

Research on China's Criminal Unlicensed Search System

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Abstract

According to whether investigators have a search warrant when searching, criminal search can be divided into certified search and unlicensed search. Articles 136 to 140 of the Criminal Procedure Law of People's Republic of China (PRC) make strict provisions on criminal search, among which Article 138 stipulates that investigators can conduct a search without a search warrant in case of an emergency when carrying out arrest or detention. As an exception to the documented search, the unlicensed search aims to make up for the inherent limitations of the documented search system and improve the efficiency of case investigation by investigation organs. However, in judicial practice, there are many restrictions and requirements for investigators to apply unlicensed search, which violates the original legislative concept and is difficult to punish crimes and protect human rights. Based on this, this paper mainly aims at the development status of unlicensed search in China and analyzes the problems existing in the system of unlicensed search in China. At the same time, combined with the unlicensed search system in developed countries ruled by law, we should actively explore the development path of unlicensed search system in China.

Keywords

Criminal Proceedings; Search without a License; Incidental Search; Emergency Search; Agree to Search.

1. Brief Introduction of Unlicensed Search System

1.1. Concept and Development of Unlicensed Search System

In order to build a fair and just legal system, the legislative and judicial organs of various countries must give consideration to substantive justice and procedural justice in the process of formulating and implementing laws. As the premise of substantive justice, procedural justice is directly reflected in criminal proceedings as whether the behavior of investigation organs and investigators exercising public power is legal and reasonable.

As an important part of criminal procedure, search procedure is related to citizens' personal freedom and inviolability of their homes. In order to avoid the abuse of power by investigation organs and investigators and neglect the legitimate rights and interests of citizens in order to achieve efficiency, most countries in the world adopt a search system based on warrant search.

Writ doctrine, as a search principle generally recognized and adopted by modern countries ruled by law, means that investigators can only search relevant personnel, articles and places according to writs when conducting investigation activities. However, in the practice of criminal search, if the investigators conduct the search in strict accordance with the doctrine of writ, it will inevitably lead to many problems such as the escape of criminal suspects, the omission of key evidence, and the inefficiency of handling cases, which is not conducive to the investigation of criminal cases. Based on this, the modern criminal search system, which takes the search with certificate as the principle and the search without license as the exception, has gradually developed.

To sum up, the unlicensed search system refers to a system in which investigators can directly search the bodies, articles and places of relevant personnel without applying for a search warrant approved in advance under certain circumstances.

1.2. Characteristics of Unlicensed Search System

1.2.1. Flexible and Efficient

The warrant search under the doctrine of writ requires investigators to search the criminal suspect, relevant personnel, articles and places in accordance with the procedure of "application first and execution later" under the condition of full investigation and sufficient evidence. However, in practice, especially in the investigation of criminal cases, the complexity of cases often leads investigators to fail to take search measures step by step according to the principle of writ.

Based on this, unlicensed search, as an exception of certified search, omits the previous investigation, application and approval of search warrant, which can not only improve the efficiency of criminal case investigation, but also provide legal protection for investigators to flexibly cope with complex changes in investigation activities.

1.2.2. Strict Application

In view of the fact that the system of search without a license greatly relaxes the authority of investigators to exercise public power, if the law does not strictly stipulate its applicable conditions, it will lead investigators to abuse the system of search without a license at will, which will violate the original legislative purpose and damage the legitimate rights and interests of citizens, and will seriously damage the credibility of the government and the country in the long run. Therefore, all countries in the world have made strict and clear restrictions on the starting procedures and applicable conditions of the unlicensed search system, so as to reduce the high risk and harm brought by unlicensed search.

1.2.3. High Risk of Abuse

As a special investigative measure to collect criminal evidence and seize criminals, unlicensed search not only gives investigators more power space, but also increases the risk of abuse of search measures to some extent.

Although the laws of various countries have clearly stipulated the procedure of searching without a license, there are still unavoidable loopholes in the procedure of searching without a license compared with that of searching with a license. For example, the vast majority of countries have only formulated ex post relief procedures, but have not stipulated the pre-procedure or supervision mechanism of unlicensed search.

2. The Present Situation of Unlicensed Search System in China

2.1. China's Unlicensed Search System and Related Regulations

The legislative purpose of China's Criminal Procedure Law is to punish crimes, safeguard human rights and maintain socialist social order. Based on the above-mentioned legislative ideas and criminal practice, a pair of basic contradictions have been formed between protecting the basic human rights of criminal suspects and prosecuting crimes in various procedures of criminal proceedings[1].

Articles 136 to 140 of China's Criminal Procedure Law make strict provisions on criminal search, among which Article 138 makes a distinction between the system of certified search and the system of unlicensed search in China, that is, the principle of criminal search in China is certified search, with the exception of unlicensed search. As a general principle of criminal search, search with evidence can not only protect the legality of investigators' search behavior in procedure, but also avoid the abuse of search power by investigation organs. Compared with

warrant search, China's warrant search system should be a special search system which is based on the restriction of investigators' search right by warrant search, and is inclined to protect interests and punish crimes.

According to the provisions of the Criminal Procedure Law, the application of unlicensed search in China has the following two restrictions:

2.1.1. Only Applicable to Investigators in the Process of Arrest and Detention

Criminal detention and arrest are both compulsory measures to deprive criminal suspects of their personal freedom. Once the law enforcement procedures of investigators are illegal, the basic rights of criminal suspects will be seriously violated. The legislature of our country has formulated this restriction condition for unlicensed search, aiming at reducing the risk of its abuse in practice by strictly controlling the preconditions of unlicensed search.

2.1.2. In Case of Emergency

The Rules of Criminal Procedure of the People's Procuratorate and the Procedural Provisions of Public Security Organs supplement the four situations and all-encompassing clauses of "emergency" by adopting the legislative mode of "enumeration+generalization", that is, the statutory emergency is strictly limited and the investigators are given certain discretion. However, the existence of the bottom clause leads investigators to apply unlicensed search only by subjective judgment in practice.

2.2. Evidence Effect of Unlicensed Search in China

According to the provisions of the Criminal Procedure Law, it is only when the investigators meet the compulsory measures of detention and arrest and face the legal emergency that they can apply the search without a license to meet the legal procedures.

However, looking at the current legal system, China has not clearly defined the legal consequences of violating the search procedure without a license, and only stipulated in principle the problem of illegal search and the exclusion of illegal evidence-only when illegal evidence seriously affects judicial justice, can not be corrected or can not be reasonably explained can it be excluded.

To sum up, although the legislature has set strict restrictions on the search system without a license, it aims to limit the search authority of investigators and safeguard the legitimate rights and interests of citizens. However, due to the lack of clear exclusionary rules of illegal unlicensed search evidence, there are still a large number of abuses of unlicensed search in judicial practice[2].

2.3. Problems Existing in China's Unlicensed Search System

2.3.1. The Conditions for Starting Unlicensed Searches are Harsh

When explaining the relationship between the two restrictive conditions of unlicensed search, there are two viewpoints: "parallel" and "overlapping". The view of "juxtaposition" holds that these two conditions exist side by side. The "overlapping" view holds that these two conditions are superimposed. According to China's legislative and judicial practice, the application of the system of searching without a license by investigators is based on the "overlapping" view[3].

The double restrictive conditions make the legal application of unlicensed search too narrow, which is likely to lead to the escape of criminal suspects and the loss of evidence in judicial practice, which is not conducive to punishing crimes[4].

2.3.2. Single Type of Unlicensed Search

There are a lot of laws and regulations on the types of search without a license in all countries of the world. Both common law countries and civil law countries have established the system of unlicensed search as an exception to writ doctrine, and established a perfect legal system of unlicensed search[5].

The current system of search without a license in China only stipulates that search without a license can be applied in case of emergency during arrest and detention. Compared with the types of unlicensed search in the global perspective, incidental search and emergency search do not exist as independent categories in China's unlicensed search system. At the same time, the current legislation and judicial practice of unlicensed search in China has not yet established and approved the consent search system.

2.3.3. There is a Gap in the Post-examination Mechanism of Unlicensed Search

Only the Criminal Procedure Rules of the People's Procuratorate stipulates that investigators should go through the relevant procedures within 24 hours after the search.

Although the legislator's legislative purpose is to make up for the legal gap in the review and supervision of the unlicensed search system, this article neither stipulates the specific procedures and contents of the investigators' formalities, nor clarifies the legal consequences of the investigators' failure to complete the formalities on time. At the same time, this provision is only aimed at the investigators of people's procuratorates, and the investigation organs in China include public security organs and state security organs in addition to procuratorates.

2.3.4. The Abuse of Unlicensed Search Lacks Legal Remedies.

In the process of abusing search without a license, on the one hand, the behavior of investigators searching citizens' bodies and residences at will seriously damages the rights granted to citizens by our Constitution and laws. On the other hand, the evidence collected by investigators in violation of legal procedures by applying unlicensed search is also flawed and illegal, and it is difficult to be the basis for determining the facts of the case in the subsequent litigation stage.

First of all, Article 136 of the Criminal Procedure Law shows that in practice, the objects searched by investigators are not limited to criminal suspects. Because of the unpredictability of investigation activities, the people searched may even include other citizens who have nothing to do with the case-even if investigators strictly follow the procedures to search, there may be cases that damage the legitimate rights and interests of citizens.

Secondly, according to the above, not all the evidence collected by illegal unlicensed search can be excluded, and its exclusion must meet two strict restrictions: first, it may seriously affect judicial justice; Second, it is impossible to make corrections or make reasonable explanations. Among them, the determination standard of "the degree that may seriously affect judicial justice" is often in the hands of judges. If the evidence collected by illegal and unlicensed search is enough to make the criminal suspect arrested and brought to justice, judges usually will not make a decision to exclude illegal evidence. And the vast majority of illegal and unlicensed searches in criminal practice can be compensated by correction and reasonable explanation.

3. Types of Extraterritorial Unlicensed Search System

Throughout the criminal search system of foreign countries, the legislation of various countries divides the search without a license into two types: compulsory search and consent search, in which compulsory search includes incidental search and emergency search.

3.1. Compulsory Search

Compulsory search means that investigators can conduct criminal compulsory search on the searched person without a search warrant in the process of criminal practice, usually when they have sufficient and reasonable reasons for suspicion, legal compulsory measures are about to be taken or unexpected emergencies occur.

3.1.1. Incidental Search

Incidental search means that investigators can search the person's body, articles, residence, etc. without a search warrant when carrying out compulsory measures such as detention and arrest. As the most primitive and universal system of unlicensed search, incidental search is widely used in criminal search practice in all countries of the world.

Overview of the legislative development and practice of extraterritorial incidental search, the application of incidental search in all countries must meet strict preconditions and procedures. First, incidental search must be based on legal detention and arrest measures. Second, incidental search should have reasonable suspicion and sufficient reasons. Third, the scope of incidental search has certain restrictions.

3.1.2. Emergency Search

Emergency search means that investigators cannot apply for a search warrant in time during the investigation, but because of the sudden nature of the case, the law gives investigators certain discretion to conduct a search in an emergency. Compared with incidental search, emergency search pays more attention to urgency and timeliness, so the legislation of various countries usually gives investigators greater discretion in the formulation of emergency search procedures-investigators can decide to apply unlicensed search without legal premises and reasons in advance.

Although emergency search gives investigators greater power and improves the efficiency of judicial organs in handling cases, there are still insurmountable problems such as random search and abuse of power in the practice of various countries. With the continuous improvement of legislation on search system, foreign countries have successively formulated post-procedure and relief for emergency search.

3.2. Agree to Search

Consent to search means that in the process of carrying out search measures, investigators can directly search the body, articles and residence of the searched object without applying for a search warrant in advance.

Different from compulsory search, the legal basis of consent search comes from the voluntary consent of the searched object. In practice, law enforcement officers often need to meet two conditions when they take consent search: first, the consent of the searched person must be voluntary and true; Second, the scope of the actual search by law enforcement officers shall not exceed the scope agreed by the searched person.

4. Perfection of China's Unlicensed Search System

After summarizing the current situation of unlicensed search system in China and comparing the types of unlicensed search abroad, it is not difficult to see that there are a lot of problems in unlicensed search system under the current legal system in China, which mainly exist in implementation procedures, post-event review, relief measures and so on.

4.1. Improve the Types of Unlicensed Search System and Establish a Legal System of Unlicensed Search.

4.1.1. Perfecting the Existing Incidental Search

At present, the incidental search in our country combines the incidental search outside the territory with the emergency search, and sets extremely strict restrictions for the emergency search[6]. Based on this, China's legislation should disassemble the existing incidental search into two types: incidental search of detention and arrest and emergency search, and make them in a parallel selection relationship. At the same time, we should improve the implementation procedure of incidental search on the existing basis: firstly, we should clearly take legal

detention and arrest measures as prerequisites. Secondly, the scope of incidental search should be clearly defined. Strict identification of the search scope can not only safeguard the legitimate rights and interests of the searched person, but also provide legal guarantee for the investigation organ to apply unlicensed search.

4.1.2. Set up an Emergency Search System Separately

In order to effectively crack down on crimes and improve the efficiency of case investigation while protecting human rights, investigators have the right to apply unlicensed search in the face of emergency, and it is not necessary to take compulsory measures such as detention and arrest as the pre-procedure of emergency search.

Therefore, it should be made clear that "emergency" is the legal prerequisite for starting the emergency search system, and the identification of "emergency" should conform to the understanding of the general public. Secondly, emergency search should strictly abide by the principle of proportionality. According to the principle of proportionality, under the premise of achieving the purpose of search, investigators should choose the way to search with the least harm to citizens.

4.1.3. Increase Consent to Search and Clarify its Restrictions

Constructing the consent search system in China is conducive to solving the problem of low application rate of unlicensed search under the current legal system and bringing convenience to investigators' search work.

First of all, the scope of consent search should be strictly limited. According to the relevant provisions of the Criminal Procedure Law, the scope of warrant search is limited to the body, articles, residence and other relevant places of the searched person. As an exception of warrant search, the scope of search without warrant should be further limited on the basis of warrant search.

Secondly, investigators should require the searched person to sign a written notice when applying the consent search. Because the legitimacy of consent to search only comes from the voluntary abandonment of the searched object's own legitimate rights and interests, if the relevant paper documents are not kept, the searched object will be unable to seek relief because of the lack of relevant evidence after agreeing to search out of fear.

4.2. Establish a Scientific and Reasonable Review Mechanism afterwards

Establish an after-the-fact review mechanism, requiring investigators to report the reasons, search methods, time, place, object and other relevant information of starting the search without a license in written form within the legal time, and then relevant personnel will review the written report according to law and make a decision on whether the search without a license is reasonable and legal.

First of all, clear the subject of review and supervision. The people's procuratorate at the same level should be the subject of post-examination and supervision of the unlicensed search behavior of public security organs; The unlicensed search behavior of the investigators of the procuratorate can be directly supervised by the people's procuratorate at a higher level.

Secondly, clarify the review period of the supervisory subject. After receiving the written report, the people's procuratorate shall make a timely decision on whether the search is legal or not. For illegal unlicensed search, investigators should be required to make corrections or pursue their legal responsibilities.

Finally, the legal consequences of illegal post supervision and censorship mechanism are strictly stipulated. If the investigator fails to submit a written report within the statutory time limit after the implementation of the act, or fails to make corrective measures for the illegal search without a license, the investigator and the relevant responsible personnel shall be punished and the citizens shall be appropriately compensated by the state.

4.3. Clearly Set up Effective Relief Measures for Illegal and Unlicensed Search

First of all, the exclusionary rule of strict standards should be applied to the exclusion of illegal evidence in unlicensed search, that is, as long as the collected evidence is not considered legitimate after being examined and determined by the people's procuratorate, it should be excluded[7]. Secondly, the law not only gives the people's procuratorate the power to examine the evidence ex officio, but also allows the searched person to apply to the people's procuratorate for examination and determination-giving the searched person the right to apply for examination, but also clarifies the legal obligations that the procuratorate should bear when determining the validity of the evidence searched without a license. Thirdly, the law should also give the searched person the right of legal relief after being searched illegally and without a license. The law should clearly stipulate that the person being searched has the right to appeal and accuse[8]. When the person being searched thinks that the investigators have violated their legitimate rights and interests, or that the investigators' search without a license violates legal procedures, they can lodge complaints and charges with the people's procuratorate.

5. Conclusion

In summary, China's criminal unlicensed search system, as an exception to the principle of warrant-based search, plays a significant role in balancing investigative efficiency with the protection of citizens' rights. However, the current legal framework reveals notable limitations in its design and application. The overly restrictive and overlapping preconditions for initiating an unlicensed search, coupled with the limited typology of such searches-lacking distinct categories for incidental, emergency, and consent-based searches-undermine both the system's flexibility and its effectiveness in practice. Moreover, the absence of a robust post-search review mechanism and clear legal remedies for abuses further exacerbates the risk of power misuse and compromises procedural justice.

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