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# Reflecting on Development of Evidence Law in China

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**Abstract:** Since 1978, Chinese evidence law has experienced significant changes and is now entering a rapid developmental stage prompted by the ongoing judicial reform. In general, current evidence law of China suffers from many issues ranging from absence of deep conceptualization, mistaken principles, overlap of contents, and lack of uniformity in application. Although some representatives of the National People's Congress persist with proposals of drafting a separate evidence code, coordinating evidence law with the existing three major procedural laws in China remains to be an extremely challenging and complicated task. In the short term, the most practical approach is for the Supreme People's Court to enact a set of *Provisions on Procedural Evidence of the People's Court* by cooperating all current evidence rules scattered in the three major procedural laws and producing a unified set of judicial interpretations. This approach does not reinvent the wheel but only seeks to “upgrade the software.” It can achieve the goal of “integrating three sets of evidence rules” by systematically compiling current evidence rules, theoretical reconstruction to remedy the absence of conceptualization, eliminating redundancy through combining identical terms, and eradicating mistaken principles through a thorough system rebuilding. However, law schools in China have ignored evidence law education for a long time, resulting in considerable difficulties in this effort, such as lack of up-to-date knowledge of, and adherence to outdated concepts by, the law makers. Therefore, strengthening evidence law education and cultivating a new generation of talents equipped with the scientific knowledge of evidence law is the key to further development of evidence law in China.

**Keywords:** Evidence Law; Developmental Stage; Problems and Reconstruction; Integration of Three Sets of Evidence Rules; Evidence Law Education

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## I. Three Stages of the Development of Chinese Evidence Law

Since 1978, Chinese evidence law has roughly gone through three developmental stages.

### A. Preliminary Recognition of Evidence Law in Legal System (1978-1995)

During the ten years of the *Cultural Revolution*, Chinese legal system was paralyzed. Law was replaced with political policy in the judicial process, and the system of the Committee of Chinese Communist Party reviewing cases was erected.<sup>1</sup> Under these circumstances, evidence law had little room to exist.

The *Criminal Procedure Law (1979)*, which includes one chapter on evidence, established the principle of adjudicating cases “on the basis of facts and following the law as the ruling measure.” The *Civil Procedure Law (for Pilot Implementation, 1982)* also devotes a chapter on evidence rules. Similarly, some specific evidence rules were enacted in the evidence chapter of the *Administrative Procedural Law (1989)*.

With designated chapters on evidence included in the *Criminal Procedure Law*, the *Civil Procedure Law* and the *Administrative Procedure Law (hereinafter “Three Major Procedural Laws”)* respectively, they represent the preliminary establishment of evidence law in the Chinese legal system. But one of the critics pointed out that there were many problems in the emerging evidence legislation: “from the perspective of legislation, laws on evidence were too abstract and too difficult to apply.... There were still no clear guidelines on the admissibility, competence, probative value, presentation, examination and review of evidence.”<sup>2</sup> And another scholar commented: “the *Criminal Procedure Law* does not fully reflect the due weight of criminal procedural evidence... There is no clear provision on many important evidence rules, which, to some extent, impedes the progress of criminal proceedings.”<sup>3</sup> Similarly, “both circles of academia and judicial practice believe that the provisions on evidence system in the *Civil Procedure Law* are crude and imperfect, and not able to meet the needs of the civil litigation.”<sup>4</sup> Similar problems were raised with respect to the *Administrative Procedure Law*.

### B. Preliminary Establishment of Evidence System (1996-2000)

#### a. Significance of the *Criminal Procedural Law (1996)* to the Development of Evidence Law

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<sup>1</sup> On September 9, 1979, the Central Committee of the Communist Party of China issued the *Instructions on Firmly Ensuring the Conscientious Implement of Criminal Law, Criminal Procedure Law* (Document 64 [1979], CCCP), which, citing many abnormal practices including substituting law with policy, replacing law with the words (of officials) and using power to suppress the application of law, expressly abolished the system of adjudicating and approving cases by various levels of the Party committees.

<sup>2</sup> BIAN, Jianlin (卞建林) & YAO, Li (姚莉), *Guanyu Jianli he Wanshan Woguo Zhengju Guize de Sikao (关于建立和完善我国证据规则的思考)* [Reflection on the Establishment and Improvement of Evidence Rules in China], 5 *Studies in Law and Business* 5, 5 (1999).

<sup>3</sup> YE, Qing (叶青) & WANG, Peide (王培德), *Wanshan Woguo Xingshi Susong Zhengju Zhidu de Jidian Gouxiang (完善我国刑事诉讼证据制度的几点构想)* [Several Ideas on the Improvement of Criminal Procedural Evidence System in China], 2 *The Rule of Law Forum* 23, 23 (1992).

<sup>4</sup> ZHANG, Weiping (张卫平), *Minshi Zhengjufa Biyaoxing zhi Kao liang (民事证据法必要性之考量)* [Considerations on the Necessity of Civil Evidence Law], 3 *Studies in Law and Business* 23, 23 (2001).

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The progress of the *Criminal Procedural Law (1996)* on the evidence system was embodied in eight aspects: (1) strict prohibition of obtaining evidence by illegal means; (2) addition of witness protection clause; (3) clarification of the prosecution's burden of proof; (4) revision of the system under which judges had the exclusive power to undertake court investigation; (5) permission of cross-examination of witnesses; (6) addition of the provisions embodying the principle of direct testimony; (7) establishment of the principle of presumption of innocence; (8) entitlement of lawyers with the right to collect evidence and examine case files.<sup>5</sup> In order to implement the new *Criminal Procedure Law*, the Supreme People's Court made a decision in July 1996 to introduce elements of the adversary system while retaining the inquisitorial system and to explore the reform of the "prosecution-defense" court trial, which has provided a broad space for the development of evidence law.<sup>6</sup>

### **b. Improving Evidence System as the Central Issue of the Civil Trial Reform**

Since 1997, on "the central issue of civil trial reform... the consensus was that the three parts of the evidence system, i.e., presentation, examination and ratification of evidence, should be strengthened, and special attention should be given to presentation." With regard to presentation, scholars generally agree that the burden of proof of the parties should be emphasized while improving the responsibility of the court to investigate and collect evidence as well as establishing the time limit of presentation."<sup>7</sup> The *Provisions on Civil and Economical Trial Reform by Supreme People's Court (1998)* included many provisions with respect to "presentation of evidence by the parties and investigation and collection of evidence by the court" and "examining evidence." According to some commentary, "80% of the [*Provisions*] are related to evidence system reform".<sup>8</sup>

### **c. Proposals for Evidence Law Legislation**

During the first meeting of the 9<sup>th</sup> National People's Congress in 1998, 32 representatives, led by CHEN, Huajiao, jointly proposed a bill on evidence law. Since then, representatives also proposed several bills of evidence law during the second, third, and fourth meetings of the 9<sup>th</sup> National People's Congress.<sup>9</sup> However, the proposals have not yet been included in the Plan of National Legislation.

### **d. Comments on this Stage**

As noted by one scholar: "there's no independent evidence law that deals with specific evidence issues in a lawsuit. The legal norms about evidence system are scattered in criminal, civil, and administrative procedure laws and some relevant judicial interpretations.... Procedure laws were drafted to conform more to the

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<sup>5</sup> See FAN, Chongyi (樊崇义), LUO, Guoliang (罗国良), *Xingshi Susongfa Xiugaihou Zhengju Zhidu de Bianhua he Fazhan* (《刑事诉讼法》修改后证据制度的变化和发展) [The Changes and Developments of Evidence System after the Amendment of Criminal Procedure Law], *Criminal Science*, Aug. 1, 1999, at 51.

<sup>6</sup> See QI, Shujie (齐树洁), ZHONG, Shengrong (钟胜荣), *Lun Minshi Shenpan Fangshi Gaige Dui Woguo Zhengju Zhidu de Yingxiang* (论民事审判方式改革对我国证据制度的影响) [The impact of the Reform of Civil Trial Style on Evidence System in China], *Law Review*, July 15, 1998, at 106.

<sup>7</sup> JIANG, Wei (江伟) et al., *1997 Nian Minshi Susong Faxue Yanjiu de Huigu yu Zhanwang* (1997年民事诉讼法学研究的回顾与展望) [Review and Prospect of the Research on Civil Procedure Law in 1997], 1 *The Jurist* 81, 84 (1998)

<sup>8</sup> ZHANG, Weiping (张卫平), *Minshi Zhengju Zhidu Gaige Zouxianq Tangzhi* (民事证据制度改革走向探知) [On the Future Orientation of the Reform of Civil Evidence System], 5 *Studies in Law and Business* 16, 17 (1999).

<sup>9</sup> See LI, Hao (李浩), *Minshi Zhengju Lifa yu Zhengju Zhidu de Xuanze* (民事证据立法与证据制度的选择) [On the Selection of Civil Evidence Legislation and Evidence System], 5 *Chinese Journal of Law* 95, 96, note 1 (2001).

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reasonable construction of the procedures. As a result, the provisions of the evidence law are not sufficiently detailed ... and lack of integrity and systematic which a scientific system should have.”<sup>10</sup>

### C. Start of Rapid Development (2001- )

#### a. Rapid Development Spurred by Judicial Practices

Two major problems have become apparent in the present judicial system: judicial unfairness and judicial corruption.<sup>11</sup> A series of injustice cases, including “SHE, Xianglin” Case in 1994, “DU, Peiwu” Case in 1998, “HUANG, Jing” Case in 2003, “GAO, Yingying” Case in 2006, “ZHAO, Zuohai” Case in 2010 and “NIAN, Bin” Case in 2014 are also closely associated with deficiencies in evidence system. As to judicial corruptions, even the Presidents of the Higher People’s Courts of Liaoning Province and Guangdong Province were involved in bribery cases in 2003, as well as the President of the Higher People’s Court of Hunan Province and the Vice President of the Supreme People’s Court of China, HUANG, Songyou in 2008. The “judicial corruption” behind all of those cases is directly related to a deficient evidence system. Two lessons can be drawn from these cases:

Firstly, fair justice means that a trial must adhere to the principle of evidentiary adjudication. The *No. 64 Document of the Central Committee of the Communist Party of China (1979)* has clearly announced that the system of reviewing cases by all levels of the Party Committees should be abolished. However, it is still quite common that all levels of the Politics and Law Committee of the Party interfere with court trials. Take “ZHAO, Zuohai” Case in Henan province in 2010 as an example. The evidence was insufficient, but the Politics and Law Committee of the Party of Shangqiu instructed the Procuratorates of Shangqiu to rule quickly and the Intermediate Court of Shangqiu to conduct a rushed trial. As a result, ZHAO, Zuohai was eventually convicted of murder and sentenced to death penalty with a suspension. To rethink profoundly about this case, one can draw a conclusion that in order to solve the problem of judicial unfairness, the principle of evidentiary adjudication should be implemented and the interference from administrative power should be avoided. The reason is clear: “judicial independence is the guarantee of judicial fairness.”

Secondly, impartial justice must rely on the regulation of evidence rules. The courts have been frequently relied on administrative bans to prevent judicial corruption. The Supreme People’s Court promulgated the *Provisions of “Five Prohibitions”* in 2009, forbidding judges from accepting gift from interested parties and other similar corruptive conduct. However, these administrative bans are usually ineffective. One example is the case of some judges in Shanghai going whoring together in 2013.<sup>12</sup> To prevent judicial corruption, it has to be made clear that the

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<sup>10</sup> WU, Hongyao (吴宏耀), *Woguo Zhengju Lifa Shizaibixing* (我国证据立法势在必行) [The Legislation of Evidence law in China is an Imperative], *People’s Court Daily*, Dec. 11, 2000, at 3.

<sup>11</sup> The President of Supreme People’s Court WANG, Shengjun said in the *Report on the Work of Supreme People’s Court* in the 3<sup>rd</sup> Session of the 11<sup>st</sup> National People’s Congress that “some judges do not have proper judicial concepts, ... they do not have consciousness to try cases independently, fairly and in accordance with the law and to safeguard the authority of rule of law. ... A small number of judges fail to perform their duties in an honest and fair manner, and they are found to bend the law in rendering judgments and conduct malpractice out of personal considerations.” See WANG, Shengjun (王胜俊), *Zuigao Renmin Fayuan Gongzuo Baogao* (最高人民法院工作报告) [Report on the Work of Supreme People’s Court], *Sup. People’s Ct.* (July 16, 2010, 11:01 AM), [http://www.court.gov.cn/qwfb/gzbg/201007/t20100716\\_7756.htm](http://www.court.gov.cn/qwfb/gzbg/201007/t20100716_7756.htm).

<sup>12</sup> See *Notice of Law and Discipline Breaching Acts of Judge ZHAO, Minghua and CHEN, Xueming etc.* by

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nature of judicial power is that judge “is entitled to admit and exclude certain evidence in accordance with the law during the procedures of the presentation, examination and ratification of evidence.”<sup>13</sup> For example, a judgment may differ substantially if a bribed judge excludes important evidence. Thus strengthening the legislation of evidence rules will play a more important role than just relying on administrative bans. The function of anti-corruption of the evidence system can be carried out by the rule of “effect of erroneous ruling”. The substantive rights of litigants being negatively affected by a judge’s decision of admitting or excluding a piece of evidence which is found to be erroneous later can be taken as the basis of an appeal. In the United States, this is known as the “Preservation of Error for Appeal” or “Preservation of Evidentiary Issues for Appeal.”<sup>14</sup> Appeal courts of China should pay more attention to reviewing the erroneous admission or exclusion of evidence, thus the corrupted judge may not be able to abuse the discretion for personal interests.

## **b. Indications of Rapid Development: Promulgation of Evidence Rules of the People's Court and Progress in Evidence Law Education**

(1) The Supreme People's Court has issued four *Provisions* on evidence. Facing the resistance against the evidence legislation, the *Provisions on Evidence in Civil Procedure by the Supreme People's Court (hereinafter Provisions on Evidence in Civil Procedure)*<sup>15</sup> and *Provisions on Evidence in Administrative Procedure by the Supreme People's Court (hereinafter Provisions on Evidence in Administrative Procedure)*<sup>16</sup> were promulgated in 2002 to meet the needs of judicial practice. In May, 2010, the Supreme People's Court, the Supreme People's Procuratorate, together with the Ministry of Public Security the Ministry of State Security and the Ministry of Justice jointly promulgated the *Provisions on Several Issues Concerning the Review of Evidence in Death Penalty Cases (hereinafter Provisions on Evidence in Death Penalty Cases)* and the *Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases (hereinafter Provisions on the Exclusion of Illegal Evidence)*.<sup>17</sup> As of today, judicial interpretations by the Supreme People's Court on evidence rules in criminal procedure, civil procedure and administrative procedure have been formulated respectively.

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*Supreme People's Court*, Xinhuanet (Aug. 7, 2013, 22:04),

[http://news.xinhuanet.com/legal/2013-08/07/c\\_116854986.htm](http://news.xinhuanet.com/legal/2013-08/07/c_116854986.htm).

<sup>13</sup> See “Renmin Fayuan Tongyi Zhengju Guiding” Sifa Jieshi Jianyigao ji Lunzheng (《人民法院统一证据规定》司法解释建议稿及论证) [Proposed Draft and Arguments of the Judicial Interpretation of “Uniform Provisions of Evidence of the People's Court”] 131 (ZHANG, Baosheng (张保生) et al, eds., 2008).

<sup>14</sup> FED. R. EVID. 103.

<sup>15</sup> *Zuigao Renmin Fayuan Guanyu Minshi Susong Zhengju de Ruogan Guiding (最高人民法院关于民事诉讼证据的若干规定)* [Some Provisions of the Supreme People's Court on Evidence in Civil Procedures] (promulgated by the Sup. People's Ct., Dec. 21, 2001, effective Apr. 1, 2002) *Sup. People's Ct. Gaz.*, Vol. 1, 2002 (China).

<sup>16</sup> *Zuigao Renmin Fayuan Guanyu Xingzheng Susong Zhengju de Ruogan Guiding (最高人民法院关于行政诉讼证据的若干规定)* [Some Provisions of the Supreme People's Court on Evidence in Administrative Procedures] (promulgated by the Sup. People's Ct., July 24, 2002, effective Oct. 1, 2002) *Sup. People's Ct. Gaz.*, Vol. 4, 2002 (China).

<sup>17</sup> *Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan, Gonganbu, Guojia Anquanbu, Sifabu: Yinfa Guanyu “Banli Sixing Anjian Shencha Panduan Zhengju Ruogan Wenti de Guiding” he “Guanyu Banli Xingshi Anjian Paichu Feifa Zhengju Ruogan Wenti de Guiding” de Tongzhi (最高人民法院、最高人民检察院、公安部、国家安全部、司法部:《印发<关于办理死刑案件审查判断证据若干问题的规定>和<关于办理刑事案件排除非法证据若干问题的规定>的通知》)* [Notice of the Supreme People's Court, the Supreme People's Procuratorates, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice on Issuing the “Provisions on Several Issues Concerning the Examination and Judgment of Evidence in Death Sentence Cases” and the “Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases”] (promulgated by the Sup. People's Ct. et al., June 13, 2010, effective July 1, 2010) *Sup. People's Ct. Gaz.*, Vol. 9, 2010 (China).

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(2) Progress has been made in evidence law education. Chinese scholars published numerous books and hundreds of papers on evidence law annually since 2001.<sup>18</sup> Some law schools developed elective courses on evidence law for graduate students. In the past, evidence law textbooks were outdated and greatly influenced by the former Soviet Union, and now they were gradually put into the archives. A number of publications covering modern concepts of evidence emerged, such as *The Law of Evidence* (BIAN, Jianlin ed. 2005), *The Concise Evidence Law* (HE, Jiahong ed., 2007) and *The Law of Evidence* (ZHANG, Baosheng ed., 2009). In addition, *Evidence, Text, Problems, and Cases* (Ronald J. Allen et al., 2002) was translated into Chinese and served as the first American textbook on evidence law published in China. Since 2008, this textbook has been used in the foreign evidence law course in China University of Political Science and Law for graduate students. The time of the course has been increased to 60 hours in 2014.

(3) Research institutions on evidence science have been established. In May 2006, the Institute of Evidence Law and Forensic Science was established in China University of Political Science and Law. The Institute features cross-disciplinary study of evidence law and forensic science. A team of evidence law teachers is made up of 10 members and the forensic science team is made up of 30 members, taking the task of training 150 graduate students. The foreign expert advisory committee of the Institute is composed of 7 members. Professor Ronald Allen of Northwestern University serves as the Chairman for the Institute. In the congratulatory letter to the founding conference of the Institute of Evidence Law and Forensic Science, XIAO, Yang, President of the Supreme People's Court, said: “[e]vidence is the foundation of realizing judicial justice. Strengthening research on evidence has great significances in effective safeguarding of the legal rights and interests of the people, guarantee for the state judicial organs fairly exercise judicial power, and realization of the democracy and rule of law.”<sup>19</sup>

(4) A series of legislation proposals on evidence by legal experts have emerged. Such proposals include: *The recommendations of the draft of Chinese Evidence Law* (BI, Yuqian ed., 2003), *The Expert Draft of Criminal Evidence Law of the People's Republic of China (Articles, Explanation and Demonstration)* (CHEN, Guangzhong ed., 2004), *The Draft of Chinese Evidence Law (proposal) and Legislative Reason* (JIANG, Wei ed., 2004) as well as *Proposal for Judicial Interpretations and Drafting Commentary of “Uniform Provisions on Evidence of the People's Court”* (ZHANG, Baosheng ed., 2008).

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<sup>18</sup> See Zhongguo Zhengju Fazhi Fazhan Baogao 1978-2008 (中国证据法治发展报告 1978-2008) [Report of the Development of Evidence and Rule of law in China 1978-2008] (ZHANG, Baosheng (张保生) & CHANG, lin (常林) eds., 2010); Zhongguo Zhengju Fazhi Fazhan Baogao 2009 (中国证据法治发展报告 2009) [Report of the Development of Evidence and Rule of law in China 2009] (ZHANG, Baosheng (张保生) & CHANG, lin (常林) eds., 2011); Zhongguo Zhengju Fazhi Fazhan Baogao 2010 (中国证据法治发展报告 2010) [Report of the Development of Evidence and Rule of law in China 2010] (ZHANG, Baosheng (张保生) & CHANG, lin (常林) eds., 2012); Zhongguo Zhengju Fazhi Fazhan Baogao 2011 (中国证据法治发展报告 2011) [Report of the Development of Evidence and Rule of law in China 2011] (ZHANG, Baosheng (张保生) & CHANG, lin (常林) eds., 2013); Zhongguo Zhengju Fazhi Fazhan Baogao 2012 (中国证据法治发展报告 2012) [Report of the Development of Evidence and Rule of law in China 2012] (ZHANG, Baosheng (张保生) & CHANG, lin (常林) eds., 2014).

<sup>19</sup> Congratulatory Letter from XIAO, Yang (肖扬), President of Supreme People's Court, Chief Justice, to the Institution of Evidence Law and Forensic Science, CUPL for the Establishment (May 20, 2006) (on file with the Institution).

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## II. Overview of the Construction of Evidence System of the People's Court

### A. The Provisions on Evidence in Civil Procedure and the Provisions on Evidence in Administrative Procedure by the Supreme People's Court

The first *People's Court Five-Year Reform Outline (1999-2003)*<sup>20</sup> issued by the Supreme People's Court in 1999 focused on trial reform and reflected the trend of changing the trial mode from an ex-inquisitorial system to adversary system. In the *Reform Outline*, the evidence system construction received more attention, because "an important factor of the adversary trial mode is an integrated series of evidence rules to guide the judge to examine and adjudicate evidence."<sup>21</sup> Six of the eleven items regarding trial mode reform related to evidence rules: (i) refine the rules for evidence examination and review; (ii) solve the problem of court appearance of witnesses; (iii) with respect to evidence in criminal procedures, the burden of proof in private prosecution should be emphasized, and issue guidance on evidence presentation between parties as well as on judge's power of investigation; (iv) with respect to evidence in civil procedures, rules on the burden of proof, time limit of evidence presentation, pre-trial discovery, evidence collection by court, evidence presentation and examination by parties need to be refined; (v) with respect to evidence in administrative procedures, rules on evidence presentation, examination and ratification need to be refined and an evidence rule system suitable for administrative procedures shall be established. In general, there were relatively clear and detailed plans about the civil and administrative procedural evidence system construction. In contrast, because of the complexity of the criminal procedural evidence system, the *Reform Outline* came in short of providing systematic, specific reform plans about criminal evidence system.

There are 83 articles in *the Provisions on Evidence in Civil Procedure (2002)*. They cover presentation of evidence, investigation and collection of evidence by people's court, the time limit of presenting evidence and discovery, examination and ratification of evidence, etc. As noted by some scholars, "in the history of China's evidence legislation, the *Provisions on Evidence of Civil Procedure* is the first legal instrument that contains a series of specific evidence rules organized in a systematic way, which shows lawmakers' understanding on making systematic evidence rules."<sup>22</sup> Also, a total of 80 articles in the *Provisions on Evidence in Administrative Procedure (2002)* were enacted, establishing the pre-trial discovery system and stipulating the legal consequence of the defendant not appearing in court.

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<sup>20</sup> Zuigao Renmin Fayuan Guanyu Yinfa Renmin Fayuan Wunian Gaige Gangyao de Tongzhi (最高人民法院《关于印发〈人民法院五年改革纲要的通知〉》) [Notice of Supreme People's Court on Issuing the "People's Court Five-Year Reformative Outline" (1999-2003)], Sup. People's Ct. Gaz., Vol. 6, 1999.

<sup>21</sup> ZHANG, Baosheng (张保生) et al., *Zhongguo Zhengju Faxue Sanshinian (1978-2008)* (中国证据法学三十年 (1978-2008)) [30 Years of Evidence Law Study in China (1978-2008)], in *Zhongguo Faxue Sanshinian (1978-2008)* (中国法学三十年(1978-2008)) [30 Years of Jurisprudence in China (1978-2008)] 361, 365 (SHU, Yang (舒扬) ed., 2009).

<sup>22</sup> TANG, Weijian (汤维建) & CHEN, Wei (陈巍), *Guanyu Minshi Susong Zhengju de Ruogan Guiding de Chuanxin yu Buzu* (《关于民事诉讼证据的若干规定》的创新与不足) [Innovation and Drawbacks of Some Provisions on Evidence in Civil Procedures], 3 *Studies in Law and Business* 156, 157 (2005).

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## **B. Plan of the Supreme People's Court about the *Provisions on Evidence in Criminal Procedure***

The Supreme People's Court's *People's Court Second Five-Year Reformative Outline 2004-2008*<sup>23</sup> planned two tasks in criminal evidence system construction: The first task is “to reform the criminal evidence system, to enact criminal evidence rules, to exclude testimony obtained by torture and other illegal methods defined by the law, to strengthen the system of witnesses and expert witnesses testifying in court, to further implement the principle of human rights protection and the presumption of innocence, and to put forward the criminal evidence legislation proposals at a right time” (Indent 3). The second task is “to reform and improve the trial procedure of death penalty cases. In the case in which suspects may be sentenced to death in the first instance, witnesses and expert witnesses must testify in court, except the cases in which the defendant confessed or there is no disputes on evidence between the parties. From 2006 and on, a court hearing must be held when trying the death penalty cases in the second instance, and relevant witnesses and expert witnesses must appear in court” (Indent 1).

## **C. Drafting the *Uniform Provisions of Evidence of the People's Court (Proposal for Judicial Interpretation)* commissioned by the Supreme People's Court**

In an official letter sent to the China University of Political Science and Law on August 11, 2006, the Research Institute of the Supreme People's Court commissioned the Institute of Evidence Law and Forensic Science to draft the *Uniform Provisions of Evidence of the People's Court (Proposal for Judicial Interpretation)* (hereinafter the *Proposal of Uniform Provisions of Evidence*), requiring that the drafter “fully draw on and learn from both domestic and international achievements of research and practice on evidence rules, especially from the experience of the people's courts in judicial practice and judicial reform”.<sup>24</sup>

A team of 9 scholars of the Institute of Evidence Law and Forensic Science, led by Professor ZHANG, Baosheng as the Chief Expert, determined the work guidelines: the drafter shall “begin with investigation and survey, attempt to unify civil procedure and criminal procedure, as well as evidence law and forensic science reflecting the spirit of the Constitution, laws and evidence policies, and focusing on the balance among logic, plainness and normalization.” After more than 20 rounds of discussion, investigation and survey in 6 courts<sup>25</sup> in Hubei, Henan, Beijing, Jiangsu, and the draft being revised five times, the team submitted the *Proposal of Uniform Provisions of Evidence* (with 8 chapters, 24 sections and 174 articles) in October, 2007. The *Proposal* clearly declares that it applies to three types of procedures and stipulates in Chapter I (General Provisions) the principle of evidentiary adjudication, the principle

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<sup>23</sup> Renmin Fayuan Dierge Wunian Gaige Gangyao 2004-2008 (人民法院第二个五年改革纲要 2004-2008) [People's Court Second Five-Year Reformative Outline 2004-2008], Sup. People's Ct. Gaz., Vol. 12, 2005.

<sup>24</sup> Letter of Authorization from the Research Office of Supreme People's Court to the Institution of Evidence Law and Forensic Science, CUPL (Aug. 11, 2006) (on file with the Institution).

<sup>25</sup> The 6 courts are (1) Wuhan Intermediate People's Court of Wuhan in Hubei Province, (2) Jiangnan District People's Court in Wuhan, (3) Dengfeng People's Court in Henan Province, (4) Zhengzhou People's Intermediate Court in Henan Province, (5) Beijing First Intermediate People's Court, and (6) Changzhou Intermediate People's Court in Jiangsu Province.



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of direct verbal trial, the consequences of erroneous determination in review of evidence, the relevance and admissibility and the general exclusion rules of relevant evidence. Chapter III (Exclusion of Evidence and Exceptions) provides for exclusion of illegally obtained evidence, hearsay rules, character and propensity evidence, and the rules under which evidence is inadmissible to prove negligence, culpable conduct or liability. Chapter V (Production of Evidence) recognizes the privileges of communications between attorney-client, mental therapist-patient, husband-wife, as well as parent-child. It also provides rules on direct and cross examination, identification, authentication and forensic examination. Chapter VII (Proof) allocates burdens of proof and establishes the standard of proof of beyond a reasonable doubt in criminal procedures and the preponderance of evidence standard in civil procedures.

The response letter from the General Office of the Supreme People's Court highly praised the work of the team and pointed out that the Institute of Evidence Law and Forensic Science fully employed its "intellectual and material resources, overcame difficulties, persisted in the spirit of rigorous study and perfectionism. As a result, the team successfully completed the drafting tasks". "*The Uniform Provisions of Evidence of the People's Court (Proposal for Judicial Interpretation)* incorporated useful domestic and international experiences based on the people's court trial practice. The proposed system is scientific; the contents are integrated; and the logic is robust; and the language is concise. This drafting process has been a good exercise by the Institute and such exploration is beneficial to our country for establishing a unified evidence system, and the *Proposal* provides the basic and important reference for the people's court."<sup>26</sup>

On May 20, 2008, at the Symposium on Evidence Rules (with the Ceremony of Issuance of the *Proposal for Judicial Interpretations and Drafting Commentary of "Uniform Provisions of Evidence of the People's Court"* (ZHANG, Baosheng Chief Editor)),<sup>27</sup> Executive Vice President of the Supreme People's Court SHEN, Deyong commented:

"The principle of evidentiary adjudication is the cornerstone of modern evidence law. Any adjudication made by judges must be based on evidence. Establishing a set of sound evidence rules and a refined evidence system is extremely important to promote the construction of rule of law, to realize judicial fairness and social fairness and justice in order to build a harmonious society. The current evidence provisions are deficient, rough, incomplete, and lack of logic. The theoretical research of evidence law is also relatively backward. Although the Supreme People's Court respectively formulated and issued the *Provisions on Evidence in Civil Procedure* and *Provisions on Evidence in Administrative Procedure* in 2001 and 2002, many evidence rules in the judicial practice are still imperfect, especially no criminal evidence rules exist. There is neither the correct theoretic instruction nor specific rules in the presentation, examination and ratification of evidence in most cases, which brings greater negative impact on the judicial practice. The book of *Proposed Draft and Arguments of the Judicial Interpretation of "Uniform Provisions of Evidence of the People's Court"* is a beneficial exploration and attempt to improve our country's evidence rules. It also

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<sup>26</sup> Response Letter from General Office of the Supreme People's Court to the Institution of Evidence Law and Forensic Science, CUPL (Dec., 2007) (on file with the Institution).

<sup>27</sup> ZHANG (2008), *supra* X. This book provides detailed explanations, arguments as well as examples of Chinese and foreign legislations for every article.

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contributes to the reform of the evidence system and the development of the evidence theory.”

#### **D. Pilot Implementation of the *Proposal of Uniform Provisions of Evidence* in Selected Courts**

Although the *Proposal of Uniform Provisions of Evidence* has received positive feedback from academia, its operability in judicial practice needs to be tested. Accordingly, on April 14, 2008, the Supreme People's Court issued the *Notice on the Pilot Implementation of the Uniform Provisions of Evidence of the People's Court (Proposed Draft for Judicial Interpretation)*<sup>28</sup> to the Higher People's Court in Beijing, Yunnan, Shandong, Jilin, Guangdong respectively, requiring them: (1) “to choose four intermediate people's courts and three basic-level people's courts to carry out the field study in order to further amend and improve the *Proposal of Uniform Provisions of Evidence*, which may provide practical basis to meet the needs of the people's court trial work.” (2) “The higher level courts should well understand the basic spirits and the main contents of the *Proposal of Uniform Provisions of Evidence*, support and guide the lower court accurately interpret and apply the rules in the Proposal, ... The higher level courts should comprehensively review the cases in which the lower level courts apply the *Proposal*. Seek instructions from the Supreme People's Court or discuss with the Institute of Evidence Law and Forensic Science timely when problems occur; (3) the selected courts should emphasize to discover, accumulate, analyze, and summarize problems in time and make suggestions. In conclusion, such experimental work may provide basis to further improve the basic contents of the *Proposal of Uniform Provisions of Evidence* and to strengthen its scientific cohesiveness and operability and to exploring about construction of evidence system with Chinese characteristics for laying a solid foundation of a fairer and more efficient judicial work.”

From May 2008 to January 2010, 20 professors and graduate students from the Institute of Evidence Law and Forensic Science of the China University of Political Science and Law jointly with 64 judges from 7 selected courts completed the investigation and experimental application of the provisions. All the 16 selected cases were video recorded. After the pilot implementation, the *Proposal of Uniform Provisions of Evidence (Amendment)* was finally finished. 36 articles, which account for 20.6% of the provisions of 174 articles, were modified. Following are two examples:

#### **Article 9 (Consequences of Erroneous Ratification of Evidence) (Original Draft)**

Erroneous ratification of admission or exclusion evidence may be used as the principal ground for appeal by a party or for protest by the People's Procuratorate, or used as the principal ground by the People's Court of the second instance for challenging the judgment of the People's Court of the first instance or vacating or remanding the case to the court of the first instance for re-trial,

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<sup>28</sup> Zuigao Renmin Fayuan Guanyu Kaizhan Renmin Fayuan Tongyi Zhengju Guiding (Sifa Jieshi Jianyigao) Shidian Gongzuo de Tongzhi (最高人民法院关于开展《人民法院统一证据规定(司法解释建议稿)》试点工作的通知) [Notice on the pilot implement of the Uniform Provisions of Evidence of the People's Court (Proposed Draft for Judicial Interpretation)], Sup. People's Ct. [2008] 129.

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provided that all following conditions are satisfied:

(1)The erroneous ratification has affected a party's substantive rights, which results in significant differences in trial results ;

(2)With respect to the erroneous ratification in excluding evidence, the party that presented the evidence has either objected to the evidentiary ruling by the adjudicators during the trial process or has objected in writing before the judgment is rendered to remind the adjudicators of the main contents of the evidence being excluded.

If a ratification of evidence has ostensible errors that should have been noticed by adjudicators and may affect the substantive rights of a party and the trial results, the court of the higher level may change the judgment or vacate the judgment and remand the case to the court of the first instance for retrial, irrespective of the party's failure to object during the trial process.

**This article is amended as:**

Erroneous ratification of admission or exclusion evidence may be used as the principal ground for appeal by a party or for protest by the People's Procuratorate, or used as the principal ground by the People's Court of the second instance for challenging the judgment of the People's Court of the first instance or vacating or remanding the case to the court of the first instance for re-trial, if such ratification has affected a party's substantive rights, resulting in significant differences in trial results. (The underlined part denotes the revised content.)

**Article 11 (Relevance of Evidence) (Original Draft)**

Relevant evidence is evidence that has probative value in ascertaining the case facts and therefore is helpful to adjudicators in examining and adjudicating the probability of existence of the case facts.

**This article is amended as:**

Relevance of evidence refers to the attribute of relationship of proof between evidence and *factum probandum*, which is helpful to adjudicators in examining and adjudicating the probability of existence of the case facts. (The underlined part denotes the revised content.)

### **III Principal Defects of the Current Evidence System**

After 35 years of efforts, China now has 51 provisions of evidence rules among the 3 Procedure Laws (*the Criminal, Civil and Administrative*), 271 provisions on evidence in the *Some Provisions on Evidence in Civil Procedures 2001*, the *Provisions on Several Issues of Administrative Procedure Evidence 2002* and the *Interpretation on the Application of Criminal Procedure Law 2012* which are all issued by the Supreme People's Court, and in addition, 54 provisions in the *Provisions on Several Issues Concerning the Examination and Judgment of Evidence in Death Sentence Cases* and the *Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases* issued by the Supreme People's Court, the Supreme People's Procuratorates, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice jointly. Thus, the number of provisions of evidence rules in

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force currently is 325 in China, among the highest in the world. However, the current evidence system suffers from lack of conceptualization, mistaken principles, overlap of contents and lack of uniformity in application. I attempt to analyze these problems below.

## **A. Lack of Deep Conceptualization**

A set of evidence rules should be based on a theoretical system that contains complex ideas, principles, customs and values. “[T]hey determine the admissibility of evidence, define the roles of all the participants at trial (judge, jury, advocates and witnesses), and structure the relationships among these various actors. They reflect our society’s views on many issues, among them: (1) appropriate means of resolving disputes, (2) the nature of knowledge ... and how knowledge is transmitted to others; (3) the dynamics of small group decision making...; (4) moral and ethical concerns... (5) the relationship between the ideal of justice and the value of efficiency. The rules of evidence rest on and are a crystallization of these various, often conflicting, views.”<sup>29</sup> Thus, “the theory system of evidence law should reflect the justifiable reasons, the basic concepts, legal principles, and value foundations which support the evidence rules, such as accuracy, fairness, harmony and efficiency which form the four pillars of the evidence value.”<sup>30</sup> The Chinese evidence rules have not yet formed an integrated and logical system. The main reason lies in the lack of correct conceptions of evidence, including a logical theme and related policy considerations.

### **a. Lack of Logical Theme of Relevance in Evidence Rules**

Relevance is the basic principle of modern evidence system, which “forbids receiving anything irrelevant, not logically probative.”<sup>31</sup> Relevance distinguishes the modern evidence system from such traditional systems as trial by ordeal and formalistic evidence system. One main reason for the lack of logical system in Chinese evidence law is that relevance has not been employed as the central theme to guide the drafting of specific evidence rules.

**Example 1:** There is no concept and rule of relevance in China's three major *Procedure Laws*. The *Civil Procedure Law (2012)*, *Criminal Procedural Law (2012)* and *Administrative Procedural Law (1989)* contain neither rules on relevance nor the very concept of “relevance.” A general principle of the Chinese procedural laws requires that “evidence must be verified before it can be accepted as the basis of determining a case.”<sup>32</sup> However, without the concept and related rules on relevance, how can a judge review and verify evidence if she has no idea to review evidence on the basis of relevance principles?

**Example 2:** The concept of “relevance” has appeared in relevant judicial

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<sup>29</sup> ALLEN, Ronald J. et al., *Evidence: Text, Problems, and Cases*, li-ii (5<sup>th</sup> ed. 2011).

<sup>30</sup> ZHANG, Baosheng (张保生), *Zhengju Guize de Jiazhi Jichu he Lilun Tixi* (证据规则的价值基础和理论体系) [The Value Foundations and Theoretical System of Evidence Rules], 2 *Chinese Journal of Law* 122, 129 (2008).

<sup>31</sup> THAYER, James Bradley, *A Preliminary Treatise on Evidence at the Common Law* 264 (1898), cited in ALLEN (2011), *supra* X, 121.

<sup>32</sup> Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (promulgated by Nat'l People's Cong., Mar. 14, 2012, effective Jan. 1, 2013), 2012:2 Standing Comm. Nat'l People's Cong. Gaz., X, X (China). It is provided in Art. 64 of Civil Procedure law (2012) that “[a] people's court shall, under statutory procedures, verify evidence comprehensively and objectively.” (Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by Nat'l People's Cong., Aug. 31, 2012, effective Jan. 1, 2013), 2012:5 Standing Comm. Nat'l People's Cong. Gaz., 533, X (China).)

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interpretations issued by the Supreme People's Court. However, without any pertinent rules, relevance has not been recognized as a fundamental attribute of evidence in most cases.<sup>33</sup> For example, Article 50 of the *Provisions on Evidence in Civil Procedures* by the Supreme People's Court provides: "During the examination of evidence, the parties shall concentrate on the authenticity, relevance and legality of evidence and make interrogations, statements and debates concerning the probative value of evidence." The following five articles in the *Judicial Interpretations of Criminal Procedure (2012)* by the Supreme People's Court have similar problems:

**"Article 104** The authenticity of a piece of evidence should be examined in the context of all other pieces of evidence of the case. The probative value of evidence shall be determined according to the specific circumstances of the case, the degree of relevance between the evidence and the *factum probandum* and the relationships between an evidence and another, etc."

This provision emphasized the review on authenticity and probative value of evidence, but neglected the examination of relevance. Firstly, authenticity of evidence cannot be known just by comprehensive review of all the evidence in the entire case because authenticity does not equal to the truth. The "truth" of a case can be found out through "the comprehensive review of evidence in the entire case," which includes presentation, examination and empirical inference by the fact finder. Authenticity, however, is "an attribute of the credibility of tangible evidence referring to whether a tangible item is what it is represented to be."<sup>34</sup> Examination of authenticity relies on the review on identity, which is decided by the judge through "the comprehensive examination of evidence in the entire case". The problem of authenticity shall be solved through identification and authentication by the lay witnesses or forensic examination. Second, assigning different levels of probative value to evidence is obviously influenced by the formalistic evidence system, which ignores the fundamental position of relevance in modern evidence system. Thirdly, the sentence "[T]he probative value of evidence shall be reviewed and determined . . . from the degree of relevance between the evidence and the case fact" amounts to a meaningless tautology.

The following four articles have similar problems:

**"Article 92** The review on audio-visual recordings shall focus on: ... (6) whether their contents are relevant to the case facts."

**"Article 69** The review on real evidence or documentary evidence shall focus on: ... (4) whether the real evidence or documentary evidence is relevant to the case facts."

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<sup>33</sup> Exceptions are Article 39 and 54 of "Some Provisions of the Supreme People's Court on Evidence in Administrative Procedures" (2001). Article 39 stipulates that "[t]he parties shall examine the evidence in accordance with the relevance, legitimacy and authenticity of the evidence, and focus on the probative value and weight of evidence." Article 54 stipulates that "[t]he court shall review every piece of evidence one by one, no matter whether it has been examined in trial, and comprehensively review all the evidence ... [it shall] exclude irrelevant evidence materials, and find the fact accurately." Both of these two rules regard "relevance" as the first property of evidence.

<sup>34</sup> ANDERSON, Terence et al., *Analysis of Evidence*, 380 (2<sup>nd</sup> ed., 2005).

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“**Article 84** The review on expert opinions shall focus on: ... (8) whether the expert opinion is relevant to the *factum probandum* of the case.”

“**Article 93** The review on electronic data such as e-mails ... shall focus on: ... (4) whether the electronic data are relevant to the case facts.”

In these 4 articles, relevance is just put, respectively, in the forth to eighth position. But relevance is the soul of evidence law and the essential condition of admissibility.<sup>35</sup> “Relevance is the main test standard of admissibility of evidence”,<sup>36</sup> which is known as the minimal relevance test. That is to say, the main function of the exclusionary rule of evidence is excluding irrelevant evidence to ensure accurate fact-finding. Accurate fact-finding is crucial because it leads to socially optimal results by securing individual rights. Indeed, without accurate fact-finding, rights are literally meaningless.”<sup>37</sup> A judge’s review on evidence is mainly review on its relevance, and then he or she will subsequently determine whether it can be accepted as the basis of the judgment.

### **b. Lack of Policy Considerations in Evidence Rules**

The construction of evidence law system also needs a series of complex policy arrangements. Policies of evidence reflect that “accurate fact-finding competes with various policies that a legal system could pursue. The realization of these policies may involve exclusionary rules of evidence”.<sup>38</sup> Policies or admissibility rules of evidence indicate the status of all kinds of values. Among these values, accuracy is the premise to realize judicial justice. Justice is the primary value of evidence system. Harmony and efficiency are also important value orientations. In the modern evidence system, “it is generally accepted that factual accuracy is the most significant objective of trials but not the only objective.”<sup>39</sup> “The pursuit of truth (i.e. seeking maximized accuracy of fact-finding) should be ranked highly but not necessarily higher than the position of other values such as the security of the state, the protection of family relationships or the curbing of coercive confession.”<sup>40</sup>

Lack of policy arrangement in the current evidence law manifests in the following aspects:

Firstly, admissibility has been replaced with legality. In China, if a judge or a law school student is asked what the basic attributes of evidence are, he/she would answer by conditioned response: “objectivity, relevance and legality”. To the question “what are the exclusionary rules of evidence?” her answer would probably be “the exclusionary rules of illegally-obtained evidence”. Nevertheless, from the perspective of evidence policy, admissibility is much more extensive than legality. The exclusion of evidence should firstly be the exclusion of irrelevant evidence, and then the exclusionary rules of hearsay evidence, character evidence and illegally-obtained evidence and so on. Therefore, replacing admissibility with legality impedes the comprehensive implementation of evidence policy immensely.

Secondly, the current evidence law contains no rules on not admitting evidence

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<sup>35</sup> See FED. R. EVID. 402.

<sup>36</sup> ANDERSON (2005), *supra* 289.

<sup>37</sup> ALLEN, Ronald J., *Difficulties of Exclusionary Rules* (排除规则的困难), 6 Evidence Science 750, 759 (2012).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> ANDERSON (2005), *supra* 83.

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to prove negligence, culpable conduct or liability for policy considerations, such as the rules for subsequent remedial measures, settlement and request for settlement and payment of medical or similar expenses. The PENG, Yu case provides a typical example. It is reported that the judge of this case in the first instance wrote in his judgment:

“If the defendant performs a Good Samaritan deed, the more desirable and practical approach should be for him to catch the person who hit the plaintiff, not simply help plaintiff up from the ground. If the defendant is a Good Samaritan, according to the social norms, he should have told the facts to the family members of the plaintiff after they arrived at the scene, let the family members to send the plaintiff to hospital and then left on his own. But the defendant did not make this choice, which is unreasonable under the social norms.” “As to the payment of medical treatment, the defendant paid two 200 Yuan for the plaintiff on that day and did not request a return. The plaintiff and the defendant are strangers who usually would not lend money to each other under common norms. Even if the money was “borrowed” from him by the plaintiff as asserted by the defendant, he should have asked others at the bus stop as witness or asked the family members for a receipt or other writing after explaining the entire incident.”<sup>41</sup>

The judgment of PENG, Yu case in the first instance has been called an “evil judgment” in China and is deemed to have a direct and negative effect on the behavior of the public. The citizens dare not to be good Samaritans. If the old man fell down on the road, no one dares to lend a hand at the risk of being claimed for compensation or losing a lawsuit.<sup>42</sup> The judgment of PENG, Yu case truly led to a social moral landslide. By contrast, Rule 407-411 of the *Federal Rules of Evidence* in the United States embodies the policy designed to encourage people to do good to the society, which is worthwhile for Chinese evidence law to emulate.

Thirdly, Chinese evidence law has no rules of privileges. Take the privilege of relatives for example. The first paragraph in Article 188 of the *Criminal Procedure Law* stipulates that “[w]here, after being notified by a people's court, a witness refuses to testify before court without justifiable reasons, the people's court may compel the witness to appear before court, unless the witness is the spouse, a parent, or a child of the defendant.” Considering the Article 60 of *Criminal Procedure Law*, which

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<sup>41</sup> Xu Moumou Su Peng Mou (徐某诉彭某) [XU v. PENG] (Nanjing Gulou Dist. People's Ct. Sep. 3, 2007), *quoted in* woolen, Yetan Dui Nanjing Pengyuan de Yixie Kanfa (Fu: Yishen Panjueshu Yuanwen) (也谈对南京“彭宇案”的一些看法(附: 一审判决书原文)) [Also Taking about some views on PENG, Yu case of Nanjing (attachment: the first-instance judgment), Fafawang (XXX), <http://www.fafawang.com/blog/a/lynn/archives/2007/10685.shtml> (need to register and add the blogger as friend). Xu Moumou Su Peng Mou (徐某诉彭某) [XU v. PENG] (Nanjing Gulou Dist. People's Ct. Sep. 3, 2007), available at BAIDU Wenku [http://wenku.baidu.com/link?url=uNhK0-qY\\_ke4jlgEjQDKk5O0AapErAjmuGT4wjyUbn539OnGkAH6Y74RBjoMmPFjMzPHce6kAZdhH-GoZ4-4BgJNVbCKz1bFVuLjZiNrS](http://wenku.baidu.com/link?url=uNhK0-qY_ke4jlgEjQDKk5O0AapErAjmuGT4wjyUbn539OnGkAH6Y74RBjoMmPFjMzPHce6kAZdhH-GoZ4-4BgJNVbCKz1bFVuLjZiNrS).

<sup>42</sup> See BU, Guangming (卜广明) & CHEN, Yong (陈咏), Yangzhou Xiaohuo Pa Danze Fuqi Daodi Laotai You Songshou (扬州小伙怕‘担责’扶起倒地老太又松手) [The Young Man in Yangzhou Helped A Granny Up and Loosen His Grip Because of Being Afraid to be Held Liable], *Yangtze Evening News*, Jan. 24, 2008, at X. See also WANG, Mi (王冕), Nanjing Jiuxun Laoren Tandao Lubian, 20 Fenzhong Nei Luren Bugan Qu Chanfu (南京九旬老人瘫倒路边, 20分钟内路人不敢去搀扶) [Old Man Who Is More Than 90 Years Old Collapsed on the Road in Nanjing While Nobody Dare to Help Him Up in 20 Minutes], *Modern Express*, Feb. 16, 2008, at X; HE, Ming (何明) et al., Qixun Laoren Yundao Nanjing Jietou Wu Yiren Gan Shenchu Yuanshou (七旬老人晕倒南京街头 20分钟 无一人敢伸出援手) [Old Man Who Is More Than 70 Years Old Collapsed on the Road in Nanjing While Nobody Dare to Give a Hand in 20 Minutes], *Global Times*, June 4, 2009, at X.

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provides that “[a]ny person who has information regarding the case shall have the obligation to testify”, Article 188 does not mean that we have established the privilege of relatives in China. The law does not exempt the spouse, parents and child of a defendant from the obligation of testifying but merely from the obligation of appearing in court, thus leaving a gap for obtaining evidence out-of-court, which brings much more danger to the stability of family relationships. As Rule 1101 (c) of the *Federal Rules of Evidence*, the rules on privilege apply to all stages of a case or proceeding. To say the least, even if there is no spousal privilege, a defendant should be entitled to confronting the witness. However, in the BO, Xilai case,<sup>43</sup> when the defendant asked to confront his wife, the presiding judge ruled that the court could not force her to appear in court according to the above-mentioned provision, but the defendant’s wife’s out-of-court statement was admitted as evidence of conviction. This obviously violates Article 59 of the *Criminal Procedure Law (2012)*, namely “[a] witness statement may be used as a basis for deciding a case only after it has been examined in court by both sides, the public prosecutor and victim as one side and the defendant and defender as the other side, and verified. If a court discovers that a witness has committed perjury or concealed criminal evidence, the witness shall be handled in accordance with law.”

## **B. Mistaken Principles**

The current evidence regimes also contains mistaken principles. Following are two illustrations.

### **a. Pre-designated Probative Value of Evidence according to the Types of Evidence**

Chinese evidence law traditionally focuses on classifying evidence and assigns probative value to various categories of evidence. For example, Article 77 of the *Provisions on Evidence in Civil Procedure by the Supreme People’s Court* requires that:

“The probative value of several pieces of evidence concerning a same fact may be determined by the people’s court according to the following principles: ... (b) real evidence, archival files, forensic examination conclusions, onsite recordings of interrogations and documentary evidence that has been notarized or registered, as a general rule, have higher probative value than that of other documentary evidence, audio-visual materials and testimonies; ... (d) direct evidence, as a general rule, has higher probative value than that of circumstantial evidence....”

These provisions purporting to assign different weight of probative value are product of the formalistic evidence theory. Gustav Radbruch criticized the error of the formalistic evidence system in focusing solely on direct evidence at the expense of circumstantial evidence. Because circumstantial evidence cannot serve as the basis for conviction, compelled confessions by torture gained legitimacy as a means of evidence collection. As a result, “eliminating torture means abolishment of the

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<sup>43</sup> *BO, Xilai Shouhui Tanwu Lanyong Zhiquan An Tingshen Jilu Huizong* (薄熙来受贿、贪污、滥用职权案庭审记录汇总) [The Compilation of Court Hearing Records of the Crimes of Embezzlement, Taking Bribes and Abuse of Power of BO, Xilai], People (Aug. 26, 2013, 15:41), <http://politics.people.com.cn/n/2013/0823/c1001-22678622.html>.



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formalistic evidence theory...”<sup>44</sup> Actually, no evidence should have preset probative value; the probative value of any evidence can only be determined through in-court presentation and examination. Therefore, the rigid rules of probative value should be abolished and replaced with a balancing test rule similar to Rule 403 of the *Federal Rules of Evidence* of the United States.

### **b. Fraudulent Proof Induced by the Evidence “Rectification” Rule**

In the two new *Provisions on Criminal Evidence*, five articles refer to a concept, evidence “rectification”. According to the Modern Chinese Dictionary, the definition of “rectification” is “to supplement and correct (the omission and error of text).”<sup>45</sup> These rules violate the requirement of the Best Evidence Rule of “prevent[ing] incomplete or fraudulent proof”, and “prevent[ing] altered copies.”<sup>46</sup>

For example:

The second paragraph of Article 9 of the *Provisions on Evidence in Death Penalty Cases* provides: “If the collection procedure or method of real or documentary evidence has any of the following flaws, the evidence cannot be adopted unless the case-handling personnel make a **rectification** or make a justification: (1) The investigation, examination or search transcripts, evidence-taking transcripts or list of seized objects attached to the physical or documentary evidence **do not bear the signature of the investigator, the holder of articles or the witness, or the features, quantity, quality, name or any other information of the evidence has not been clearly stated**; (2) It has not been stated whether the photo, visual recording or reproduction of the physical evidence or **the duplicate or photocopy of the documentary evidence has been verified as identical with the original, or there is no time of reproduction or the signature (seal) of the person (entity) from whom the evidence is taken....**” (Boldface added by author)

**Article 14:** “If the procedure or method of collecting a witness’ testimony has any of the following flaws, the testimony cannot be adopted unless the case-handling personnel make a **rectification** or justify it: (1) **The name of the inquirer, recorder or legal representative or the starting time, ending time and location of the inquiry is not specified**; (2) **The location of the inquiry does not conform to the relevant provisions**; ... (4) **The inquiry transcripts show that the same inquirer has inquired of different witnesses during a same period of time.**” (Boldface added by author)

**Article 21:** “An inquiry transcript/records which has any of the following flaws cannot be adopted unless the case-handling personnel make a **rectification** or justification: (1) **The inquiry time, inquirer, recorder, legal representative or other information in the transcript is wrong or contradictory**; (2) **It does not bear the inquirers’ signature....**” (Boldface added by author)

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<sup>44</sup> See RADBRUCH, Gustav, Faxue Daolun (法学导论) [Introduction to Jurisprudence] Chapter 8 “Procedure Law” (MI, Jian (米健) & ZHU, Lin (朱林) trans., 1997).

<sup>45</sup> Xiandai Hanyu Cidian (现代汉语词典) [The Contemporary Chinese Dictionary] 101 (The Commercial Press, Updated Ed., 2002).

<sup>46</sup> Seiler v. Lucas film, LTD., 808 F.2d 1316, 1319 (9th Cir. 1986), *quoted in* ALLEN, Ronald J. et al., Evidence: Text, Problems, and Cases 693 (3<sup>rd</sup> ed., 2002).

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**Article 30:** “Under any of the following circumstances, the identification result can be used as evidence if the case-handling personnel make a **rectification** or justification: **(1) There are less than 2 investigation personnel who preside over the identification event; ... (4) The identification records are too simple and only contain the result instead of both the result and the process....**” (Boldface added by author)

It is not hard to realize that if, under these four provisions, the investigators are authorized to “rectify” evidence (by making supplement and correction evidence), it would encourage or indulge fabrication of evidence.

Moreover, the following rule is more ridiculous:

**Article 14 of the Provisions on Exclusion of Illegally Obtained Evidence:** “Where any material or documentary evidence **is obviously collected in violation of law, which may affect the impartiality of court trial, a rectification** or justification shall be made, otherwise the evidence shall not be used as a basis for decision.” (Boldface is added by author)

Now that obtaining of the evidence violates the rule and may obviously affect a fair trial, why rectifying (supplement and correction) them is still allowed? If so, all illegally obtained evidence could be rectified and changed to legally valid evidence. Exclusionary rules of illegally obtained evidence would become dead letters.

### C. Overlap of Contents

Statistics reveals that there are 51 provisions on evidence in three major Procedure Laws, in which 19 articles (accounting for 37.2%) overlap each other. In a total of 271 provisions on evidence in the *Provisions on Evidence in Civil Procedure*, the *Provisions on Evidence in Civil Procedure* together with the *Judicial Interpretation on Criminal Procedural Law*, 109 articles overlap each other.

For instance:

Article 48 of the *Criminal Procedure Law (2012)*:

... Evidence shall include:

- (1) Real evidence;
- (2) Documentary evidence;
- (3) Testimony of witnesses;
- (4) Statements of victims;
- (5) Statements and exculpations of criminal suspects or defendants;
- (6) Forensic examination opinions;
- (7) Records of crime scene investigation, examination, identification and investigative experiments; and
- (8) Audio-video materials, and digital data.

Evidence must be authenticated before it can be admitted as the basis for deciding a case.”

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Article 48 of the *Civil Procedure Law* (2012):

... Evidence shall include:

- (1) Statements of the parties;
- (2) Documentary evidence;
- (3) Physical evidence;
- (4) Audio-video evidence;
- (5) Digital data;
- (6) Testimony of witnesses;
- (7) Forensic examination opinions;
- (8) Written records of site inspection and investigation.

Evidence must be authenticated before it can be taken as a basis for factual determination.

Several problems in these two articles appear to be apparent: (1) why the sequence of 8 types of evidence differs? (2) why in one legislation “Audio-video evidence and digital data” are classified as one type, but are separated in another legislation? (3) with respect to the requirement that “evidence must be authenticated”, is there any distinction between the wording “before it can be admitted as the basis for deciding a case” and the wording “before it can be taken as a basis for factual determination”? These overlapped contents not only present waste of legislative and judicial resources, but will also confuse judges. This problem is mainly due to the deficiency of overall design of construction of evidence system, but it also proves the necessity and feasibility of the formulation of the *Uniform Provisions of Evidence*.

#### **D. Lack of Uniformity in Application**

In consideration of judicial practice, various provincial judicial organs have issued a vast number of local rules of evidence in implementation of the three major *Procedure Laws*. Seven or eight provinces formulated 46 *Provisions on Evidence*, among which there are 2 Uniform Evidence Rules, 24 Criminal Procedure Evidence Rules, 15 Civil Procedure Evidence Rules and 5 Administrative Procedure Evidence Rules. 33 of these evidence rules are issued by the provincial Higher People's Courts (60%) and 13 evidence rules are from the municipal courts (40%).<sup>47</sup>

Consequently, problems such as absence of conceptions, mistaken principles, overlap of contents and logical fallacies in all these local rules of evidence are more serious, which aggravates the lack of uniformity in application of evidence rules throughout China.

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<sup>47</sup> See FANG, Baoguo (房保国), *Xianshi Yijing Fasheng – Lun Woguo Difangxing Xingshi Zhengju Guize* (现实已经发生——论我国地方性刑事证据规则) [The Fact Is There – On Local Rules of Criminal Evidence in China], *Tribune of Political Science and Law*, May 15, 2007, at 41. See also REPORT 2009, 19-20; REPORT 2010, 24; REPORT 2011, 15, *supra* X.

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## IV. Path to a More Cohesive Evidence System

### A. Remove Three Theoretical Obstacles

The first theoretical obstacle is the so-called civil law tradition. Legislation in modern China mainly followed civil law tradition. However, beginning with the *Criminal Procedure Law* (1996), elements of adversarial system were introduced into the three procedural laws, which resulted in the preliminary construct of an adversarial trial mode. Indeed, China's procedure law has the characteristics of a mixed system. At the same time, the two major Western legal systems have also demonstrated a trend toward convergence. "Reform and harmonization are breaking down the distinctions between common law and civil law procedure."<sup>48</sup> Therefore, the fact that an independent evidence code is typically absent in civil law tradition must not be a theoretical barrier to the innovation of Chinese evidence system.

The second theoretical obstacle is the so-called particularity of the fact finding in China.<sup>49</sup> In fact, in terms of case facts, there is no difference among different countries: the facts or elements of a crime in the U.S., in China and in Tanzanian are of the same nature, so are civil disputes, such as contract disputes, property disputes, marriage disputes, in these three countries. This is because human beings share similar physiological needs, social lives and behavior patterns. The fact-finding is a process of empirical inference, subject to the law of epistemology. It is in this sense that Professor Ronald Allen emphasized that "evidence law is universal," "[fact-findings] are not different in China and the United States. The only relevant differences between the two cultures would have to do with exceptions to the general principle of admitting all the relevant evidence the parties wish to admit."<sup>50</sup> In my view, evidence law performs double functions of "seeking the truth" and "seeking the good".<sup>51</sup> As well as the pursuit of accuracy in fact finding, it also pursues justice, harmony and efficiency. These values are all universal. The construction of Chinese evidence system should mainly focus on the study of common rules shared by other countries' evidence regimes and should not put excessive emphasis on "Chinese characteristics."

The third theoretical obstacle is the particularity of each procedure. Current evidence legislation in China adopts the mode of enacting separate evidence rules for criminal procedure, civil procedure and administrative procedure. This is the main reason underlining system disorder and overlap of contents of evidence law. In fact, in terms of the facts involved in a case, it is difficult to tell which are criminal, and which are civil. In order to address the issues of disorganization, overlapping and system disorder of evidence rules, we must break the barriers of this particularity of

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<sup>48</sup> WALKER, Janet & CHASE, Oscar G., *Common Law, Civil Law and the Future of Categories*, li (2010).

<sup>49</sup> See YANG, Yuguan (杨宇冠) & SUN, Jun (孙军), *Goujian Zhongguo Tese de Feifa Zhengju Paichu Guize* (构建中国特色的非法证据排除规则) [Build the Exclusionary Rules of Illegal Evidence with Chinese Characteristics], *Journal of National Prosecutors College*, Aug. 10, 2010, at 101. See also LIANG, Kun (梁坤) & YANG, Jianguo (杨建国), *Zhongguo Tese Zhengju Zhidu: Jieding Pingjia yu Jianguo* (中国特色证据制度: 界定、评价与建构) [Evidence System with Chinese Characteristics: Definition, Evaluation and Construction], *Procuratorial Daily*, July 31, 2008, at 3.

<sup>50</sup> ALLEN, Ronald J., *The Jurisprudential and Political Foundation of Criminal Procedure* (刑事诉讼的法理和政治基础), *Z1 Evidence Science* 162, 172 (2007).

<sup>51</sup> ZHANG, Baosheng (张保生), *Zhengju Faxue* (证据法学) [Evidence Law] 108 (2009).

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each procedure, and pick the common and special rules respectively out from evidence rules of the three proceedings.

**B. Drafting the *Provisions on Procedural Evidence of the People's Court that Integrates Three Sets of Evidence Rules*<sup>52</sup>**

Evidence system is one of the fundamental systems for a state under rule of law. It would be desirable as a long-term goal for the national legislature to include evidence law in its legislative agenda. However, one must not underestimate the difficulty and complexity of harmonizing the three procedure laws and evidence law. For the short-term, the most feasible approach is to draft the *Provisions on Procedural Evidence of the People's Court* by the Supreme People's Court.

In 2011, the *Research on Provisions on Procedural Evidence* was approved as a major project of the National Social Science Fund, of which the chief expert is SHEN, Deyong, Executive Vice President of the Supreme People's Court. Members of the joint team for this project include 15 judges and 15 professors and Ph.D. candidates from the Institute of Evidence Law and Forensic Science of the China University of Political Science and Law. Professor Ronald Allen was appointed as the only foreign advisor. The main research task of the project is to build Chinese evidence law system and improve the system of evidence in China. Specifically, it is to enact a set of evidence rules, in the form of judicial interpretations of the Supreme People's Court, which are suitable for application to any type of cases tried by the people's courts at any level, i.e., to realize the *integration of evidence rules*.

The research work of the project consists of roughly four stages: (1) to investigate and survey the status of application of evidence rules in 10 courts around China; (2) to organize translation and study of evidence laws of foreign jurisdictions; (3) to draft the *Provisions of Procedural Evidence of the People's Court (Proposal draft for Judicial Interpretation)*; (4) to pilot the *Provisions of Procedural Evidence of the People's Court (Proposal draft for Judicial Interpretation)* in 10 courts throughout China, and to sum up experience and revise *the Provisions*. The final results will be submitted to the Supreme People's Court. At present, the team has accomplished the first and second stages of the research work, and has embarked upon the drafting phase.

The main work in the drafting stage is, by adopting the “software upgrading” approach, to systematically compile 325 current rules of evidence, to build up the system so as to address the problems of lack of conceptualization and faulty logic, to eliminate duplication by combining identical items, to eradicate mistaken principles and conflicts among rules through thorough system reconstruction. The systematic

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<sup>52</sup> The *integration of three types of evidence rules* means to integrate the evidence provisions in criminal, civil and administrative procedure laws into a uniform legal instrument. This is the opinion of HU, Yunteng (Director of Research Office of the Supreme People's court), who is in charge of this sub-project. See Secretariat of the Project Team, Brief Work Report of the Major Project of National Social Science Fund – Research on procedural evidence rules (No. 2, 2012).

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architecture of the *Provisions of Procedural Evidence of the People's Court* can be summarized in a catch phrase “One-Two-Three-Four”, namely: one logical theme: relevance; two parts of proof: burden and standard of proof; three statutory procedures: presentation, examination and ratification of evidence; four value foundations: accuracy, justice, harmony and efficiency.

### C. Faith in Evidence Law Education

The construction of evidence system is a long-term, arduous task, which requires close cooperation and joint promotion of the jurisprudential circle as well as the legislative and judicial departments. At present, the main difficulties confronted by the joint research team in the work are that the views of judge members diverge from those of scholar members. According to the division of work, the scholar members submitted the *Provisions on Procedural Evidence of the People's Court (Discussion Draft*, which contains a total of 9 chapters, 24 sections and 179 articles), to the second conference of the project team on August 30, 2013. However, this draft was rejected by the judge members. It was thus decided at this conference to prepare another draft for discussion by judge members, which has not yet been completed.

There are two direct reasons for this disagreement. The first one is that the judge members have never received systematic education of evidence law theory as a result of the lack of evidence law courses in most law schools. Professor ZHANG, Wenxian said, due to the congenital deficiency of our legal education, current judges are in great need of knowledge of evidence science.<sup>53</sup> The second reason is that the scholar members do not have experience for trial. Evidence law is the accumulation of the judge trial experience, therefore the scholar members also need to learn from the judge members about their trial practice. That is to say, there should be a mutual learning process among the joint team members.

In addition to the above two direct reasons, it has to be noticed that as a developing country, China's market economy and the rule of law are still at the developmental stage. For instance, there are large gaps between many indices of China and those of developed countries in the Rule of Law Index of the World Justice Project (WJP), especially in the aspect of fundamental rights protection.<sup>54</sup> With regard to the protection of evidentiary rights, there's a legal maxim “no right without a remedy.” However, until 2013, there were still 174 out of 1600 (11%) counties of China in which there was no single lawyer. Most of the counties without a lawyer are located in the poor areas of western China, while lawyers all gather in big cities with more developed market economy.<sup>55</sup> Therefore, given the above noted, direct and

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<sup>53</sup> See JIAO, Hongyan (焦红艳) & MO, Jingqing (莫静清), *Zhengjuxue Faguan Qianzhuang Quanguo Weiyi Fating Kexue Falü Shuoshi Ban Mingluo Kaijiang* (“证据学法官”前传: 全国惟一法庭科学法律硕士班鸣锣开讲) [Prequel to “Evidence Law Judge”: The Unique Class in China for Jurist Master of Forensic Science Begins], *Legal Daily* (weekend), Sep. 17, 2009, at 16.

<sup>54</sup> AGRAST, Mark David et al., *WJP Rule of Law Index 2012-2013*, The World Justice Project (Nov. 28, 2012), available at [http://worldjusticeproject.org/sites/default/files/WJP\\_Index\\_Report\\_2012.pdf](http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf).

<sup>55</sup> WANG, Junfeng (王俊峰), *Quanguo 136 Ge Xian Zouchu Lüshi Wurenqu Wu Lüshi Xian Duozai Xibu* (全国136个县走出律师‘无人区’无律师县多在西部) [136 Counties around China Got Rid of the No-Lawyer Situation,

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indirect, reasons, it is impossible to construct a sound system of evidence by one stroke. The United States declared independence in 1776. It was not until 1975 that the Federal Rules of Evidence was promulgated, which means it took nearly 200 years. The People's Republic of China is only 65 years old; maybe we should not eager to rush out an outcome. Of course, we should neither take no action. As a college professor, I believe that one kind of effort can never be made in vain, that is to dedicate myself to the evidence law education, and to foster a new generation of legal professionals who possess a good knowledge of modern evidence law, and would complete the historical mission.

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(Discussion Draft)

August 30, 2013

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