

A Study on the Witness-Protection System in the Process of Investigating Crimes: In a Perspective of the Legalized Witness-Protection System in Taiwan

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Received 15 November 2014; accepted 9 February 2015
Published online 26 March 2015

Abstract

At present, the establishment of the witness-protection system in the process of investigating crimes is still in its infant step in China. The relevant laws and regulations are specifically found in the “Code of Criminal Procedure” and some other judicial interpretations. To build up this system judicially, the human rights must be put into priority. Based on the revised version of the “Code of Criminal Procedure” in 2013, this paper describes the deficiency of this law document, integrating the enlightening Taiwan examples into the discussion of those in China to explore the development of the witness-protection system.

Key words: Investigating crimes; Witness-protection System; Taiwan

Gong, W. L. (2015). A Study on the Witness-Protection System in the Process of Investigating Crimes: In a Perspective of the Legalized Witness-Protection System in Taiwan. *Canadian Social Science*, 11(3), 110-115. Available from: <http://www.cscanada.net/index.php/css/article/view/6224>
DOI: <http://dx.doi.org/10.3968/6224>

INTRODUCTION

In the investigations of duty crimes, the witness is informed by the Procuratorate to participant in the criminal proceedings as the witness is familiar with the duty crime cases. This is of great practical importance as regards to the accurate and timely investigation of the criminal facts, the fight against duty crimes, maintain the government’s integrity system and smooth function of the government agencies. However, in reality, the witness is not willing

to cooperate with the Procuratorate because of fearing vengeance. Consequently, it has become an important issue for both the academic and practical departments to protect the personal rights, property rights, rights of action etc. of the witness. The revised version of The Criminal Procedural Law has been implemented from January 1, 2013, which covers several measures in protecting the witness and construct the initial law systems in protecting the witness. However, The Criminal Procedural Law has its drawbacks and omissions in the related regulations in protecting the witness and thus cannot resolve the actual problems encountered in the investigations of criminal offenses. This essay is going to analyze the drawbacks of The Criminal Procedural Law in regulating the measures of witness protection, and explore the effective witness protection clauses with analyzing and summarizing the effective experience of witness protection in the Taiwan areas.

1. BASIC THEORY IN WITNESS PROTECTION LEGAL SYSTEM

1.1 Relevant Concept Analysis of Witness Protection Legal System

The concept of “Witness protection legal system”, referred to as “Witness Protection” by some scholars, is contained within multiple subjects as Constitution Jurisprudence, Science of Procedure Laws and Sociology. With the in-depth development of Science of Procedure Laws in mainland China as well as the implementation of newly revised *The Criminal Procedural Law*, scholars have entered into agreement on the basic characteristics of “Witness protection legal system”, while they hold various recognitions on both innovation and extension of the concept of “Witness protection legal system”, thus the author concludes authorized definitions concerning “Witness protection legal system” as follows:

a) Witness protection legal system refers to “the protection system that judicial offices implement to ensure the safety of a witness and his or her relatives in a certain range” (Cheng, 1999).

b) Witness protection legal system refers to “the legal protection that the State implements to a witness in the criminal prosecution regarding his or her duty on testification and to relatives’ safety and interests” (Miao, 2006).

c) Witness protection legal system refers to “the legal protection that the State implements to avoid the hinder of witness’ testification by means of violence and threats, or the retaliation behaviors of assault and insult on testified witness to a witness and relatives regarding their safety and interests” (Zhu, 2003).

In the author’s opinion, Witness protection legal system indicates the general term of legal system that special offices implement to guarantee the security control on legitimate interests as personal rights, rights of property and procedural rights of a witness and close relatives in accordance with the Law in special term to ensure the witness’ providing legal, real and reliable witness testimonies. Witness protection legal system contains the two levels of protection beforehand and afterwards, while among which the former focuses on the security measures on a witness in advance, the later emphasizes more on compensatory security measures, especially on the sanction against behavior of retaliation to such witnesses according to the Law.

1.2 Necessity Analysis of Witness Protection legal System in the Construction of Criminal Investigation on Duty

Firstly, in the construction of duty crime investigation, Witness protection legal system is to realize the unity between performance of national responsibility and accomplishment of criminal procedural law objective. *The Criminal Procedural Law* states in Paragraph 2 that one of its missions is to protect citizens of their personal rights, proprietary rights, democratic rights and other rights. While the state exerts the duties of testification on citizens, it shall implement its responsibility of protecting the safety and interests of witnesses in criminal actions. During the duty crime investigation, that witnesses provide with witnesses and testimony truthfully sheds great importance on procuratorial organs ascertaining the facts of duty crime so as to guarantee the success of investigation activities. In addition, that the State guarantees the witness who is acquainted with the case to testify with effective security measures contributes to reflecting the transparency and justice of procuratorial organs and promoting their credibility among the public, thus to realize the unity of the dual goals of national responsibility and objective of criminal procedure law thereby.

Secondly, in the construction of duty crime investigation, Witness protection legal system is the value

pursuit of constitutional states protecting human rights. *The Criminal Procedural Law* writes the constitutional principle of “respecting and protecting human rights” into the general provisions of the criminal procedural law for the first time. While the Law stresses on the duty of a witness’ testification, it shall establish complete and effective witness rights protection system in criminal proceedings. Witness rights protection is one of the most important contents in the criminal procedural law, and the strengthening on rights protection becomes an irresistible trend of the development of modern criminal procedure system. Modern criminal procedure pursues the combination of crime punishment and human rights protection, thus reflecting not only the scientificity and advancement of criminal procedure system but the basic legal concept of human rights protection in criminal procedure regarding the reinforcement of protection to legitimate interests as witness’ personal safety and property safety.

Thirdly, in the construction of duty crime investigation, Witness protection legal system is one of the contents of that complete the evidence system. The improvement of the new criminal procedure law in the evidence system concentrates on the increase of categories of testimony and collection methods as well as the development of evidence standards. Paragraph 48 and 53 of *The Criminal Procedural Law* regulate on witness that it shall request higher substantial requirement. The priority and irreplaceability of a witness in criminal procedure decide the irreplaceability of witness regarding this kind of grounds. Seeing that a witness will be affected by the mental state, emotion, and memory skills of himself or herself as well as objective factors as threats and intimidation from the outside world, the witness presents with a certain instability and variability. In criminal procedure, the prompt and effective security measures to witnesses and the establishment of complete witness protection system help to encourage and protect citizens’ behaviors of reporting and disclose crime, to avoid the losses of legal grounds of witness, and finally to be investigated by procuratorial organs at all levels to collect grounds, identify the facts of the case, judge the case nature accurately, and determine the subjective guilty and severity of the suspect, which will ensure the objectivity and justice of the results of a case.

2. MAIN PROBLEMS IN PROTECTING THE WITNESS IN DUTY CRIMES IN THE MAINLAND

Firstly, it lacks feasibility and practicality in the witness protecting system. Paragraph 61 and 62 in *The Criminal Procedural Law* stipulate that The People’s Court, The People’s Procuratorates and The Public Security Organs should ensure that safety of the witness and his/her

relatives should be guaranteed, but the procedures in actual protecting, the executive units involved, and the measures in actual operation have not been specified. In addition, *The Criminal Procedural Law* has not set up rules in regulating the qualification of the witness asks for protection, and the helping and subsidization areas.

Secondly, the witness protecting system lacks overall protection. a) the protected subject areas are narrow, it lacks protection in people who have close interest with the witness as well as in the victim and his/her relatives. According to *The Criminal Procedural Law*, the victim and his/her relatives are not included as the witness. But the reality shows that those who have close interest with the witness are often familiar with the whole crime cases and thus become criminal suspects or the objects who would be threatened by the criminal suspects. b) The protecting areas are narrow and lack overall protection towards the legal rights of the witness. The personal safety, as well as other legal rights of the witness might be in danger when he/she presents in the court. In the actual cases, the phenomenon of damaging the witness' reputation or violating the witness' property rights exist. *The Criminal Procedural Law* emphasizes the protection of the witness's personal safety but neglects the protection of the witness's reputation, privacy, property rights and other legal rights. c) The criminal cases involving witness protection are narrow, Paragraph 63 in *The Criminal Procedural Law* stipulates that four cases could activate witness protection: crime of jeopardizing state security, crime of terrorism, gangland crime and drug crime and no regulation has been set as regards to duty crimes such as corruption and bribery crimes, pirating crimes.

Thirdly, the witness lacks full range protection and mostly ex post protections have been utilized. The criminal offense against witness protection and crime of retaliating against the witness in Paragraph 307 and 308 in *the Criminal Law*, and regulations in witness protection in paragraph 62 in *The Criminal Procedural Law* are protection and penalty procedures activated when the witness and his/her relatives' personal safety have been violated. No effective legal protection has been set before the witness and his/her relatives' personal safety has been threaten or offended.

3. MAIN CHARACTERISTICS OF WITNESS PROTECTION LEGAL SYSTEM IN TAIWAN

In Taiwan, except for Protection System of Witness specialized in *The Criminal Procedural Law*, there are The Witness Protection Act and The Enforcement Provisions of Witness Protection Act formulated to strengthen the protection of witnesses. It regulates in Chapter 10, Paragraph 1162 of *The Criminal Procedural*

Law of Taiwan that the accused shall not implement harm or threat to the safety or interests of a witness, spouse, lineal relatives, collateral blood relatives within the third degree, or in-laws, parents or family members within the second degree. And the "Witness" Section in Chapter 12 Paragraph 2 systematically regulates the Witness System. The collection methods, procedures, requirements, or prohibited requirements of the witness's testimony and relevant rules of evidence are specifically stipulated in Section 2. Paragraph 194 stipulates that the witness may request the legal per diem and travelling expenses, and also stipulates that, for the request for the legal per diem and travelling expenses, the witness shall apply to the court thereby within 10 days after the completion of interrogation. But the travelling expenses shall be requested paid beforehand. In addition, *The Witness Protection Act* and *The Enforcement Provisions of Witness Protection Act* of Taiwan have made clearer and more detailed provisions for the witness protection system. The main characteristics of the witness protection legal system in Taiwan are described as follows:

Firstly, ascertain the witness protection institution. Paragraph 7 in Witness Protection Act of Taiwan stipulates that, "the prosecutor or court shall approve and issue the witness protection document, and which shall indicate the following items:.....SEVEN. The executive protection agency. The protection measures in Clause 5 of the previous term shall be determined in accordance with the methods listed in Paragraph 11 to 13." Paragraph specifically stipulates that the prosecutor or the court is the agency to review and approve the witness protection. Paragraph 12 of the law stipulates that "if the court or the prosecutor is prohibited or limited by the previous term, shall approve and issue the protection document, which shall indicate the following items:..... FIVE. The judicial police agency that executes the protection, shall treat the protected person as the content of specific behavior." The provisions thereof indicate that the executive agency that protects the witness shall be the judicial police agency.

Secondly, the witness protection range is quite broad. In the first place, The Witness Protection Act of Taiwan clearly indicates the criminal case range to protect witnesses, and in addition to defining "the imprisonment criminal offence of no less than three years", it also emphasizes the duty crime "crime offense of corruption". In the second place, regarding the subject range of the witness protection system, The Witness Protection Act of Taiwan specifically stipulates that, "the witness or the person who is closely related to the witness", and in which "the person who is closely related to the witness" shall be the person who suffers harm in life, the physical, freedom or property, due to the presence of the witness for testifying. Finally, the protective rights of the witness protection system include the rights of "life, the physical, freedom or property".

Thirdly, the diversification of means of criminal witness protection system. In the first place, Paragraph 11 of The Witness Protection Act of Taiwan specifically stipulates that, in making a record or document, the real name and identity information of the witness, shall be replaced by the code, and shall not indicate the age, birthplace, residence, identification number or passport number, as well as other materials sufficient to recognize the identity of the witness. The record or document shall be sealed and not be read by or provided to other agencies, groups or persons rather than the investigation and judicial agencies. In the second place, the Clause 1, Paragraph 12 of The Witness Protection Act of Taiwan stipulates that, the person assigned by the judicial police agency shall, within a certain term, protect the personal security of the witness or the person who is closely related to the witness. In the third place, the Clause 2, Paragraph 12 of The Witness Protection Act of Taiwan stipulates that, the certain person shall be prohibited or limited to approach the physical, residence, work place or certain activity of the witness or the person who is closely related to the witness. Finally, Paragraph 13 of The Witness Protection Act of Taiwan stipulates that, the court or the prosecutor shall pay for the short-term living arrangement, and assign the arrangement agency, during a certain term, to arrange the protected witness to an appropriate environment or assist the transformation of the work, and provide the life care.

Fourthly, establish the relatively complete legal procedure. Paragraph 4 of The Witness Protection Act of Taiwan stipulates that, the witness or the person who is closely related to the witness, who may suffer harm in the life, physical, freedom or property, due to the witness' presentation to testify, shall be protected necessarily, and the court in the trial, or the prosecutor in the investigation, shall approve and issue the protective document, in accordance with the authority thereof, and the request of the witness, the victim or the representative thereof, the defendant or the defender thereof, the person to be transferred or the lawyer thereof, assistant, judicial police officers, the agency that the case is transferred to, or the private prosecutor of the private prosecution. But if the time is urgent, the court or the prosecutor may not approve and issue the witness protection document in time, and shall take the necessary protective measures. The judicial police agency, during the investigation of criminal or gangster cases, if such verifier shall be protected necessarily as specified in the previous article, shall take the necessary protective measures, and inform the prosecutor or the court of the protective measures within seven days. If the protection measures are considered not appropriate by the prosecutor or the court, the prosecutor or the court shall instruct to change the measures or stop using the measures. Regarding cases of application for protection,

the competent court shall be the court in charge of the criminal or gangster cases.

Fifthly, severe punitive measures are made against the actions that infringe upon the criminal witness's legitimate rights and interests. Paragraph 16 of The Witness Protection Act of Taiwan stipulates that,

a civil servant, who discloses or delivers regarding the documents, pictures, information, identity materials, or other objects that are sufficient to identify the witness of the witness, who shall be kept secret for the identification in accordance with the Law, shall be convicted with the imprisonment of no less than 1 year but no more than 7 years. A civil servant, who commits an attempted crime, shall receive penalty. A civil servant, who commits the previous two criminal offences due to negligence, shall be convicted with the imprisonment of no more than 2 years, detention or be fined no more than NT 300,000 dollars. A person, who is not a civil servant, shall be convicted with the imprisonment of no more than 3 years, detention or be fined no more than NT 500,000 dollars, if because of the person's position or business, the person knows or holds the documents, pictures, information, identity materials, or other objects that are sufficient to identify the witness of the witness, who shall be kept secret for the identification in accordance with the Law, and discloses or delivers the above mentioned objects.

Sixthly, the exempt system of witness. The tainted witness protection is also known as the exempt system of witness in other countries and regions, and because of the early starting in the witness system in criminal cases, other countries and regions in the world have formed the relatively complete exempt system of witness. In Taiwan, exempt system of witness is also utilized for tainted witness. This regulation is in accordance with the *Witness Protection Law*. Article 14 regulates, "if the defendants and suspects in criminal cases provide important evidence related to the criminal cases so that prosecutors are able to find other accomplices, the punishment could be reduced or exempted for the prosecutors' consent "

4. SPECIFIC MEASURES TO PERFECT THE WITNESS PROTECTION SYSTEM OF DUTY CRIME INVESTIGATION IN MAINLAND CHINA

Whereas the need of duty crime investigation in mainland China, I believe that we shall perfect the witness protection system of duty crime investigation in mainland China from the following six aspects:

Firstly, relevant laws and regulations for witness protection shall be perfected. For one aspect, formulate the separate The Witness Protection Act. Current Chinese laws and regulations relevant to witness protection mainly scatter in Constitution, The Criminal Law, The Criminal

Procedural Law, The Public Security Management Punishment Law and other related departmental regulations. The legislative contents are too principle and a perfect witness protection system has not yet been formed. The scattered witness protection provisions without strong operability often make the witness sink into the helpless position. Although the new Criminal Procedural Law has strengthened relevant provisions for the witness protection, I believe that it is difficult to realize the witness protection only by amending the Criminal Procedural Law Criminal Procedural Law itself. Witness protection is only likely to be realized by the judicial reform. Therefore, as to the current status of mainland China, I believe that the Witness Protection Act and its specific implementation rules shall be formulated. Since the witness protection involves all aspects of society with multifarious contents and various provisions, it is hard to be totally covered by the single-line procedure law or evidence law. Moreover, dangers to the witness happen not only in criminal proceedings, but also in the administrative action, civil suit and other non-judicial fields such as arbitration. Therefore, the Witness Protection Act shall clearly stipulate the rights and obligations of the witness, witness protection institution and its duty, objects to be protected, procedure, means, launch conditions, case scope, funds guarantee, expenses bearing, legal responsibilities and other aspects. For other aspects, perfect Paragraph 63 of the Criminal Procedural Law to explicitly stipulate that the witness protection may be started in major duty crime cases, such as major corruption and bribery case and major malfeasance and infringement case.

Secondly, the subject and right scopes of the witness protection shall be expanded. The current subject and right scopes of the witness protection in the Criminal Procedural Law are too narrow, so we shall actively learn from the Witness Protection Act of Taiwan area, expanding the subject scope of the witness to be protected to include the relatives thereof and those who are closely related to the witness, such as friends or classmates of the witness; meanwhile including the right of reputation, right of fame, right of privacy, proprietary right and other legitimate rights and interests in the scope of witness protection so as to provide comprehensive protection for the legitimate rights and interests of the witness.

Thirdly, the independent, unified and efficient witness protection institution shall be established. Paragraph 61 of *the Criminal Procedural Law* stipulates that the protection institution may be the people's court, the people's procuratorate and the public security organization. Except those, such law doesn't clearly stipulate the specific protection institution, which causes the totally different operation mechanism in the judicial practice. In the duty crime investigation, the special witness protection institution is set up in the bailiff department of

procuratorial organs at all levels, and responsible for the specific issues of witness protection in the duty crime. It is also stipulated the specific starting and ending time of the witness protection in each stage and the specific protection measures in each corresponding stage to feasibly protect the legitimate rights and interests of the witness in the criminal proceedings for the institution.

Fourthly, specific procedures to protect the witness shall be perfected. a) The witness protection startup procedure is divided into the active protection procedure and the protection procedure based on application. The former refers to that during the procuratorial organ's investigating cases, if the physical security, property right and other rights of the witness or the person closely related to the witness are threatened, the investigator believes that it is necessary to take protective measures for the witness or the person closely related to the witness and applies to the chief procurator who decides whether to take protective measures for the witness or the person closely related to the witness. The latter refers to that when the physical security, property right and other rights of the witness are threatened, the witness or the legal representative thereof shall have the right to apply for a witness protection from the special witness protection institution of the procuratorial organ, and the chief procurator of which will decide whether to take protective measures for the witness after the institution receives the witness protection application. b) The term for the examination and approval of the witness protection. In order to timely protect the witness or the person closely related to the witness, it shall be stipulated that the examination and approval term shall be within 3 days, or 7 days for more important and complicated cases, from the date of application. Within the term for the examination and approval, the special witness protection institution of the procuratorial organ can adopt temporary protection measures and assign at least 2 bailiffs to perform the measures. c) The relief of witness protection and relevant rights relief. The legal situation of relieving the witness protection measures: The realistic threat to the witness or the person closely related to the witness does not exist anymore; the protected objects have unclear whereabouts or have died; the protected objects initiatively ask for removing the protection. Within 3 days of taking the relieving decision, the protected objects shall be notified in writing. If the protected object has any objection to the decision, he may apply for reconsideration to the complaint and appeal department of the procuratorial organ, which shall make a decision within 7 days and notify the protected object in written form.

Fifthly, the witness exemption system shall be actively explored and established. Because of the cryptic and highly intelligent characteristics of the duty crime, it is very difficult to investigate the duty crime. During the duty crime investigation, especially the corruption and

bribery criminal offence, the briber is the key witness to investigate the bribery crime and find out the crime facts. But because bribery itself is a crime, the briber is afraid of exposing his bribe and suffering from criminal punishment even though he wants to be the witness. If the witness exemption system can be established for the briber and other accomplice-turned-prosecution witnesses of key roles, it is of great practical significance to solve the difficult problem of investigating the duty crime.

SUMMARY

In conclusion, the revised *the Criminal Procedural Law* does has some drawbacks in the witness protection. As far as I am concerned, an independent, unified and highly effective witness protection organization could

be founded, and the rules of procedures in protecting the witness as well as of witness protection in areas of exploring the witness exempt system and other five areas.

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