

## The Exclusionary Rule of Illegal Obtained Co-defendant Confession in China

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### Abstract

The co-defendant refers to defendants that get involved in the same criminal procedure and the merger investigation, prosecution and trial, or any other defendants who share implicated relationship due to additional prosecution. In practice, there is a problem that whether the defendant can motion the exclusionary rule of the illegally obtained co-defendant confession. Even though the current exclusionary rule had positive improvement in these years, there are still blank areas, among which the problem doesn't get a clear answer in the legislation. The question contains a proposed key point: how to define the character of co-defendant confession? Regarding that the part of the co-defendant confession about other co-defendants is often an important and unfavorable evidence against them, from the perspective of a fair trial, this confession should be regarded as witness testimony against other co-defendants. And it is necessary to give other defendants the right of cross-examination. For the purpose of deterring and curbing the state organs from illegal investigation in criminal proceedings, the accused should be fully given the qualification to motion the exclusionary rule within a reasonable range. Therefore, based on the intrinsic attribute of witness testimony in the co-defendant confession, the defendant should be entitled to the right to motion, if and only if the part of the co-defendant confession related to him is obtained by illegal torture.

**Key words:** Co-defendant confession; Witness testimony; Exclusion of illegal obtained evidence

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### INTRODUCTION

The co-defendant, I refer to, is defendants that get involved in the same criminal procedure and the merger investigation, prosecution and trial, or any other defendants who share implicated relationship due to additional prosecution (Lin, 2005, p.127). This concept differs from the alleged accomplice in criminal law, namely a co-defendant is an appellant titled that a man officially gets involved to the criminal trial procedure, especially the one judged by the courts. According to the criminal connections, co-defendant are mentioned as follow: (a) Complicity in a crime or several crimes; (b) Commit crimes at the same time and place; (c) Because of crimes of harboring, shielding, destruction of evidence, perjury, stolen goods and other crimes, get implicated in various relationship with the principle crime, or become and add as the joiner. (d) No direct implicature, and the co-defendants are formed in accordance with the law for the convenience of trial or other reasons. As far as the research in this paper is concerned, in the fourth situation, there is no connection in criminal fact among the co-defendants, which is thus beyond the scope of this paper.

Co-defendant cases are common in practice. Compared with single defendant cases, such cases are more complicated: on one hand, the facts of the case are intertwined with each other, and the process of proof is thus more cumbersome. On the other hand, there is an obvious interest relationship between the co-defendants, which leads to forming alliances against the prosecution parties, or forming hostile to each other, increasing

the difficulty of conviction and sentencing. In the real cases, the confession of the co-defendant is an important kind of evidence. However, in the Chinese trial, it is difficult for the defendant to effectively cross-examine the confession of the co-defendant. This stems from the fact that in the Chinese Criminal Procedure Law, there is only the concept of “Statements and exculpations of criminal suspects or defendants” (Article 48). However, the nature of the co-defendant confession is not further clarified. Correspondingly, the evidence rules represented by the illegal evidence exclusionary rules are difficult to play their due role in co-defendant confession.

Article 54 of Chinese Criminal Procedure Law stipulates that “Confessions extorted from a criminal suspect or defendant by illegal means such as torture, testimony of witnesses and statements of victims collected by violent means, threat or other unlawful means shall be excluded.” According to this, if the defendant encounters the aforementioned illegal investigation, he can of course enter a motion of the exclusionary rule against his guilty confession. However, when the co-defendant in the same case suffered from illegal evidence collection, can the defendant be allowed to motion the illegal evidence exclusion procedure against the confession of the co-defendant? The illegal investigation did harm directly to the co-defendants rather than the defendant, but it might cause the defendant to bear unfavorable legal consequences. If permitted, could the defendant motion the exclusion procedure in the name of an illegally obtained confession or in the name of an illegally obtained “witness testimony”?

Therefore, this paper takes the question of whether the accused can raise a motion of the exclusion of illegally obtained confession of the co-defendant, as the starting point and end point of the research, and responds to this difficult problem that often occurs in practice. Moreover, through this question, the research can further enrich China’s illegal evidence exclusionary rules.

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## 1. DISPUTES ON THE NATURE OF CO-DEFENDANT CONFESSION

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### 1.1 The View of Comparative Law

In common law countries, this issue is not in dispute. According to the common culture of Anglo-American law, once a defendant gives up the right of silence and makes a confession, he is converted to be a witness, along with which his confession becomes witness testimony. As a result, cross-examination of testimony is needed at the trial before testimony becoming basis for judgments.

In contrast, civil law countries hold a more cautious attitude towards the confession of co-defendant. Unlike common law countries, which classify the statement of parties and the opinions of expert as testimony, civil

law countries do not recognize taking the parties and expert to be witnesses. Moreover, witness testimony is divided into specific witness testimony, statements by the parties and expert opinions. Germany Court made a judgment on the validity of the co-defendant confession in 1882, and declared that prohibiting a co-defendant from converting to a witness, and considered that the defendant in the criminal proceedings directly against him cannot be required to make a statement and conduct an investigation as witnesses, even for a crime that he did not participate (Hu, 2012, p.171). In Taiwan District, there is a corresponding Chief Justice Interpretation No. 582 early in 2004, telling that “the co-defendants, for the other defendants in the same case, should be regarded as the third person other than the defendant party, whose nature is a witnesses and who can not influence the other defendants enjoying their original constitutional rights because of joiner relationship.” This interpretation clearly specified that when a co-defendant makes a statement directly against the other defendants, he is with the eligibility of a witness. Therefore, the co-defendant statement should be regarded as witness testimony for other accomplice and be investigated in court like other witness testimony. Meanwhile, Article 180 of Criminal Procedure Law in Taiwan District provides as follow: “In a case of co-defendants or private prosecutor that one or several persons have a relationship in the preceding paragraph, it is the co-defendant’s obligation not to refuse the testimony as for his co-defendants or his private prosecutor matters.” This shows that in Taiwan District Law, defendants belong to the party in the trial, and thus generally cannot be regarded as a witness. However, when his statement is related to other co-defendants, He can become witness testimony exceptionally. Even though, there is still objections to this judicial opinion.

### 1.2 Co-defendant Confession in Chinese Legal Context

Article 48 of the Criminal Procedure Law in China clearly stipulates “Statements and exculpations of criminal suspects or defendants” as an independent type of evidence. The defendant’s confession is one of the most important evidence types in criminal proceedings and has an irreplaceable role. As far as the subject and content are concerned, the “confession” in Chinese law text refers only to the statement made by the criminal suspect or the defendant, about the facts including his criminal actions, the accomplice’s criminal actions, and exculpations against allegations of the procuratorate. From the view of litigation, the confession is applicable to the three stages of investigation, prosecution and trial. In other words, the confession is also the statement made by the defendant to the investigating organ, the procuratorial organ and the judicial organ. The particularity of the confession lies in the litigation status of the criminal suspect and the

defendant. In China, criminal suspects and defendants have the obligation to make statements truthfully. State organs can interrogate them and take enforcement measures according to the law. The content of their statements are directly related to their own interests and the outcome of the case, as the identification has the most direct and intuitive effect. The defendant's confession has a special status in the law of evidence.

In principle, the defendant cannot be a witness and the witness cannot be the defendant. However, this basic point is shaken in the view of the proof of defendant confession. Article 53 of the Criminal Procedure Law in China stipulates: "A defendant cannot be found guilty and sentenced to criminal punishments if there is no evidence other than his/her own statement." In the co-defendant case where the only evidence is the co-defendants' confession against each other, there are two opposing views on the proof of the co-defendant confession. The first one is that the accomplices are witnesses of each other. If the confession can be verified by mutual authentication, the only existing confession can be the sole basis of judgment. The other one is that regarding the characteristics of the confession and different degrees of interest relationship between the co-defendants, even if their confessions can be mutually proved, the confessions cannot be the sole basis for verdict.

Obviously, the latter point is supported with strict explanation of the Article 53, that the co-defendants' confessions do not have the attributes of the witness testimony, and cannot be complementary. However, the Supreme People's Court showed a different view in Notice of the Supreme People's Court on Issuing the Summary of the Symposium on the Work of Hearing Drug Crime Cases in Certain Courts Nationwide (2008). It stipulates that "Some drug crime cases often have difficulty in examining evidence and identifying facts, in absence of evidence such as drugs and drug money. In dealing with such cases where only the accused's confession is consistent with the other defendants' confessions, the confessions can be used as the evidence basis, if they are totally coincident and proven without confession by inducement, extortion or collusion. However, it is particularly prudent to immediately enforce the death penalty on the accused in this kind of cases." This unclear position brings about a conflict between the criminal rules in particular crime and the overall criminal rules, and confusion in application of confession rules and witness rules.

## 2. MY OPINION OF THE POSITION OF CO-DEFENDANT CONFESSION

In my view, I believe that the part of the confession regarding other co-defendants, in any form, should be regarded as witness testimony against other co-defendants. In other words, the co-defendant has the qualifications of witnesses.

### 2.1 The Part of the Statement Related to Other Co-defendant is Often Important for Proof the Criminal Fact and Detrimental to Other Co-defendants

On issues of co-defendant, the European Court of Human Rights has proposed the concept of "adverse witness": as long as someone presents unfavorable statement about the accused guilty before the court other than the accused himself, the defendant is entitled to its justiced right questioning this "adverse witness" (Lin, 2007, p.119). Although this concept focuses more on the confrontation questioning towards confession statement, it gives us a unique perspective to understand the nature of the co-defendant statement. That is, even though the co-defendants jointly form a procedural joinder relationship due to the fact reasons, each crime of each defendant still exists independently. So co-defendant statement detrimental to other defendants is an objective statement about case fact of other co-defendants. Whether or not the statement is in a tangle with his own criminal act, their criminal facts are affirmed and judged individually. At this point, this part of the statement of co-defendants is statement that given by a witness, directly referring to the crime that the other co-defendants committed.

### 2.2 Co-defendant Statement Related to Other Co-defendants Needs to be Questioned by Their Defendants

Co-defendants generally can not entrust a same defend lawyer. Because several co-defendants are often not only consistent with each other but also have conflict stakes. Hiring a criminal lawyer to defense for several co-defendants at the same time may result in contradictory, and can not guarantee the maintenance of lawsuit interests of the several parties, including the right to question and cross-examine witnesses.

On another perspective, the doubt on the co-defendant confession and witness testimony differs significantly. Generally speaking, witnesses have no interest in the case, and are always more neutral and objective than criminal suspects. Moreover, for those who intend to make perjury or conceal evidence, witnesses will be subject to criminal law sanctions (Article 305 of the Criminal Law in China). But in compare, the false co-defendant confessions, in addition to reflecting the bad attitude of confession and being give heavier sentence, do not bring disadvantages. Therefore, from the perspective of the risks and interest relationship, the two are not the same. However, the difference does not overturn my basic point of view. On the contrary, the question of the authenticity of co-defendant confession is so prominent that the basic attributes of the witness testimony should be emphasized, when the confession involves other defendants, and the other defendants should be given the right of cross-examination accordingly.

In the proceeding of a criminal trial, as long as the content of a defendant's statement involves other co-

defendants, it will indeed influence the substantive rights of the other co-defendants, and even affect the outcome of the trial. "Considering confrontation and questioning as a guarantee for rights of defense of criminal defendants for the principle of a fair trial, as long as the court render a person other than the accused himself giving unfavorable statements about the defendant, whatever the presenter is a complainant/victim, accomplice/co-defendant or other person who accidentally witnessed the crime, and whatever way the unfavorable statements are presented in testifying in person in court, reading a written record, playing the confession tape or citing the original inquiry officers, the presenter is a 'adverse witness' that is obliged to be questioned by criminal defendant himself (Lin, 2008, p.250)." Co-defendants have the right to question and cross-examine the presenter to verify the authenticity, legitimacy and relevance of the statement, avoiding the parties suffering from false accusations, and maintaining their right of defense and confrontation.

### **3. REASONABLE EXTENSION OF THE EXCLUSIONARY RULES OF ILLEGALLY OBTAINED EVIDENCE IN THE FIELD OF CONFESSION OF THE CO-DEFENDANTS IN CHINA**

Although the Criminal Procedure Law in China officially established the exclusionary rules of illegal evidence in 2012. The Supreme People's Court and the Supreme People's Procuratorate have been working hard to promote the rules. In 2017, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice issued the Provisions on the Several Issues concerning the Strict Exclusion of the Illegally Collected Evidence in the Handling of Criminal Cases, which brought new progress. However, as a whole, China's exclusionary rules still have a large gap. There is no clear answer in the statute to whether the accused can apply for excluding the illegally-obtained co-defendant confession. If based on the foregoing discussion that the attribute of the witnesses' testimony of co-defendant confession is affirmed, then who has the right to motion exclusionary rules of this illegal evidence?

#### **3.1 The Court and Procuratorate**

According to Articles 55 and 56 of the Criminal Procedure Law in China, the court and procuratorate have right to motion the exclusion procedure for all types of illegal evidence, including defendant's confession.

In the perspective of court, Chinese Criminal Procedure Law Article 186 and Article 189 respectively stipulates that the judge can interrogate the defendant, and

question the witnesses and expert witnesses. Article 191 also stipulates that during a court hearing, if the judges have doubts about the evidence, they can announce an adjournment, in order to carry out investigation to verify the evidence. Obviously, the Criminal Procedure Law authorizes the court the power of investigation. According to this, the trial judge may put forward questions and doubts towards evidence during the trial. Accordingly, the court, in order to guarantee a fair trial, should be given the motion qualification to exclude illegal evidence and make investigation of the legality of the evidence.

In the perspective of procuratorate, Chinese procuratorate is responsible for prosecution of criminal cases. It has the power to ascertain the legitimacy of the source of evidence in the course of the prosecution. This checking mechanism can reduce miscarriages of justice and the cost of the trial. However, when the prosecutors accuse the defendants, the appearance of illegal evidence usually goes against their charges and moreover contradicts their pursuit. Meanwhile, the prosecution undertakes the due obligations of proving the legality of the evidence. So arming the prosecution with right as principal which aims at their self-discovery and self-correction of illegal investigation in the court is unrealistic. However I still believe it is unnecessary giving the prosecution the right, as the prosecution is given the legal supervision authority from the Constitution, and certainly and rightfully has the power and duty to supervise and correct those illegal investigation. It means the prosecution has the right and duty to exclude illegal evidence at any time. Regarding the necessary but unrealistic motion power, we should pay more attention to the issue of how to implement the prosecution's supervision in the criminal evidence. Article 55 of the Law emphasizes procuratorate's obligation of investigating the illegal evidence collection, proposing corrective opinions, and pursuing criminal responsibility of the investigators. In other words, the procuratorate, as the initiator of the illegal evidence exclusionary rules, mainly plays a role in the review of evidence during the prosecution stage.

#### **3.2 The Defendant**

According to Article 106 of the Criminal Procedure Law of China, participants in the proceedings mean the parties, legal representatives, agents ad litem, defenders, witnesses, expert witnesses and interpreters. In comparison with the court and procuratorate, the motion qualification of the participants in the proceedings has more dispute, especially in the co-defendant cases.

Fourth Amendment of Constitution in the United States prohibits unreasonable searches and seizures of persons, houses, papers, and effects, and states that no warrants shall issue, but upon probable cause. However, when someone proposes exclusionary rules of this illegal evidence, he has to first testify that he is "the victim of this search or seizure activity ... to distinguish those

saying ‘even though the evidence is collected through the implementation of search and seizure activity of others, however, the use of that evidence will lead to prejudices towards him’ (Dressler & Michaels, 2008, p.349).” That is, only the victim himself who is to suffer from the unreasonable evidence search of police can challenge the legality of the evidence and claims illegal evidence excluded. This logic gets the subject of illegal evidence exclusion limited to direct victims. What “direct victim” means? According to this provision of Fourth Amendment, “direct victim” is suffering because the unreasonable evidence search of police is threatening and even violating his constitutional rights. From this perspective, we can define the “suffering” as the infringement of participants’ constitutional rights and litigation rights during criminal proceedings.

In China, the infringement epitomizes that judicial officers extort confession from criminal suspect or defendant by torture or extorts testimony from a witness by violence. Such actions pose a direct harm to the participants’ constitutional right. According to aforementioned logic, only direct victims themselves, namely defendants, witnesses and victims suffering from torture or violence can propose illegal evidence exclusion on his own statements and testimony.

Subject qualification for the defendants who has suffered torture is essentially self-evident. However, the motion qualification for witnesses and victims cannot avoid being questioned. No matter how the evidence is collected by investigator, favorable or unfavorable evidence towards defendants, it is generally the defendants that to bear the consequences of these evidence.

Witnesses and victims will not get their entity interests damaged because of the testimony or statement and consequently do not have a reasonable motive to propose illegal evidence exclusion. For the unreasonable treatment and accordingly infringement of individual rights that witnesses and victims suffer in criminal proceedings, they can get relief by other means such as appeal and prosecution. In this sense, giving witnesses and victims qualifications of illegal exclusion seems to be a waste of legal resources.

However, what about confining the motion qualification for exclusion procedure of co-defendant statement to a particular scope. It means that only suspects suffering from torture have the right to propose exclusion procedure of his statement. This exclusive right can neither be extended to evidence provided by other participants (witness testimony, statements of victims), nor can be delivered to co-defendants. In this analogy, it is easy to imagine, as a result, investigators may use the loophole to apply violent and threatening methods to witnesses, victims and co-defendants in order to get their wanted evidence. It highly probably causes a disguised encouragement for the organs to commit offenses in

criminal proceedings. The consequence is horrible and poses a great challenge to criminal investigation and judicial fairness.

Therefore, we have to make a balanced choice between the two extreme analogies. Based on the purpose of deterrence and containment of illegal activities committed by investigators in criminal proceedings, we must bring other subjects into illegal evidence exclusionary rules.

First of all, witness testimony and victim statement are related to the behavior of the defendants, and they always directly affect the substantial matters and the trial results. In order to avoid investigators taking invasive means to obtain the negative statements towards defendants, it is supposed to give defendants the qualifications for rising exclusion procedure of witness testimony and victim statement that are illegally obtained.

Secondly, according to the above analysis of the nature of the co-defendant’s statement, the part that referred to other co-defendants should be regard as the witness testimony. And the exclusionary rules should also be conditionally extended to the co-defendants. When co-defendant statement is all about himself and is illegally obtained, the other co-defendants have no right to motion illegal evidence exclusion. Only if the co-defendant statement refers to other co-defendants and is obtained because of illegal torture, co-defendants can be eligible for the motion of exclusionary rules for this part.

Last but not least, as defending lawyers are responsible for the protection of defendants’ litigation rights, it is necessary to allow them to propose the exclusion procedure when their clients meet the qualification and requirements. It is worth mentioning that it is because of the defendant’s rights that counsels can file the motion. That is, counsels don’t have an independent subject qualification.

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## CONCLUSION

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The issue of co-defendant is very common in criminal procedure. Because the inextricable relationship among the co-defendants, the demonstration could be very complex. This paper focuses on the concept of co-defendant in the criminal procedural law, the evidence category of co-defendant confession and the motion subject in the illegal evidence exclusionary rules. In this aspect, these discussions are highly of necessity and significance in the judicial practice.

In my view, the co-defendant statement cannot be all classified as defendant confession without necessary distinction. Limitation to the simple classification of evidence is not only conducive to deal with criminal cases which involve co-defendants, but also likely leads to difficulties in judicial practice. Based on the survey of witness system in the Common Law and the Civil Law and analysis of proof content of co-defendants in the

China Criminal Procedure Law, I think the co-defendant statement which involves other co-defendants' crime should belong to the category of witness. And according to evidence rules of witness, those statements should accept questions from other co-defendants and their lawyers. Therefore, I assume that exclusionary rule can apply to the co-defendant confession, and we should give the motion qualification of the rules to the other co-defendants, their defense counsel, the court and the procuratorate. Shortly, we should clear the definition of co-defendant confession and promote the exclusionary rules of illegal evidence by strengthening legislation, in order to implement the synergy realization of values of both substantive truth and due process in the criminal procedural law.

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