

# The Predicament of Proof in China's Exclusionary Rule

Wang Chao<sup>1</sup> and Yuan Tian<sup>2\*</sup>

<sup>1</sup>College for Criminal Law Science  
Beijing Normal University, China

\*Corresponding author's email: [wangchao@bnu.edu.cn](mailto:wangchao@bnu.edu.cn)

<sup>2</sup> College for Criminal Law Science  
Beijing Normal University, China  
Email: [15617178866@163.com](mailto:15617178866@163.com)

**ABSTRACT----** According to the principle of the distribution of burden of proof, the logical premise that a court excludes illegally obtained evidence for prosecution is either a defense party can prove that a prosecution party has unlawful investigations, or the prosecution party fails to prove the legality of evidence collection. Although the illegal investigations have become a repeated phenomenon, because of the prosecution party's selectivity of proof and the asymmetrical proof between prosecution and defense, an investigation regarding the legality of evidence for the prosecution initiated by the court often fall into the predicament of proof that the court fails to ascertain whether there are illegal investigations. Given that the defense party cannot directly prove the illegal investigations and is difficult to challenge the legality of evidence for the prosecution, it is impossible for the court to exclude illegally obtained evidence in the light of the defense party's application.

**Keywords**----the exclusionary rule; burden of proof; asymmetrical proof; the selectivity of proof

## 1. INTRODUCTION

In recent years, it has become commonplace for investigators to collect evidence by torture and other illegal means. With the continuous reform of China's exclusionary rule, coupled with the growing popularity of the theory of procedural justice and the concept of human rights protection, more and more defendants and their defenders are adopting procedural defense strategies in the court proceedings, requesting the court to exclude evidence obtained by the investigating authorities through torture to extort confessions and other illegal methods. However, in judicial practice, the defense's application for exclusion of illegal evidence is rarely supported by the people's courts.

Although there are many reasons why the implementation effect of China's illegal evidence exclusion rule is far from the system's expectations, such as the mutual cooperation and mutual control relationship among the three organs of the public prosecution and the law, the criminal procedure structure of the assembly line operation, the traditional concept of emphasizing the correctness of the results and neglecting the procedural fairness, etc., in terms of the technical rules of the exclusion of illegal evidence, the proof quagmire of the prosecution and the defense around the issue of the exclusion of illegal evidence is also an important factor. This is because, under the influence of the mechanism for allocating the burden of proof, the logical premise of the court's exclusion of illegal evidence is either that the defense is able to prove the existence of illegal evidence-taking by the prosecution, or that the prosecution is unable to prove the legality of the evidence-taking. However, both of these scenarios rarely occur in the proof dilemma in China's illegal evidence exclusion rules. In a nutshell, despite the illegal evidence collection behavior, but the prosecution by virtue of its own advantage can easily prove the legality of evidence collection, and the defense because of the lack of sufficient evidence, neither can really challenge the legality of the prosecution's evidence, but also the inability to directly prove the existence of illegal evidence collection behavior. And under such circumstances, it is simply impossible for the court to exclude prosecution evidence that is challenged by the defense. The following is a further discussion of the problem of the proof dilemma in China's illegal evidence exclusion rules from two aspects.

## 2. UNPROVABLE ILLEGAL EVIDENCE COLLECTION BEHAVIOR

Theoretically speaking, it is clear that the prosecution should bear the burden of proving the legality of the prosecution's evidence. This is not only an inherent requirement of the principle of the presumption of innocence and the maintenance of procedural justice, but also an objective need to safeguard human rights, promote the rule of law and

maintain equality between prosecution and defense. If the prosecution evidence does not need to be proved by the procuratorial organs to prove its legitimacy, then illegal evidence-gathering behaviors such as extorting confessions by torture will become the magic weapon of the investigating authorities to collect evidence. And in this case, the legitimacy of criminal proceedings will be lost. Despite the fact that the burden of proof in the exclusionary rule is so important, it is regrettable that before June 13, 2010, when the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice jointly issued the "Provisions on a Number of Issues Concerning the Exclusion of Illegal Evidence in Handling Criminal Cases," China's Criminal Procedure Law and its judicial interpretations did not provide for the burden of proof in the rule of exclusion of illegal evidence distribution of the burden of proof in the rules on the exclusion of unlawful evidence. Judicial practice in recent years has shown that trial judges and even public prosecutors have often, in accordance with the principle of "whoever asserts, whoever adduces evidence", ordered the defendant to prove the grounds for retracting his or her confession, or allowed the defendant to bear the burden of proving that the evidence was obtained illegally.

However, judicial practice has proven that it is difficult for the defense to discover, find or fix strong evidence of illegal evidence collection by investigators. In the defense cannot fully prove illegal evidence and its exclusion of the court's lack of constraints on the court, not only the defense's illegal evidence exclusion application is difficult to obtain the court's support, and illegal evidence exclusion of the investigation and hearing procedures are difficult to be activated. In order to avoid preventing the new illegal evidence exclusion rules from becoming illusory as in the past due to unclear allocation of the burden of proof, Article 11 of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Handling Criminal Cases, Article 57 of the Criminal Procedure Law as amended in 2012, and Article 59 of the Criminal Procedure Law as amended in 2018, all explicitly stipulate that procuratorates shall bear the burden of proving the legitimacy of the collection of evidence. responsibility. Although this provision theoretically helps to reduce the burden of proof on the defense, the success rate of the defense's application to exclude illegal evidence has not been improved in the face of the defense's limited ability to adduce evidence.

## 2.1 Limitations on the ability of the defence to present evidence

Theoretically speaking, in the process of applying for the exclusion of illegal evidence, if the defense does not bear any burden of proof, then the legitimate rights and interests of the accused are obviously more likely to be fully protected. However, this will inevitably increase the proportion of "frivolous applications", thereby increasing the burden on the prosecution and even the court, resulting in delays in the proceedings. Because, if the defense in the application for the exclusion of illegal evidence does not have to bear any burden of proof, then, even if the prosecution does not have illegal evidence, the defense in order to strive for its favorable verdict will also hold a fluke mentality to continue to apply for the exclusion of illegal evidence. In order to avoid the failure of the prosecution, the prosecution had to constantly prove the legality of the evidence collection behavior. The court also needs to constantly launch a special investigation, in order to confirm the prosecution evidence has the legitimacy. However, in judicial practice, compared with the prosecution's legal evidence, illegal evidence is, after all, a minority. If the defense is not allowed to bear a certain burden of proof, then it will inevitably lead to many originally do not need to prove the legitimacy of the prosecution evidence is also "forced" into the court for illegal evidence held in the special investigation. The result is bound to be an unnecessary waste of judicial resources and a decline in litigation efficiency.

Perhaps it is based on this consideration that the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Handling Criminal Cases and the revised Criminal Procedure Law not only emphasize that the procuratorial authorities should bear the burden of proving the legality of evidence collection, but also explicitly require that the defense party should also fulfill certain obligations when applying for the exclusion of illegal evidence, i.e., according to the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Handling Criminal Cases Article 6, Article 58(2) of the Criminal Procedure Law as amended in 2018, and Article 96 of the Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China, the defense side, when applying for the exclusion of unlawful evidence of the prosecution, must provide the court with the relevant clues or materials, such as the person, time, place, manner, and content, of the suspected unlawful evidence collection. This means that if the defense does not provide relevant clues or materials in accordance with the above provisions, then the court has the right to refuse to initiate a court investigation on the question of whether there is illegal evidence collection.

Although the above provisions objectively help to reduce the "frivolous applications" of the defense and prevent unnecessary delays in criminal proceedings, in the absence of a fundamental improvement in the defense's ability to obtain evidence, it is difficult for the defense to provide relevant clues or materials such as the person, time, place, manner, content, etc., of the suspected unlawful evidence collection. get. According to Article 96 of the Criminal Procedure Law as amended

in 1996, although lawyers are able to intervene in the investigation stage in advance, the lawyers entrusted to them only have the right to learn about the suspect's suspected crimes, to meet with the suspect in custody, to learn about the case from the suspect, and to provide legal advice, to act on behalf of the suspect in a complaint or indictment, and do not have the right to read the case file or to investigate and obtain evidence. From the judicial practice, in the lawyer cannot read the file, investigation and evidence collection, difficult to meet with criminal suspects, lawyers in the investigation stage is not only difficult to in-depth understanding of the case, but also impossible to find investigators to carry out unlawful evidence collection behavior clues or evidence. In the examination and prosecution stage, although the defense's ability to participate in criminal proceedings has been strengthened, but the defense is still unlikely to find clues or materials of illegal evidence collection. This is mainly reflected in the following three aspects.

First, according to article 37 of the Criminal Procedure Law as amended in 1996, although a defence lawyer enjoys the right to investigate and collect evidence, he or she may collect materials relating to the case from the relevant units or individuals only with their prior consent. If a defense lawyer conducts an investigation and obtains evidence from victims or their close relatives, or from witnesses provided by the victims, the defense lawyer is required not only to obtain their prior consent, but also to obtain permission from the people's procuratorate or the people's court in advance. In the investigation and evidence collection lack of mandatory and the need for judicial approval, defense lawyers are difficult to achieve the desired effect of the investigation. Especially in judicial practice, the public security judicial organs to the investigation and evidence collection behavior of defense lawyers suspected of "criminal law" article 306 "perjury" and arrest, prosecution, trial of defense lawyers has become a common phenomenon and the impact of bad. In order to avoid being prosecuted for perjury, many lawyers will investigate the evidence as "forbidden area" or "minefield" and willing to give up the investigation of evidence, and even because of perjury under article 306 of the criminal law and dare not engage in criminal defense business.

Secondly, in accordance with article 37, paragraph 1, of the Criminal Procedure Law as amended in 1996, although defence lawyers have the right to apply to people's procuratorates and people's courts for the collection and retrieval of evidence or to apply to people's courts for notification of witnesses to appear in court to testify in court, the applications of the defence lawyers are often lost without trace because of a lack of cooperation on the part of the judicial authorities.

Third, according to the provisions of Article 36 of the Criminal Procedure Law as amended in 1996, although defense lawyers have the right to read the files during the examination and prosecution stage, in the case where the scope of the defense lawyers' reading of the files is limited to the litigation documents and technical identification materials of the case, the defense lawyers can neither access to the evidentiary materials of significance for the conviction and sentencing, nor can they discover clues, materials or evidence relating to the unlawful taking of evidence. or evidence. At the trial stage, according to Article 150 of the Criminal Procedure Law as amended in 1996, although the scope of the defense lawyer's perusal of the file has been expanded, the indictment, catalog of evidence, list of witnesses, and copies or photographs of the main evidence that the procuratorate transfers to the court are often the materials that have been filtered through the case handlers and that are capable of proving the facts of the crime. This means that it is not only difficult to find evidence of innocence or mitigating circumstances, but it is also unlikely that defense lawyers will be able to find any clues or materials useful in proving illegal evidence-gathering.

It is worth noting that, in order to address the problems encountered by defense lawyers in the course of criminal defense, such as the difficulty of meeting with, reviewing and obtaining evidence, the Lawyers Law, which was amended and adopted at the thirtieth meeting of the Standing Committee of the Tenth National People's Congress on October 28, 2007, has significantly strengthened the rights of defense lawyers to meet with, review and obtain evidence. For example, under article 33 of the 2007 Lawyers Law, lawyers may meet directly with criminal suspects and defendants during the investigation stage on the basis of their practicing certificates, proof of law firms, and power of attorney or official legal aid letters, without the need for prior authorization from the investigating authorities. Under article 34 of the 2007 Lawyers Law, lawyers may inspect, extract and copy case-related documents and case file materials during the examination and prosecution stage, while they may inspect, extract and copy all case-related materials during the trial stage. Under article 35, paragraph 2, of the 2007 Lawyers Law, lawyers may, by virtue of their practising certificates and proof of their law firms, directly investigate the situation relating to the legal affairs they undertake with the relevant units or individuals, without the need to obtain their consent or the permission of the judicial authorities.

Although these provisions theoretically help defense lawyers to find relevant clues, materials, or evidence of unlawful evidence-gathering acts, in the context of the great controversy in the practical and theoretical circles over the conflict between the Law on Lawyers and the Criminal Procedure Law, the difficulties for defense lawyers to meet with each other, read the files, and investigate and obtain evidence still have not been significantly improved after the implementation of the Law on Lawyers. In the process of revising the Criminal Procedure Law as amended in 1996, although the lawyer

community and the theoretical community had high expectations for the new Criminal Procedure Law, and the Criminal Procedure Law as amended in 2012 and 2018 did make relatively substantial changes to the defense system, such as advancing the time for the defense to participate in the criminal proceedings, expanding the scope of legal aid, and perfecting the right of the defense lawyers to meet with the defenders and to read the files. However, the right to investigate and obtain evidence under Article 41 of the Criminal Procedure Law as amended in 2012 and Article 43 of the Criminal Procedure Law as amended in 2018 still follows exactly the provisions of Article 37 of the Criminal Procedure Law as amended in 1996. Although according to Article 39 of the 2012 Criminal Procedure Law and Article 41 of the 2018 Criminal Procedure Law, the defender has the right to apply to the People's Procuratorate and the People's Court for access to the evidentiary materials collected by the public security organs and the People's Procuratorate during the period of investigation and examination and prosecution that proved that the suspect or defendant was not guilty or was not guilty of a minor offence and had not been submitted, in the absence of safeguards, the application of the defense may not be able to obtain the consent of the procuratorate or the court. Especially in the case where the defender is still unable to be present to supervise the investigative activities, it is still very difficult for the defender to find clues, materials or evidence of unlawful evidence-gathering by virtue of the right to meet with the defendant, the right to read the files and the virtually non-existent right to investigate and obtain evidence.

In addition, where the question of what constitutes relevant clues or materials is left entirely to the subjective judgment of the trial judge, whether or not to initiate the investigative process of excluding illegal evidence will still depend on the will of the court, not on the application of the defense. Further, although the defense can provide relevant clues or materials to the court when applying for the exclusion of illegal evidence, if the court considers that these clues or materials are of no value in discovering or proving the existence of unlawful deposition, it is entirely possible that the court will refuse to initiate the court investigation procedures for the exclusion of illegal evidence on this ground. For example, on April 24, 2012, during the trial of Xie Yalong's bribery case before the Intermediate People's Court of Dandong City, Liaoning Province, even though the defendant described the process of the investigators' extortion of confessions by torture, and the defendant and his defender provided clues in court about the extortion of confessions by torture, including the specific time, place, and perpetrator of the extortion of confessions by torture, and filed a motion to initiate the exclusion of unlawful evidence, the court did not initiate the exclusion of unlawful evidence procedure in court. did not initiate the illegal evidence exclusion procedure in court. One of the judges of the court in an interview with reporters on this issue also made it clear that: "This argument is not new, all the people who come to the court believe that they are wrongly accused, so there must be evidence. If there is no evidence, you can't say that just by your own words." From the cases publicly reported by the media, after the implementation of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases, it has become commonplace for the court to refuse to initiate the court investigation process because the defense is unable to present relevant clues or materials to its satisfaction. In this case, if the defense still want to successfully apply for the exclusion of illegal evidence, then it is bound to be objectively have to bear the burden of proof of the existence of illegal evidence collection behavior of the prosecution. But the problem is that, according to the previous analysis, in the defense cannot fully participate in investigative activities, especially cannot be present to supervise the investigative activities and investigation and evidence collection is difficult, the defense is almost impossible to find strong evidence directly proved that the investigating authorities have illegal evidence collection behavior.

## 2.2 Lack of adequate involvement of lawyers

Criminal defense is undoubtedly a highly specialized activity. To achieve good defense results, it not only requires the defendant and his or her advocate to have rich defense skills or defense experience, but also to have excellent legal literacy. Especially in the case of the law is more and more complex, more and more difficult to understand, the criminal defense of legal expertise and legal skills requirements are also more and more high. In modern criminal proceedings, although the defendant enjoys the right to self-defense, it is difficult for the defendant's defense to compete with the powerful prosecution authorities when the vast majority of defendants do not possess legal expertise and master defense skills. In order to fully protect the defendant's right to defense, the modern rule of law countries do not provide for a perfect defense system, give the defendant the right to hire a defense lawyer. Practice has shown that defence lawyers help defendants exercise their right to defence, which not only helps to safeguard the legitimate interests of the defendant, but also helps to achieve procedural justice and promotes the judicial organs to handle cases in accordance with the law.

In order to fully safeguard the defendant's right to a defence, the Chinese legislature has not only provided for a defence system in the Criminal Procedure Law, but has also specifically enacted a law on lawyers, which contains relatively detailed provisions on the rights and obligations of defence lawyers, professional ethics, and safeguards for their practice. In particular, the Criminal Procedure Law amended in 2012 significantly enhanced the protection of the right to defense of

criminal suspects and defendants by modifying the defense system. Although China's criminal defense system has made significant progress at the legal level, the proportion of Chinese lawyers involved in criminal defense is significantly low due to the high risk of practice, difficulty of defense, and low fees. Han Jiayi, secretary-general of the Criminal Committee of the National Lawyers Association, revealed in an interview with a reporter that "various statistics show that the current rate of defense in criminal cases in China is less than 30%". Other journalists have reported that as the number of criminal cases continues to rise, China's criminal defense rate has slipped from about 30 percent to about 10 percent. In Beijing, where lawyers' business is most developed, the defense rate of lawyers in criminal cases is even less than 10%. According to another survey, in 2009, courts at all levels in Shaanxi province accepted 17,800 criminal cases, lawyers involved in the defense of only 3,349 cases, accounting for 24.4%; the province's lawyers for 1 year for criminal cases per capita is only 0.9, and is a declining trend year by year.

It is obvious that, in the absence of lawyers in most criminal cases, the rule of excluding illegal evidence provided for in China's Criminal Procedure Law is difficult to implement in practice, even though considerable progress has been made at the legislative level. To torture to force confessions, the most common illegal evidence collection behavior as an example. In judicial practice, torture to coerce confessions is usually carried out in the suspect's personal freedom is restricted. In the absence of the involvement of a defense lawyer, the court's ability to exclude an illegal confession often depends on the suspect himself. However, in the vast majority of cases, criminal suspects who lack legal literacy do not have the awareness or ability to retain relevant evidence.

More importantly, even if some criminal suspects are aware of the importance of collecting evidence, they are often unable to fix and preserve evidence of forced confessions in a timely manner because they are detained. Although some criminal suspects still retain the scars on their bodies from the torture, it is difficult for them to make it clear in front of the trial judge that the scars must have been caused by the torture and not by other reasons (e.g., self-inflicted injuries, etc.). Moreover, many experienced investigators know very well how to avoid leaving evidence of coerced confessions during the interrogation process. Therefore, for a defendant who has been coerced into making a confession and lacks legal expertise, it is very difficult for him to persuade the court to initiate the illegal evidence exclusion investigation procedure without the participation of a defense lawyer. Even if the court is occasionally able to initiate illegal evidence exclusion investigation procedures, he may not be able to persuade the court to exclude illegal pre-trial confessions because he lacks the legal expertise and evidence necessary to do so. Beijing, a lawyer specializing in the defense of death penalty cases in an interview with the reporter has made it clear that the torture of confessions, a persistent problem for many years has been prohibited, the reason is that the defendant cannot prove its existence, that is, most of the time, the defendant is simply unable to provide, and is unlikely to provide the illegal evidence of the person, time, place, manner, content and other relevant clues or evidence. This is because, firstly, no police officer will take the initiative to tell you his name before beating you; secondly, some defendants who have been detained off-site for many days cannot tell you the time and place of the interrogation in a dark room; thirdly, after adopting a variety of disguised means of coercing confessions by means of torture such as deprivation of sleep, deprivation of food, and exposure to bright light, defendants are unable to provide information about the manner and content of the coercion of the confessions for the court to accept.

### 3. DIFFICULTY IN CHALLENGING PROSECUTION EVIDENCE

According to the general principles of proof in criminal proceedings, if the defense fails or is unable to bear its burden of proof after filing an application to exclude illegal evidence, then the defense's application will be rejected by the court. In this case, even if the prosecution does not respond to the defense's application, it does not affect the admissibility of the prosecution's evidence. However, if the defense is able to fulfill the corresponding burden of proof after filing the application for exclusion of illegal evidence, then the prosecution evidence will face the risk of being excluded. In order to avoid the prosecution's evidence being recognized as illegal evidence and thus being excluded by the court, it is necessary for the prosecution to prove the legality of the prosecution's evidence. China's illegal evidence exclusion rules, as long as the defense can be required to prove the existence of illegal forensic behavior of the relevant clues, materials or evidence, the court is obliged to start the investigation of illegal evidence exclusion procedures, and the prosecution should come up with evidence to prove the legality of evidence collection. Since the implementation of the "provisions on handling criminal cases to exclude illegal evidence of a number of issues", with the establishment of illegal evidence exclusion rules to prove the allocation of responsibility mechanism as well as the weakening of the judge's discretionary power, the court initiated the illegal evidence exclusion of the investigation process of the case began to gradually increase up. Although the defense's application for the exclusion of illegal evidence has received increasing attention from the courts, the legality of the prosecution's evidence is difficult to substantively challenge under the current conditions.

### 3.1 Diversity of avenues of proof for the prosecution

According to article 7 of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases, when both the prosecution and the defense are in doubt about the legality of the acquisition of a confession prior to the trial, the means by which the public prosecutor proves the legality of the acquisition of a confession include not only providing the court with transcripts of the interrogation, audio-visual recordings and explanatory materials stamped with the official seal but also submitting a request to the court to notify the person who conducted the interrogation or any other person who was present in the courtroom to testify in the courtroom. The Criminal Procedure Law, as amended in 2012 and 2018, also makes special provisions on the court investigation procedures for illegal evidence. Although the court investigation procedures for illegal evidence provided for in China's Criminal Procedure Law and its judicial interpretations are theoretically helpful in proving the existence of unlawful evidence-gathering behaviors such as extorting confessions through torture, in judicial practice, court investigations of pre-trial statements by trial judges are often merely a formality, making it difficult to truly ascertain the existence of unlawful evidence-gathering behaviors such as extorting confessions through torture.

For a long time, in the absence in China of the right to be present during interrogation by a defence lawyer, a mechanism for separating investigation from detention, and a system of simultaneous recording and video-recording of the entire process, interrogation transcripts are usually the result of clandestine and unilateral production by investigators. This means that, regardless of whether or not the investigators have extorted confessions through torture and other illegal evidence-gathering behaviors, the interrogation transcripts usually have the words "I have read the above transcripts, and what I have said is the same as what I have said, and it is true," as well as the suspect's signature, which ensures that the interrogation transcripts have an irrefutable and legal appearance. Although a large number of false cases have repeatedly proved that the legal appearance of the interrogation transcripts does not mean that the legitimacy of the interrogation process and the interrogation transcripts record the authenticity and reliability of the content, but in China does not provide for hearsay rules of evidence, the interrogation transcripts have a natural ability to evidence, resulting in the interrogation transcripts without the qualification of the evidence can be examined directly into the courtroom, the prosecution and defense as the object of evidence and cross-examination. The object of proof and cross-examination. In the interrogation transcripts have the legal appearance of the case, the defense is difficult to the legality of the interrogation process to carry out effective questioning and debate. Moreover, the procedural issue of whether the illegal confession is excluded will inevitably be submerged in the question of whether the interrogation transcript is true and reliable, and even transformed into the substantive issue of whether the defendant's criminal facts have been proved. And under such circumstances, it is difficult for the court to firmly exclude illegal confessions that can prove the facts of the crime. Similar to the interrogation transcripts, in the absence of hearsay rules in China, the "situation statement" produced by the investigating authorities and aimed at proving that the investigators did not use torture to extract confessions and other unlawful evidence has developed into another killer application for the public prosecutors to deal with the defendants' retracted confessions or the defense's application for exclusion of unlawful evidence.

Obviously, in the "situation statement" and interrogation transcripts of the double protection, coupled with the defense would have been very difficult to collect by virtue of the existing conditions to be able to prove the existence of torture confession and other illegal acts of evidence, the public prosecutor in the court by virtue of the investigating authorities to provide written materials are often sufficient to deal with the defense on the legitimacy of evidence collection Challenge, and therefore neither the motivation nor the need to the court to the interrogation of other people present or other witnesses and directly to the court to notify the interrogator to testify. Moreover, in the interrogators and other relevant persons with the investigating authorities or the end of the criminal proceedings, even if they can testify in court, it is unlikely to expect that they can directly prove the court of torture to extract confessions and other unlawful evidence collection behavior. The defense lacks sufficient understanding of the interrogation process and the defendant's lack of questioning and debating skills, the defense cannot challenge the legality of the prosecution's evidence simply by questioning the interrogators or other relevant persons in court. In his interpretation of Xie Yalong's case, Xu Lanting, a well-known lawyer, once clearly stated: "According to the regulations, when the court conducts an investigation into the extortion of confessions by torture, it can notify the interrogators and other people present during the interrogation to testify in court. However, these people are mostly legal professionals with experience and knowledge in dealing with questions from all parties in the courtroom, and it is difficult for the defendant and his or her defense to discover evidence of extorted confessions through questioning them." This may be in judicial practice, we often see investigators testify in court only for the prosecution to prove the legality of evidence collection is favorable, but does not help the court to exclude illegal evidence of an important reason.

In addition, it is worth noting that although both the prosecution and the defense have the right to apply to the court for investigators or other witnesses to testify in court, the defense's application is rarely supported by the court. For example,

in the Xie Yalong bribery trial, defense lawyers to appear in the trial of 24 witnesses, none of them were present at the trial site. In sharp contrast, the prosecuting authorities through the investigators testified in court to refute the defendant retracted the confession and the defense of illegal evidence exclusion application cases have been reported. Similar to the defense to apply for investigators to testify difficult, when the defense to the court to apply for scar identification, in order to identify the defendant's body scars and torture to force confessions whether there is a causal relationship, often also not the court's permission. For example, in the Xie Yalong bribery case, although the defense lawyers submitted in court, "injury identification application", requesting Xie Yalong left eardrum and arrhythmia for injury identification, but the Dandong Intermediate People's Court held that the prosecutor's office to submit eight written materials to prove that the defendant Xie Yalong did not suffer from torture to force confessions, so the defendant Xie Yalong and the defense of the defendant Xie Yalong and the torture to force confession and the request for injury identification. Therefore, the opinions of the defendant Xie Yalong and his defense that Xie Yalong was tortured to make a confession and that he requested an injury appraisal were not accepted.

Theoretically speaking, China in 2005 began to gradually implement the whole audio-video recording system may help to solve the real mystery of the existence of torture to extort confessions and other illegal evidence collection behavior. After all, built on the basis of modern science and technology, the whole audio-video recording with its interrogation process synchronization and comprehensive interrogation content can be relatively intuitive reproduction of the whole process of investigation and interrogation, and then prove that the investigators whether or not there is torture to extract confessions and other illegal forensic behavior. However, if the procuratorial organs continue to adopt selective broadcast audio and video recording strategy, then the superiority of the whole audio and video recording system will be gone. This is because, in the procuratorial organs to decide how to use the whole audio-video recording information, the public prosecutor is unlikely to submit to the court to prove the existence of torture to extract confessions and other unlawful acts of evidence recording. That is to say, the public prosecutor will only submit to the court the audio and video recordings that have been examined by the prosecutor to ensure that there is "no problem", i.e., that they can prove that the interrogation procedure is lawful. This means that the prosecution's selective broadcast not only can not be completely true to reproduce the whole process of investigation and interrogation, and thus provide the defense with the opportunity to prove that torture and other illegal evidence collection behavior and the basis, and on the contrary, completely reduced to the prosecution to prove the legality of the prosecution's evidence as well as the court to deal with the defendant retracted confessions, the defense to apply for the exclusion of illegal evidence tool. It is because of the prosecution in the court selective use of audio-video recording, we can often see in the media how the prosecution use full audio-video recording to refute the defendant to retract the confession, the defense of illegal evidence exclusion application of news reports in this regard, and so far has not yet been found that the defense can make use of the full audio-video recording to prompt the court to exclude the prosecution's unlawful evidence of the success of the case.

### 3.2 Remediability of illegal evidence

Perhaps even more disappointing to the defense is the fact that not only can the procuratorial authorities easily prove the legality of evidence-gathering by virtue of their strong recourse, but when prosecution evidence is at risk of being excluded, they can also take appropriate remedial measures to amend the illegal evidence that has been challenged by the defense, thus effectively avoiding the exclusion of the prosecution evidence by the court. According to Article 14 of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases, although the scope of application of China's rules on the exclusion of illegal evidence has been expanded from illegal verbal evidence to include physical and documentary evidence, the court's exclusion of illegal physical or documentary evidence requires not only that the procedures used by the investigating authorities and procuratorate for the collection of physical or documentary evidence are clearly in violation of the law and likely to affect a fair trial, but also that the procuratorate be unable to make corrections or reasonable explanations for illegal physical or documentary evidence. In other words, in the course of a court trial, if the court is able to determine that the physical or documentary evidence submitted by the procuratorial authorities is unlawful, the court will not immediately exclude the unlawful physical or documentary evidence, but will allow the procuratorial authorities to make corrections or provide reasonable explanations. Obviously, it is very easy for the procuratorial authorities to make corrections to illegal material or documentary evidence when they have the power of investigation and the power to return it for supplementary investigation. After the implementation of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases, we have not yet found that the courts have excluded illegal physical or documentary evidence, which seems to validate this point from one side.

As opposed to the illegal taking of evidence or the correction of documentary evidence, the procuratorial authorities are more accustomed to applying for an adjournment of the trial to remedy the legality of the prosecution's evidence.

According to Article 165 of the Criminal Procedure Law as amended in 1996, Article 198 of the Criminal Procedure Law as amended in 2012, Article 204 of the Criminal Procedure Law as amended in 2018, and Article 7(1) of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases, if the public prosecutor is unable to prove the legitimacy of the prosecution's evidence in the courtroom, he or she can suggest to the court that the trial be adjourned in order to add new evidence to prove the legitimacy of the prosecution's evidence. hearing in order to add new evidence to prove the legality of the prosecution's evidence. Moreover, it is worth noting that, according to the provisions of Article 9 of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases, although both the prosecution and defense have the right to apply for an adjournment of the trial in the course of the court hearing, when the public prosecutor suggests an adjournment because of the need to supplement the investigation, the court must agree to the adjournment without enjoying any discretion, and when the defense applies for notification of the interrogator, the other people who were present at the time of the interrogation or the presence of Other witnesses to the court, the court may adjourn the trial only if deemed necessary. In the past two years of illegal evidence exclusion rules practice has proved that the court agreed to adjourn the trial because of the defense's application is not rare, but the application for adjournment of the trial has become the usual way of the procuratorial authorities to deal with illegal evidence exclusion investigation. From the actual effect, in the resumption of the court hearing, no matter which way the procuratorial authorities, such as notification of investigators or relevant personnel to testify in court, issued by the investigative authorities to prove that there is no unlawful evidence collection behavior of the situation, the court played the whole audio-video recording, etc., the public prosecutor on the collection of legal evidence of the opinion in the vast majority of cases will be adopted by the court, and the defense's application for the exclusion of unlawful evidence rarely The defense's application for exclusion of illegal evidence is seldom supported by the court.

In addition, in individual cases, the procuratorial organs will also be excluded because of the court of first instance prosecution evidence and through the second instance of protest to re-prove the legitimacy of the prosecution evidence. This was hailed by the media as the country's first case of illegal evidence exclusion and by the theory of the case of bribery in Ningbo Zhang Guoxi fully embodied. To summarize, in the case of Zhang Guoxi, the court of first instance for lack of evidence as the guilty confession before the trial as the basis for the case. After the prosecuting authorities filed a protest, the court of second instance in the final judgment, but pointed out that: "during the second trial, the prosecuting authorities to submit the bribe giver Zhou Liang, Shi Jiandang to testify in court, submitted the bribe giver Shi Jiandang synchronized interrogation video, Zhang Guoxi synchronized interrogation video, as well as the investigators on the legitimacy of the interrogation process. The collegial court, the court prosecutor, the defense jointly watched the synchronous interrogation video, confirmed that the source of clues in this case is normal, the investigating authorities are based on the Shi Jiandang's account of the investigation of ZhangGuoXi, ZhangGuoXi small area of subcutaneous bruises on the right upper arm, skin scratches 2cm is not the result of torture to force confessions. Zhang Guoxi did not make a confession of guilt under torture."

#### 4. CONCLUSION

The mechanism for allocating the burden of proof is a core element that relates to whether the rule of exclusion of illegal evidence can be implemented. In terms of the general principle of burden of proof allocation, if the defense bears the burden of proving the illegality of the evidence, then whether the court excludes illegal evidence will depend on whether the defense can prove the prosecution's unlawful evidence collection; if the prosecution bears the burden of proving the legality of the evidence, then whether the court excludes illegal evidence will depend on whether the prosecution can prove the legality of the evidence collection. Prior to China's 2010 reform of the illegal evidence exclusion rules, the Chinese Criminal Procedure Law and its judicial interpretations did not provide for the issue of the burden of proof in the illegal evidence exclusion rules, resulting in the defense having to objectively bear the burden of proving the illegal evidence collection behavior. However, in the defense cannot participate in criminal investigation activities and evidence collection ability is very limited, the defense is simply impossible to prove that the investigating authorities of illegal evidence collection behavior. This is China's criminal justice practice illegal evidence collection behavior is common and the prosecution illegal evidence cannot be excluded an important reason.

It is undeniable that with the reform of China's illegal evidence exclusion rules, the burden of proof on the defense has been reduced. However, given the closed nature of investigative activities and the lack of fundamental improvement in the defense's ability to obtain evidence, it is not only difficult for the defense to submit clues, materials or evidence related to illegal evidence collection to the satisfaction of the court, but it is also still unlikely to directly prove that the investigating authorities have committed illegal evidence collection. Even if the court agrees with the defense application to start the investigation of illegal evidence, the defense is difficult to expect the court can successfully exclude the prosecution's illegal

evidence. This is because it is not difficult for the powerful prosecution to fulfill its burden of proving the legality of the evidence when there are various means of proof and remedies are readily available. Judicial practice has repeatedly proved, in the defense and evidence collection opportunities and evidence collection ability is very limited and have to rely too much on questioning or debate skills, no matter which way the prosecution to prove the legality of evidence collection, the legality of the prosecution's evidence is actually difficult to be challenged substantively. This means that, in the prosecution by virtue of the strong public power has to fulfill its responsibility to prove the case, if the defense still insisted on the court to exclude the prosecution's illegal evidence, then it is bound to come up with more persuasive clues or evidence is likely to win the court's support. And this is too weak for the defense is like fishing for the moon. It is because of the prosecution and defense of the power ratio is too disparate, whether before or after the reform, illegal evidence exclusion rules in judicial practice are in name only in the embarrassing situation, and cannot be expected to become a curb on torture confession and other illegal acts of evidence as a sharp weapon.

Although the defense's illegal evidence exclusion application often because of the prosecution's strong response and can't get the court's support, but the prosecution's evidence in the end has the legitimacy or in the end whether there is illegal evidence collection behavior of the court, in fact, is still in a state of suspense. On the one hand, the court dared to reject the defense's illegal evidence exclusion application and adopt the prosecution's opinion, not because there is no illegal evidence, but the prosecution and defense in the investigation process of illegal evidence exclusion of evidence to prove that the power of the results of the asymmetry. Further, relative to the defense because of the inability to directly collect persuasive evidence and forced to show the oral argument, the court in the process of investigation of illegal evidence exclusion naturally rely more on the prosecution to submit a variety of evidence. On the other hand, although the procuratorial organs relative to the defense has incomparable evidence, but this does not mean that the procuratorial organs to the court to submit a variety of evidence must be able to rule out the reasonable doubt on the illegal evidence collection behavior. For example, in the case of interrogation transcripts made entirely by investigators secretly and unilaterally, it is inevitable that people have doubts about the legality and authenticity of the pre-trial confession of guilt; in the case of investigative and procuratorial organs selectively applying the system of full audio-visual recording, people have reason to believe that there is no synchronized audio-visual recording of interrogation activities or audio-visual recordings not played in court may hide the secret of coercing confessions under torture; for the Investigative organs issued to prove that there is no illegal evidence collection behavior of the "situation statement" and investigators in the court of law "self-certification", people also can not eliminate the illegal evidence collection behavior of doubt; and so on. Perhaps it is because of the existence of illegal evidence is a difficult to find out the muddled account, so the court ruled in the negative defense to exclude illegal evidence of the opinion, the adoption of the prosecution's evidence is often to take a more ambiguous way of expression. In order to avoid causing trouble, some courts simply in the verdict of the defendant guilty based on the way to take evasive, not on whether there is illegal evidence and whether to exclude illegal evidence of this issue to make any statement.

From this point of view, the asymmetric proof of the prosecution and defense and the prosecution's selective proof of the result is inevitable, the court's illegal evidence exclusion investigation procedures into the proof of the existence of unlawful evidence cannot really find out in the predicament. In this proof of the dilemma, although the defense is eager to identify the prosecution's illegal forensics, but in the case of limited forensic capacity, the defense can only hope that the prosecution is unable to prove the legitimacy of the prosecution's evidence; and although the prosecution has the ability to ascertain the existence of illegal forensics investigating authorities, but based on the need to prosecute the function of the prosecuting authority even if there is an illegal forensics, the procuratorate will also try to cover up the investigating authority's illegal forensics. Illegal evidence collection behavior of the investigating authorities. And in the defense lack of strong evidence and the prosecution can provide appropriate evidence to explain or prove that the prosecution evidence is legal, coupled with the prosecution enjoys the power to investigate crimes and supervise the criminal trial, it is difficult to expect the court at the risk of offending the prosecution and exclude the prosecution evidence challenged by the defense. Therefore, if we do not solve the above problem of illegal evidence exclusion rules, even if the supreme people's court and the supreme people's procuratorate through the judicial interpretation of the further refinement of the illegal evidence exclusion rules, it is difficult to avoid the illegal evidence exclusion rules to repeat the mistake of the name exists in practice.

## 5. REFERENCES

1. Wang Chao, Research on the Police Testimony System, People's Public Security University of China Press, 2006 edition.

- 2.Fan Chongyi, Study on the Implementation Problems and Countermeasures of the Criminal Procedure Law, People's Public Security University of China Press, 2001 edition.
- 3.Sheng Lang (Ed.), Interpretation of the Criminal Procedure Law of the People's Republic of China (revised version), Beijing: Law Press, 2012.
- 4.Wang Chao, the Utopia of Excluding Illegally Obtained Evidence, Beijing: Law Press, 2014.
- 5.Chen Shixing, The Existence of Perjury by Lawyers Makes Criminal Defense a Formality, Nanfang Daily, July 29, 2011.
- 6.Zhang Youyi, Criminal Defense Lawyers Face Six Major Difficulties in Practice, Legal Daily, January 6, 2008.
- 7.Zhang Liang, Declaration slogan-style lawyers' rights implementation is very difficult), Legal Daily, December 30, 2009.
- 8.Wu Weimin and Seed Jinghua, More than 100 legal celebrities debate the environment for lawyers to practice law), Democracy and Legal System Times, No.1, 2010.
- 9.Li Xin, Xie Yalong Retracts Confession in Court, Wants to Get His Name Right, Beijing Morning Post, April 25, 2012.
- 10.Xu Hui, When did the court start the illegal evidence exclusion procedure, Shanghai Rule of Law Daily, April 27, 2012.
- 11.Zhang Lei, Xie Yalong Says He Was Forced to Confess Under Torture, Prosecution Denies It, Beijing News, April 25, 2012.
- 12.Li Na, Defense Obstruction of Testimony Ties the Hands of Criminal Defense Attorneys, Legal Daily, August 8, 2011.
- 13.Li Weiwei and Qiu Yuanyuan, Criminal Defense Only 20% of Adults Hire Lawyers, Legal Daily, October 20, 2005.
- 14.Huang Xiuli, Less than 10% of Criminal Cases Defended by Lawyers", Beijing Daily, August 29, 2005.
- 15.Li Yuanfang, Amendment to the Criminal Procedure Law Can Help Lawyers Break the "Three Difficulties", China Business News, September 16, 2011.
- 16.Chen Hongwei,The Reasoning behind Criminal Confessions, Legal System and News, No.7, 2010.
- 17.Yang Ming and Zhang Hailin, Illegal Evidence Exclusion: Troublesome Beginning, Oriental Outlook Weekly, No.48, 2010.
- 18.Wang Fan and Wang Hong, Xie Yalong's confessions coerced by torture? It's Hard to Prove, Legal Evening News, April 25, 2012.
- 19.Zhu Youyou and Chen Jiawei, China's First Case of Illegal Evidence Exclusion Suffers Great Reversal in Final Trial, Rule of Law Weekend, July 25, 2012.