

On the Complete Realization of the Right to Silence in China from the Perspective of the Role Change of the Accused

Hui Qiang *

Institute for Chinese Legal Modernization Studies / School of Law, Nanjing Normal University,
Nanjing, China

*Correspondence: qianghui000@163.com

Abstract: Since the Zhou Dynasty, China has a tradition of "emphasizing confession". Until now, "confession centrism" is still a deep-rooted judicial concept in the minds of judicial personnel. This leads to the repeated prohibition of extorting confessions by torture in our country, and eventually leads to many unjust and false cases. The long-term judicial tradition from "no confession without conviction" to "Leniency for confession and strictness for resistance" has made the accused bear different functions according to their different status in various stages of criminal proceedings, which makes the role overload, role conflict and role tension of the ordinary criminal accused more prominent, and even lead to the extreme situation of role collapse. To give the defendant an opportunity to change his identity may help us to find a solution to the complete realization of the right to silence and the protection of the right to abstain.

Keywords: Defendant; Witness; Role dilemma; Identity change; Right of silence.

Tob Regul Sci.™ 2021;7(5-1): 3636-3642

DOI: doi.org/10.18001/TRS.7.5.1.140

Introduction

With the transformation of legal research paradigm, "dramatic role theory" has gradually entered the judicial field. For example, Professor Jiang Guohua put forward the proposition that justice should return to common sense and rationality again, pointing out that judges should not only play the role of referee, but also play the role of social engineer, and finally settle down in the role of rule applicator. However, there is little discussion on the role dilemma of the criminal defendant in the judicial field. The different status and different functions of the accused in different stages of the criminal procedure make the role overload, role conflict and role tension of the ordinary person of the criminal prosecution particularly prominent, and even lead to the extreme situation of role collapse. In 2012, China has written "self-incrimination" into the 2012 Criminal Procedure Law, which is a major advancement in China's judicial protection of human rights. However, the new law only establ

ishes the minimum protection requirement of the right not to be forced to self-incriminate, and does not involve the higher requirement, that is, the right not to be forced to self-prove innocent with the right of silence as the main content. In order to give full play to its due value, it is necessary to start from the connotation of the right, combined with the current situation and future development trend of China's human rights judicial protection, and with the help of the research method of "dramatic role theory", explore how to transform the criminal defendant into a witness, change the "defendant's confession" into "witness testimony", and then apply the witness testimony rules to solve the problem of extorting a confession by torture.

The Role Dilemma of the Accused

In China's criminal justice system, which emphasizes substance over procedure, the accused is doomed to face multiple tests and pressures. On the other hand, as the criminal investigation organ's assistant to the criminal investigation organ, on the other hand, as the

criminal investigation organ's assistant, it's also the important support to the public prosecution organ. This kind of torn and contradictory state not only makes the criminal accused physically and mentally tired, but also easily falls into the situation of lack of protection and implementation of rights.

The Dilemma of the Role Overload of the Accused

The so-called role overload means that the same subject has to play multiple roles in symbolic theater interactions due to social relations, professional characteristics, gender status, and other characteristics. However, due to the natural tension between the roles, it cannot follow Established scripts are used to perform different roles, leading to the Phenomenon of Performance Disruptions. Role overload usually exists in different status of the same subject or the same status of the same subject. In the process of criminal proceedings, the criminal accused should not only play the role of "everyone yells at" and "everything is aimed at", but also plays the role of "active cooperation" in the interrogation room and the dual role of "assistant" of public prosecution of "confession of guilt and punishment". Even when the defendant or the accused is the only identity, his understanding, comprehending and performance of this role will also be split due to the gap between ideal and reality. As a criminal suspect, he is a "villain" who has committed a heinous crime. He is a "criminal" who infringes on the interests of the state, destroys social order and harms the personal and property safety of others. He is also a person who makes every effort to find evidence to send him to court or even to prison. It has laid a foundation for the hostile relationship and tension between the investigation organs. If they can exercise the right of silence, they can only bear the physical and mental oppression mentioned above, but as long as they open their mouths, they will pull themselves into the plight of role overload. In this dilemma, the criminal suspect has lost the protection of the right to silence, can not enjoy the treatment of witnesses, but also has "multiple duties", and is in a state of separation and lack of protection. However, the overload of "multiple roles" does not necessarily lead to role conflict. For example, if a woman is both a teacher and a mother,

part of the time will only lead to role overload. Only when the conflict between different roles is more intense, will there be role conflict.

The Dilemma of the Role Conflict of the Accused

In terms of logic, role conflict is the further development of role overload. In short, the role conflict of the accused is an upgraded version of role overload, which has stronger struggle with each other. In criminal procedure, the role conflict of the accused is characterized by three situations. One is that the criminal suspect uses the right of silence to make neither guilty confession nor innocent excuse. In this case, as a simple criminal accused, the role conflict he bears is the sense of division caused by the gap between ideal and reality when the same subject is in the same position, which brings less pressure. In fact, it is necessary to answer the question that the suspect is not only guilty but also guilty in practice. Therefore, whether active or passive, the criminal suspect will be in the dual position of the accused and the evidence provider in the investigation activities, which is the second situation that will produce role conflict, in which the conflict between roles is more obvious. As the accused, his subjective will is to avoid or mitigate punishment and escape criminal sanctions, which is consistent with the purpose of providing innocent excuse and relevant evidence. As the evidence provider of the prosecution activities of the investigation organ, it is required to make a statement that is disadvantageous to the investigators, so as to help the investigators to prosecute themselves. This kind of conflict is very obvious and difficult to resolve. I believe that no one can willingly make a guilty confession under the "painstaking" of investigators. Even in the leniency procedure of confession, it is only in order to obtain the corresponding leniency treatment that they reluctantly admit their guilt and punishment. After being transferred to the court for examination and prosecution, the accused should also play the role of criminal defendant and key witness of criminal case. At this time, he has lost the protection of the right to silence, and he needs to answer all the questions truthfully in court, watching himself personally punish the crime, instead of giving up the intention for each question. At the same time, he fails to enjoy the corresponding rights and obligations of the

witness. At this time, the role conflict of the accused in criminal proceedings reached its peak.

The Role Tension Dilemma of the Criminal Accused

As mentioned above, logically, role tension is an upgraded version of role conflict. That is, only when the conflict between roles is severe enough, will there be role tension. The role conflict of the criminal accused is characterized by the three situations mentioned above, and only in the two situations of different status of the same subject can the situation of role tension appear. The first is that when the willingness to get rid of crime is dominant, whether in any stage of criminal proceedings, when the accused refuses to cooperate, it will be subject to constant external pressure and emotional oppression from the prosecution organ. At this time, one of the consequences of the conflict may be to provoke investigators and lead to the wrong behavior of extorting confessions by torture. This is the internal role conflict, which can not meet the needs of others, and bring external physical and mental harm to themselves. The second is to give up resistance and is willing to cooperate with investigators and prosecutors to promote the litigation process. Although the accused has chosen to admit guilt and punishment for various internal and external reasons when facing the difficult resolution of role conflict, in the process of promoting the procedure, when he is aware of the consequences of conviction and punishment that his behavior may bring to him. There will be role tension caused by role conflict, and their inner choice will be repeated, which is one of the important reasons for inconsistent confession. In this case, our system should be aware of the internal factors of this situation, from understanding to dispelling, rather than blindly suppressing, or even aggravating the penalty because of his confession retraction. The defendant should be given the right of choice according to the problems in the trial. The third case is a special case in the case of guilty plea, that is, after the accused has made a choice to enter the trial procedure, the judge does not make a judgment on the content of the statement of guilty plea, but gives a too light or too eavy judgment result. At this time, the new hope or unexpected attack may make the criminal accused fall into the role tension again, and he may

regret his previous choice of confession and punishment. When this happens, in the subsequent trial procedure (second instance or trial supervision procedure), not only should he not adopt the previous choice, that is, confession statement as adverse evidence against him, but also should give him a chance to make a choice again, so as to eliminate the imbalance of rights caused by this tense situation.

Beyond Role Dilemma: from Defendant to Witness

In common law countries, if the defendant gives up the right of silence, he will be on the witness seat and perform all the obligations of the witness as the witness. At this time, he can not continue to be protected by the right to silence, but must be questioned by the court to find out the truth of the case. Foreign scholars have a heated debate on the system of the defendant giving up the right to silence and turning into a witness. The defendant who gives up the right of silence will become a witness, and his statement will also change from "the defendant's confession" to "the witness testimony". If a person keeps silent about this, he will be doubted by others, and even the innocent suspect will be in a disadvantageous position. In fact, it is the same in the court environment. Although it is forbidden to infer unfavourably from silence, this kind of doubt will bring certain damage to the interests of the accused. Therefore, it is in line with the thinking logic of the general rational person to turn the defendant into a witness and let him make a truthful statement.

The right to silence tries to protect the defendant's human rights at the cost of discovering the truth. However, the defendant's right to find truth is hindered by the defendant's right to find truth.

In today's multi value society, evidence law can not only be based on the "shared value of social members" to protect basic human rights We should also pay attention to the value pursuit of discovering the truth. Bentham is a firm critic of the right to silence. In his opinion, the evidence law is to find the truth of the case as much as possible, that is, the substantive truth. Therefore, Bentham strongly opposed the rule of admissibility of evidence, which was already quite technical in Britain at that time, and attacked the system of the right to silence in

which the defendant's silence prevented the court from finding the truth of the case. In this regard, Bentham put forward three critical opinions on the system of the right to silence with utilitarian cognition of evidence law. First of all, it is not cruel and inhumane for the defendant to incriminate itself. Secondly, Self-Incrimination is not unfair. Bentham claimed that the theory of "Fox hunter's reason" can be applied to nature, because the diversity of species needs to be protected, but it can not be applied to court activities. The purpose of judicial procedure is to explore the truth of the case, that is to find the truth. In order to explore the truth as much as possible, we should search for evidence to the maximum extent. The confession of the defendant is the most reliable evidence, because no one will put himself in a bad position by telling lies. Thirdly, the right is only to a certain extent the protection of the innocent people, and it is meaningless to the innocent people. Therefore, Bentham's criticism of the right to silence is mainly from the aspect of entity reality. The change from the identity of the defendant to the identity of the witness is a powerful remedy for the defect that the right to silence hinders the discovery of the real entity.

Many scholars believe that the biggest defect of the right to silence is the weak actual protection effect. Therefore, even if the defendant gives up the right to silence and becomes a witness, it will not pose a great threat to him. Although the right to silence is clearly stipulated in the legislation, it will inevitably make the judge make adverse inference to the defendant. Since these inferences are derived from the right to silence which is essentially ambiguous, it is more reliable to obtain them from other channels. Therefore, some scholars claim that the defendant is actually damaged by this legislative system design. First of all, the right to silence does not prevent forced confession out of court. Second, the right does not protect the privacy of the defendant. Thirdly, the right does not prevent the malpractice of inquisitorial litigation. In the face of the above-mentioned disadvantages of the right to silence, it seems that the defendant's behavior of giving up the right to silence as a witness need not be totally denied.

In addition, the anti pooling effect is a controversial theoretical basis of the right to silence. According to this theory, if the right to

silenc

e is abolished, the guilty will spread lies, which will make it more difficult to distinguish the two. And Redmayne scholars argue that innocent people may also remain silent about interrogation. When they are accused of being innocent, they may also be faced with a sense of being guilty. Therefore, it is very risky to distinguish the guilty from the innocent according to whether they are silent or not.

Obstacles to the Change of the Role of the Accused

Of course, the change of the role of the prosecutor also faces a lot of opposition. For example, R.H. Helmholtz claims that the legal norm of NEMO tenetur (no one has the obligation to betray himself) is an important theoretical basis for the origin of the right of silence in European common law. The Christian creeds closely related to this legal standard are "confession" and "duty of self preservation". The right to silence is a universal human rights protection content in a modern country ruled by law. It embodies the protection of human dignity and is "the central idea based on human dignity". It means that "the state cannot regard the people as only one of the means, tools or goods of its role. When people exercise their rights, they have the freedom space of their autonomy, and dignity is generated." On the one hand, the defendant's desire to be "protected by law" and "human nature" is not respected. Criminal suspects and defendants are not the object of prosecution, but one of the subjects of criminal procedure. They also enjoy a wide range of litigation rights. On the other hand, according to Roberts, if the defendant is not given the right, it is easy to fall into the situation of "cruel Trilemma": answering interrogation will Self-Incrimination, lying in oath will be guilty of perjury, refusing to answer interrogation will be guilty of contempt of court. The ideological basis of this cruel situation is that forcing a person to blame himself is not in line with humanity, and it is an infringement of human dignity. Therefore, the right of silence should be given to the accused in order to avoid being humiliated by such a situation. Therefore, the most fundamental theoretical basis of the right to silence is to protect human rights. J. Langbein, the proposer of the theory of "adversarial litigation mode", distinguished "the right of

silence from the privilege of not being forced to testify. He believes that an effective right not to be forced to self incriminate should include the right of silence in the trial", Rabin emphasized an important aspect of the meaning of the right not to be forced to self incriminate, that is, the right to silence. Rabin believes that the development of the defense system and the change of the view of criminal trial purpose play a key role in establishing the right of not being forced to self incriminate including the right to silence. The emergence and development of the defense system and the change of the view of criminal trial purpose provide the basis for the origin of the right.

Conclusion: the Role Change Helps the Complete Realization of Self-Incrimination in China

China's criminal procedure law has established the right not to be forced to self prove guilty, then, to establish and improve the right of not being forced to prove innocent with the right of silence as the main content is the future direction of efforts.

The evidence of "confession of the accused" is the main type of evidence obtained in the investigation stage. In order to prevent the recurrence of extorting a confession by torture caused by "repeated confession", it is necessary to require the investigators to fulfill the obligation of informing the defendant's rights in the investigation stage; in addition, referring to the rules of the right to silence of the common law system, the defendant who abstains from the right to silence is transformed into a witness. To change the "confession of the accused" into "the testimony of the witness", and then apply the rules of the testimony of the witness, is to protect the defendant who has lost the right.

In the investigation stage, the human rights of suspects are most likely to be violated. If the investigators do not inform the suspects of their relevant rights before interrogation, the suspects generally have no way to know their rights and can not exercise them. The right notification system is an important procedural guarantee of the defendant's human rights, so that his rights do not become mere formality.

The premise is that China has established the right to silence system in the future. Since it is a right, the executor of power can choose to exerci

se it or give up. If the defendant exercises the right of silence, he will be protected by the relevant rules of the right to silence. In fact, in the judicial practice of common law countries, more than 90% of the cases are solved by the defendant's guilty confession. Therefore, referring to the system of the right to silence, the defendant who voluntarily abstains will be transformed into a witness, and the "confession of the defendant" will be transformed into "witness testimony", and then the rules of witness testimony will be applied. It is the protection of the human rights of abstainers. It should be emphasized that this right must be abandoned out of free will. First of all, the defendant must testify voluntarily. Secondly, no matter whether there is imputation content or not, as long as the defendant testifies is to give up the right to silence. The Constitution gives him this right of choice, which is also the protection of privilege, but sometimes it may lead to obstacles in finding truth. Thirdly, it is not absolute for the defendant to perform his duty of statement after he becomes a witness. Therefore, the defendant can no longer invoke the right. However, the loss of this right by the defendant is not complete, and the defendant who testifies in the first trial is not prohibited because the right is invoked in the second trial in the same case, and "if he renounces his silence and becomes a witness, he can still refuse to be questioned about the questions asked in his statement." In our country, the defendant can choose to give up the right of silence to testify in court, but in order to protect the right of the defendant, the law should stipulate that the abandonment should be carried out one by one according to each problem. Therefore, the transition is not final.

The tradition of "emphasizing oral confession" leads to the repeated prohibition of extorting confessions by torture in China. The investigation organs regard obtaining the evidence of "confession of the accused" as a powerful breakthrough or even the only breakthrough. Therefore, if the statement made by the accused who has given up the right of silence is still regarded as "the confession of the defendant", it may make the unjust and false cases happen one after another. Therefore, it is necessary to transform the defendant into a witness and "the confession of the defendant" into "the testimony of the witness" in order to protect the defendant who abstained from voting.

Referring to the relevant experience of foreign witness testimony rules, our country should recognize the defects of the existing evidence law, which can not only improve the evidence law, but also pave the way for the thorough protection of the defendant's right to silence. First of all, the restrictions on the qualification of witnesses should be relaxed. Witness Qualification needs to meet the following two conditions: one is to know the situation of the case, the other is to have the ability of perception and expression. Secondly, to establish the witness oath system in China, the witness needs to make clear the connotation of the oath is that he / she will be punished with perjury if he/she tells a lie. Thirdly, improve the rules of cross examination. According to the provisions of the criminal procedure law of China and the foreign inquiry rules, the subjects of cross examination include the public prosecution organ and the parties. The judge is not the subject of cross examination, because we should continue to improve the adversary litigation mode in our country. The legislative provisions can be amended as follows: direct inquiry is not allowed to be induced, but cross examination is not restricted; the scope of cross examination cannot exceed the scope of direct inquiry.

After the defendant becomes a witness in the criminal procedure, all the same rules as the witness are applied. Therefore, it is closely related to the perfection of the witness system.

Acknowledgements

This study is the phased achievement of the National Social Science Fund Project (19CFX008).

References

1. Bonventre, Vincent (1982) An Alternative to the Constitutional Privilege against Self-Incrimination, Brooklyn Law Review, Vol. 49.
2. Baosheng Zhang (2018) Evidence Law, China University of Political Science and Law Press.
3. BENTHAM, Michael A. (1988) Self-Incrimination and the Law of Evidence, Bentham and the Law of Evidence.
4. Changyong Sun (2001) The Dispute and the Legitimate Basis of the Right to silence (Part I), Modern Law Science.
5. CHOO, A. L-T (2013) The Privilege against Self-Incrimination and Criminal Justice.
6. Chongyi Fan, et al.(2005) Special Research Report on the Revision of Criminal Procedure Law, China People's Public Security University Press.

7.

G

7. uoqing Liu (2012) Comparison and Reference: On the Principle of Self-Incrimination, The Proceedings of China Criminal Procedure Law Research Association annual meeting (Hangzhou).
8. Guohua Jiang (2011) Common Sense and Rationality II: Rethinking the Role of Judges, Journal of Political Science and Law.
9. Guohua Jiang (2015) On the Role Dilemma of Judges, Law and Social Developmen.
10. Hoho W. Strong & Kenneth S. Broun (2004) McCormick on Evidence, translated by Weijian Tang et al., China University of Political Science and Law Press.
11. Halou, M., Samin, R., & Ahmad, M. (2019). Impacts of change management on risk and cost management of a construction projects. Journal of Project Management, 4(2), 157-164.
12. Hui Qiang (2016) Impeachment in the Trial-Centeredness. Journal of Xi'an Jiaotong University(Social Sciences).
13. Irving Goffman (2008) Self Presentation in Daily Life, translated by Gang Feng, Peking University Press.
14. John H. Langbein (1983) Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources, 50 U. Chicargo Law Rev.
15. John H. Wigmore (1961) Evidence in Trial at Common Law, John T. McNaughton Rev. (Ed).
16. Jiahong He (2004) Research on Witness System, People's Court Press.
17. Larry Laudan (2014) Philosophy of Misjudged Case: Epistemology of Criminal Procedure, translated by Li Changsheng, Peking University Press.
18. Ling Peng (2007) A Study on the Principle of Self-Incrimination, doctoral dissertation of China University of political science and law.
19. LAMBERIGHTS, Stijn (2016) The Privilege against Self-Incrimination: A Chameleon of Criminal Procedure, New Journal of European Criminal Law,vol.7.
20. Mirjan R. Damaska (2004) The Faces of Justice and State Authority: A Comparative Approach to the Legal Process, translated by Zheng Ge, China University of Political Science and Law Press.
21. REDMAYNE, M. (2006) Rethinking the Privilege against Self-Incrimination, O.J.L.S., vol. 27.
22. ROBERTS, P. & ZUCKERMAN, A.(2010) Criminal Evidence.
23. SEIDMMAN, D.J.& STEIN A. (2000) The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege, Harv. L. Rev., vol. 114.
24. Yan Zhang (2006) A Study on the Privilege of Self-Incrimination, Master's Thesis of China University of Political Science and Law.
25. Yanyan Zhang (2009) On the Informing Procedure of Criminal Investigation: Reunderstanding the Function of Miranda Rules, Journal of Hunan Police Academy.
26. Yang Ye (2017) On the Testimony of Criminal Witnesses, China University of Political Science and Law Press.

Hui Qiang

On the Complete Realization of the Right to Silence in China from the Perspective of the Role Change of the Accused

27. Yanyou Yi (2008) Witness Testimony Rules in Common Law, *Journal of Comparative Law*.
28. Zhenshan Li (2001) Human Dignity and Human Rights Protection, Yuanzhao Pub. Comp.