

## COMMENTARY

### INTERACTIONS BETWEEN NATIONAL JUDICIAL PRACTICE AND SUPRANATIONAL LEGAL VALUES: REFLECTIONS ON CHINA'S EVIDENCE LEGISLATION DEVELOPMENT

*Wang Zhuhao*\*    *Li Jia*\*\*

Like other civil law countries, China does not have an evidence code. Its evidence rules are scattered among respective procedural codes. Since the beginning of this century, Chinese scholars and practitioners have engaged in a movement toward specialized evidence legislation. During this movement, a good number of judicial interpretations, amendments to existing procedural laws, and experimental drafts of evidence statutes have surfaced. The most recent developments are the 2012 amendments to the Civil Procedure Law and the Criminal Procedure Law, both of which came into effect on 1 January 2013; and more importantly, two experimental drafts of comprehensive evidence legislation initiated by the Supreme People's Court: the People's Courts Uniform Provisions of Evidence in 2008 and the People's Courts Provisions of Evidence in Litigation in 2012. Both drafts contemplate an ultimate conversion to a comprehensive evidence statute. In both drafts, one can easily identify traces of elements that are regularly seen in the evidence laws of common law countries, from terminology and methodology to legal principle. Yet both drafts maintain significant traditions found in Chinese law and culture, and both demonstrate creativity in certain aspects.

This paper analyzes the latest developments in China's evidence legislation as a case study to the interactions between national legislative practice and supranational legal values. China's example shows that reforming one nation's legislation in the global context is a process of modernization, in which the recipient nation embraces universally recognized values by incorporating elements and fostering these values

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\* Assistant Professor at Institute of Evidence Law and Forensic Science of China University of Political Science and Law. This article is an interim research product for China Ministry of Education Project of Humanities and Social Sciences (Project No. 13YJC820073).

\*\* J. D. candidate at Indiana University Maurer School of Law.

into its law. But the incorporation of these elements varies in each recipient nation due to push back by local factors, including but not limited to local context, culture, sentiment and institutional traditions. Throughout this process, local traditions and new ideas coexist with supranational legal values, creating laws unique to the recipient nation. This paper argues that this modernization process leads to diversified expressions of global legal culture.

## I. INTRODUCTION

There is an interesting paradox: although the concept of codification originated in the civil law system,<sup>1</sup> most civil law countries do not appear interested in creating a statute specifically for evidence.<sup>2</sup> Their rules governing evidence are typically scattered among various procedural statutes.<sup>3</sup> So far, no civil law country has enacted separate evidence legislation.<sup>4</sup> Judges in civil law countries generally follow the principle of free evaluation of evidence, which is highly discretionary,<sup>5</sup> and it probably explains why civil law countries do not see the need to have separate evidence legislation. However, almost counter-intuitively, sophisticated separate evidence legislation now exists in many common law countries which traditionally relied mainly on case law.<sup>6</sup> The most representative is the United States Federal Rules of Evidence (hereinafter the "FRE").<sup>7</sup>

However, it seems that China is on the way to breaking the paradox. Like other civil law countries, the code-based legal system in China still does not have a separate evidence statute. However, following China's judicial reform in the late twentieth century, over the past decade an unprecedented amount of effort has gone into the study and development

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<sup>1</sup> Yi Yanyou, *The Codification of Evidence Law: The Enactment of the U. S. Federal Rules of Evidence and the Inspiration It Provides to Our Evidence Law Legislation*, 26 *Tribune of Political Science and Law* 80, 80-82 (2008).

<sup>2</sup> WU DANHONG, *THE IDEAL AND REALITY OF EVIDENCE LAW LEGISLATION IN CHINA*, *CHINA CIVIL AND COMMERCIAL LAW*, at <http://www.civillaw.com.cn/article/default.asp?id=51456> (Last visited on Aug. 7, 2014).

<sup>3</sup> Wu Danhong, *The Myth in Evidence Law Studies: Between Western Samples and the Reality in China*, 24 *Tribune of Political Science and Law* 17, 19 (2006).

<sup>4</sup> ZHANG BAOSHENG, *THE VALUE BASIS AND THEORETICAL SYSTEM OF RULES OF EVIDENCE*, at <http://mall.cnki.net/magazine/Article/LAWS200802011.htm> (Last visited on Aug. 7, 2014).

<sup>5</sup> He Jiahong & Yao Yongji, *On the Comparison of the Evidence System in the Two Main Legal Systems*, 4 *Comparative Law Studies* 64, 65 (2003).

<sup>6</sup> Yi Yanyou, *supra* note 1, 81-82.

<sup>7</sup> *Id.*, 80; He Jiahong, *A DISCUSSION OF THE FUNCTION OF EVIDENCE LAW*, *FA SHANG YANJIU, STUDIES IN LAW AND BUSINESS*, 2008, at [http://article.chinalawinfo.com/Article\\_Detail.asp?ArticleID=52486](http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=52486) (Last visited on Jan. 7, 2013).

of evidence law in China.<sup>8</sup> Some scholars call it an “evidence legislation movement” ( hereinafter the Movement) .<sup>9</sup> The Movement is fruitful and influential; for example , it led to the 2012 amendments to China’s Criminal Procedure Law<sup>10</sup> and to the Civil Procedure Law.<sup>11</sup>

Most interestingly , the Movement has recently proposed two significant sets of legislative change. The first , the People’s Courts Uniform Provisions of Evidence ( hereinafter the 2008 Evidence Provisions) resembles the FRE in a number of significant aspects;<sup>12</sup> but the second set ( up to date still under revision , expected to be finalized by the end of 2014) , the People’s Courts Provisions of Evidence in Litigation ( hereinafter the 2012 Evidence Provisions) , has significantly moved away from this approach.<sup>13</sup>

The Movement could be seen as reflection of a vigorous interaction between national judicial practice and supranational legal values. On the one hand , universally recognized values in evidence law once introduced into China have shown a strong vitality , being accepted quickly and widely by mainstream legislative , judicial and academic sectors in the country.<sup>14</sup> On the other hand , due to local traditions such as peculiarities in China’s Constitution , its judicial system , procedural laws and local practice of dispute resolutions , the Movement encounters obstacles and resistance.<sup>15</sup> Each minor development in the Movement involves an evolutionary process that re-creates the local culture by incorporating universally upheld values in a way unique to the people.<sup>16</sup> By the end of this process , national judicial practice may either accept or resist supranational legal values , depending on compatibility between these two.<sup>17</sup> Occasionally , certain national judicial practice may even evolve into some new trend of supranational legal values.<sup>18</sup>

This paper analyzes the latest developments in China’s evidence legislation as a case study in interactions between national judicial practice and supranational legal values. Chapter II provides a brief

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<sup>8</sup> Wang Jinxi , *The Two Dimensions of Evidence Science* , 27 *Tribune Of Political Science And Law* 150 , 150 ( 2009) .

<sup>9</sup> *Id.*

<sup>10</sup> 2012 CRIMINAL PROCEDURE LAW , at [http://www.gov.cn/flfg/2012-03/17/content\\_2094354.htm](http://www.gov.cn/flfg/2012-03/17/content_2094354.htm) ( Last visited Aug. 16 , 2014) .

<sup>11</sup> 2012 CIVIL PROCEDURE LAW , at [http://www.gov.cn/flfg/2012-09/01/content\\_2214662.htm](http://www.gov.cn/flfg/2012-09/01/content_2214662.htm) ( Last visited Aug. 16 , 2014) .

<sup>12</sup> ZHANG BAOSHENG , *PEOPLE’S COURTS UNIFORM PROVISIONS OF EVIDENCE ( PROPOSED JUDICIAL INTERPRETATIONS) AND ANALYSIS* ( 2008) .

<sup>13</sup> ZHANG JUN , *PEOPLE’S COURTS PROVISIONS OF EVIDENCE IN LITIGATION ( WORKING DRAFT)* ( 2012) ( unpublished draft) .

<sup>14</sup> See discussions in greater detail in Chapter IV. A of this paper.

<sup>15</sup> See discussions in greater detail in Chapter IV. B of this paper.

<sup>16</sup> See discussions in greater detail in Chapter III. B of this paper.

<sup>17</sup> See discussions in greater detail in Chapter V. of this paper.

<sup>18</sup> *Id.*

summary of the latest developments of the Movement. Chapter III explores two major impetuses behind the Movement, notably the Chinese people's pledge to resist miscarriages of justice and the impact of supranational values as a sign of legal globalization. Chapter IV itemizes five featured supranational values and four local contextualized factors that play defining roles in the Movement. Chapter V highlights landmark aspects in the 2008 Evidence Provisions and the 2012 Evidence Provisions from a comparative law perspective to look into the interaction between local factors and supranational values in the Movement. Chapter VI concludes that the Movement demonstrates a trail of modernization that will likely shape China's new identity in the global legal society, and add to the diversity of modern legal systems.

## II. DEVELOPMENT IN CHINA'S EVIDENCE LEGISLATION MOVEMENT

To date, China's officially promulgated evidence-related rules exist respectively in its statutes of civil procedure, criminal procedure and administrative procedure, as well as in the judicial interpretations of these procedural statutes by the Supreme People's Court.<sup>19</sup> Before 2000, very few evidence rules were contained in statutes: only eight in the 1996 Criminal Procedure Law,<sup>20</sup> six in the 1989 Administrative Procedure Law<sup>21</sup> and twelve in the 1991 Civil Procedure Law.<sup>22</sup> These rules were mostly simple expressions of general principles,<sup>23</sup> and almost half of them were either identical or substantially similar.<sup>24</sup>

Before the Movement, the concept of evidence law was rarely mentioned or studied in China's legal academies.<sup>25</sup> Although the subject of evidence did exist, scholars usually associated it with the science of procurement and authentication of evidence, but not with legal rules governing the introduction and evaluation of evidence in court.<sup>26</sup>

<sup>19</sup> Wang Yunying, A Discussion Regarding the Legislative Model for Our Evidence Law, 4 Journal of Fujian Administration Institute 83, 83 (2009).

<sup>20</sup> 1996 CRIMINAL PROCEDURE LAW, ART. 42-49, at [http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content\\_5004654.htm](http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content_5004654.htm) (Last visited on Jan. 7, 2013). This statute was later amended in 2012.

<sup>21</sup> 1989 ADMINISTRATIVE PROCEDURE LAW, ART. 31-36, at [http://www.npc.gov.cn/wxzl/gongbao/1989-04/04/content\\_1481162.htm](http://www.npc.gov.cn/wxzl/gongbao/1989-04/04/content_1481162.htm) (Last visited on Jan. 7, 2013).

<sup>22</sup> 1991 CIVIL PROCEDURE LAW, ART. 63-74, at [http://www.lawyeer.org/Act/Act\\_Display.asp?RID=27866](http://www.lawyeer.org/Act/Act_Display.asp?RID=27866) (Last visited on Jan. 7, 2013). This statute was later amended in 2007 and in 2012.

<sup>23</sup> Wang Yunying, *supra* note 19, 83.

<sup>24</sup> 1996 Criminal Procedure, *supra* note 20; 1989 Administrative Procedure, *supra* note 21; 1991 Civil Procedure, *supra* note 22; Zhang Baosheng, *supra* note 4 (stating that the redundancy rate was about 44.8 percent).

<sup>25</sup> CHEN RUIHUA, FROM "EVIDENCE" TO "EVIDENCE LAW", STUDIES IN LAW AND BUSINESS, 2006, at [http://article.chinalawinfo.com/Article\\_Detail.asp?ArticleID=47183](http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=47183) (Last visited on Oct. 27, 2014).

<sup>26</sup> *Id.*

However, in recent years, the enthusiasm of Chinese legal scholars and practitioners to push for evidence legislation has been unparalleled.<sup>27</sup> Since 2000, academic publications about evidence have flourished; law journals emphasizing evidence have appeared; academic institutes specializing in evidence have emerged in top law schools; and in 2006, China University of Political Science and Law established the nation's first doctoral degree program in evidence law.<sup>28</sup> The Movement has brought about significant changes to existing procedural law in China, and China is moving closer to the goal of enacting a specialized evidence statute.

#### *A. Legislation and Judicial Interpretations*

Since 2002, the Supreme People's Court has promulgated important judicial interpretations specifically addressing evidence issues respectively in criminal actions,<sup>29</sup> civil actions<sup>30</sup> and administrative actions.<sup>31</sup> In 2007, the People's Congress amended the Civil Procedure Law.<sup>32</sup> In 2012, the People's Congress amended the Criminal Procedure Law<sup>33</sup> and once again, amended the Civil Procedure Law.<sup>34</sup> All three amendments contained significant additions and changes to articles concerning evidence.<sup>35</sup>

The 2012 Criminal Procedure Law, for the first time, included language requiring human rights protection, granting right to counsel and addressing right against self-incrimination.<sup>36</sup> It also improved rules concerning witness testimony in court; added exclusionary rules for the exclusion of illegally obtained evidence and rules concerning witness protection and compensation; and adopted the "beyond reasonable doubt" standard.<sup>37</sup> The 2012 Civil Procedure Law improved rules concerning witness testimony in court and authentication of evidence, and

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<sup>27</sup> Wang Jinxi, *supra* note 8, 150.

<sup>28</sup> Zhang Baosheng, *supra* note 4.

<sup>29</sup> PROVISIONS CONCERNING HEARING AND JUDGING EVIDENCE IN CAPITAL CASES, at [http://www.law-lib.com/law/law\\_view.asp?id=316882](http://www.law-lib.com/law/law_view.asp?id=316882) (Last visited on Aug. 7, 2014); PROVISIONS CONCERNING THE EXCLUSION OF UNLAWFULLY OBTAINED EVIDENCE IN CRIMINAL CASES, at [http://www.law-lib.com/law/law\\_view.asp?id=316883](http://www.law-lib.com/law/law_view.asp?id=316883) (Last visited on Aug. 7, 2014).

<sup>30</sup> PROVISIONS FROM THE SUPREME PEOPLE'S COURT CONCERNING EVIDENCE IN CIVIL LITIGATION, at [http://www.court.gov.cn/bsfw/sszn/xgft/201004/t20100426\\_4533.htm](http://www.court.gov.cn/bsfw/sszn/xgft/201004/t20100426_4533.htm) (Last visited on Aug. 7, 2014).

<sup>31</sup> PROVISIONS FROM THE SUPREME PEOPLE'S COURT CONCERNING EVIDENCE IN ADMINISTRATIVE LITIGATION, at [http://www.law-lib.com/law/law\\_view.asp?id=40817](http://www.law-lib.com/law/law_view.asp?id=40817) (Last visited on Aug. 7, 2014).

<sup>32</sup> 2007 CIVIL PROCEDURE LAW, at [http://www.china.com.cn/policy/txt/2007-10/29/content\\_9139262.htm](http://www.china.com.cn/policy/txt/2007-10/29/content_9139262.htm) (Last visited Aug. 7, 2014).

<sup>33</sup> *Supra* note 10.

<sup>34</sup> *Supra* note 11.

<sup>35</sup> *Supra* note 10; *supra* note 11; and *supra* note 32.

<sup>36</sup> *Supra* note 10, art. 2, 14, 39, 40.

<sup>37</sup> *Supra* note 10, art. 46-63.

added a rule regarding witness compensation.<sup>38</sup>

Notwithstanding the continuous legislative and judicial efforts on evidence law, China is still far from having a comprehensive and modern system of evidence rules. Zhang Baosheng, the leading evidence law scholar in China, stated in a report for the 2012 Evidence Provisions project:

[T]hree fundamental problems remain in existing evidence rules. First of all, evidence rules in procedural laws and judicial interpretations in China have not been promulgated in a systematic and logical way. Relevancy rule is incomplete and is not referred to as a “logical thread” for trial judges to consider when determining admissibility of evidence. Second and a related problem is a significant number of existing evidence laws either overlap or are redundant. For example, according to the latest statistics, a total of fifty-one evidence rules are included in the Procedural Laws of China, nineteen of which are redundant. This indicates a tremendous waste of legislative and judicial resources. But more importantly, such redundancy in regulations causes confusion among trial judges when adjudicating cases. Last but not least, the current existing China’s evidence laws are short for policy-based rules, lacking considerations on important social values, such as fairness and efficiency.<sup>39</sup>

### *B. Experimental Drafting Projects*

Although legislation has not yet separated evidence law from traditional procedural statutes, Chinese scholars have created various drafts of specialized evidence statutes, with a goal of establishing a comprehensive and modern system of evidence rules.<sup>40</sup> Recently, two influential experimental projects received substantial support from the Supreme People’s Court, coming closer to the goal of comprehensive evidence legislation in China: the 2008 Evidence Provisions<sup>41</sup> project and the ongoing 2012 Evidence Provisions<sup>42</sup> project.

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<sup>38</sup> *Supra* note 11, art. 63-81.

<sup>39</sup> ZHANG BAOSHENG, EVIDENCE RULES ARE THE FOUNDATION OF JUDICIAL JUSTICE (unpublished conference material for the 2012 Provisions project) (on file with the CUPL Evidence Institute).

<sup>40</sup> BI YUQIAN, DRAFT OF CHINA EVIDENCE LAW (PROPOSAL) (2003); CHEN GUANGZHONG, THE P. R. CHINA CRIMINAL PROCEDURAL EVIDENCE LAW EXPERT DRAFT (2004); JIANG WEI, DRAFT OF CHINA EVIDENCE LAW (PROPOSAL) (2004).

<sup>41</sup> *Supra* note 12.

<sup>42</sup> *Supra* note 13.

The 2008 Evidence Provisions project started in 2006 when the Research Office of the Supreme People's Court delegated the Institute of Evidence Law and Forensic Science at China University of Political Science and Law ( hereinafter the CUPL Evidence Institute) to draft a set of judicial interpretations.<sup>43</sup> The intention was first to formulate a comprehensive set of evidence rules in the form of judicial interpretations promulgated by the Supreme People's Court; and when the time is right , this document could later serve as a blueprint for a formal evidence code.<sup>44</sup> In April 2008 , the Research Office of the Supreme People's Court delegated the CUPL Evidence Institute to pilot the 2008 Evidence Provisions in seven lower courts ,<sup>45</sup> and the drafting group further perfected the draft in 2010 based on feedbacks from the pilot program.<sup>46</sup>

The 2008 Evidence Provisions are , to a significant extent , modeled on the FRE.<sup>47</sup> The Provisions consist of seven chapters and contain 172 provisions.<sup>48</sup> Part Two of Chapter One<sup>49</sup> and all four parts of Chapter Three<sup>50</sup> highly resemble the language in Rule 401-411 of the FRE.<sup>51</sup> One can also find traces of the FRE in other parts of the 2008 Evidence Provisions; for instance , provision 68 of the 2008 Evidence Provisions describes an attorney-client privilege that drew inspiration from the FRE.<sup>52</sup> Other than heavily referencing the FRE , the drafting notes in the 2008 Evidence Provisions also cite evidence rules in other jurisdictions<sup>53</sup> as well as existing sources of evidence rules in China.<sup>54</sup>

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43 Zhang Jun , National Social Science Foundation Key Projects ( The Third Batch) Bidding Application , 26 , Sept. 15 , 2011 ( unpublished bidding application for the 2012 Provisions project , and on file with the CUPL Evidence Institute) .

44 *Id.* , 37-38.

45 Including four appellate courts and three trial courts: Kunming Intermediate People's Court , Shenzhen Intermediate People's Court , Dongying Intermediate Court , Yanbian Intermediate Court , Haidian People's Court , Dongcheng People's Court , and Shunde People's Court. *Id.* , 26.

46 Letter from the Supreme People's Court to the CUPL Evidence Institute ( Mar. 16 , 2012) ( on file with CUPL Evidence Institute) .

47 Email from Zhang Baosheng , Dean of the CUPL Evidence Institute and leading expert of the 2008 Evidence Provisions project , to Zhuhao Wang ( Nov. 15 , 2012 , 12: 18 AM CST) ( on file with Zhuhao Wang) ( "[ The 2008 Evidence Provisions ] was mainly a product of sinicizing the achievement of the U. S. evidence law" ) .

48 Chapter One "General Provisions"; Chapter Two "Categories and Forms of Evidence"; Chapter Three "Exclusion of Evidence and Exceptions"; Chapter Four "Pretrial Exchange of Evidence"; Chapter Five "Presentation of Evidence in Court"; Chapter Six "Collection and Protection of Evidence by Court"; Chapter Seven "Proof". 2008 Evidence Provisions , *supra* note 12.

49 *Id.* , Entitled "Relevance and Admissibility".

50 Part One "Exclusion of Illegally Obtained Evidence"; Part Two "Exclusion of Hearsay"; Part Three "Exclusion of Character and Propensity Evidence"; and Part Four "Evidence Not Admissible to Prove Faults or Liabilities".

51 Compare 2008 Evidence Provisions , *supra* note 12 , with Fed. R. Evid. 401-411.

52 Compare 2008 Evidence Provisions , *supra* note 12 , provision 68 , with Fed. R. Evid. 502.

53 For example , evidence rules in Italy , Germany , France , Russia , Japan , India , Australia , the Philippines , and Canada. 2008 Evidence Provisions , *supra* note 12.

54 Including procedural statutes passed by the People's Congress and judicial interpretations promulgated by all levels of courts in China.

The ongoing 2012 Evidence Provisions project is led by Shen Deyong, the Vice Chief Justice of the Supreme People's Court.<sup>55</sup> Zhang Baosheng, the leading expert involved in the drafting of the 2008 Evidence Provision is also an important member of the 2012 Evidence Provision drafting group.<sup>56</sup> The goal of this project is similar to that of the 2008 Evidence Provisions.<sup>57</sup> It consists of nine chapters and includes 179 provisions.<sup>58</sup> While the 2012 Evidence Provisions maintain some of the concepts borrowed from the FRE in the 2008 Evidence Provisions,<sup>59</sup> it mainly relies on existing statutes and judicial interpretations in China.<sup>60</sup> Its text reads much less like the FRE, and it has blended a significant number of local factors or newly invented factors into concepts borrowed from the FRE.<sup>61</sup>

### III. INTRINSIC AND EXTRINSIC IMPETUSES BEHIND CHINA'S EVIDENCE LEGISLATION MOVEMENT

The Movement has two deeply rooted impetuses, one internal and the other external. The first, an internal motivation, derives from the Chinese people's deep loathing and apprehension of wrongful verdicts. The second, an external impetus, comes from the impact of legal globalization in the form of a series of supranational legal values that have a growing influence on reformers of evidence legislation in China.

#### A. Inner Incentives: *Pledge to Resist Miscarriages of Justice*

In the past, due to heavy reliance on confessional evidence in criminal prosecutions, torture and forced confessions were prevalent in criminal cases and led to numerous wrongful convictions.<sup>62</sup> This has gradually become the most formidable challenge to the rule of law in

<sup>55</sup> Letter from the Supreme People's Court to the CUPL Evidence Institute, *supra* note 46; 2012 Evidence Provisions Bidding Application, *supra* note 43, 3.

<sup>56</sup> 2012 Evidence Provisions Bidding Application, *supra* note 43, 3.

<sup>57</sup> *Id.*, 46.

<sup>58</sup> Chapter One "General Provisions"; Chapter Two "Exclusion of Evidence and Exceptions"; Chapter Three "Pretrial Exchange of Evidence"; Chapter Four "Authentication"; Chapter Five "Collection and Protection of Evidence by Court"; Chapter Six "Burden of Proof and Standard of Proof"; Chapter Seven "Presentation of Evidence in Court"; Chapter Eight "Confrontation"; Chapter Nine "Evaluating the Weight of Evidence". 2012 Evidence Provisions, *supra* note 13.

<sup>59</sup> Relevance, privilege, exclusion of illegally obtained evidence in criminal cases, and so forth. 2012 Evidence Provisions, *supra* note 13.

<sup>60</sup> The 2012 Evidence Provisions' drafting notes cite only to sources of law in China; Email from Zhang Baosheng to Zhuhao Wang, *supra* note 47.

<sup>61</sup> See discussions in greater detail in Part IV of this paper.

<sup>62</sup> DEMOCRACY AND LAW: BUILDING "TWO DEFENSIVE LINES" TO AVOID WRONGFUL CONVICTIONS, PEOPLE, Apr. 19, 2005, at <http://npc.people.com.cn/GB/14840/3333260.html> (Last visited on Oct. 27, 2014).



China. Shen Deyong, the Vice Chief Justice of the Supreme People's Court, stated in a report for the 2012 Evidence Provisions project that "in recent years, recurring wrongful convictions have placed unprecedented challenges on China's judicial authority. If we do not deal with this problem with appropriate actions, daily adjudicating work will be put in jeopardy".<sup>63</sup> Investigations indicate recent notorious wrongful convictions nationwide. The She Xianglin Case in 1994, the Du Peiwu Case in 1998 and the Zhao Zuohai Case in 2010 all showed adjudicating errors in the fact-finding process,<sup>64</sup> not in the decision-making process of any legal issue.<sup>65</sup> Nearly all mainstream critics in China pointed to an unsound system of evidence rules as a key reason for such miscarriages of justice.<sup>66</sup> Their consensus is that if trial judges in China had a more advanced system of evidence rules to apply, then fewer systematic errors of factual adjudication would occur.<sup>67</sup> Thus, Chinese legal authorities see reforming evidence legislation as an urgent call and expect that a comprehensive and modern system of evidence rules would be an effective tool to minimize the total number of wrongful verdicts in the nation.

*B. External Driving Force:  
Impact of Supranational Values as  
a Sign of Legal Globalization*

In the contemporary world, the reach of globalization has spanned beyond the movement of goods, services and capital.<sup>68</sup> It now encompasses the flow of ideas around the world, and increasingly influences the legal and social institutions in individual nations.<sup>69</sup> If globalization is considered as the main paradigm of our time, then legal globalization would be a chapter of it, even though nowadays most of the conceptual and theoretical discussions of globalization still focus on three

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<sup>63</sup> SHEN DEYONG, PRESENTATION AT THE 2ND WORKING CONFERENCE FOR THE NATIONAL SOCIAL SCIENCE FOUNDATION KEY PROJECT "STUDIES ON LITIGATION EVIDENCE RULES" (unpublished conference material for the 2012 Provisions project, and on file with the CUPL Evidence Institute).

<sup>64</sup> See discussions of "Chinese judges' Dual Role" in greater detail in Part III and Part IV of this paper. In the Chinese legal system, no jury exists, and judges are both finders of fact and decision-maker of legal issues.

<sup>65</sup> Zhang Baosheng & Chang Lin, *The Progress of Evidence Law Development in China in the Year of 2012*, 2 *Evidence Science* (2014).

<sup>66</sup> Zhang Baosheng, *Overview of Basic Situations and Implementation Plan for the National Social Science Foundation Key Project "Studies on Litigation Evidence Rules, 2013"* (unpublished conference material for the 2012 Provisions project, and on file with the CUPL Evidence Institute).

<sup>67</sup> *Id.*

<sup>68</sup> TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, *BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS*, at xii (2009).

<sup>69</sup> *Id.*

aspects: economics , culture and politics.<sup>70</sup> Legal globalization is not a theory , just as globalization is not a theory.<sup>71</sup> Instead , it is an inexorable phenomenon , like a natural “evolutionary process”.<sup>72</sup> One expression of it is law operating at a supranational level , such as world trade and international arbitration , and there are a number of transnational codes , such as those for commercial , aviation and maritime law.<sup>73</sup> Another expression of legal globalization is the more fluid idea of laws among nations. Laws from one country often have an inspiring influence beyond their national level , studied and learned by other nations , in a process from which supranational legal values gradually form.<sup>74</sup> This diffusion of a rule or a system of law from one country to another has been described as a “legal transplant” .<sup>75</sup>

A synonym for globalization is “modernization” which “involves reflexivity , departing from tradition , changing the structure of social relations”;<sup>76</sup> and “[m]odernity is inherently globalizing”.<sup>77</sup> Alan Watson’s analogy in *Legal Transplants: An Approach to Comparative Law* is particularly helpful in explaining why interpreting globalization as modernization would be proper in legal transplants:

[L]aw like technology is very much the fruit of human experience. Just as very few people have thought of the wheel yet once invented its advantages can be seen and the wheel used by many , so important legal rules are invented by a few people or nations , and once invented their value can readily be appreciated , and the rules themselves adopted for the needs of many nations.<sup>78</sup>

To use an analogy , globalization in legal transplants is not about all nations producing the same cars , but is about nations taking the idea of cars and producing different cars that represent their respective identities , which will lead to an increase in the variety of cars available on a global scale. In this analogy , the reason why the idea of cars spreads globally is that it serves a need that all members of the global society share , and represents a value that all members of the global society recognize; it is

70 RALF MICHAELS , *GLOBALIZATION AND LAW: LAW BEYOND THE STATE* , in *LAW AND SOCIAL THEORY* , at 287-303 ( Reza Banakar & Max Travers eds , Hart , 2nd ed , 2013) .

71 *Id.*

72 Alistair King , *Legal Globalization: Investigating the Effects of an “Inexorable Phenomenon”* , *The Barrister* ( Oct. 12 , 2008) .

73 *Id.*

74 *Id.*

75 ALAN WATSON , *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* , at 21 ( University of Virginia Press , 1974) .

76 ANTHONY GIDDENS , *THE CONSEQUENCE OF MODERNITY* , at 63 ( Cambridge: Polity Press , 1990) .

77 *Id.*

78 ALAN WATSON , *supra* note 75 , 100.

human progress. The process of taking the idea of cars and developing it into different forms can thus be described as modernization.

Similarly, in legal transplants, when a legal concept or rule, essentially an idea, is universally recognized to uphold an important value in the human society, it becomes part of the supranational legal values<sup>79</sup> that represents human progress. The recipient nation embraces the globally recognized values by incorporating the idea into its system, but the expression of the idea varies in each recipient nation due to modifications by local factors, including but not limited to local context, culture, sentiment or institutional traditions.<sup>80</sup> Just as a medical organ transplantation surgery is highly likely to fail simply due to rejection by the patient's body, a legal transplant may fail if local factors reject that change. The endpoint of a successful legal globalization will not be complete integration, but a diversified expression of supranational legal values survived by a vital interaction with inevitable local factors in the recipient nation, which constitutes modernity in the form of global legal culture.

#### IV. SUPRANATIONAL VALUES IN EVIDENCE LAW AND RELATED LOCAL FACTORS UNDERLINING CHINA'S EVIDENCE LEGISLATION MOVEMENT

Taking a closer look at the on-going evidence legislation movement in China, what really underlies the Movement is a vigorous interaction between supranational values in evidence law that have been gradually accepted by Chinese authorities in the legislative, judicial and academic fields, and the inevitable local factors that have been relied upon by Chinese authorities to reject or modify these values.

##### *A. Featured Supranational Values in Evidence Law That Have Been Gradually Accepted in China*

Ideas flow with the movement of people. Nowadays, in addition to a steady growth of high profile academic exchange programs between China and western countries<sup>81</sup>, an ever-increasing number of young people in

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<sup>79</sup> The concept of "supranational legal values" has been mentioned, but its meaning varies in different academic discussions. See, e. g., Charles H. Koch, Jr., *Envisioning A Global Legal Culture*, 25 *Mich. J. Int'l L.* 1, 2 (2003); Russell Menhart, *Changing Identities and Changing Law: Possibilities for A Global Legal Culture*, 10 *Ind. J. Global Legal Stud.* 157, 159 (2003). For the purpose of this paper, it is defined as a collection of legal elements that foster globally recognized values and represent progress of human society.

<sup>80</sup> *Id.*

<sup>81</sup> Lin Jinhui & Yan Xiao, *Expansion and Exploration on Studies of China-foreign Cooperation in Education*, 9 *Educational Research* 109, 109 (2011).

China have been studying overseas on their own initiative. According to statistics provided by China's Ministry of Education, the total number of Chinese students studying abroad has increased in double figures for five consecutive years, reaching four hundred and fourteen thousand in 2013, of which 20 percent are law students.<sup>82</sup> Top-tier law schools in the United States, United Kingdom, Germany and France are among the most popular study-abroad destinations.<sup>83</sup> After graduation, most of these young people choose to return back to China instantly or after a few years legal practice in the foreign country.<sup>84</sup> These western-educated young people, compared to the elder generation of Chinese legal practitioners, have acquired knowledge of an entirely different set of legal values.<sup>85</sup> Most significantly, they have brought back to China modernized legal ideas and customs that represent human progress.<sup>86</sup>

In the meantime, since the late 1990s, as a result of various meritorious incentives, a significant number of world-class legal scholars from western countries have maintained visits to China,<sup>87</sup> encouraging the development of the rule of law in China.<sup>88</sup> For instance, Ronald J. Allen,<sup>89</sup> Professor of Law from Northwestern University School of Law, since 2004 has worked closely with the Supreme People's Court and CUPL Evidence Institute to help formulate proposals for evidence legislation reform and has been responsible for hosting and supervising the study and research of Chinese law faculty and students at Northwestern University.<sup>90</sup> His ideas and notions on evidence law and procedural law have had a significant influence in China and in 2007, Allen was designated as a Yangtze River Scholar, the highest academic honor that is given by the Chinese Government.<sup>91</sup> Below is an excerpt from Allen's work,

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<sup>82</sup> STUDY ABROAD TREND REPORT IN 2014, CHINA EDUCATION ONLINE, at <http://www.eol.cn/html/lx/2014baogao/content.html> (Last visited on Aug. 21, 2014); STATISTICS ON STUDY ABROAD PERSONNEL IN 2014, at <http://www.moe.gov.cn/publicfiles/business/htmlfiles/moe/s5987/201202/130328.html> (Last visited on Aug. 21, 2014).

<sup>83</sup> Id.

<sup>84</sup> Id., Hou Yaokun & Ma Long, 70 Percent Study-Abroad Students Back to China for Career, *People Daily*, Dec. 6, 2013, at 4.

<sup>85</sup> Chen Changgui, Gao Lanying & Lou Xiaolin, Why Back to China and How Do They After Return: Statistical Study on 471 Study-Abroad Students Returning to China, 13/14 *China Higher Education* 47, 47 (2000).

<sup>86</sup> Wen Jinhai, Zhang Bin & Xu Chunliang, Embracing Overseas Talents in Support for Domestic Industrial Upgrading: Overseas Recruitment Strategies in Zhejiang Province, 11 *Chinese Talents* 14, 14 (2011).

<sup>87</sup> Qiang Wei, 60 Years' Foreign Experts in China, 5 *International Talent* 32, 33 (2014).

<sup>88</sup> Luo Xu & Sun Jing, Foreign Experts' Chinese Dream, *Guangming Daily*, July 3, 2013, at 15.

<sup>89</sup> Professor Allen was recently also retained by the Tanzanian Government to assist in the reform of its evidence law. His research result on related topics has already been published in *Boston University International Law Journals*. See *infra* note 93.

<sup>90</sup> RONALD J. ALLEN'S WIKIPEDIA PAGE, at [http://en.wikipedia.org/wiki/Ronald\\_J.\\_Allen](http://en.wikipedia.org/wiki/Ronald_J._Allen) (Last visited on Aug. 22, 2014).

<sup>91</sup> Id.

Reforming the Law of Evidence of Tanzania ( Part Two) : Conceptual Overview and Practical Steps , regarding five featured “supranational values in evidence law” that he argues must necessarily have a profound impact upon China’s evidence law.

1. Pursuit of Factual Accuracy. — Accurate fact-finding is as fundamental to the construction of a just society as is the articulation of rights and obligations.<sup>92</sup> Indeed , accuracy in fact-finding may be more fundamental than rights and obligations , for without accurate fact-finding , rights and obligations are meaningless.<sup>93</sup> Every contested claim of a right or an obligation is entirely dependent upon the finding of facts.<sup>94</sup> In order to assert and defend a right in court , one must first establish the facts that demonstrate that a right has been violated. Thus , no legal system can afford to ignore factual accuracy. One might reasonably suppose that natural reasoning processes based on innate cognitive capacities work well , and thus typically should be deferred to in the pursuit of factual accuracy.<sup>95</sup> However , there may be some recurring situations that lead to error when natural reasoning is applied; for example , the possibility that natural reasoning about certain forms of evidence can generate error explains the frequently found authorization to exclude evidence when it may be misleading or unfairly prejudicial.<sup>96</sup> It also underlies other rules , such as limitations on character and propensity evidence,<sup>97</sup> and the requirement that witnesses testify from first-hand knowledge.<sup>98</sup>

Factual accuracy is the most significant aspiration of a rational legal system , but it is by no means the only one. Accuracy has a cost , and the cost can sometimes exceed its value.<sup>99</sup> A legal system overly preoccupied with factual accuracy may undermine the very social conditions that the

<sup>92</sup> Ronald J. Allen , *The Framework for the Reform of Evidence* , 31 ( 5 ) *Evidence Science* , 632-633 ( 2013 ) .

<sup>93</sup> Ronald J. Allen , Timothy Fry , Jessica Notebaert & Jeff VanDam , *Reforming the Law of Evidence of Tanzania ( Part Two) : Conceptual Overview and Practical Steps* , 32 ( 1 ) *Boston University International Law Journal* , 4 ( 2014 ) .

<sup>94</sup> Ronald J. Allen , *supra* note 92.

<sup>95</sup> Ronald J. Allen , Timothy Fry , Jessica Notebaert & Jeff VanDam , *supra* note 93 , 11.

<sup>96</sup> U. S. FED. R. EVID. 403( “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice [or] misleading the jury. . . .” ) ; HODGE M. MALEK , JONATHAN AUBURN & RODERICK BAGSHAW , *PHIPSON ON EVIDENCE* § 20-63 , 540 ( 16th ed. 2005 ) ( “The [English] common law discretion to exclude evidence more prejudicial than probative remains. . . .” ) .

<sup>97</sup> U. S. FED. R. EVID. 404( “Evidence of a person’s character . . . is not admissible to prove . . . the person acted in accordance with the character.” ) ; *Criminal Justice Act* , 2003 , c. 44 , § § 99 - 112 ( U. K. ) ( excluding character evidence subject to exceptions ) .

<sup>98</sup> U. S. FED. R. EVID. 602( “A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” ) ; MALEK , AUBURN & BAGSHAW , *supra* note 28 , § 12-17 , 324( “The facts testified to by a witness must . . . be those which have occurred within his own personal knowledge. . . .” ) .

<sup>99</sup> Ronald J. Allen , Timothy Fry , Jessica Notebaert & Jeff VanDam , *supra* note 93 , 12.

legal system is trying to foster.<sup>100</sup>

2. The Economic and Social Values of Incentives. — Factual accuracy competes not only with cost; it must also be weighed against other policies that a government may reasonably pursue.<sup>101</sup> For example, the law of privileges may foster and protect numerous relationships, including spousal, legal, medical, spiritual and governmental.<sup>102</sup> Another example is that a system can provide incentives to fix dangerous conditions in a timely fashion after an accident by preventing the use of evidence related to those repairs.<sup>103</sup> Although a reasonable person might infer such repair shows that the property owner acknowledged a dangerous condition, admission of the repair evidence creates a disincentive to fix the dangerous condition, putting more people in danger.<sup>104</sup> Still other policies can be pursued. As one last practical example, in the United States, a vast body of exclusionary rules is premised on the perceived need to regulate police investigative activities.<sup>105</sup> Rules of evidence can also encourage or discourage certain kinds of lawsuits from being brought.<sup>106</sup>

3. General Considerations of Fairness. — Principles of fairness and equity may also influence the law of evidence, although the precise effect of this variable is often hard to sort out from more overtly utilitarian motivations.<sup>107</sup> Some think that the limit on unfairly prejudicial evidence reflects not only the concern about accuracy but also the concern about humiliation, as is also the case with rape relevancy rules.<sup>108</sup> The limits on prior behaviour and propensity evidence reflect in part a belief that an

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<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> U. S. FED. R. EVID. 501 advisory committee notes to 1974 enactment (outlining a proposed system of privileges for the Federal Rules of Evidence, including protections for communications between husbands and wives and communications with clergy, among several others); Rules of Procedure and Evidence, Doc. ICC-ASP/1/3 (pt. 11-A), Rules 73, 75 (Sept. 9, 2002) (providing absolute privilege for attorney-client and family communications, while privileging certain confidential communication with professionals – such as doctors, counselors, and clergy – when it meets certain requirements). See JUDGE RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE § § 6.74 – 6.76, 195 (2002) (privileging communication of U. N. personnel).

<sup>103</sup> U. S. FED. R. EVID. 407 (disallowing the admission of evidence where “measures are taken that would have made an earlier injury or harm less likely to occur” to prove negligence, culpable conduct, design defects, or need for warning).

<sup>104</sup> Ronald J. Allen, Timothy Fry, Jessica Notebaert & Jeff VanDam, *supra* note 93, 13.

<sup>105</sup> RONALD J. ALLEN, WILLIAM J. STUNTZ, JOSEPH L. HOFFMANN, DEBRA A. LIVINGSTON & ANDREW D. LEOPOLD, COMPREHENSIVE CRIMINAL PROCEDURE (3rd ed, 2011).

<sup>106</sup> John Leubsdorf, Evidence Law as a System of Incentives, 95 IOWA L. REV. 1621 (2010).

<sup>107</sup> Ronald J. Allen, Timothy Fry, Jessica Notebaert & Jeff VanDam, *supra* note 93, 13.

<sup>108</sup> U. S. FED. R. EVID. 412-415.

individual should not be trapped in the past.<sup>109</sup>

4. The Risk of Error. — A mistake-free legal system is not possible. It is critically important to recognise that two types of errors can be made: a wrongful verdict for a plaintiff (or in a criminal case a conviction of an innocent person), which is named “Type I” or false-positive error, and a wrongful verdict for an accused (or the acquittal of a guilty person), which is named “Type II” or false-negative error.<sup>110</sup> Resource allocation and other decisions will affect the relationship between these two types of errors.<sup>111</sup> Normally, civil litigation is structured to attempt both to reduce the total number of errors and to equalise the numbers of errors made on behalf of plaintiffs and defendants.<sup>112</sup> In civil cases, an error either way results in identical misallocation of resources. The criminal justice process, by contrast, is designed to reduce the possibility of wrongful conviction at the admitted expense of making more mistakes of wrongful acquittals.<sup>113</sup> Although the matter is complicated, these perspectives explain in large the preponderance of evidence standard in civil cases and the standard of proof beyond a reasonable doubt in criminal cases.<sup>114</sup>

5. Rules vs. Discretion in the Admissibility of Evidence. — Aspects of the law of evidence are rule-like in the sense of providing necessary and sufficient conditions for deduction to occur about the matter that the rule governs.<sup>115</sup> However, important parts of the law of evidence simply allocate responsibility and discretion precisely because the particular issue is too complicated for rule-like treatment.<sup>116</sup> Perhaps the single most important aspect of the law of evidence—relevancy—has this attribute.<sup>117</sup> It is impossible to state a priori the necessary and sufficient conditions for the relevance of most evidence presented at any particular trial. The conditions that make evidence relevant or irrelevant cannot be known in advance, and they depend on the unique characteristics of each trial. For example, it is impossible to know in advance how a witness will testify in a dispute that has not yet materialised. Thus, it is impossible to

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<sup>109</sup> *United States v. Harding*, 525 F.2d 84, 89 (7th Cir. 1975) (Stevens, J.) (“When the prior conviction is used to impeach a defendant who elects to take the stand to testify in his own behalf, . . . [it] implies that he is more likely to have committed the offense for which he is being tried than if he had previously led a blameless life.”); I WIGMORE, EVIDENCE § 57 (3d ed. 1940) (“The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court.”).

<sup>110</sup> Ronald J. Allen, Timothy Fry, Jessica Notebaert & Jeff VanDam, *supra* note 93, 14.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> China shares these well-known standards. See 2012 Criminal Procedure Law, article 53.

<sup>115</sup> Ronald J. Allen, Timothy Fry, Jessica Notebaert & Jeff VanDam, *supra* note 93, 15.

<sup>116</sup> *Id.*

<sup>117</sup> U. S. FED. R. EVID. 401.

create a set of evidentiary rules that regulate such matters in detail.<sup>118</sup> Instead, the law of evidence must vest responsibility in someone—party or judge—to determine what evidence to offer, and it does so under quite general guidelines.<sup>119</sup>

### *B. Inevitable Local Contextualized Factors in China*

As mentioned above, restructuring evidence legislation is not just a matter of optimizing these supranational values. It also has a heavily local contextualized component. Below is a brief summary<sup>120</sup> of four featured local factors that play a defining role in China's evidence legislation reform.

First, China has long time been considered as an inquisitorial system country, as opposed to an adversarial system. All rules that structure the process of proof are derived from and implement a theory of dispute resolution.<sup>121</sup> The dominant theory of dispute resolution in most common law nations is the adversarial process,<sup>122</sup> which is the fundamental rationale behind many legislation designs, including robust pre-trial discovery and sophisticated direct/cross examination led by the litigating parties.<sup>123</sup> For example, in the United States, it is generally believed that adversarial investigation and presentation of evidence is more likely to yield a verdict consistent with the truth than would a process more dominated by a tribunal.<sup>124</sup> The parties know their case better than anyone else and have the proper incentives to invest the optimal resources in dispute resolution.<sup>125</sup> A government bureaucracy normally would be a poor substitute for the more thorough knowledge and more finely calibrated incentives of the parties.<sup>126</sup> However, the adversarial process is not universal. China has for a long time accepted an inquisitorial or non-adversarial process whereby the court is actively involved in investigating the facts of the case.<sup>127</sup> Existing procedural laws of China barely include rules of pre-trial discovery or direct/cross-examination by

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<sup>118</sup> Ronald J. Allen, Timothy Fry, Jessica Notebaert & Jeff VanDam, *supra* note 93, 15.

<sup>119</sup> *Id.*

<sup>120</sup> This portion (Chapter IV. B of this paper) is influenced by thinking in Ronald J. Allen, *the Framework for the Reform of Evidence*, 21 (5) *Evidence Science* (2013).

<sup>121</sup> Ronald J. Allen, *supra* note 92, 633.

<sup>122</sup> *Id.*

<sup>123</sup> See generally Kirsten DeBarba, *Maintaining the adversarial system: The practice of allowing jurors to question witnesses during trial*, 5 *Vanderbilt Law Review*, 1521-1548 (2002).

<sup>124</sup> Ronald J. Allen, *supra* note 92, 635.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Chen Weidong & Hao Yinzong, *Structural Defects in China's Criminal Litigation and Retifications*, 4 *Chinese Journal of Law* 101, 101-102 (2000).



the litigating parties.<sup>128</sup> In China, it is generally believed that control by a disinterested tribunal will lead to less abuse and manipulation of evidence and increase the chance that verdicts are consistent with the truth.<sup>129</sup>

Second, the judiciary system is not fully independent from Government in China. The second and related point is that theories of dispute resolution, such as the adversarial system or inquisitorial system, are themselves derived from underlying conceptions of the appropriate role of government in the resolution of disputes between private individuals in civil cases and in the prosecution of criminal cases.<sup>130</sup> In the Anglo-American tradition, the role of the government in private dispute resolution has been largely facilitative.<sup>131</sup> The government provides a fair and disinterested forum for the impartial resolution of private disputes, and that is essentially the only obligation, or a right, the government has.<sup>132</sup> In an extraordinary way, this conception of dispute resolution affects criminal cases as well. The government prosecutes cases, but the government is conceived of as analogous to a private party that stands on equal footing with the other private party, the defendant, before the courts.<sup>133</sup> The courts are neutral, in other words, and are not part of the organs of government structured to further the government's specific policy interests in the particular trial.<sup>134</sup> Again, this is not a universal characteristic of legal systems. In China, the Constitution does not have a "separation of powers" doctrine and the judicial branch is still considered part of the organs of government.<sup>135</sup> Judges in China never get tenured.<sup>136</sup> They are appointed and removed by the People's Congress (another organ of the government in China), and within the same payroll system as other government employees.<sup>137</sup> Furthermore, the People's Procuratorates (counterpart of "prosecutors" in the United States) has some special supervisory power over the People's Courts in China.<sup>138</sup> When certain conditions (mainly under article 242 of the 2012 Criminal Procedural

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<sup>128</sup> Huang Songyou, *Comparative Studies on Discovery Rules: While Commenting on Discovery in China's Civil Procedural Practice*, 5 *Tribune of Political Science and Law* 103, 112 (2000).

<sup>129</sup> *Id.*

<sup>130</sup> Ronald J. Allen, *supra* note 92, 633-634.

<sup>131</sup> *Id.*, 634.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Ma Huaide & Deng Yi, *Judiciary Independence and Amendment to the Constitution*, 12 *Legal Science* 29, at 29-31 (2003). Yu Jingyao, *Analysis on Structure of Judicial Independence and Judicial Reform*, 3 *Chinese Journal of Law* 52 (2004).

<sup>136</sup> Zhuang Liqin, *Discussion on Judge Welfare System in China*, 30 *Legal System and Society* 45, 45 (2010). Lu Fangxia, *Reflection on Chinese Judges' Role as Government Employees*, 6 *Journal of the Communist Party School of the Zhejiang Province* 115, 117-118 (2005).

<sup>137</sup> *Id.*

<sup>138</sup> Chen Si, *Reflection on Procuratorates' Supervision Power Over Courts: Operation of Protest Power Against Courts' Rulings as an Example*, 10 *Legal Science* 130, 130-133 (2007). Chen Le & Zeng Jian, *Reflection and Restructuring on China's Procuratorates' Power: Focusing on Analysis of Protest Power Against Courts' Rulings*, 9 *Legal System and Society*, 149 (2012).

Law) are met , the procuratorates may protest against the rulings of lower-level or same-level courts and demand a retrial.<sup>139</sup>

Third , the Constitution of China has no specified protections for the personal liberties of criminal defendants , such as the right to confront and to cross-examine accusatory witnesses. The judiciary and the other branches of government are designed to further the aspirations reflected in the founding documents and traditions of the country , such as the Constitution.<sup>140</sup> For example , the Fifth Amendment to the United States Constitution protects against self-incrimination and the Sixth Amendment grants criminal defendants even more discrete personal liberties , including but not limited to the right to an impartial jury and the right to confront and cross-examine adverse witnesses.<sup>141</sup> However , in China , the Constitution does not explicitly afford criminal defendants any of above-mentioned rights.<sup>142</sup> Thus , unlike the United States , evidence legislation in China lacks direct support at the constitutional level.

Fourth , in China , it is for the judge rather than the jury to determine facts of a case. Another important local factor is the effect that juries or lay assessors have on the structure of a legal system.<sup>143</sup> In the United States , juries are at once revered and simultaneously treated as alien intruders into the otherwise professional world of the law and accordingly must be regulated and controlled.<sup>144</sup> Considerable part of the law of evidence and procedure in the United States is driven by the judge-jury divide.<sup>145</sup> However , in China , trial judges determine both facts and legal issues , and there is no such design of “jury trial”.<sup>146</sup> When determining the facts of a case , Chinese judges prefer to and are used to exercising FRE-Rule 403 type discretionary rules , rather than complying with highly regulated rules like FRE hearsay rules or character evidence rules in which judges’ discretions are much limited.<sup>147</sup> In addition , it is generally believed in China that compared to laypersons , judges are experienced professionals who are less likely to be unfairly prejudiced against either party to the case in making their adjudications.<sup>148</sup>

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<sup>139</sup> Id.

<sup>140</sup> Ronald J. Allen , *supra* note 92 , 634.

<sup>141</sup> U. S. Const. Am. 5-6.

<sup>142</sup> Chen Ruihua , *Issues in Constitutionalizing Criminal Defendants’ Rights* , 5 *Tribune of Political Science and Law* 29-35 ( 2000 ) . Chen Ruihua , *Constitutional Protections on Criminal Defendants’ Rights* , 9 *Law Application* ( 2004 ) .

<sup>143</sup> Ronald J. Allen , *note* 92 , 635.

<sup>144</sup> Id.

<sup>145</sup> Id.

<sup>146</sup> Huang Songyou , *Fact-finding Power: Mode Alternatives and Structuring* , 4 *Chinese Journal of Law* 50-54 ( 2003 ) .

<sup>147</sup> Zhao Peixian , *Judges’ Discretion in Fact-findings and Corresponding Procedural Controls* , 5 *Journal of National Prosecutors College* ( 2013 ) .

<sup>148</sup> Huang Songyou , *supra* note 146.

## V. ANALYSIS OF THE 2008 EVIDENCE PROVISIONS AND THE 2012 EVIDENCE PROVISIONS

The 2008 Evidence Provisions and the 2012 Evidence Provisions are the latest , but still interim , achievements of the Movement. Although they contemplate ultimate conversion to a formal statute , both are experimental drafts of judicial interpretations , rather than proposed statutes. This would allow more flexibility in terms of adjustment and practical experiment at this stage , and will speed up the promulgation of a comprehensive set of evidence rules.<sup>149</sup> That said , to attempt an entire statute in the form of judicial interpretations is unprecedented in China.

In both drafts , one can easily identify traces of elements regularly seen in the common law system , from terminology and methodology to legal principles , but with variations on some level. Yet both documents maintain a significant number of traditions in Chinese culture and law , and both demonstrate creativity in certain aspects. The 2008 Evidence Provisions lean to embracing more supranational values in evidence law while the 2012 Evidence Provisions puts more weights on local factors. The following aspects are addressed in both Provisions and had been new to the legal system in China before the Movement.

### A. *Establishing an Evidence Code*

Both Provisions adopt the approach of codifying evidence rules. The idea of fully systemizing evidence law and providing more technical details , inspired by the FRE and other evidence statutes of common law countries , would directly address fundamental gaps in China's existing evidence legislation. A fully rational and logical system of evidence law would restrain the use of arbitrary and capricious discretion by judges and thereby increase consistency and reduce uncertainty.<sup>150</sup>

The strongest argument against eventually enacting an evidence code is that China's court system is separated into specialized divisions ( e. g. , civil and commercial courts , criminal courts , administrative courts and so forth) , a feature that U. S. courts do not share.<sup>151</sup> This arguably creates an institutional inertia that could constitute an obstacle to codification. However , given the striking overlap of evidence rules scattered throughout the various procedural statutes , as discussed in Chapter II , perhaps the contention that countries in the civil law system cannot enact an evidence

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<sup>149</sup> 2012 EVIDENCE PROVISIONS BIDDING APPLICATION , *supra* note 43 , 38-41.

<sup>150</sup> EDGARDO BUSCAGLIA & WILLIAM RATLIFF , LAW AND ECONOMICS IN DEVELOPING COUNTRIES 6 ( 2000) .

<sup>151</sup> Zhang Baosheng , *supra* note 4.

code<sup>152</sup> merely demonstrates academic inertia or prejudice that fails to see the necessity to modernize the system.

### *B. Exclusionary Rules*

The exclusionary rules against the admissibility of illegally obtained evidence serve the supranational value of protecting individual rights. The 2008 Evidence Provisions have four provisions pertaining to the exclusion of illegally obtained evidence in criminal cases,<sup>153</sup> and the 2012 Evidence Provisions have eleven such provisions.<sup>154</sup> Both Provisions prohibit forced self-incrimination and prohibit confessional evidence obtained as a result of such force.<sup>155</sup>

Even though China's Constitution does not protect a criminal defendant's personal liberties (as discussed in Chapter IV), Chinese scholars and practitioners in the past decade have devoted increasing attention to China's international obligation to protect the human rights of the accused, as expressed in international treaties. Gradually, a consensus has been formed in the general public of China that criminal defendants have human rights and exclusionary rules are necessary to ensure these rights. This example shows that if local culture is at odds with globally recognized values, the global legal culture has a chance of eventually changing.

In addition, an interesting variation of the exclusionary rules in the 2008 Evidence Provisions and the 2012 Evidence Provisions is that both Provisions exclude unlawfully or tortuously obtained evidence in civil and administrative cases.<sup>156</sup> It seems that China is extending the individual rights protection to evidence collection in civil and administrative cases. This may be in an effort to further emphasize individual rights in China's legal reforms, and China may have a chance to join few other countries with similar rules to lead a new trend of supranational values in evidence law.

### *C. Privileges*

Privilege rules protect individual rights by ensuring free communications within a relationship of trust and confidence. Both the

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<sup>152</sup> Zhang Baosheng, Man Yunlong & Long Weiqiu, *The Value Basis of American Evidence Law*, J. 6 China U. Political Sci. L. 51 and 52 (2009), at 51, 52.

<sup>153</sup> 2008 Evidence Provisions, *supra* note 12, provisions 22, 23, 24, 27.

<sup>154</sup> 2012 Evidence Provisions, *supra* note 13, provisions 21-31.

<sup>155</sup> 2008 Evidence Provisions, *supra* note 12, provision 128; 2012 Evidence Provisions, *supra* note 13, provision 72.

<sup>156</sup> 2008 Evidence Provisions, *supra* note 12, provision 25; 2012 Evidence Provisions, *supra* note 13, provision 32.

2008 Evidence Provisions and the 2012 Evidence Provisions include privilege rules ,but the scope is quite different in each document.

Although both Provisions provide for attorney-client privilege , the 2008 Evidence Provisions protects “confidential communications ” between an attorney and his client ,<sup>157</sup> while the 2012 Evidence Provisions protects “related circumstances and information that the attorney learned during the representation ”.<sup>158</sup> The language in the 2012 Evidence Provision is closer to the confidentiality rule in the United States ABA Model Rules of Professional Conduct ,<sup>159</sup> while the 2008 Evidence Provision adopts the language of the FRE;<sup>160</sup> it seems that the scope of protection is broader in the 2012 Evidence Provision. Neither Provisions provide rules regarding waiver of privileges. Although the attorney-client privilege is not yet included in a formal procedural statute ,the Standing Committee of the People’s Congress added a confidentiality rule in China’s Lawyer Law in 2007.<sup>161</sup>

Both Provisions provide an immediate relative privilege , which is a variation of the marital communication privilege in the United States and other common law countries. However ,the 2008 Evidence Provisions and the 2012 Evidence Provisions both extend such a privilege to parents and children.<sup>162</sup> The protected scope of this immediate relative privilege is not limited to communications between the witness and the defendant ,<sup>163</sup> so it is broader than that of the U. S. marital privilege. This is probably because the traditional culture in China features an extremely close and trusting relationship between parents and children ,often even to a greater extent than a spousal relationship. Such a variation is in line with the value that privilege rules protect and here again China may have a chance to join few other countries with similar rules to lead a new trend of supranational value in evidence law.

#### *D. Relevance and Admissibility*

The concepts of relevance and admissibility reflect a logical ,<sup>164</sup> coherent and standardized approach to the organization of an evidence

<sup>157</sup> 2008 EVIDENCE PROVISIONS , supra note 12 ,provision 68.

<sup>158</sup> 2012 EVIDENCE PROVISIONS , supra note 13 ,provision 97.

<sup>159</sup> Compare 2012 Evidence Provisions , supra note 13 ,provision 97 with MODEL RULES OF PROF’L CONDUCT R. 1.6 (2012) .

<sup>160</sup> Compare 2008 Evidence Provisions , supra note 12 ,provision 68 with FED. R. EVID. 502( g) (1) .

<sup>161</sup> LAWYER LAW , art. 38 , at [http://www.law-lib.com/law/law\\_view.asp?id=223162](http://www.law-lib.com/law/law_view.asp?id=223162) ( Last visited on Aug. 7 ,2014) .

<sup>162</sup> 2008 EVIDENCE PROVISIONS , supra note 12 ,provision 70; and 2012 EVIDENCE PROVISIONS , supra note 13 ,provision 98.

<sup>163</sup> Id.

<sup>164</sup> Zhang Baosheng , supra note 4.

rule system. This is universally recognized.<sup>165</sup> To use such an approach serves values of efficiency and fairness by ensuring consistency and reducing randomness in the evaluation of evidence.<sup>166</sup>

Both the 2008 Evidence Provisions and the 2012 Evidence Provisions adopted these supranational concepts in various provisions. The 2008 Evidence Provisions' relevance and admissibility rules resemble their FRE counterparts.<sup>167</sup> The 2012 Evidence Provisions combine the relevance and admissibility requirements into one rule and remove the balancing test in FRE, which weighs probative value against prejudice and waste of time. The balancing test is replaced with language requiring a holistic analysis of all evidence.<sup>168</sup> This might be an attempt to streamline the rule system.

Both Provisions also adopt rules limiting the admissibility of certain types of evidence for a specific policy-based purpose; for example, the equivalent of FRE rules regarding subsequent remedial measures and compromise offers.<sup>169</sup> One unique variation is that both Provisions limit the use of certain evidence to prove the legitimacy of a state action in an administrative suit.<sup>170</sup> This creative element shows the drafters' interest in balancing the powers between state and individual in an administrative action.

### *E. Weight of Evidence v. Hearsay*

The 2008 Evidence Provisions adopts the concept of hearsay and use language that is substantially similar to FRE rules in its hearsay section.<sup>171</sup> However, in the 2012 Evidence Provisions, the drafters choose to leave out the hearsay rules.<sup>172</sup> There are a number of reasons for this:

1. Practical Considerations. — Due to the Chinese cultural tradition of avoiding public confrontation, witnesses are usually extremely reluctant

<sup>165</sup> UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, article 19(2) (2006), at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html) (Last visited on Oct. 27, 2014).

<sup>166</sup> HE JIAHONG, THE UNIFICATION AND ACCURACY OF LEGAL LANGUAGE, J. RENMIN U. CHINA, no. 1, 2009, at [http://article.chinalawinfo.com/Article\\_Detail.asp?ArticleID=52821](http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=52821) (Last visited on Aug. 7, 2014).

<sup>167</sup> Compare 2008 Evidence Provisions, *supra* note 12, provisions 11-13 with FED. R. EVID 401-403.

<sup>168</sup> Compare 2012 Evidence Provisions, *supra* note 13, provision 7 with FED. R. EVID. 502(g)(1).

<sup>169</sup> Compare 2008 Evidence Provisions, *supra* note 12, provisions 35-37 with FED. R. EVID 407-409; Compare 2012 Evidence Provisions, *supra* note 13, provisions 34-35 with FED. R. EVID 401-403.

<sup>170</sup> 2008 EVIDENCE PROVISIONS, *supra* note 12, provisions 26; 2012 EVIDENCE PROVISIONS, *supra* note 13, provisions 33.

<sup>171</sup> Compare 2008 Evidence Provisions, *supra* note 12, provisions 28-32 with FED. R. EVID 801-807.

<sup>172</sup> 2012 EVIDENCE PROVISIONS, *supra* note 13.

to testify in court.<sup>173</sup> According to several surveys conducted from 2005 to 2007, the average rate of appearance when witnesses were asked to testify in court was consistently less than 20 percent.<sup>174</sup>

Although, in order to encourage witness appearances in court, the 2012 Evidence Provisions provide financial compensation and mechanisms to protect the privacy, identity and physical safety of witnesses, the low appearance rate remains a problem and thereby makes it impracticable for the hearsay rule to fully apply.

2. The Judges' Dual Role. — Under American evidence rules, judges may consider hearsay for certain issues such as admissibility. In the Chinese legal system, as discussed in Part III, no jury exists, and judges are both finders of fact and decision-makers on legal issues; that means they have to consider more hearsay evidence than US judges.

3. A Weight of Evidence System. — Taking into account the Chinese judges' long-time preference to exercise FRE-Rule 403 type discretionary rules, the alternative mechanism proposed in the 2012 Evidence Provisions is a weight of evidence approach that ranks the weight of different types of evidence in reaching a final decision on the facts.<sup>175</sup> Instead of completely excluding certain evidence where veracity cannot be ascertained, this system requires corroborating evidence for the suspicious evidence before it can be taken into account. In this way, judges will have more opportunity to consider evidence in a holistic manner, thereby fostering fairness and efficiency.

## VI. CONCLUSION

By considering the latest developments in China's evidence legislation, especially by comparing proposals made in the 2008 Evidence Provisions with those in the 2012 Evidence Provisions, one can easily identify a vigorous interaction in evidence law between supranational values and local factors. What is less obvious is that such interaction may have one of three possible results. First, supranational legal values may synchronize with national legal practice (for example, codification of evidence law and recognition of relevancy as the main line of logic in organizing the evidence law system), and re-create the local culture by incorporating universally upheld values in a way unique to the people. This is a form of legal globalization or, to be precise, legal transplant. However, such a synchronization process is not a matter of mere passive

<sup>173</sup> Paul J. Schmidt, A Review of China's New Civil Evidence Law, 12 Pac. Riml. & Pol'Y J. 291, 303 (2003).

<sup>174</sup> Zhang Zhong, Investigation and Research Report Regarding the People's Court Uniform Provisions of Evidence, Evidence Law Theories and Forensic Science 99, 112 (2007).

<sup>175</sup> 2012 EVIDENCE PROVISIONS, supra note 13, provisions 169 and 170.

acceptance. China's experience shows that peculiarities in local traditions will always foster variations in line with the universally recognized values, thereby extending the nature and expression of those values. Secondly, supranational legal values (for example, those embodied in hearsay rules), may not be incorporated at all because of deeply rooted local factors resisting the change—just as where medical organ transplantation surgery fails due to rejection by the recipient's body. Thirdly, in exceptional cases, innovative national judicial practices (such as extending the marital communication privilege to parents and children, and extending the exclusionary rule to civil and administrative cases) may serve to develop and extend supranational legal values.

Nonetheless, overall, the experimental drafting processes of the 2008 Evidence Provisions and the 2012 Evidence Provisions demonstrate a trail of modernization. China is reshaping its identity in global legal society as a participant in the development of the evidential process, a process that ultimately strives to achieve fairness, efficiency, and increased protection for individual rights.

China's ongoing efforts in reforming its evidence law is simply a milestone of its ongoing effort to modernize its legal system; moving forward, it is logical to expect that the Chinese legal system will further embrace more supranational legal values in not only the design of procedural rules, but also the way lawyers practice law and even the concept of judicial independence in the Constitution. It will likely shape China's new identity in the global legal society and add to the diversity of modern legal system.

(Revised by Samuel K. Choi)