

Brief Introduction to the Stain Witness System and Enlightenment on China's Judicial Practice

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Abstract:

The “stained witness” system originated in the United Kingdom and is the result of a series of types of witness systems. It is essentially a judicial transaction. In China's existing legal norms, there is no explicit establishment of a tainted witness system. However, our country is facing an increasingly severe crime situation and high-tech criminal methods, making it necessary for our country to introduce this system. Therefore, through the comparative research method, studying the application methods of this system by foreign countries can help us summarize the pros and cons of the use of the tainted witness system. In the process of introducing and constructing the tainted witness system in the future, we have established an exemption system and supporting measures in line with our national conditions..

Keywords:

Tainted Witness, Criminal Immunity, Judicial Practice

1. Overview of the Tainted Witness System

1.1. The concept and characteristics of a tainted witness

The term “tainted witness” is actually a foreign term and has different definitions in different countries and regions. It is called “marginalized accused” in the UK, “crown witness” in Germany, and “witness for the prosecution” in Taiwan.

Currently in our country, there are three different views on the existence of tainted witnesses. The first view is that a “tainted witness” is a witness who has a blemish on their identity when testifying and has not been handled by the judicial authorities. The second view is that a “tainted witness” is a litigation participant who has a criminal record but is compelled to testify by the prosecutor because they have knowledge of the case. The third view is that a “tainted witness” is a participant in criminal activity who trades with the prosecutor to obtain immunity from criminal responsibility in exchange for providing important evidence or clues they have. These views reflect the characteristics of a tainted witness from different perspectives, such as content, purpose and form. However, they are not comprehensive enough.

After summarizing the characteristics, the author concludes that a tainted witness has the following features:

A tainted witness is transformed from an accused person who is being pursued by the prosecution to cooperate with the investigation of the case. Although they may be closely related to the crime itself, they still meet all the conditions of a witness. Since witnesses in our country are irreplaceable, the legal rules that exist concerning witness protection should apply to tainted witnesses as well.

A tainted witness is closely related to the crime itself and has a criminal record. In other words, their behaviour meets the main and objective constitutive elements of a criminal offence stipulated in China's Criminal Law. Additionally, a tainted witness may also have the following forms of association with the case: they may appear as co-perpetrators of a crime, have committed upstream or downstream crimes related to the case, be the offender of a joint crime, or possess vital clues or knowledge about the case.

The decision to transform a tainted witness should be made by the national prosecutor's office. Generally, only in cases that are very complex, where the prosecutor's office finds it difficult to obtain evidence, and the accused person has important clues or evidence that are essential to the investigation and prosecution of the entire case can they be transformed into a tainted witness.

A tainted witness is often able to mitigate or have their criminal behavior reduced or completely eliminated as a result of their testimony.

In summary, a person who holds important evidence or clues related to the case, has committed relatively minor crimes that have not yet been punished, and has undergone a judicial decision that allows them to reduce or waive their criminal responsibility by testifying against others, is considered to be a tainted witness.

1.2. The concept of the witness protection system

The witness protection system is currently relevant in many countries and regions worldwide. In essence, it is a choice made by a country after balancing interests in the face of complex and ever-changing forms of crime. Compared to different countries and regions, their legislative provisions and specific case law in the judicial practice have great differences in order to solve their existing problems. Therefore, for countries that apply the witness protection system, the specific legal provisions are not entirely the same. In a broad sense, the witness protection system results in the typification of a series of witness system types, such as the scope of its application, the application object, the specific operating procedures and regulations, exemption responsibility forms, witness protection systems, and related supporting measures. In a narrow sense, the witness protection system is the exemption system for tainted witnesses. Referring to the "Yuanzhao Anglo-American Law Dictionary", "exemption" is explained as a kind of special favor granted by the law in which individuals are not subject to certain legal consequences or do not apply certain legal rules for legitimate reasons.

The tainted witness exemption system has always been the core issue that scholars argue about. The "Black's Law Dictionary" in the United States explains the witness protection system as: "In criminal proceedings, the state grants immunity to tainted witnesses from criminal prosecution in exchange for their testimony". In our country, some scholars also support this view, believing that the witness protection system is

essentially an exchange of judicial interests, where the prosecutor decides not to prosecute or drop some or all criminal charges against a person who has knowledge of major case clues in exchange for his or her testimony. Some scholars also believe that the witness protection system is actually a kind of judicial power, where the judicial authorities have the power to decide who can become a tainted witness, and also have a certain degree of discretion over whether the party can be exempted, or the extent to which they can be exempted during the prosecution process. In other words, becoming a witness for exemption is not a “right” enjoyed by tainted witnesses. Experts have also proposed that the system is a criminal justice measure: “Tainted witnesses assist the prosecution in solving cases out of their own will, to maintain national interests and public safety. As the prosecution, they cannot use the evidence provided by tainted witnesses to make charges that are unfavorable to them.”

2. The Development of the System of Tainted Witness in the Common Law and Civil Law Jurisdictions

2.1. Common Law System

2.1.1. The United Kingdom

It is widely believed that the tainted witness system originated in the UK. This can be traced back to the famous impeachment case of Lord Melville in the early 19th century. In the first case where witness immunity was applied, the House of Lords issued a writ of immunity to key witnesses to obtain their testimony against Lord Melville, while no longer pursuing the criminal behavior of witnesses with lesser offenses.

The significance of this case lies in the fact that, while following the principle of “no one shall be compelled to give evidence against oneself,” the House of Lords obtained important evidence and clues by granting immunity to those with lesser offenses, which was the model of the initial use of the immunity system in the UK. After the 1970s, with the trend of cracking down on crime becoming more severe, the UK Parliament passed legislation to limit the application of the principle of “no one shall be compelled to give evidence against oneself” in specific judicial precedents to a certain extent. It required criminal suspects or defendants to cooperate with judicial authorities while at the same time requiring that the evidence obtained by forcing witnesses should not be used as evidence against them in future litigation. After that, in 1981, Section 72 of the Supreme Court Act and Section 2 of the Criminal Trial Evidence Act in 1987, respectively, adopted the evidence-use immunity model in cases of infringement of intellectual property rights and major fraud. The latter also stipulated that if a suspect or witness who provided testimony in criminal cases provided false testimony during police investigation or during the trial which did not match the facts of the investigation, judicial authorities would decide to revoke the witness’s immunity.

2.1.2. The United States

Half a century after the tainted witness system was established in the UK, the US also established this system. However, the development of this system in the US has taken a tortuous path since its inception, with the most significant issue being the divergence in the use of witness immunity models.

The tainted witness immunity system in the US was initially established in the federal legal system. In 1857, the US Congress passed the first federal immunity law, which stipulated the witness immunity system. In 1862, the US Congress passed new federal immunity legislation, which limited the scope of immunity responsibility for tainted witnesses while also requiring a specific immunity model for evidence use. Soon, this law was criticized by some members of the US legal profession. They believed that the law was not sufficiently protective of witnesses, as important evidence provided by tainted witnesses might be used against them in future prosecutions. Furthermore, this regulation also seriously violated the Fifth Amendment to the US Constitution's provisions on "no one shall be compelled to give evidence against oneself."

Faced with many doubts, the US legislative body evaluated the advantages and disadvantages of the existing exemption system and denied the evidentiary exemption model in the exemption law enacted in 1893. Due to the judicial independence of each state compared to the federal government, federal states in the United States still use the invalidated evidentiary exemption model in practice. It was not until 1970 that the US revised the Organized Crime Control Act. For crimes committed by witnesses, as long as the prosecution does not use testimony or other evidence discovered through the use of the testimony of the immunized defendant to prosecute the tainted witness in subsequent prosecutions, an evidence immunity model may be used. Currently, the evidence immunity model is widely used in US federal courts, but it does not oppose the use of the crime immunity principle in relevant precedents. Since the US legal system adopts a dual-track model of federal and state jurisdiction, different exemption systems will be chosen between states and between federal and state jurisdictions.

2.2. Civil Law System

2.2.1. Germany

Germany, influenced by the English and American legal systems, was the first civil law country to establish a witness immunity system in its history. Under the German Code of Criminal Procedure, the federal prosecutor is authorized, with the approval of the highest court in the relevant jurisdiction, to grant immunity to some members of terrorist organizations who meet the legal requirements, in order to obtain necessary testimony and case clues from "tainted witnesses" with regard to protecting national security and social order. The advantages and value of this system were reflected in the subsequent crackdown on major crimes, but due to lax legislation, it still remains controversial. It was not until 1999 that this provision was limited to money laundering and drug cases, and it provided immunity or reduced punishment for defendants who voluntarily cooperated with prosecutors in joint crimes. However, many scholars believe that evidence obtained through this method is questionable in terms of legality and procedural legitimacy, and there are concerns about undermining public legal awareness and compromising or condoning criminal behavior. Therefore, Germany has always had strict legislative restrictions on the application of the witness immunity system.

2.2.2. Taiwan Province of China

In order to achieve the main purpose of encouraging witnesses to testify in court and improve the common phenomenon of low witness appearance rates in Taiwan, the "Witness Protection Act" was passed in 2000 in the Taiwan region to enable Taiwan

to effectively crack down on and punish serious criminal behavior. Article 14 (1) of the Witness Protection Act provides that members of organized crime groups involved in smuggling, drug trafficking, corruption, bribery, money laundering and other serious crimes who provide important evidence of the criminal acts of group members in the case and play an important role in the prosecution can be exempted from prosecution with the consent of the prosecutor. Article 14 (2) provides that even if the suspect is not a co-conspirator in a joint crime, if they provide information about the upstream and downstream, the front and back hands of the person involved in the crime, which enables the prosecution to obtain important crime-related evidence, and if the crime of the “tainted witness” is less serious than that of the suspect or defendant, a decision not to prosecute the “tainted witness” may be made with the consent of the prosecutor. In essence, it is a kind of plea bargaining that exchanges important testimony for immunity. The Witness Protection Act also stipulates the protection and scope of witnesses. If the prosecution leaks confidential information such as the witness's identity and commits the crime of divulging confidential information, they shall be sentenced to a term of imprisonment of not less than one year and not more than seven years, and if the crime is attempted but not successful, a fine shall be imposed.

2.2.3. Macao Special Administrative Region

The Macau SAR has provisions in place for cases that seriously harm social interests. For example, in cases involving organized criminal organizations, there are regulations that stipulate a reduction or exemption of punishment for “tainted witnesses” in exchange for their cooperation in providing important evidence. Article 5 of the Macau Organized Crime Law provides that “criminal participants who make efforts to prevent organized criminal activities or provide important clues for the authorities, or those who expose the plans and members of organized criminal organizations, can receive lighter penalties or even be exempted from punishment.” In addition, the Macau government has legislated provisions for witness protection. Article 13 of the same law provides that individuals who disclose the identity of protected tainted or undercover witnesses in violation of the confidentiality obligation can be sentenced to 2 to 8 years in prison. Even after the case is closed, relevant information must be kept confidential for a period of 10 years, and violations of confidentiality will be punished.

3. The Application of the Stain Witness System in China

There are no clear regulations on the system of tainted witnesses in Chinese legislation, but there are plenty of relevant cases in judicial practice. One example is the “Qijiang Hongqiao Case” in Chongqing in 1999, where the prosecution chose not to prosecute the bribery of tainted witnesses in exchange for testimony against the main suspect who was charged with bribery. This case is also known as the first case of “tainted witnesses” in China. Experts in the legal and judicial fields have different views on the application of the “tainted witness” system in China. According to a survey of the National Social Science Fund project “Witness System Research”, 73% of judges believe that a system of tainted witness exemption should be implemented. This includes 16% who advocate for exemption from criminal prosecution, 34% who advocate for exemption of evidence use, and 50% who advocate for a combination of evidence use exemption and crime exemption. It is clear that the establishment of a

system of tainted witnesses in China is necessary for the construction of a legal system.

3.1. The Applicable Conditions for Establishing a Stain Witness System in China

It is easy to see that the legislative and judicial institutions of each country will reasonably apply the system of witness exemption based on their own national conditions. Although our country has increasingly drawn on the laws of Western countries or other civil law countries in recent years, the process of legalization is not a simple copy-and-paste process, and the construction of this system must also conform to the current status of our country's legalization and our country's special national conditions. Comparing the analysis of the representative countries' systems of tainted witnesses in the previous section, the main differences lie in the legislative requirements and exemption models. Therefore, based on the existing models of the system of tainted witnesses in foreign countries, we can draw inspiration for the establishment of our own institutional rules.

3.1.1. The scope of application of the stain witness system

For countries that have established a system of tainted witnesses, there are two main approaches for applying the system to cases: The first is adopted by countries such as the United States, where there are no clear rules in the legal norms, and prosecutors have the discretion to decide whether to use the system based on the needs of the case. The second approach is adopted by countries such as Germany, Hong Kong, and Macau SAR, where the specific application of the system to cases is determined through legal provisions. Both approaches have advantages and disadvantages, but considering the current situation of severe crime prevention and the relatively limited judicial resources, allowing prosecutors to exercise discretion without strict supervision and restrictions can easily lead to abuse of judicial resources and hinder the efficiency of the legal process. Therefore, at the current stage, China should establish specific standards in legislation based on the severity of the case and the difficulty of obtaining key evidence, and limit the scope of application to cases that seriously harm national and social interests, including cases involving terrorist organizations, organized crime activities, drugs that pose a threat to national security, and corruption cases. These types of cases share the common characteristics of high social harm, concealed criminal methods, and difficulty in investigation. In the future, as the application of this system becomes more mature, the scope of its application can be appropriately expanded. Before China has clear legislative provisions, the scope of the system should not be expanded to all criminal cases, or the discretion should not be left completely to prosecutors.

3.1.2. Applicable objects of the stain witness system

The system of tainted witnesses is generally applied to suspects who have committed lighter crimes in serious joint or related crimes, and the statements made by tainted witnesses are aimed at other defendants who have committed serious crimes in the same joint or related crimes. Firstly, tainted witnesses should have played a secondary or assisting role in the serious joint crime, and should not be the main suspect. In terms of a secondary role, tainted witnesses, although perpetrators or participants in the joint crime, committed crimes that were lighter than those of the main suspect and did not cause serious harm, and were therefore regarded as secondary defendants based on their actual roles played. In terms of an assisting role,

tainted witnesses only provided convenient conditions for others to commit a crime. The main suspect in a joint crime is subjectively and socially more harmful, therefore, they cannot become tainted witnesses, otherwise the state's right to punish will be completely lost. In addition to joint crimes, suspects in serious crimes who are either lookouts or have played a part of the role before or after the crime committed can become tainted witnesses, but the crimes they assist the prosecutor in exposing must be more serious than their own committed crimes, otherwise the system of tainted witnesses cannot be applied. In summary, the use of tainted witnesses in serious joint or related crimes is based on a balance of interests. The system of tainted witnesses acts as a regulator and a balance between public and private interests in order to maintain public interests and achieve greater punishment rights. Prosecuting authorities should fully evaluate and weigh whether a suspect can become a tainted witness based on the established criminal facts and evidence collected, as well as the suspect's status and role in the criminal proceedings.

3.1.3. Exemption forms of the stain witness system

Lastly, there is the choice of forms of immunity. From the perspective of seeking the truth and the obligation of the prosecuted person, which are the traditions of China's criminal proceedings, the existing criminal proceedings structure dominated by state power, and the incomplete system of human rights protection, the author believes that adopting a criminal immunity model would be more suitable. However, in judicial practice, a distinction between complete and limited criminal immunity should be made. Compared with immunity for the use of evidence, criminal immunity can eliminate the worries of retaliatory prosecution after the testimony of witnesses, and stimulate the initiative of defendants or crime suspects to cooperate, and enhance the quality of evidence provided by tainted witnesses. This model is especially fitting for China's criminal justice policies. However, a complete criminal immunity has its downside, and the state would have to bear the cost of giving up the prosecution of witnesses. Therefore, it should be reasonably limited. "Limited immunity" should be based on the severity of the tainted witness's own crimes in the testimony provided. If the crime is minor, the accused should be granted complete criminal immunity. If the crime is serious, the accused should only be partially exempted from criminal responsibility, meaning that the state reserves the right to prosecute in part. This partial immunity is well connected to our country's existing system of self-surrender and meritorious service.

3.2. Supporting Measures for Establishing a Stain Witness System in China

The system of witness protection is in fact the sum of a series of witness protection systems, established in national legislation in common law countries such as the United Kingdom and the United States, as well as in civil law countries such as Germany, to ensure the development of the system. For example, the United States has its "Witness Protection Program," while the Hong Kong Special Administrative Region provides protection to witnesses and punishes those who leak the identities of witnesses. Drawing on the experiences of other countries, it is easy to see that without corresponding supporting measures, a comprehensive and complete system of protection cannot be guaranteed, and the development of the system of witness protection is bound to be hindered.

3.2.1. The system of compelled testimony of tainted witnesses.

The rule of testimony reinforcement requires evidence other than testimony to be used to verify and support the true information contained in the testimony. In criminal proceedings, tainted witnesses have a dual litigation identity. On the one hand, they are defendants in criminal cases and participate directly in the criminal proceedings. On the other hand, they are also the providers of witness testimony, directly related to the criminal truth, and may have personally participated in criminal activities. Therefore, as a defendant in criminal proceedings, to absolve themselves and reduce their criminal responsibilities, witnesses may shift their own guilt onto the principal offender in the criminal organization or even fabricate evidence to shift responsibility. And when providing testimony as a witness, they may withhold facts and provide false evidence because they fear revenge from their co-defendants or the remaining forces of the criminal organization, thus endangering their own or innocent family members' safety. It is not difficult to see that under such circumstances, the testimony obtained by the prosecution is often lacking in authenticity and credibility, and should not be used as the sole basis for a conviction. From the perspective of their dual identity, the current Article 55 of China's Criminal Procedure Law provides rules for the reinforcement of defendants' testimony. When serving as a witness, their nature falls within the scope of testimony specified in Article 50 of the Criminal Procedure Law. Therefore, it is necessary to establish separate rules for the reinforcement of testimony provided by tainted witnesses, as witness testimony and defendant's testimony are clearly different types of legal evidence. In judicial practice, relevant supporting evidence should be introduced to substantiate the target and facts of the testimony and form a complete chain of evidence with other evidence to prevent wrongful convictions.

3.2.2. Stain witness protection system

The protection of witnesses is a key issue that affects the effectiveness of the tainted witness system. Tainted witnesses have a dual identity as accused parties in criminal cases and prosecution witnesses, making them key figures in navigating complex cases and uncovering the truth. However, their involvement in criminal activities as accomplices, accessories or associates also increases the risk of retaliation against them or their innocent family members. Even though the ringleaders of some criminal organizations may have been punished, residual forces may still exist, making it necessary to provide special and comprehensive protection to tainted witnesses. Furthermore, such protection is a prerequisite for encouraging witnesses to provide truthful and detailed information. I believe that the witness protection regime should begin from the investigation stage. Investigation is a necessary prerequisite for subsequent prosecution and trial, and a failure in the investigation process may prevent progress from being made. Therefore, there is a risk of illegal behavior, such as torture, during the investigation process that goes beyond the prosecutor's jurisdiction. In view of the potential expansion and arbitrary exercise of investigative powers, we need to strictly supervise and regulate investigative powers from a legislative perspective. Taking into account the principle that the prosecutor's office acts as the supervisory body in criminal proceedings, I suggest that relevant prosecutors should be involved in cases where the tainted witness system is applied, with the specific approach based on Article 567 of the Criminal Procedure Rules of the People's Procuratorate to expand the scope of prosecutorial oversight of investigations. On another level, it is necessary to provide protection to witnesses and their close relatives after the fact. Current Chinese law explicitly stipulates protection for witnesses, such as Article 63 of the Criminal Procedure Law that outlines the

protection obligations of public security and judicial organs towards witnesses and their close relatives, and Article 308 of the Criminal Law that punishes those who retaliate against witnesses. However, there are flaws in the law in terms of lack of specific assignment of responsibilities and unclear division of labor among different authorities, which can lead to a lack of true protection for witnesses. Tainted witnesses in particular have a much higher probability of being subject to retaliation and infringement than ordinary witnesses, and without a detailed protection system, they may become victims of retaliation. To avoid such occurrences, China should learn from other countries to establish a specialized witness protection agency led by the public security department responsible for protecting the personal safety of witnesses and their close relatives. When prosecutors decide to apply the tainted witness system, the protection agency should participate in judicial activities to ensure that relevant personnel are free from threats and infringement. Article 64 of the Criminal Procedure Law, last amended in 2018, outlines protection measures for witnesses involved in significant organized crimes, such as confidentiality of witness personal information, protection of life and residence, and computer processing of appearance and vocal characteristics when testifying. However, the practical implementation of witness protection measures lacks specific division of labor, limiting the applicability of protection measures for tainted witnesses. Therefore, specific special regimes should be added to the tainted witness system, such as confidential protection of witness information and personalized protection of relevant personnel when threatened.

4. Conclusions

The tainted witness system is essentially a judicial exchange that is based on the pursuit of value through a balance of interests. It is a secondary choice that comes at the cost of the state relinquishing some prosecution rights in exchange for cooperation from suspects involved in less severe crimes, in order to protect larger national or social interests. In today's world, with increasingly diverse criminal methods and highly concealed criminal activities, it is difficult for prosecutors to solve cases. Under such circumstances, the introduction of the tainted witness system is a timely response. From the perspective of the development of criminal proceedings, the tainted witness system can achieve mutual benefits and fight crime on the basis of procedural justice. From the perspective of promoting the construction of the rule of law, the tainted witness system can utilize limited.

Conflicts of Interest

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