

# Institutional Arrangements Securing the Ban on Torture in China

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## Editorial

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## Editorial

Similar to USA, China prohibits torture in law, but torture still persists in practice. China has taken efforts to exclude tortured confession from use in the past decade. Its institutional arrangements respect for prohibiting torture, given that the relevant law protect the accused's access to lawyers or appeals on the ground of such confession.

Specifically, the 2012 Criminal Procedure Law (CPL) has made clear that confessions extorted through illegal means, such as torture, and witness testimony and depositions of victims obtained illegally, such as by violence or threats, should be excluded from use. To institutionally prevent extortion of confession by torture, it has regulated that suspects be sent to a detention facility for custody after being detained or arrested and be interrogated there, apart from the audio or video-taped process of interrogation. Revisions on ruling out illegal evidence and strictly regulating the procedure of collecting evidence are designed to effectively curb torture.

Furthermore, the new procedure allowing courts to call investigators to explain the legality of evidence (Art. 56), to call on prosecutors to provide evidence of the legality of evidence (Art. 55), and to require a witness statement to be examined and verified in court before it can serve as the basis for deciding a case (Art. 59), is intended to safeguard the right of a defendant and his or her lawyers to apply to the court for excluding evidence illegally gathered as they allege, in amended Art. 56. Both evidence provisions and exclusionary rules have been

regarded as instrumental in changing a situation from that 'the confession is king', to the proper relation between material evidence and oral statements, of which the latter should be completely relied on. In 2006, the Supreme People's Procuratorate issued "Directives to Eliminate Interrogation through Torture", which requires that People's Procuratorates in China begin taping interrogations to prevent coerced confessions'.

Concerning appeals, the Chinese criminal justice system, in practice, does not appear to effectively protect an accused, even if he or she is persistent in claiming his or her factual innocence. But the law enforcement authorities usually seeking for crime control by any means are legally endowed the power to control whether limitations of fact-finding are respected. Such limitations are often against the authorities' common goal of crime control. Also, they often benefit a lot from the high rate of conviction based on confession and have no real interests to limit fact-finding in handing criminal cases. If the detection or punishment rate is low in ranking, crime control authorities would be punished by less financial support, fewer human resources or no promotion of leaders. On the contrary, high or almost-full rates often bring more benefits in many aspects. It is a question of honour, promotion or awards. The 2012 CPL contain some loopholes and other defects which will frustrate their intent and damage the exclusion of illegally obtained evidence. A major defect is on unfair burdens of proof, frequently imposed on the accused. The law imposes an onus on the prosecution to demonstrate that evidence was not collected through torture. This recognizes that it

would be very difficult for the accused to show that he or she was tortured, but the provision is nonetheless flawed because the prosecution often has no better knowledge of what occurred during interrogation, which is in most cases was not conducted by the prosecution but by the police. This again points to the need for institutional reforms to ensure that the police who conduct interrogations are present and can answer for their conduct at trial.

Who bears the burden of proof in practice in China is not uniform. Sometimes it is borne by the Procuratorates, sometimes by courts and, in the worst cases, simply by defence. The common law voluntariness rule is more protective of the accused in those countries. Consistent with the presumption of innocence, it requires the prosecutor to prove beyond a reasonable doubt that the statement was voluntary.

Hence, the following institutional improvements are necessary. First, existing legal and judicial interpretations only provide for "strictly prohibiting extorted confessions by torture and collecting evidence by illegal means of threat, enticement, deceit or other methods". This narrow

approach leaves many loopholes through which injustice can pass. To close these loopholes, further clarification of such concepts as "extorted confessions by torture", "threat", "lure" and "deceit" is necessary, and what constitutes "other methods" should be further defined in order to enhance the operability of the provision.

Second, exclusionary rules should be considered as a right of criminal suspects and defendants. Such rights should limit investigative powers and protect the right of the accused to a fair trial. Where the defence applies for the review process but the court refuses to start it, or where the defence is dissatisfied with the outcome made by the court after the process, the defence and prosecution parties should be entitled to express objections as a relief right. On this basis, if the accused refuses to accept court judgements or the prosecution believes definite errors exist in the first-instance court's decision on illegally obtained evidence, either party could object them at appeal. Appeal courts should review the defence's appeal and the prosecution's protest. Only in this way can the procedural rights of both parties can be effectively protected.

