

Discussion on the Problem of Relatives' Free Witness in China-Compared with Foreign Law

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Abstract—The exemption of relatives' privileges is an important right stipulated in China's Criminal Procedure Law and an important system for maintaining family ethics. However, the privilege of exemption from the relatives of our country has problems such as unclear rights subject, unspecified content, contradiction between the privilege and the accused's cross-examination right, and narrow scope of application. From the perspective of comparative law, this paper draws on the relevant provisions on relative immunity abroad, and combines the status quo of relative immunity of our country to further explore its existing problems and propose some suggestions for improvement.

Keywords—Relatives exemption from privilege; Privilege exemption; Status quo

I. INTRODUCTION

The exemption of relative immunity is one of the important contents of the witness's exemption from the license. Article 193 of the Criminal Procedure Law of the People's Republic of China states: "After a notice from the people's court that a witness does not appear in court without justifiable reasons, the people's court may force him to appear in court, except for the spouse, parents, and children of the defendant." It stipulates that witnesses have the obligation to testify in court, and also clarify the privileges of relatives exemption from the rules in the exceptions. However, from the perspective of the article, there are many problems in the practice of the space hole for its content [1]. Looking at the relevant literature, the historical development of the privilege of relatives exemption is almost a point that everyone has neglected, and the author believes that the change of legislative intention can be derived from the historical changes, and then analyze the problems of the system. Therefore, this article will first discuss the historical changes in the exemption privileges of relatives.

II. THE HISTORICAL DEVELOPMENT OF THE SPECIFIC CONTENT OF THE PRIVILEGE OF RELATIVES IN CHINA

A. "Close relatives" System

According to relevant information, the system of "close relatives" first appeared in the Spring and Autumn Period and the Warring States Period. "The Analects of Confucius" records: "Yang Gongyu Confucius: The straightforwardness of our party is different: the father is the child, the child is the father, the straight In it, "[2] is actually the earliest manifestation of the privilege of the modern relatives. During

the Qin and Han Dynasties, "close relatives" was widely circulated and gradually became a moral code and litigation principle. Especially in the period of Emperor Wu of the Han Dynasty, with the concept of Dong Zhongshu's "dismissal of 100 schools and the unique respect for Confucianism", the Confucian classics were raised to the law, and "closed relatives" became a legal system. Until the eve of the founding of New China, China's system of tolerance and concealment was "not a witness, not a testimony, and evolved to be limited to relatives; it evolved to have a duty of compatibility; and evolved to the trial. It is necessary to impose a penalty for the testimony of the card, and it is necessary to impose penalties for violation of the law [3]. The scope of the relatives and relatives is constantly expanding from the initial couples, and the sanctions for violating the hidden system are also increasing. This is also consistent with the social moral ethics of the time, that the stable social family ethical relationship is far more consistent than the punishment of crime.

B. Modern relatives exemption from privilege

In the early days of the founding of New China, due to the influence of the Marxist-Leninist materialist concept, the Confucian classics, which were hidden by relatives, were considered to be too much to maintain the dress of the three principles and five commons, and were abandoned. The relative exemption of the privilege until the 2012 Criminal Procedure Law was re-established as a litigation right. Article 62 of the New Criminal Procedure Law of 2018 stipulates: "All persons who know the circumstances of the case have the obligation to testify. People who are physically or mentally deficient or young, cannot distinguish between right and wrong, cannot be correctly expressed, and cannot be witnesses. "This article clearly defines the obligation to testify. At the same time, Article 193 stipulates: "After the notice of the People's Court, if the witness does not have a valid reason not to testify in court, the people's court may force him to appear in court, except for the spouse's spouse, parents, and children." The exception here is actually given to these. The person is not forced to appear in court, but in essence does not exempt the spouse, parents, children from the testimony of the test, when the investigative authorities require, these people still have the obligation to testify in court. At the same time, the subject of the exemption-free privilege of relatives in our country has been identified as a witness in practice, and does not include the accused. Is there such a defect in such a provision? Foreign laws and China's relevant regulations are very different.

III. LEARNING THE PRIVILEGE OF RELATIVES FROM FOREIGN LAW

A. *The United States' relatives exemption from the privilege system*

The exemption privileges of relatives of common law countries are mainly limited to the couple's exemption privileges, also known as spouse privileges or marriage privileges. It is mainly to stipulate that the husband or wife may exempt the testimony of the other party's situation during the existence of the relationship between the husband and wife, especially if the other party is unfavorable. This privilege actually contains two specific aspects: the privilege of marriage and the right to stipulate the spouse testimony [4]. Marriage exchange privilege refers to the right of the husband or wife to protect the secret exchange of content during the relationship between husband and wife. As long as the relevant situation is a secret exchange between husband and wife, the content of frank exchange is the privacy protection of the husband and wife, and the right to testify can be waived. The essence of this provision is to promote frank exchanges between husband and wife without any scruples. This can actually enhance the marital relationship and maintain a harmonious relationship between husband and wife and family relationship. It is a reasonable and reasonable trade-off between punishing crime and maintaining marital relationship. For example, Section 504, paragraph 2 of the United States Uniform Evidence Rules (1999) states: "Everyone has the right to refuse and to prevent his spouse from giving evidence of his secret exchanges with his spouse during the marriage [5]"

B. *Germany relatives exemption from the privilege system*

Germany is a typical representative of civil law countries, and their relatives are exempt from the privilege of exemption from the relatives of the common law countries. The exemption from the right to exemption of relatives as stipulated in Article 52 of the German Criminal Procedure Law is specified as the right to refuse to give evidence for personal reasons. The first paragraph states: "The following persons have the right to refuse to give evidence: 1. The engaged person of the accused; 2 The spouse of the accused person, even if the marriage relationship no longer exists; 3. The person with the accused person who is now or has been in a kinship relationship or has a relationship with the second parent, etc." includes two generations Beside the blood relatives and in-laws, and even the "factual marriage" relationship without marriage registration [6]. This reflects Germany's focus on protecting the rights of individuals while maintaining the relationship between husband and wife. This is exactly the opposite of China's concept of focusing on social stability and combating crime.

IV. ANALYSIS OF THE PROBLEMS EXISTING IN THE SYSTEM OF EXEMPTION OF PRIVILEGE OF RELATIVES IN CHINA

A. *The subject of the right of relatives exemption is not clear*

Article 193 of the Criminal Procedure Law of the People's Republic of China stipulates: "After the notice of the people's court, if the witness does not appear in court without justifiable

reasons, the people's court may force him to appear in court, except for the spouse, parents and children of the defendant." The method of righteous interpretation interprets the literal meaning of the law, and the spouse, parents, and children have the privilege of exemption from the relatives. As to whether the defendant enjoys the right, this provision does not stipulate. But in fact, the defendant's enjoyment of this right should be the original intention of the relatives' exemption from the privilege system. But the practice in practice excludes the accused from the subject of this right. For example, in the Bo Xilai case trial in 2013, because his wife made a statement against him in court, the defendant twice asked the person who made the testimony to complain that his wife was in confrontation with him. The presiding judge refused, and the reason for his refusal was to invoke the provisions of section 188 of the Criminal Procedure Law that had not been amended at the time regarding the exemption of relatives from relatives [7]. This means that the subject of the exemption of the privilege of the relatives of the law does not include the defendant. This move caused a heated discussion in the academic community.

B. *The content of exemption privileges of relatives are not specific*

According to the provisions of Article 193 of the Criminal Procedure Law of the People's Republic of China, in combination with the interpretation of the law, the exception is actually to clarify that the spouse, parents, and children have the obligation not to be compelled to testify in court. Is it equivalent to the exemption of these persons? What is the obligation to testify? This is not the case with the analysis of the legislator's intentions. This means that if these people still need to testify when they are deemed necessary to testify, they can choose not to testify in court. According to the analysis in the previous section, this regulation is very different from the foreign regulations. So how to evaluate such a regulation is a question worth exploring. I believe that its provisions do not meet its legislative purposes, or that people do not want the role of the law, that is, to maintain the ethical relationship of relatives, because the subject of kinship of relatives must be the two parties, including the defendant and the relatives of the defendant. Fang, now the actual rights provisions are only restricted to the relatives, and can not completely protect the family ethical relationship, thereby stabilizing the society and promoting social harmony.

C. *The privilege of the relative's exemption from the certificate contradicts the accused's right to cross-examination*

The accused's right of cross-examination is an important right of the defendant and an important right to procedural justice. At the same time, it is also the embodiment of the defendant's full freedom to enjoy the right to defense. In the above-mentioned Bo Xilai case trial, the presiding judge cites the law's refusal of the defendant's request without objection, because the law clearly stipulates that the spouse has the privilege of refusing to testify in court, and Bo Xilai's wife, Gu Kailai, explicitly stated to the court that he is not He will testify in court, but there will be serious procedural problems. The

testimony made by the witness outside the court has not been confronted by the trial and deprived the defendant of the right of cross-examination. From this practical case, the following thinking can be triggered: although the general relative witnesses are unwilling to make testimony against the defendant based on the kinship relationship with the defendant, there are special circumstances. That is to say, the above-mentioned Bo Xilai case is such a special case. When such special circumstances arise, how to protect the accused's right of cross-examination to ensure the procedural fairness. There is another situation that cannot be ignored, that is, when the relative witnesses are not willing to testify in court, but they are subjected to the coercion of the public authority to make testimony against the defendant and read it as a transcript in the trial, how to protect the accused's cross-examination right.

D. The application scope of relatives exemption from privilege applies is too narrow

The current application of the relatives of the relatives in China is limited to spouses, parents and children. First of all, it is too narrow relative to the provisions of our criminal procedure law on close relatives, not to mention the relevant provisions of the civil law countries. The subjects of the civil relatives of the civil law system are generally widely used. For example, Germany includes not only the blood relatives and in-laws within two generations, but also the "factual marriage" relationship without marriage registration. In fact, there are many shortcomings in the application of the subject too narrow, and the value of maintaining family ethics and social harmony cannot be maximized, and it will be contrary to the expected purpose of the law. For example, the two-generation kinship within the applicable subjects in Germany and the in-laws within three generations are indeed important subjects in the family ethical relationship. Therefore, the design of the applicable subject in our country is considered too narrow and obviously deviates from reality.

E. The regulations are too general and lack special considerations for special circumstances.

The purpose of the establishment of the relative exemption privilege system is to promote the harmony of kinship, and is the result of the trade-off between punishing crimes to maintain social justice and maintaining family ethics. China's legal provisions preliminarily consider punishing crimes to maintain social justice while paying attention to the harmony of individual family relationships, but neglecting the harmfulness of serious crimes to society. A general rule for the value goal of social harmony means that in the event of a major crime, such as crimes that endanger national interests, social interests, and public interests, if relatives also enjoy the exemption from privilege, the case will pursue a fair value goal. The big discount, this is tantamount to sacrificing big interests to protect small interests, because the interests of individual people and even the interests of individual families are small interests relative to the interests of the majority of the state, society and the public, so the legislation must Consider the principle of proportionality of interest.

V. SUGGESTIONS ON THE IMPROVEMENT OF THE EXEMPTION PRIVILEGES OF RELATIVES IN CHINA THROUGH VALUE ANALYSIS

A. Defining the right scope of the right subject

Whether the subject of rights mentioned in the above analysis is unclear, the subject of rights is too narrow, or the right of constitutional right of the right is contradictory to the immunity of the relatives, the essence of the subject is that the subject of the right is unscientific. The ultimate goal of the law is to maintain the harmony of social relations, just as we must follow the principle of consistent crimes and punishments, and also consider the social harmfulness of crimes. The essence is that social harm is not conducive to social harmony. The purpose of the relative's exemption from privilege is no different. However, its protection is limited to the ethical relationship of family relatives, the branch of social relations, and the content of social relations. That being the case, first of all, we have to consider that the ethical relationship of family relatives is composed of two parties, the testimony of the relatives and the defendant. According to this line of thinking, the accused should naturally be the subject of the privilege of the relatives. Second, the design of the relative exemption privilege system itself is also to protect the accused and prevent the accused from being accused of being unfavorable to his own testimony and losing legal justice. Obviously, the defendant's enjoyment of this right should not be deprived of the subject's qualifications, but should be the main right of the right, that is, the core right. The relative's exemption privilege should be born from it, and it is the right of attribute quality. Third, once the accused's rights subject qualification is deprived, it will inevitably create a conflict between the accused's cardinal rights and the relative's exemption privilege. When the law protects the defendant's interests, the defendant's interests are sacrificed to maintain the defendant's interests. The purpose of family harmony is obviously not desirable. Finally, in order to maximize the goal of establishing the law, the scope of the rights subject should be increased.

B. Defining the specific content of the rights

As analyzed above, the specific rights of the rights subject are limited to the fact that they are not allowed to testify in court according to the literal meaning of the law, but still have the obligation to testify in court, or to completely exempt the relatives from appearing in court. If it is the former, it is obvious that it does not have much meaning. Because the new criminal procedure law already stipulates in Article 62 that every person who has the ability and knows the truth has the obligation to testify in court, there is no need to emphasize it once in this article. Therefore, it should be exempted from the obligation of relatives to testify, so that it is conducive to a harmonious husband and wife relationship and family relationship.

C. *Setting up exceptions*

For general crimes where social harm is not serious, the relatives' obligation to testify is waived. Cases that are more harmful or even serious to the society, such as cases that endanger national interests, endanger national security, endanger social interests, and endanger public interests such as those that endanger the interests of the majority, should limit the obligation of relatives to exempt from testimony. In fact, it is an exception to the exception, which is an exception to the exemption privileges of spouses, parents, and children. This is more conducive to balancing the realization of the goal of combating crime and maintaining the harmonious value of the family.

D. *Clearly inform the procedure*

Rights and obligations are often corresponding, that is, relatives enjoy the exemption from privilege, and the public authority has the obligation to inform, through legal and reasonable notification procedures, so that the accused and their informed relatives know their rights in time, and more conducive to the harmony of family relations and social relations. Many foreign laws have clearly defined the notification process. For example, Article 121 of the Japanese Criminal Procedure Law stipulates: "Before inquiring, the witness shall be informed that he may refuse to provide testimony that may expose himself or a person under section 147 of the law to criminal prosecution or guilty verdict. Person, if the judge deems it necessary, he shall be informed in accordance with the provisions of this article that he may refuse to provide testimony 7.

VI. CONCLUSION

The exemption of the privilege of relatives is an important part of the exemption privilege and an important manifestation of the defendant's right to defend. Compared with foreign laws, our relatives' exemption from privilege has many problems. These problems are not conducive to the realization of the purpose of designing this right, which is not conducive to the harmony of family relations and social stability. Therefore, it is necessary to pay attention to the problem after finding out the problem, to improve the disease, and to improve the self-protection. The interests of society promote social harmony.

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