminal evidence legislation has always lagged in China. The NPC has not created a separate criminal evidence code, instead choosing to provide the rules governing criminal evidence in a special chapter of the criminal procedure code. In that criminal procedure code, the legal provisions that directly relate to criminal evidence rules are generally too few in number and too vague in content.

For example, in the first criminal procedure code adopted at the Second Session of the Fifth NPC on July 1, 1979, there were only seven provisions directly related to the criminal evidence rules. This first version of code governing criminal evidence does not reflect the modern concept of rule of law and regular features of criminal procedure and evidence are not provided, such as the principle against self-incrimination, the exclusionary rule, the hearsay rule, objects of proof, burden of proof, and criminal presumption. The Fourth Session of the Eighth NPC adopted the Decision on Revising the Criminal Procedure Law of the People's Republic of China on March 17, 1996, which created large-scale modifications for the CPL of the P.R.C (1979 Revision). However, with regard to the criminal evidence rules, the 1996 CPL has no noteworthy changes.

As judicial practice has shown, the legislation lag of criminal evidence not only fails to meet the needs of criminal justice reform but also brings a series of problems to the criminal justice judiciary. For instance, China's adversarial trial system requires witnesses to testify in court in theory, but witnesses rarely testify in practice. According to data obtained from the Supreme People's Court, the rate of criminal witness testimony in court does not exceed 10% in first instance criminal cases, and this rate does not exceed 5% in second instance criminal cases. For another striking example, although more and more emphasis is given to the procedural rule of law and protecting human rights in China's CPL, coercion and other illegal investigative practices remain commonplace. According to the "Report of the Law-Enforcement Inspection Team of the Standing Committee of the National People's Congress on the Implementation of the Criminal Procedure Law of the People's Republic of China" (by Hou Zongbin, at the 19th Meeting of the Standing Committee of the Ninth National People's Congress, December 27, 2000), there were three main problems of implementations related to the CPL of 1996. One of them was the breeding and spread of torture. Moreover, even though a defendant may apply to a People's Court to exclude illegally obtained evidence, the People's Court rarely supports his or her application.

To solve the problems arising from the legislation lag of criminal evidence, the 5th Session of the Eleventh NPC adopted the Decision on Amending the CPL on March 14, 2012, and the Decision created large-scale modifications in the criminal evidence rules. After this amendment, the criminal evidence chapter increased in size from 8 articles to 16 articles. By contrast to the 1996 CPL, the revised contents of the new chapter governing evidence includes the following: (1) it modifies the concept of evidence; (2) it changes expert conclusions to expert opinions; (3) it regards transcripts of identification, transcripts of investigative reenactment and electronic data as new categories of evidence; and (4) it expands the scope of evidence that shall be kept confidential from evidence involving state secrets to evidence involving any state secret, trade secret, or personal privacy. The additional criminal evidence rules primarily include the following: (1) placing the burden of proving the defendant's guilt on the prosecutors; (2) the principle against self-incrimination; (3) defining the conditions of sufficiency of evidence; (4) the exclusionary rule; (5) a system of investigators testifying in court; (6) statutory protective measures for witnesses; and (7) a witness compensation system. In addition to the aforementioned, the 2012 CPL (P. R. C) also adds some criminal evidence rules in other chapters, such as defining the specific situations in which a witness and an identification or evaluation expert must testify in court, providing the conditions in which a People's Court may force the witness to appear before court, and punitive sanctions a People's Court can enforce when a witness refuses to appear before court without justifiable reasons.

There is no doubt that the revised criminal evidence rules are an immense improvement at the legal level. On the one hand, the 2012 CPL (P. R. C) enriches the contents of the criminal evidence rules. On the other hand, the revised criminal evidence rules are more reasonable insofar as legal principles are concerned and will be more effective in judicial practice. These can be exemplified in the exclusionary rule and the criminal witness testifying system, and they are most important changes in the process of criminal evidence system reform. Although the 1996 CPL (P. R. C) art.43 explicitly requires that criminal

investigators cannot collect evidence through coercion, threats, inducements, deception or other illegal means, there are no legal consequences for such illegal actions. Therefore, coercion and other illegal investigative actions have become commonplace in judicial and investigative practice, and illegally obtained evidence obtained by the prosecution remains admissible as a basis for a sentence. By contrast to the 1996 CPL (P. R. C) art.43, the exclusionary rule is obviously more operational in the 2012 CPL (P. R. C). On the one hand, the 2012 CPL (P. R. C) not only emphasizes that judicial personnel shall collect evidence under legal procedures but also clearly defines the legal consequences of illegally obtained evidence and the scope, conditions, and phases of application of the exclusionary rule. According to Article 54 of the 2012 CPL (P. R. C), a confession of a criminal suspect or defendant extorted by coercion or obtained by other illegal means and/or a witness or victim statement obtained by violence, threat, or other illegal means shall be excluded. If any physical or documentary evidence is not gathered under statutory procedure that may seriously affect justice, then correction or justification shall be provided; otherwise, such evidence shall be excluded. If it is discovered during the criminal investigation, examination, prosecution, or trial of a case that any evidence shall be excluded, such evidence shall be excluded and not used as a basis for a prosecution proposal, a prosecution decision, or a sentence. On the other hand, the 2012 CPL (P. R. C) provides a series of supporting measures to ensure the implementation of the exclusionary rule. For example, the new CPL expressly prescribes the operating procedure of the exclusionary rule. According to Article 56 of the 2012 CPL (P. R. C), a judge may initiate a formal investigation procedure regarding the legality of evidence collection in view of his or her authority, the application of a party concerned, or the application of the defense counsel to determine whether the evidence was illegally obtained and should therefore be excluded. On the basis of Article 57 of the 2012 CPL (P. R. C), during the investigation in court regarding the legality of the prosecution's evidence, a People's Procuratorate shall prove the legality of evidence collection by use of existing evidentiary materials, investigators'

testimonies, and other means. Under Article 58 of the 2012 CPL (P. R. C), if the use of illegal means to obtain evidence as described in Article 54 of this law is confirmed or cannot be ruled out, the relevant evidence should be excluded. As another example, in determining the legality of investigative behaviors, Article 57,§2 of the 2012 CPL (P. R. C) provides, "if the existing evidentiary materials cannot prove the legality of evidence collection, a People's Procuratorate may request a People's Court to notify relevant investigators or other persons to appear before court to explain; additionally, the People's Court may notify relevant investigators or other persons to appear before court to explain. The relevant investigators or other persons may also file a request for appearing before court to explain. The relevant persons notified by the People's Court shall appear before court." On the basis of Article 121 of the 2012 CPL (P. R. C), when interrogating a criminal suspect, investigators may keep an audio or visual record of the interrogation process; and, in a case regarding a crime punishable by life imprisonment or death penalty or any other significant crime, the investigators shall keep an audio or visual record of the interrogation process. An audio or visual record shall cover the entire process of interrogation to ensure its integrity.

Since the founding of the new China, the NPC has been required to adopt the guiding ideology of the "general rather than detailed" because of deficiencies in legislative techniques and theoretical research. Because of this reasoning, there are few witness testifying rules in the 1979 and 1996 CPL (P. R. C). Furthermore, these two old laws only roughly provide the witness protection system and don't establish the witness compensation rule, the compulsory testifying rule, the witness sanction rule, and other important witness testifying rules. It is generally acknowledged that the lack of witness testifying rules is the important cause of the low rate of witness testimony in court. In view of the above lessons, the NPC obviously improved the functionality of the witness testifying system during amending the 1996 CPL (P. R. C). First of all, the new CPL not only emphasizes that a witness should testify in court but also adds a series of protective measures for a witness to testify in court. For the purpose of moving a witness to testify in

court and increasing the rate of witness testimony in court, the new CPL not only improves the witness protection system but also adds several protective measures for it as following: (1) Article 63 of the 2012 CPL (P. R. C) provides the witness compensation system to prevent a witness from unnecessary losses for testifying; (2) Article 188, §1 of the 2012 CPL (P. R. C) provides the compulsory testifying system for a witness to prevent a witness from evading the obligation to testify; and (3) Article 188,§2 of the 2012 CPL (P. R. C) provides the sanction system for a witness who refuses to testify in court to prevent a witness from arbitrarily refusing to testify. From judicial experiences of Western countries, China has established relatively complete systems of witness testifying at least at the legal level. Secondly, the new CPL makes a preliminary provision for legal consequences when a witness fails to testify in court. According to Article 187, §3 of the 2012 CPL (P. R. C), if the identification or evaluation expert refuses to do so after being notified by the people's court, the expert opinion may not be used as a basis for deciding the case. Although the new criminal procedure law does not provide the corresponding legal consequences when a witness refuses to testify in court, Article 76 of Interpretation on the Application of the Criminal Procedure Law (issued by the Supreme People's Court, December 20, 2012) provides, if a witness fails to testify in court, the witness's written testimony out of court that has not been verified and confirmed by the witness can not be used as a basis for deciding a case. Finally, the new criminal procedure law makes more clear provisions for the witness testifying system. For example, to strengthen the functionality of the witness protection system, the 2012 CPL (P. R. C) not only stresses that People's Courts, People's Procuratorates, and public security authorities have obligations to protect the safety of witnesses1 but also provides the scope of application, concrete measures, and proceedings of the witness protection in great detail. In the light of Article 62 of the 2012 CPL (P. R. C) provides, when a witness, identification or evaluation expert, or victim testifies about a crime involving national security, terrorist activities, organized crime of a gangland nature, or a drug crime that endangers the personal safety of the witness, identification or evaluation expert, victim or close relatives of the victim,

the People's Court, People's Procuratorate, and public security authority shall take one or more of the following protective measures: (1) it shall not disclose his or her true personal information, such as name, residence, and employer; (2) it shall not expose his or her image, true voice, etc., when he or she takes the stand; (3) it shall prohibit particular persons from contacting the witness, identification or evaluation expert, the victim and the victim's close relatives; (4) it shall provide special protection for such witness's body and residence; and (5) it shall provide other necessary protective measures. When a witness, identification or evaluation expert, or victim believes that his or her personal safety or that of his or her close relatives is endangered by his or her testimony in criminal procedures, he or she may request protection from the People's Court, People's Procuratorate, and public security authority. The relevant entities and individuals shall cooperate with the People's Court, People's Procuratorate, or public security authority in taking protective measures in accordance with law.

A slight change in the criminal evidence rules may affect the entire criminal process. To bring the criminal evidence rules into full play, there should be a receptive and properly structured environment in which to perform with corresponding supporting measures from the court, and these rules should have no obvious flaws. Since the NPC has implemented such large-scale modifications of the criminal procedure law, the environment in which the criminal evidence rules operate has evidently been objectively improved. However, because of legislative drafting, traditional ideas and other factors, there are still some deep dilemmas that existing laws fail to resolve in the practical application of these rules in China. If there is no further criminal justice reform to solve these dilemmas, the revised criminal evidence rules may not be fully implemented in the criminal justice system and will not become the symbol of modernization and democratization in China's criminal justice, as was expected when the legislation was enacted. In view of this, this article will briefly analyze the deep-seated dilemmas that China's new criminal evidence rules are faced with from four aspects as follows.

2. **Judicial Tradition of Transferring Files**

In theory, after both parties adduce evidence, cross-examine and debate, judges make a decisions about whether to convict and how to sentence based on hearings in court. However, because the link between prosecution file materials and the court has not been severed for a long time, many judges are neither willing nor accustomed to make adjudicate in a public hearing, and they often prefer to make decisions by reviewing the prosecution file materials in writing outside of court. The link between the prosecution file materials and the court is difficult to sever because China has a long judicial tradition with transferring files between the prosecution and the court.

In the inquisitorial system provided in the 1979 CPL (P. R. C), a People's Court substantively reviewed all materials in the case transferred by a People's Procuratorate before opening a court session; this led to the stereotypes of "judgment before trial" and "a highly formalistic court trial". With the advance of trial reform, Article 150 of the 1996 CPL (P. R. C) provides, "a People's Procuratorate can only transfer the bill of prosecution containing clear facts of the crime accused and, a list of evidence and a list of witnesses and duplicates or photos of major evidence attached to it." This meant that the People's Procuratorate did not transfer all materials in the case after 1996. This incomplete pretrial procedure reform still cannot eradicate the phenomenon of "judgment before trial" although it may help decrease a judge's prejudgment to an extent. After all, the People's Court still can arrive at a preliminary conclusion under these procedures. More significantly, it has gradually become the norm that the People's Procuratorate initially transfers all materials in the case before the trial because of the costs of copying. Moreover, Article 365 of the Criminal Procedure Rules for People's Procuratorates provides, "A People's Court shall transfer evidence materials adduced, read out and played in court; and if the People's Procuratorate cannot transfer these materials in court, it shall transfer them within three days after the court announce an adjournment." Obviously, whether reviewing case files before trial or after trial, judges will lose their motivation or interests in hearing evidence at trial when they can access the

prosecution file materials at any time. Unfortunately, when amending the CPL (P. R. C) in 2012, the 5th Session of the Eleventh NPC did not take measures to change the judicial tradition of the transferring-files doctrine; instead, it strengthened that tradition. Specifically, Article 172 of the 2012 CPL (P. R. C) provides that a People's Procuratorate shall transfer the case file and evidence to the People's Court when initiating a public prosecution.

Although the file transfer from a People's Procuratorate to a People's Court is helpful for the defense party to know prosecution evidence to prepare for his or her defense, it may create obstacles to implement the new criminal evidence rules. This is because if the People's Procuratorate transfers the case files to the People's Court, not a judge's direct impression on the adducing evidence, cross-examination, and debate, but his or her written review of the case files will likely have substantial influence upon the decision. However, if the adducing evidence, cross-examination, and debate between both parties fail to exert a substantial influence on the judgment conclusion, the hearing judges will only care about the correctness of the judgment conclusion and will have no motivation to exclude illegally obtained evidence. Without doubt, the hearing judges will care nothing about whether witnesses, victims, identification or evaluation experts, and criminal investigators can testify in court. Thus, if the hearing judges deem that they can preliminarily make the correct judgment conclusion simply by reviewing the case files, it will be immaterial for them to decide whether to exclude illegally obtained evidence or summon witnesses, victims, identification or evaluation experts, and criminal investigators to testify. Only when the hearing judges are still unable to make an affirmative judgment conclusion through reviewing the case files will they be truly concerned with whether to exclude illegally obtained evidence, or really consider whether it is necessary for them to summon witnesses, victims, identification or evaluation experts, and criminal investigators to testify. Past judicial practice has shown that many judges are generally uninterested in summoning witnesses to testify under the influence of the transferring-files doctrine.

3. The Abuse of Discretionary Power

The correct utilization of discretion is a puzzle in criminal procedure. On the one hand, the generality, abstractness, and ambiguity of legal provisions inevitably offer the judiciary certain discretion. On the other hand, the discretionary power tends to be abused by the judiciary because of the lack of effective oversight. Before the amendment of the CPL (P. R. C) in 2012, the judiciary had almost absolute discretion with respect to evidence rules because they were crude and simple, and it is usually not favorable for suspects and defendants when the judiciary is wielding its discretionary power in a judicial environment that stresses punishment. This may be one of the reasons why witnesses generally do not testify in court and illegally obtained evidence is difficult to exclude. The discretionary power of the judiciary has certainly been weakened with the large-scale modifications of the criminal evidence rules in 2012, but it remains difficult for the new criminal evidence rules to effectively control judicial discretion because of legislative drafting and traditional judicial concepts, among other reasons.

The new criminal evidence rules remain susceptible to judicial abuse. An explicit and concrete evidence rule contributes to a fair trial and restricts a judge's discretion. Although a judge's discretion can be restrained in part with the improvement in functionality in the new criminal evidence rules, the judiciary still has many opportunities to abuse its discretion in criminal trial. For example, according to Article 54 of the 2012 CPL (P. R. C), any physical or documentary evidence that is not gathered under the statutory procedure may be brought into the scope of the exclusionary rule, but it must be based on the premise that this evidence may seriously affect justice. However, existing laws do not define the standard under which to evaluate what "may seriously affect justice", leaving it to the judge to decide. On the basis of Article 56 of the 2012 CPL (P. R. C), the judge shall conduct an investigation procedure regarding the legality of evidence collection, but the premise is that the defense party must offer the court relevant materials in this process. Although this provision may help to avoid unnecessary

delay in criminal procedure objectively, it may also leave room for abuse of discretion when the court decides whether to conduct the special investigation procedure; if the court holds that relevant clues or materials offered by the defense have no value in showing or proving illegal investigations, it is entirely possible for the court to refuse to initiate an investigation regarding the legality of state evidence under this pretext. In light of Article 187,§1 of the 2012 CPL (P. R. C), the premise of the compulsory obligation to testify is to meet the following three requirements simultaneously: (1) each party may raise any objection to a witness statement; (2) a witness statement has a material effect on the conviction and sentencing of a case; and (3) a People's Court deems it is necessary for a witness to testify in court. This means that whether a witness testifies depends almost entirely on the judge's discretion and has no material connection with whether a defendant's right to cross-examine or a fair trial is infringed because a judge can refuse to notify a witness to testify in court as long as he or she deems that a witness's testimony has no significant influence over conviction and sentencing or it is otherwise not necessary. Likewise, according to Article 187,§3 of the 2012 CPL (P. R. C), whether an identification or evaluation expert testifies depends on whether a judge deems it necessary, with no consideration for a fair trial or a defendant's right to cross-examine. Because a judge has arbitrary discretionary power to determine whether a witness or an expert testifies, absurd results may follow. For example, although the defense party has persuaded a witness to testify in court, a judge may show impatience because he or she is afraid that allowing the testimony may result in the decline of judicial efficiency, and not allow the testimony. Given that Article 191 of the 2012 CPL (P. R. C) roughly provides for an out-of-court investigation, a collegial panel will have discretionary power without restriction on the conditions, scope, and procedure of the out-of-court investigation, such as whether both parties must have access to the investigation (including being on the scene) or whether evidence acquired through this investigation is subject to cross-examination.

Conversely, without the rule of admissibility, a People's Procuratorate has

many chances to abuse its discretion when using evidence. Because the 2012 CPL (P. R. C) does not provide for the hearsay rule and particularly the rule of admissibility, the People's Procuratorate has almost discretionary power without restriction on whether and how to present evidence obtained by an investigative organization during the court trial. In light of the natural tendency to avoid disadvantages, it is illogical to assume that the People's Procuratorate will adopt measures that are beneficial to a defendant when adducing evidence. If the People's Procuratorate can freely choose the means of adducing evidence, it will inevitably exert a negative influence on the implementation of existing criminal evidence rules. For example, the audio and video recording system provided by Article 121 of the 2012 CPL (P. R. C) would theoretically contribute to the implementation of the exclusionary rule without question because the system is based on modern technology and it can realize the synchronization of the content and process of the interrogation. In other words, the audio and video recording materials can reconstruct the entire process of an investigative interrogation. Obviously, these materials will be helpful in proving coercion and other illegal interrogations. However, if the People's Procuratorate continues to use the tactic of selectively playing the audio and video recordings in court, the advantages of the audio and video recording system will disappear. If the People's Procuratorate can decide by itself how to use the audio and video recordings, it is impossible to assume that the public prosecutors will present audio and video recordings that directly prove coercion and other unlawful interrogations in court. In other words, they will present those recordings in court only when the public prosecutors determine that the audio and video recordings “have no problems”, i.e., that they prove the legality of the interrogation process. The selective playing of the People's Procuratorate fails to fully reconstruct the investigative interrogation and offer the defense a chance or basis to prove coercion and other unlawful interrogations; instead, it becomes a tool used for proving the legality of prosecution evidence, for refuting a defendant’s denial of his confession and for defending against a defense counsel’s application to exclude illegally obtained

evidence. Reports of how the People's Procuratorate refutes a defendant's denial of his confession and refutes a defense counsel's application to exclude illegally obtained evidence by playing the audio and video recordings are everywhere, but there has not been a successful case where the defense has prompted a People's Court to exclude illegally obtained prosecution evidence with the help of the audio and video recordings thus far.

4. Excessive Emphasis on the Truth of a Case Fact

To correctly solve the issue of conviction and sentencing, a judge must regard the ascertained truth in criminal cases as the basis for judgment; otherwise the judge may make an erroneous judgment and harm judicial credibility and violate the lawful rights and interests of people. In view of this, Article 51 of the 2012 CPL (P. R. C) provides that a sentence of the People's Court must be consistent with the truth, and when truth is withheld intentionally, liability shall be investigated. However, under the influence of the ideology of seeking truth from facts and the epistemology of dialectical materialism, as found in the former criminal procedure law, the criminal trial procedure in the 2012 CPL (P. R. C) also puts an excessive emphasis on discovering the truth in a case. For example, to ascertain the truth, Article 50 of the 2012 CPL (P. R. C) provides that judges, prosecutors, and criminal investigators must, under legal procedures, gather various types of evidence that can prove the guilt or innocence of a criminal suspect or defendant and the gravity of the crime. According to Article 186 and 189 of the 2012 CPL (P. R. C), judges may forwardly question a defendant, a witness, or expert during the trial. Article 191 of the 2012 CPL (P. R. C) provides that a People's Court may investigate and verify evidence by crime scene investigation, examination, seizure, impoundment, forensic identification or evaluation, property inquiry, freezing of property, and other measures, if a collegial panel has any doubt about evidence during a court session. In light of Article 243 of the 2012 CPL (P. R. C), when a People's Court discovers that there are any definite errors in findings of fact or application of law in an effective

sentence or ruling of the court, the People's Court may conduct the trial supervision procedures on its own and retry the original case.

Objectively, the preference for truth-seeking does not mean that it is not good for China's judges. After all, the clearer the facts of a case are means the less likely there is an error in the criminal judgment, and the impartiality and authority of the criminal trial will be fully guaranteed. It is unfortunate that the court must be subject to legal restraints when ascertaining criminal facts. Within a specified time and space, the court is not likely to completely ascertain the truth in a case, which means that the facts used as a basis of judgment are only the facts admitted at the legal level and do not necessarily equal the original appearance of criminal facts. Because the court cannot necessarily fully find out the original appearance of criminal facts, why should the judgment of the court be accepted and complied with? Obviously, to make the facts used as a basis of judgment acceptable, the criminal trial must abide by rules that manifest justice. Furthermore, although the court cannot necessarily find out the truth in a case in light of the standards of a fair trial (and sometimes the fair trial even hinders the finding out of the truth), the facts that a court determines in a fair trial are acceptable facts, and judgments based on a fair trial are acceptable and convincing. Conversely, if the court ignores the legitimacy of trial procedure to find out the truth, even if the court can discover the complete truth and make an absolutely correct judgment, the legitimacy and acceptability of the judgment will be damaged. From this perspective, the preference for an excessive emphasis on the truth will inevitably exert an adverse influence on the implementation of criminal evidence rules in China's criminal courts.

If a court excessively emphasizes the truth, it is not necessary, to a certain extent, for the court to summon a witness, a victim, an expert, a criminal investigator, and other relevant persons to testify in court. For example, in the case of the authenticity of a witness's testimony, it is difficult to convey that the witness's statement in court is necessarily more reliable than the witness's statement in the transcript of questioning undertaken by an investigative

authority. The reason a modern state ruled by law stresses that a witness must testify in court is that the primary value of a witness testifying is not about how to find out the truth but about how to protect the defendant's right to cross-examine and, thus, to a fair trial in modern criminal procedure. Although a witness testifying in court objectively contributes to finding out the truth, this is only the incidental function of maintaining a fair trial. We cannot negate the value of witness testimony in maintaining a fair trial because of the reliability of the transcript of questioning. Otherwise, we will be putting the proverbial cart before the horse. Furthermore, the foundation will be laid for a witness testifying in court only when judges are convinced of the value of a witness testifying to protect the fairness of a trial. If judges consider that the only value of a witness testifying is to find out the truth, the necessity of summoning a witness to testify will decline significantly. However, in judicial practice, many judges are accustomed to treating the issue of witness testimony only from the angle of finding out the truth. They deem that a witness testifying is only a legal form as opposed to the authenticity of a witness's testimony, and the final purpose of the witness testifying is to ensure the authenticity of a witness's testimony, otherwise it is not necessary to emphasize the legal form. In other words, if the authenticity of the record of testimony of a witness can be validated, it is not necessary for the court to summon a witness to testify in court. Therefore, during a court trial, many judges would rather make a public prosecutor read out the record of testimony of a witness than summon witnesses to accept the questioning of both parties in court.

Additionally, if a court excessively emphasizes the truth, it will have no motivation to exclude illegally obtained evidence. After all, much illegally obtained evidence objectively would play an important role in seeking the truth and proving criminal facts. In many criminal cases, whether to accept illegally obtained evidence will even directly influence the final outcome of the criminal trial. In practice, many judges will regard illegally obtained evidence for the prosecution as a basis for deciding a case and ignore the impartiality and

legitimacy of prosecution activities as part of respecting the truth and guaranteeing a correct judgment. Even if the court can occasionally exclude illegally obtained evidence, it is difficult to change the final outcome of conviction and sentencing. Only when the court holds that illegally obtained evidence really prevents it from finding out the truth will it actually take into account whether to exclude illegally obtained evidence. That is to say, a court will only determine to exclude illegally obtained evidence only when the defense can present adequate evidence to prove the innocence of a defendant and the prosecution party cannot prove the legality of the evidence for the prosecution. However, because the abilities of the parties to a criminal trial are enormously different, the chance for these conditions to occur simultaneously is slim.

5. Too Low Representation Rate in Criminal Cases

It is beyond doubt that a criminal defense is a highly specialized activity. To obtain good defense, a defendant and his or her defense counsels need experience, skills and legal savvy. Particularly as law is becoming more and more complicated and increasingly difficult to understand, there are increasingly high requirements for criminal defense lawyers for the knowledge of law and legal skills. In modern criminal procedure, although a defendant has the right to defend himself or herself, it is difficult for his or her defense to counter with the prosecution of a powerful procuratorial organization because the vast majority of defendants do not have knowledge of law and defense skills. To fully protect a defendant's right of defense, a modern state ruled by law provides a defense system and gives the defendant the right to retain a defense lawyer. Judicial practice has shown that the right to an attorney contributes to protecting the defendant's lawful interests, realizing procedural justice, and prompting judicial authorities to correctly handle a legal case under the law.

To protect a defendant's right of defense, China's legislature not only provides the defense system in the CPL (P. R. C) but also specifically promulgated the Lawyers Law of the P. R. C (2007 Revision) , which provides practices, rights,

obligations, legal liabilities, and other characteristics of lawyers. In particular, the 2012 CPL obviously enhances the protection of a suspect or defendant's defense right by amending the defense system. For example, Article 33 of the 2012 CPL (P. R. C) provides that a criminal suspect shall have the right to retain a defense counsel from the day when the criminal suspect is interrogated by a criminal investigation authority for the first time or from the day when a compulsory measure is taken against the criminal suspect. According to Article 47 of the 2012 CPL (P. R. C), if a defense counsel believes that a public security authority, a People' Procuratorate, a People's Court or any staff member thereof has impeded his or her exercise of procedural rights, he or she will have the right to file a petition or accusation with the People's Procuratorate at the same level or at the next higher level. The People's Procuratorate shall examine the petition or accusation in a timely manner and, if it is true, notify the authority involved to correct its behaviors. Although China's criminal defense system has seen an immense improvement, the proportion of lawyers being engaged in criminal defense is low because of occupational risk, difficulties in defense, low fees and other reasons. When interviewed by a Legal Daily reporter, Han jia yi, the Secretary-General of the Professional Committee of the National Bar Association Criminal once said, "At present, various statistics indicate that the representation rate in criminal cases does not exceed 30%." In Beijing, where lawyers' practices are the most developed in all of China, the representation rate in criminal cases is even lower than 10 percent.

Apparently, with the lack of lawyers' participation in most criminal cases, even if criminal evidence rules in the 2012 CPL (P. R. C) have observed great progress at the legislative level, they are difficult to implement in judicial practice. Take coercion, the most common illegal investigation in China's judicial practice, for example. In judicial practice, coercion often occurs when a suspect's personal freedom is restricted. If a suspect does not retain a defense lawyer, whether a People's Court excludes illegally obtained evidence is often determined by the suspect himself or herself. However, in most instances, the suspect has no

consciousness and ability to acquire relevant evidence because ignorance of the law. More significantly, even if some suspects can realize the importance of collecting evidence, he or she often fails to keep and conserve evidence that relates to coercion because of the detainment itself. Although some suspects' scars that are the results of coercion can still be kept until court trial, it is difficult for them to clearly explain that these scars were caused by coercion and not by self-mutilation or other reasons before court judges. Moreover, many experienced criminal investigators know how to avoid leaving evidence that relates to coercion during an interrogation. Thus, for a coerced defendant who lacks knowledge of the law, if he or she fails to acquire the help of a defense lawyer, it will be difficult for him or her to persuade the court even to conduct an investigation procedure regarding the legality of evidence collection. Even if the court can occasionally conduct the procedure, the suspect often fails to impel the court to exclude illegally obtained confession before trial because of his or her lack of the knowledge of law and necessary evidence.

6. Conclusion

To make up for the defects of the former CPL in evidence rules and solve the low rate of witness testimony in court, coercion, and other problems, the NPC created large-scale modifications for the criminal evidence rules in 2012 when amending the 1979 CPL (P. R. C) for the second time. The revised criminal evidence rules clearly represent great progress in both legislative techniques and contents of the legislation. However, the legislation and practice of China's criminal evidence law are still beset by some deep dilemmas. If China fails to build a good operating environment for the new criminal evidence rules by further judicial reform, it may be impossible for the new CPL (P. R. C) with high expectations of all sectors of society to overcome the low rate of witness testimony in court, coercion, and other persistent problems.

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