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On the Exclusion of Derivative Evidence Obtained from Illegal Evidence

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Abstract

In judicial practice, the operation of the illegal evidence exclusion rule faces dif-ficulties, and the exclusion of derivative evidence obtained from illegal evidence has never been established in China's current legal texts. The normative purpose of the illegal evidence exclusion rule is: evidence must not be obtained by in-fringing upon the fundamental rights of the accused. Centered on this, it is nec-essary to judge whether the inherent defect of derivative evidence is a sub-stan-tive defect, and then determine whether to exclude derivative evidence of illegal evidence through a balancing of interests. Constructing a "hierarchical" evi-dence review system combining pretrial conferences and trial-centered pro-ceedings will promote the exclusion of illegal evidence. Derivative evidence of illegal verbal evidence should be absolutely excluded, while derivative evidence of illegal physical evidence should be subject to a combination of absolute ex-clusion and relative exclusion.

Keywords

Illegal Evidence; Absolute Exclusion; Relative Exclusion

1. Problem Awareness and Definition of Research Object

1.1. Problem Awareness

Since the illegal evidence exclusion rule was formally established in the Criminal Procedure Law of the People's Republic of China (hereinafter referred to as the "Criminal Procedure Law") in 2012, the issue of excluding illegal evidence has remained a hot topic in both theoretical and practical circles. However, the attitude towards whether derivative evidence obtained from illegal evidence should be excluded has never been clear. When the series of norms on illegal evidence exclusion were introduced, various draft opinions repeatedly discussed how to handle derivative evidence of illegal evidence. Unfortunately, these discussions ultimately came to nothing, and provisions regarding the exclusion of derivative evidence were never established. Discussing illegal evidence exclusion inevitably involves derivative evidence. The lack of legislative response in China does not mean it doesn't exist in judicial practice. It is precisely the lack of a normative system and insufficient theoretical support that lead to numerous difficulties in the operation of the illegal evidence exclusion rule in practice. Among these, the handling of derivative evidence is a major challenge.

Derivative evidence of illegal evidence is theoretically often referred to as the "fruit of the poisonous tree." There are two viewpoints in China's theoretical circles: First, the "fruit of the poisonous tree" should be excluded, meaning "discard the tree along with its fruit"; Second, the "fruit of the poisonous tree" can be used as evidence, meaning "discard the tree but eat the fruit." The theoretical discussion often stays at introducing the content of the American "fruit of the poisonous tree" rule, proposing legislative suggestions for China to introduce this principle to handle derivative evidence of illegal evidence, or exploring a Chinese path for derivative evidence of illegal evidence. However, issues such as defining the scope of derivative evidence of illegal evidence, the reasons why derivative evidence is difficult to exclude, the improvement of related supporting systems, and specific exclusion standards have not been deeply and systematically researched. Regarding the exclusion of derivative evidence of illegal evidence, first, solutions should be sought from within the existing legal normative system using legal hermeneutics. Second, an accurate assessment should be made of the current operational environment for illegal evidence exclusion in criminal proceedings to improve relevant supporting systems for "exclusion." Finally, specific standards for reviewing and excluding derivative evidence should be established. We must not "introduce for the sake of introduction" or "learn for the sake of learning"; discussing derivative evidence should not inevitably lead to advocating for the introduction of the "fruit of the poisonous tree" rule.

1.2. Definition of Derivative Evidence

How should the scope of derivative evidence of illegal evidence be defined? This is the prerequisite for discussing the exclusion of derivative evidence; only by clarifying the object and boundaries of derivative evidence can the discussion be meaningful. Therefore, derivative evidence possesses the following characteristics: First, it originates from illegal evidence and lacks an independent source; Second, its method of acquisition complies with legal provisions; Third, it falls within the "shadow" of the illegal evidence collection act and is closely related to it; Fourth, it involves the determination of case facts and influences the outcome of the case. In terms of the legal norms of China's Criminal Procedure Law, derivative evidence can be divided into two main categories: First, verbal evidence and physical evidence derived from illegal verbal evidence; Second, verbal evidence and physical evidence derived from illegal physical evidence. The difference lies in whether the source of the derivative evidence is verbal or physical evidence. Different exclusion standards and methods should be adopted for derivative evidence originating from different types of source evidence.

2. Analysis of the Causes of the Problem

China's system of criminal evidence rules has only been initially formed for about a decade. Compared to the relatively mature and systematic criminal evidence rules in foreign jurisdictions, China's criminal evidence rules are still in an exploratory stage of "crossing the river by feeling the stones." After absorbing and learning from a series of principles of modern evidence law, they have been refined based on China's judicial practice. As an important component of criminal evidence rules, the illegal evidence exclusion rule started relatively late in China's rule of law process. Since its inclusion in the Criminal Procedure Law in 2012, it has only truly been placed on the judicial agenda in recent years, during which there have been various controversies and practical difficulties. While the exclusion of illegal evidence itself faces various problems, discussions about its derivative evidence are even scarcer.

2.1. Substantive Truth Doctrine as the Purpose

China's criminal procedure purpose is the organic unity of "punishing crime and protecting human rights." This essentially embodies the value trade-off between substantive truth doctrine and due process doctrine in criminal proceedings. From the perspective of China's legal tradition, "the value orientation has always leaned towards discovering substantive truth and punishing crime, unwilling to be bound by formal rules. Excluding illegal evidence may lead to the loss of the truth of the case, which most judicial personnel have not psychologically adjusted to accept." Precisely because of the substantive truth doctrine, it is difficult for both the general public and legal practitioners to emotionally accept the leniency or indulgence of criminals resulting from the exclusion of illegal evidence. In the initial stage of developing illegal evidence exclusion, even first-hand illegal evidence may not necessarily be fully excluded, let alone derivative evidence of illegal evidence.

2.2. Superficial Interpretation of Norms

In judicial practice, one difficulty in excluding illegal evidence lies in the unclear connotations and blurred boundaries of norms, leading to inconsistent identification of illegal evidence. As highly abstract general norms, laws cannot cover every aspect and explicitly list every possible situation; this is unnecessary and impossible. Judicial interpretations use the "pain rule" to clarify which illegally obtained confessions are subject to exclusion. Judicial practice holds that physical evidence or documentary evidence collected in violation of statutory procedures that may cause serious judicial injustice should first be rectified or explained; only if rectification or explanation is impossible should it be excluded. The relationship between these two steps is "progressive." Past interpretations of legal provisions have deviated or remained superficial, failing to recognize the substantive connotation and value objectives of the illegal evidence exclusion rule. Seeing the essence beyond the phenomenon, the illegal evidence exclusion rule embodies the spirit of "no one shall be compelled to incriminate themselves" and the independence of procedural value. Its normative purpose directly points to protecting the fundamental rights of the accused. If we firmly grasp this point: What constitutes illegal evidence? Should its derivative evidence be excluded? The acquisition of physical evidence has a "one-time" characteristic. In some situations, once physical evidence is collected, the process cannot be "replicated," leaving no room for rectification. For example, a fruit knife found at a murder scene must be excluded if there was a serious procedural violation during its extraction; investigators cannot recreate the scene to collect evidence again. Similarly, physical evidence obtained through illegal searches or seizures of the accused person's body infringes upon their personal rights and should be excluded.

2.3. Formalistic Review of Criminal Evidence

Modern evidence law should revolve around the admissibility of evidence. The first step in evidence review is to evaluate the qualification of evidence; only evidence with qualification can proceed to the next stage of assessing its probative value. However, in judicial practice, the scrutiny of evidence qualification is not very strict. Usually, when we mention the "three attributes of evidence," we naturally list them in this order: "objectivity, relevance, and legality (admissibility)." If evidence plays a crucial role in determining the facts of a case, this role tends to have a "redeeming" effect on its procedural illegality or flaws. Since the purpose of establishing criminal facts can be achieved, why care if the evidence collection methods were improper? The review of criminal evidence in China is often formalistic and fails to serve its intended purpose. Particularly, the review of evidence legality is neglected. In the initial stage of constructing the normative system for illegal evidence exclusion, the legality review of first-hand evidence itself faces various controversies, and the legality of evidence derived from it is ignored. Both legislation and judicial practice adopt an evasive attitude. The existing evidence review system often conflates the review of admissibility and probative value. "A significant risk inherent in this is that it encourages fact-finders to seek corroboration of evidence while ignoring the prerequisite of evidence admission." Therefore, some scholars believe that the operation of the illegal evidence exclusion rule during the review for prosecution stage is less about evidence exclusion and more about evidence screening. The public security organs, procuratorates, and courts reach a tacit understanding based on their respective basic needs, reducing the rigidity of the illegal evidence exclusion rule and achieving a de facto flexible exclusion effect.

3. Conceptions for Future Improvement

3.1. Improving the Normative System for Illegal Evidence Exclusion - Using Legal Hermeneutics as the Method

China's existing legal norms concerning illegal evidence exclusion are mainly concentrated in Articles 56 to 60 of the Criminal Procedure Law, alongside a series of judicial interpretations that refine them. Chinese civil law scholar Professor Liang Huixing acknowledges the status of judicial interpretations as sources of law. He believes judicial interpretations have a "quasi-legislative" nature. "Although judicial interpretations are not legislation, based on legal policy reasons, they can be treated like laws and regulations. In other words, in a sense, judicial interpretations are equivalent to legislation." Law is a subject learned through interpretation; the application of any legal provision is inseparable from interpretation. Literal interpretation is the starting point of legal interpretation, while purposive interpretation is its ultimate destination. The reason why contradictions and conflicts exist in the current judicial interpretations regarding the illegal evidence exclusion rule is that their interpretation has always revolved around the literal level. Language inherently possesses fuzziness and polysemy. When interpreters ignore the purpose for which the norms were established, they inevitably fall into the quagmire of wordplay, failing to grasp the essence. First, the legislative purpose of the illegal evidence exclusion rule is to use the method of "procedural violation directly leading to invalidity of the substantive procedure" to block law enforcement personnel from obtaining evidence by infringing upon the fundamental rights of the accused.

3.2. Activating the Evidence Review Function of Pretrial Conferences - "Hierarchical" Review

Article 187 of the Criminal Procedure Law stipulates the content and procedures for pretrial conferences. The "Procedures for People's Courts Handling Pretrial Conferences in Criminal Cases (Trial)" issued by the Supreme People's Court in 2017 refined the provisions on pretrial conferences. According to the existing normative expressions, if the defendant and their defender apply for the exclusion of illegal evidence and provide relevant clues and materials, the court shall hold a pretrial conference to understand the situation and listen to opinions. This makes the status of the pretrial conference awkward. On the one hand, it aims to advance the litigation system reform centered on trial, handling issues unrelated to fact-finding and legal judgment during pretrial preparations to make the subsequent trial more focused and substantive. On the other hand, if it merely involves understanding the situation and listening to opinions without taking substantive measures, what is the real function of the pretrial conference? If it cannot substantively exclude illegal evidence nor prevent it from contaminating the cognition of the judges, wouldn't such a pretrial conference be superfluous? Since China lacks the dichotomy between judges and juries, it cannot completely isolate the source of contamination (illegal evidence) from influencing the formation of inner conviction, as in the common law system. To further promote the litigation system reform centered on trial, the pretrial conference is an excellent focal point. The pretrial conference and the trial are two procedurally sequential steps; the former should be leveraged to prevent prejudgment by adjudicators and strengthen the centrality of the trial. Regarding the exclusion of illegal evidence and its derivative evidence, under the premise of ensuring the realization of the above two functions, it is entirely feasible to exclude them during the pretrial conference. Specifically, the pretrial conference and the trial should cooperate to perform a "hierarchical" evidence review function. The modern criminal evidence review system presents a three-dimensional structure: horizontally, it clearly divides the two major stages of "evidence admission – evidence evaluation"; vertically, it establishes multi-level regulations concerning the scope, subjects, and procedures of review.

3.3. Exerting the Effect of Procedural Sanctions

Based on the above discussion of the "exclusion" function of pretrial conferences, completing the exclusion of illegal evidence within the pretrial conference is essentially conducting a "trial within a trial." Justice itself does not realize justice; it provides an opportunity to realize justice. "Even if the law is carefully followed, the process is fairly and appropriately guided, and the procedural requirements are perfectly stipulated, it is still impossible to completely avoid erroneous results. Such miscarriages of justice do not stem from human error but from the accidental conjunction of circumstances defeating the purpose of legal norms." By conducting judicial review of the legality of litigation acts, the legitimacy of the procedure is used to maximize the correctness of the substantive outcome. The real trial addresses substantive issues such as fact-finding, application of law, and the criminal responsibility of the defendant, while the pretrial conference adjudicates procedural matters. Given China's lack of a judicial review mechanism for investigative and prosecutorial acts and the weak force of procedural sanctions in reality, completing the judicial review of pre-trial litigation acts and the exclusion of illegal evidence and its derivative evidence within pretrial conferences is a good path to advance the theory of procedural sanctions into judicial practice. This truly integrates legal theory with existing systems, accomplishing the localized construction of judicial review within China's judicial practice under the existing normative and institutional framework.

4. Specific Standards for Excluding Derivative Evidence of Illegal Evidence

4.1. Judging the Degree of Inherent Defect in Derivative Evidence - Centered on Normative Purpose

The exclusion of derivative evidence of illegal evidence also involves a choice between criminal procedural value concepts: prioritizing crime fighting or procedural justice? Derivative evidence originates from illegal evidence, contaminated by the first-hand illegal evidence, possessing inherent defects. How to judge the degree of this inherent defect directly affects its ultimate fate. If the inherent defect of derivative evidence results from evidence-gathering acts that seriously infringe upon citizens' fundamental rights, and the derivative evidence plays a key role in determining the facts of the case, how should this trade-off be made? If the inherent defect was not caused by the infringement of fundamental rights but merely by a procedural violation or technical error, should such derivative evidence be excluded? If the evidence-gathering method infringed upon the citizen's fundamental rights, then the inherent defect of the derivative evidence is substantive; otherwise, it is non-substantive. The legislative purpose of the illegal evidence exclusion rule is to use the method of "procedural violation directly leading to invalidity of the substantive procedure" to block law enforcement personnel from obtaining evidence by infringing upon the fundamental rights of the accused. Centered on this normative purpose and combined with the expression in Paragraph 1 of Article 56 of the Criminal Procedure Law, it is clear that: First, verbal evidence obtained by illegal means should be absolutely excluded. The reason is that if verbal evidence is obtained through illegal acts, it inevitably infringes upon the fundamental rights of the accused. Therefore, guided by the normative purpose, derivative evidence of illegal verbal evidence possesses a substantive inherent defect of infringing upon citizens' fundamental rights because its "source of contamination" inherently involves such infringement.

4.2. Exclusion of Derivative Evidence of Illegal Verbal Evidence - Absolute Exclusion

Verbal evidence is mostly formed through the oral statements of the parties. If illegal means are used to obtain verbal evidence, it inevitably infringes upon the fundamental rights of the parties. This not only conflicts with the basic concept of criminal procedure – protecting human rights – but also violates the normative purpose of the illegal evidence exclusion rule – judicial personnel must not obtain evidence by infringing upon the fundamental rights of the accused. Therefore, derivative evidence of verbal evidence should be absolutely excluded. According to China's current evidence classification standards, derivative evidence of verbal evidence should include: derivative evidence from confessions and defenses of criminal suspects and defendants, derivative evidence from witness testimony, and derivative evidence from expert opinions and identification records. Due to their substantive inherent defects, and based on purposive interpretation and a balancing of interests, the above derivative evidence naturally falls within the scope of illegal evidence exclusion.

4.3. Exclusion of Derivative Evidence of Illegal Physical Evidence - Combination of Absolute Exclusion and Relative Exclusion

Derivative evidence of physical evidence roughly includes the following categories: derivative evidence of physical evidence and documentary evidence, derivative evidence of inspection records and examination records, derivative evidence of audio-visual materials and electronic data. The situation regarding this type of derivative evidence is more complex because the illegal act may directly affect the party or may not reach the party. Therefore, for derivative evidence of physical evidence, absolute exclusion and relative exclusion coexist, discussed under three scenarios: First, the evidence-gathering act infringes upon citizens' fundamental rights. In this case, the derivative evidence has a substantive inherent defect, such as physical evidence obtained through illegal searches or seizures of the accused person's body or residence. An attitude of absolute exclusion should be adopted. Second, the evidence-gathering act constitutes procedural impropriety. If, in the absence of this derivative evidence, the criminal facts can still be established based on existing evidence. Since procedure has independent value, and the evidence-gathering act violated due process, based on the principle of procedural sanctions, it should be excluded. However, if this derivative evidence is crucial to establishing the facts of the case, and it is difficult to find other direct or indirect evidence to prove the case facts, then based on the criminal procedural value of "justice prioritized, efficiency considered," which emphasizes substantive truth while avoiding the trouble of obtaining other evidence, this derivative evidence should be admitted. Third, the evidence-gathering act constitutes a technical error. When such illegality is relatively minor and there is room for rectification, the impact of the illegality usually does not extend to the derivative evidence. Therefore, such derivative evidence should be admitted.

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