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FOREWORD BY EDITOR-IN-CHIEF
Prof. (Dr.) Yubaraj Sangroula

FEATURE ARTICLE

China South Asia Connectivity:
Reflections on Benefits of OBOR in
Nepal from International Law
Perspective
Prof. (Dr.) Yubaraj Sangroula

ARTICLES

Tax Implications of Brexit –The Road
Ahead
Dr. Kannal DP Singh

Maritime Threats to the South and
Southeast Asia: Scope for a Regional
Agreement
Mr. Utpal Kumar Raba & Dr. Raju, K. D.

An Overview on Climate Change
Displacement: Exploring New Principles
and Frameworks for Funding
Ashna Singh K

“Corruption” in Development Grants
and Aids: An Impediment to Sustainable
Development Initiatives
Upma Gautam & Deeksha Bajpai Tewari

Arrest on Reasonable Suspicion and
Credible Information: Policy and
Practice in Bangladesh
Hussain Mohmmad Fazlul Bari

Assessing on Female Criminality: A Case
Study of Varanasi District Jail
Dr. Bibha Tripathi

Post-Earthquake Resurrection:
Jurisprudential Diagnosis from the
Standpoint of the Earthquake Victims
Anil Kumar Shrestha

Using the Unprecedented Nuclear Weapons
Advisory Opinion as Precedent in the
Marshall Islands Cases
Pallavi Kisbore

The UN System and the Non-Governmental
Organisations
Pradeep Pathak

The Implementation of the International
Covenant on Civil and Political Rights in
China’s Judicial System: Perspectives on
Adoption of Exclusionary Rule in China
SUN Xu

Private Property Rights versus Eminent
Domain in Nepal
A reference to road widening drive in the
Kathmandu valley
Dev Sunar

Understanding the quintessence of Clinical
Legal Education: Nepalese Experience
Gyanu Gautam



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The Implementation of the International Covenant on Civil and Political Rights in China's Judicial System: Perspectives on Adoption of Exclusionary Rule in China

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Abstract

China has signed the 1966 International Covenant on Civil and Political Rights (ICCPR)¹ on the date of October 5, 1998.² Though awaiting ratification of the ICCPR, China as a party to the 1969 Vienna Convention on the Law of Treaties (VCLT),³ has adopted considerable number of measures to live up to the spirit and purpose of the ICCPR in accordance with Article 18 of the VCLT. The recent evidence of this is China's effort to promote in-depth judicial reform. This essay critically focuses on the newly amended criminal procedure law, especially the rule on exclusion of illegally obtained evidence.

Exclusionary Rule under International Law

Exclusionary rule under international law refers to the obligation of States to refrain from admitting any evidence acquired by torture or other illegal means amounting to cruel, inhuman or degrading treatment.⁴ Though explicitly provided by the 1987 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁵ this rule has been further provided implicitly by the ICCPR as well. Article 14 of the ICCPR guarantees the right to equality and fair trial before the courts. The Human Rights Committee (HRC), recognized- by many scholars and institutions including International Court of Justice (ICJ) as

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¹ *International Covenant on Civil and Political Rights*, 999 UNTS 171, adopted on 16 December 1966).

² Available at <https://treaties.un.org/p. s/showDetails.aspx?objid=0800000280004bf5&clang=en>, accessed on 12 May 2017.

³ *Vienna Convention on the Law of the Treaties*, 1155 UNTS 331, adopted on 23 May 1969, entered into force 27 January 1980.

⁴ Tobias Thienel, 'The Admissibility of Evidence Obtained by Torture under International Law', vol. 2, *European Journal of International Law* p. 349, 2006, p. 350.

⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85, adopted on 10 December 1984), art 15.

well- as an authoritative interpreter⁶ of the ICCPR, has repeatedly pointed out that the right to fair trial stipulated by Article 14 of the Covenant is at the heart of all the human rights.⁷

In its General Comment No. 24 of 1994, HRC has incorporated protection against torture and has provisioned for the guarantee of right to fair trial into preemptive norms of ICCPR. Thus reservation of provisions relating to these rights will be incompatible with the object and purpose of the Covenant.⁸ Later in the year 2007, HRC further reiterated the same wordings of General Comment No. 24 in General Comment No. 32 as that “a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant.”⁹ Though rights stipulated in Article 14 themselves are not of non-derogable nature as those of Article 4 of the Covenant, these rights will indirectly indicate their preemptive nature when read in conjunction with other rights. Indeed, alike HRC has clarified in its General Comment, evidence gathered through torture or cruel treatment in violation of non-derogable rights of Article 7 of the Covenant should never be admissible.¹⁰ It is thus to pursue the object and purpose of the ICCPR that statements or confessions obtained illegally should be treated with great caution.

The VCLT requires States to act in good faith¹¹ and to refrain from conducts that may defect the object and purpose of a given treaty before the treaty’s entry into force for that State right after the date of its signature.¹² Therefore, China should not defect object and purpose of the ICCPR; for it, emphasis has been put on the exclusion of illegal evidence so as to serve this end.

Adoption of the Exclusionary Rule in 2012 Amendment of China’s Criminal Procedure Law

One of the most significant signs of China’s effort to realize this object and purpose of ICCPR is China’s amendment to the Criminal Procedure Law (CPL), where the rule of exclusion of illegally acquired evidence¹³ has been adopted. The

⁶ *Case Concerning Ahmadou Sadio Diallo, Guinea v. Congo*, Merits, 2010, ICJ Rep, p. 639.

⁷ UN Human Rights Committee (HRC), *General Comment No. 32, art 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, available at <http://www.refworld.org/docid/478b2b2f2.html>, accessed on 11th May 2017.

⁸ UN Human Rights Committee, *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under art 41*, 4 November 1994, CCPR/C/21/Rev.1/Add.6, para. 8, available at <http://www.refworld.org/docid/453883fc11.html>, accessed on 11th May 2017.

⁹ *General Comment 32* (n 7), para. 5.

¹⁰ *Ibid*, para. 6.

¹¹ See *Vienna Conventions on Law of Treaties*, preamble & art 26.

¹² *Ibid*, art 18.

¹³ *Criminal Procedure Law of the People’s Republic of China (2012 Amendment)*, 14 March 2012, China, art 54.

latest amendment of the CPL is an indication of China's faithful implementation of obligations under the ICCPR: in which core rights of the ICCPR are being transformed into domestic legislation of China. There is no explicit provision in the Constitution of China concerning how international conventions and treaties should be applied internally. However, ensuring direct application of international conventions in certain fields of private law as well as endeavoring transformation of international rules into domestic laws is commonly practiced.¹⁴ For example, in the UK, any of a treaty comes into effect only after Parliament endorses to adopt it by passing a bill in relation.¹⁵ In China, the mode adopted for the purpose is transformation of international law into municipal law; and it has been evidenced by the amendments of laws into large scale prior to China's entry into the World Trade Organization.¹⁶

General Provisions of the CPL and its Amendments

The rules of evidence set by the earliest CPL of 1979¹⁷ have roughly the seven provisions. The issues of evidence were nearly overlooked again in the CPL Revision of 1996,¹⁸ where the exclusionary rule was also not explicitly explained. The 2012 amendment is an obvious progress on the rule of evidence compared with its predecessors as the number of evidence related provisions doubled than that of the 1996 amendment, and wording like "expert conclusions" has been changed to "expert opinions"¹⁹ so as to ensure that ultimate power to adjudicate rests on the Court. Most prominently, the 2012 amendment adopts the exclusionary rule in Article 54, which stipulates that physical or documentary evidence collected in violation of law and justice may be excluded, inter alia, confession extorted by torture as well as statement of witness or victim obtained by violence or threat must be excluded. This is a final response to the long condemned absence of rules excluding evidence obtained through torture²⁰ while both the criminal law and CPL before the amendment prohibited torture. Mere prohibition on obtaining evidence through torture cannot safeguard justice sufficiently. Public criticism and discussion have been even more intense since the case of Zhao Zuohai and She Xianglin, who were both, tortured to confess "crime" of non-existence, and were put into jail for a decade or longer.

¹⁴ Seidl Hohenveldern, 'Transformation or Adoption of International Law into Municipal Law', vol. 12, *International & Comparative Law Quarterly*, 1963, p. 88.

¹⁵ Malcolm N. Shaw, *International Law*, 6th ed., Cambridge University Press, Cambridge, 2008, p. 139.

¹⁶ ZHU Wenqi, *Textbook on Principles and Cases of International Law*, Renmin University of China Press, Beijing, 2006, p. 9.

¹⁷ *Criminal Procedure Law of the People's Republic of China (1979)*, 1 January 1980.

¹⁸ *Criminal Procedure Law of the People Republic of China (1996 Amendment)*, 17 March 1996.

¹⁹ *Criminal Procedural Law, 2012*, art 48 (6).

²⁰ Stanley Lubman, 'China Changes Rules on Evidence Obtained by Torture', *Wall Street Journal*, available at <https://blogs.wsj.com/chinarealtime/2010/06/15/china-changes-rules-on-evidence-obtained-by-torture/>, accessed on 12 May 2017.

This exclusionary rule, intended to prevent extraction of confession by torture, aims at protecting from self-incrimination.²¹ This is just in accordance with Article 14 of the ICCPR and HRC's interpretation of the Covenant which asserts on inadmissibility of evidence collected by infringing non-derogable rights of Article 7, and Article 14 (which in its paragraph 3, provides explicitly the freedom from self-incrimination). By amending the CPL, China is not only agreeing ICCPR's object and purpose, but also actively fulfilling specific obligations.

Other Provisions Specifying Application of the Exclusionary Rule

Other provisions of the chapter on evidence of the 2012 amendment further stipulate on when and how the exclusion of illegal evidence rule can be invoked. The exclusionary rule not only applies during the process of court trial but also applies to all the other procedures including examination, prosecution proposal, and prosecution decisions.²² Article 55 talks about the responsibility of People's Procuratorate to monitor the investigation of criminal investigators to see whether it has been made on due information from a report or made by self discovery.

Article 56 relates to the discretion of the judge during court trial to conduct an investigation of legality of evidence whenever the judge reckons necessary. The defendant and other persons concerned may apply for exclusion of illegal evidence upon providing supporting material. Article 57 provides that the prosecutors have the burden of proof or legality of evidence, and investigators may appear to clarify either at Court's request or out of willingness.

The 2012 amendment puts forward a fair share of responsibility on People's Procuratorator and People's Court to ensure the exclusion of illegal evidence during the whole procedure of criminal cases. By reiterating the possible breach of criminal code,²³ public security and other investigators are strictly prohibited from engaging in torture. Besides, the Supreme People's Procuratorate has also prohibited collecting evidence through acute physical and mental pain as it is illegal.²⁴

Implementation and Application of Exclusionary Rule to CPL after Amendment

Though newly adopted exclusionary rule of the CPL covers the whole procedures of criminal cases, specific working guidelines to cover these procedures are

²¹ Jianlin Bian, 'Legislative Process in Chinese Criminal Proceeding System: the Second Amendment to the Criminal Procedure Law of China', vol.7, *Frontiers L. China* p. 175, 2012, p. 179.

²² *Criminal Procedural Law 2012*, art 54.

²³ *Ibid*, art 55.

²⁴ *Rules for Criminal Procedure of the People's Procuratorate (for Trial Implementation)*, 22 November, 2012, art 95.

required to ensure its practical effects. Subsequent regulations and provisions issued by the Ministry of Public Security and the Supreme People's Procuratorate, which are responsible for investigation, examination and prosecution of cases, are detailed for implementation of the rule.

The Ministry of Public Security issued provisions concerning the audio and video recording of interrogation of criminal suspects in 2014.²⁵ The provision explicitly requires that recording for certain felony charges, for example murder and drug-related crime suspects, who are likely to face life sentence or other severe punishment, is a must.²⁶ The provisions suggest that efforts should be made to develop techniques for all interrogation to be recorded. Chapter two prescribes rules relating on how the recording should be made, managed and used. The last chapter highlights that all the records are required to transfer for review, and special attention should be paid to see if there exists any illegally acquired evidence.

Likewise, the People's Procuratorate in 2015 issued eight prohibitions concerning duty-related crime investigations.²⁷ The seventh of the eight prohibitions is strict prohibition against "extorting confessions by torture or collecting evidence by other illegal means". Moreover, the latter part of the seventh prohibition highlights criminal responsibility of a wrong doer, who collects evidence by torture.

The right of the defendant lawyer to access as well as to read the investigation and interrogation of the case is necessary to realize the exclusionary rule. Supreme People's Court, Supreme People's Procuratorate and the Ministry of Public Security have together issued provisions on the protection of lawyers' practicing rights in 2015.²⁸ It calls for authorities to refrain from infringing legal rights of lawyers and to ensure that documents related to investigation, interrogation, prosecution and other procedures should be availed for lawyers.

The exclusionary rule has not stopped as a paper-written rule as it has been applied in criminal cases at every stage to safeguard the rights of the suspects. Cases including application of Article 58 to exclude evidences, where the record of interrogation indicated obvious inconsistency, the refusal of witness to come to

²⁵ Notice of the Ministry of Public Security on Issuing the *Provisions on Audio and Video Recording Interrogation of Criminal Suspects by Public Security Organs*, Ministry of Public Security, PRC, 1 October, 2014 [*Provisions on Audio and Video Recording*]

²⁶ *Provisions on Audio and Video Recording* (n 25), art 4.

²⁷ Notice of the Supreme People's Procuratorate on Issuing the Eight Prohibitions of the Supreme People's Procuratorate on the Duty-related Crime Investigation, Supreme People's Procuratorate, PRC, 5 August, 2015.

²⁸ Provisions of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and Other Departments on Legally Protecting Lawyers' Practicing Rights, Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, 16 September, 2015.

court and audio-video recording inconsistent with the provisions required by Ministry of Public Security are some of them.²⁹ However, the situation is not that promising given that Courts are still reluctant to apply this rule,³⁰ and there are many complex reasons for this unwillingness.

Conclusion: Possibilities of Improvements in China

Court trial is the centre around which China is now pushing forward its judicial reform.³¹ The latest amendment to the Criminal Procedure Law of China is a milestone of China's reform on its judicial system. This amendment marks China's ever-stronger determination for People's Court to act independently. It is also China's positive measures to implement obligations under the ICCPR and to live up to its object and purpose.

Whatever progressive provisions of the law may seem, there are always obstacles in their real-life application. In the first place, though the Criminal Code and 2012 amendment have prohibited extraction of confession through torture, the exact legal definition of torture has not been stipulated.³² Further, the rule set out by Article 54 of the 2012 amendment makes the distinction between evidence that must be excluded and evidence that may be excluded, which means that if satisfying explanation can be provided by the investigator, the latter can be admitted as evidence. Many scholars and lawyers in China have pointed to the blurred boundary between the two and the People's Court's reluctance to apply the exclusionary rule— they prefer to rely on the rule of defective evidence— as principal concerns which should be immediately corrected.³³

After examining cases concerning exclusionary rule after 2012, even judges are left with the impression that the materials introduced by the defendant and relied upon by the People's Court are normally health inspection reports rather than the records of interrogation though only the latter is the legal form of recording investigation and interrogation.³⁴ To cope with these practical dilemmas, more detailed provisions are still in need. More definite and objective definition of

²⁹ See *Tang Ping, Zhang Zhilin and Sun Surong Drug Trafficking Case*, Judgment of Intermediate People's Court of Yibing, Sichuan Province of China, 2015.

³⁰ *A Case where Illegal Evidence Was Successfully Excluded*, King and Capital Law Firm, January, 2014, p. 47.

³¹ 'China Issued White Papers on Judicial Reform of Chinese Court', *China Daily*, available at http://www.chinadaily.com.cn/china/2017-02/27/content_28361584_2.htm, accessed on 12 May 2017.

³² Gong Renren, 'Problems related to the Implementation of Convention against Torture in China', vol. 4, *Peking University Law Review* p. 955, 2016, p. 956.

³³ Ma Minliang, 'Structural Dilemma of Exclusionary Rule: A Reflection Based on the Internal Perspective', vol. 4, *Modern Law Science* p. 184, 2015, p. 188.

³⁴ Wang Decheng, 'A Practical Analysis on the Application of Exclusionary Rule', vol. 32 *Shandong Justice* p. 55, 2016, p. 56.

torture should be given. Clarification of difference between illegal evidence that can be corrected and that must be excluded is necessary so as to prevent abuse of this rule.

To better supervise the procedure of evidence collection and the rights of those accused, as required by the 2012 amendment, China is confronted with a tougher challenge of progressively securing the independence of the People's Court. The transformation of stereotype takes time. Fortunately, even in cases where the Court found the evidence not to be excluded at the procedural level, the probative value of the evidence concerned are questioned by the judges at the substantial level. Attitude should always be positive about China's judicial reform and its further action under the human rights conventions which has been ratified or signed by China.
