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On the immunity of tainted witness

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Abstract: The core of tainted witness immunity system is the power of tainted witness immunity. Tainted witness immunity has different power contents and characteristics in different legal system countries.In essence, it is the power of the prosecution department to exempt the parties from a certain range of criminal responsibility in the field of criminal procedure in order to obtain testimony or information.In China, the immunity of tainted witness can be divided into broad immunity and narrow immunity according to the degree of immunity; the subjects of immunity include public security organs, procuratorial organs and courts; the applicable standard of immunity should reflect the necessity under the principle of balance;Immunity may be revoked due to legal circumstances or public interest.

Key word: Tainted witness;Immunity;Non-prosecution system;apply

The immunity system of tainted witness is undoubtedly a very challenging and controversial theoretical and practical issue in the judicial reform of criminal procedure in China.There has been much discussion on this issue in the academic circles.However, from the existing domestic research results, most scholars only discuss the procedural matters of tainted witness immunity system, but there is little discussion and Research on the concept of tainted witness immunity.Although there are many practical cases of the use of tainted witnesses in China's judicial practice[1], the 2018 criminal procedure law also incorporated the content of the exemption of tainted witnesses in the leniency system of guilty plea and punishment into the legal norms on the basis of summarizing the previous pilot experience.[2]However, the current academic research on the immunity of tainted witnesses is

[1]Some cases cited in many scholars' articles can be referred to. See Liang Yu-xia: on the transaction exemption of tainted witness testimony - legal thinking triggered by Qijiang-Hongqiao case, published in China Journal of criminal law, issue 6, 2000; Duan Xiao-bo: the application of the exemption system of tainted witness testimony in China, published in China prosecutor, issue 1, 2011.

[2]The ninth provision on the lenient treatment of criminal cases for confession and punishment is stipulated in the article, "the criminal suspect voluntarily confesses the facts of a suspected crime, has a major meritorious service or a case involves major interests of the state and needs to cancel the case. The public security organ handling the case shall report to the Ministry of public security in a hierarchical manner, and the Ministry of public security shall submit it to the Supreme People's Procuratorate for approval".The thirteenth provision provides that "if a criminal suspect voluntarily confesses the facts of a suspected crime, or has a major meritorious service or a case involving the state's major interests, the people's Procuratorate may make a decision not to prosecute, or may also prosecute one or more of the alleged crimes according to the approval of the Supreme People's Procuratorate".Article 182 of the revised criminal procedure law in 2018 stipulates that,"If a criminal suspect voluntarily truthfully confesses the facts of a suspected crime, there are significant meritorious deeds or cases involving major interests of the state, the public security organ may revoke the case through the approval of the Supreme People's Procuratorate, and the people's Procuratorate may make a decision not to prosecute or to prosecute one or more of the suspected crimes".

still insufficient. No matter the analysis, research and judgment of the attribute of the immunity of tainted witnesses abroad or the construction of the system of the immunity of tainted witnesses in China, there is no doubt that more practical observation and theoretical exploration are needed.

I. Deconstruction of the immunity of tainted witness

At present, there are many differences in the academic circles on the analysis of the nature of the immunity of tainted witnesses[3]. On this issue, the academic circles generally have the following four kinds of Views:

First, the transaction theory holds that immunity is not the exclusive right (power) of the prosecution and defense party, but the result of negotiation and transaction.Some scholars believe that the tainted witness exemption system is an extension of the plea bargaining system, "the two are intertwined", and the establishment of the tainted witness exemption system should take the plea bargaining system as the "premise"[4];Some scholars believe that the tainted witness system is the witness's "voluntary choice based on the temptation of immunity from criminal responsibility"[5];Some scholars believe that the tainted witness system is essentially "a judicial transaction"[6].Second, the theory of power.A few scholars believe that the nature of the immunity of tainted witnesses is not a right and privilege of witnesses, but "the power of the government as the prosecution"[7].Third, the theory of rights.In terms of research style, some scholars regard the immunity system of tainted witnesses as an exception to the right to silence and the privilege of not forcing anyone to prove his crime[8], and believe that granting witnesses immunity from prosecution is "a right to exclude self -incrimination"[9].Fourth, the theory of special non-prosecution[10].Some scholars also believe that similar systems can be attributed to "special discretionary non-prosecution" in combination with the reform of the leniency system of confession and punishment and the amendment of the criminal procedure law in China in recent years.

The differences in the nature and understanding of immunity reveal that China's academic circles still lack sufficient understanding of the immunity of tainted witnesses.Of course, there are some factors, such as the late start of the research on the witness exemption system in China and insufficient attention;but the more important reason is the extensive reference to the foreign research model.In fact, the tainted witness exemption

[3]According to the research data currently available to the author, there are few relevant materials that take the power of immunity of tainted witnesses as a separate research object. The key to grasp the content and attributes of a procedural system is to grasp the main rights (powers) and obligations (responsibilities) that constitute the system. Therefore, for some research materials, there is "the essence of tainted witness immunity system" or "the nature of tainted witness immunity system" involved in the writing and discussion. The author classifies it as an analysis of the essence or nature of the concept of tainted witness immunity. For the convenience of citation and writing below, this paper uses the tainted witness immunity system as a synonym of tainted witness immunity in individual contexts.

[4] See Zhu Xiao and Jiang Fen: the current situation of international legislation on "plea bargaining" and the improvement of relevant systems in China's criminal procedure, He-bei law, No. 1, 2003.

[5]See Qu Xin and Liang song: Empirical Analysis on the establishment of stain witness exemption system in China -- taking bribery cases as an example, published in evidence science, No. 6, 2008.

[6]See Huang Shu-biao: Research on the exemption system of foreign tainted witness testimony and Its Enlightenment to China, in Gui-Hai Press, No. 3, 2013; Liang Yu-xia: on the transaction exemption of tainted witness testimony - legal thinking triggered by Qijiang-Hongqiao case, in miscellaneous records of China's criminal law, No. 6, 2000.

[7]See Xu Jing-cun and pan Jing-gui: Research on the exemption system of "tainted witness", published in people procuratorial, No. 4, 2004.

[8]See sun Chang-yong: Research on the basic contents of the system of the right to silence, Vol. 4 in the proceedings, Law Press, April 2000.

[9]See Zhang Chun-xia: on the immunity of tainted witnesses, Journal of East China University of political science and law, issue 2, 2003; Wang Jinxi: the privilege of the arguer against forced self-incrimination and the witness immunity system, Jin-ling law review, issue 1, 2002.

[10]In essence, special non-prosecution belongs to discretion in criminal justice and can be classified as power theory. Because scholars holding this kind of views focuses on the analysis of relevant systems in China, it is different from the applicable context and field of the above three views, so it is listed separately here.

system is stipulated in many countries and regions outside the territory, which is not without precedents[11], and even reflected in some international conventions on crimes in specific fields. However, if we only investigate the tainted witness system based on country and region as an example, it is inevitable to catch a glimpse and generalize.Therefore, according to the different content and nature of stain witness immunity, this paper divides the stain witness immunity system in foreign mainstream countries and regions into two parts.

II. The immunity of tainted witnesses: The power to compel witnesses to testify

The origin of stain witness immunity: the rise and development of the privilege of not forcing self-incrimination

Historically, the privilege against self-incrimination has experienced a complex and long process. In Britain in the 13th century, the privilege of not forcing self-incrimination was born in the tide of people's opposition to the inquisition system of religious court, and developed and expanded in the 16th century. In this centuries long struggle against the church oath system and the torture system, the idea that confession should comply with voluntariness gradually entered the British law through various precedents. These precedents were based on a large number of cases and produced a constantly evolving sense of moral indignation among the public.[12] This privilege was initially not limited to criminalization, but also to the protection of reputation from loss;it is not limited to the accused, but also protects witnesses;it was not limited to judicial proceedings, but also restricted all institutions engaged in interrogation at that time.It can be applied in trial procedures, pre-trial inspection and even pre-trial investigation[13].It can be seen that the privilege of not forcing self-incrimination includes the resistance to the oath system of the church in the middle ages, the anti-human rule of self-incrimination and the system of torture;It essentially realizes the protection of human rights' equality, dignity and conscience, as well as the defense of the right to free speech[14]. For this reason, in some common law countries, the privilege of not forcing self-incrimination is also guaranteed as a constitutional right.Subsequently, since the rule of "prohibiting the defendant from testifying"[15]was successively denied by common law countries, the privilege of not forcing self-incrimination became more and more important and controversial.[16]

Shortly after the establishment of the privilege against self-incrimination in Britain, cases involving immunity came one after another.In 1742, the House of Commons passed the amnesty Act, which aims to exempt the testimony of indicted (suspects).However, the bill was not passed by the House of Lords because the House of Lords believed that the bill would produce unreliable involuntary confessions.[17]Ithas to be said that the emergence of the Immunity Act and immunity has a certain relationship with the application of the privilege against self-incrimination.In fact, Wigmore also recognized that "Britain has a long and established tradition, that is, using immunity as a legal method to abolish the privilege against self-incrimination"[18].In the United States, the United

[11]According to incomplete investigation, countries and regions such as the United States, Canada, Australia, New Zealand, Japan, Germany, Austria, the United Kingdom, Norway, Switzerland, Hong Kong, Macao and Taiwan have successively established stain witness exemption systems.

[12]Such indignation is based on two factors: one is the public's dissatisfaction and condemnation of torture or forced confession after coercion and intimidation, which is considered not only uncivilized but also unreliable; The second is that the public is vigilant that the government may use the practice of forced self-incrimination to arbitrarily convict, thus threatening the public's basic rights such as freedom and property rights.

[13]Herman:The Unexplored Relationship Between the Privilege against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II), (1992) 53 Ohio State Law Journal 497, 543.

[14]See Murphy v. waterfront Commission, 378 U.S. 52-55 (1964).

[15]See Griffin v. California, 380 U.S. 609 (1965); Lakeside v. Oregon, 435 U.S. 333 (1978).

[16]Murphy v. waterfront Commission of the United States Supreme Court, 378 U.S. 52-55 (1964).

[17]L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 328-329 (1968).

[18]8J. WIGMORE, EVIDENCE § 225, at 493 n.2 (McNaughton rev. ed. 1961).

States Congress passed the first compulsory immunity act in 1857[19].Under the act, a witness may be exempted from any punishment or confiscation of property for any fact or act involving which he must testify when required to testify by Congress or its Committee.Since the act is considered to give excessive immunity to witnesses[20], the exemption Act amended in 1862 restricts it, adopts the form of actual testimonial immunity, and allows the use of evidence from independent sources for prosecution.[21] Subsequently, Congress amended the exemption act again in 1893 and stipulated that "no one shall be prosecuted or subject to any punishment or confiscation for any transaction, matter or thing he testified", thus establishing the concept and model of transactional immunity[22].In 1964, two U.S. court decisions accelerated the development of immunity in the United States[23], and finally established the use / derivative use immunity model in the organized crime control act of 1970 promulgated by Congress.

III. The logical setting of stain witness exemption system in common law countries

From the origin of tainted witness immunity system, it is not difficult to see that it has a prerequisite relationship with the privilege againstself-incrimination.In countries and regions that have established the common law privilege of not forcing self-incrimination, including the United States, Canada, Australia, New Zealand, the United Kingdom, and Hong Kong and so on, they have also generally established the stain witness immunity system.As an exception, Canada has written the immunity of tainted witnesses into the constitution as a system to replace the privilege of not forcing self-incrimination.[24]However, at the institutional level, there are conditions and preconditions for the application of the tainted witness immunity system to replace the privilege of not forcing self-incrimination, and such preconditions are often submerged in the carnival of the witness's exemption protection: the witness is forced to testify.[25]

In the cases and bills on immunity in common law countries, we can often see the relevant provisions of forcing witnesses to testify: Article 6002 of the United States Code stipulates that "... If the presiding officer of the procedure informs the witness that an order to testify has been issued to him in accordance with the provisions of this part, the witness shall not refuse to comply with the order to testify on the basis of the privilege of opposing forced self-incrimination";another example is the United Kingdom, which stipulates that the prosecution can "force" the respondent to make a statement[26];Section 5 of Canada's Evidence Act 1985 provides that if a witness is

[19]Act of Jan. 24, 1857, Ch. XIX, 11 Stat. 155 (1857).
[20]The bill allows witnesses to be exempted from prosecution by proving that they have done all illegal acts. Such a broad exemption has been criticized by many.
[21]Wendell, Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion, 10 ST. Louis U.L.J. 327, 332 (1966).
[22]See Brown v. walker, 161 U.S. 591 (1896).
[23]The two cases are Malloy v. Hogan and Murphy v. waterfront Commission. See 378 U.S. 1 (1964); 378 U.S. 52 (1964).
[24]Article 13 of Canada's Charter of rights and Freedoms (promulgated in 1982 as an appendix to the Constitution) stipulates that "a witness testifying in any procedure has the right to prevent any evidence of guilt from being used as evidence to prove his crime in any other procedure, except when charged with perjury or providing contradictory evidence". In fact, Canada is the only one of the above-mentioned countries to abolish the privilege against self-incrimination. In 1893, the Canadian evidence act abolished the common law privilege of witnesses to refuse self-incrimination in criminal and civil proceedings; this privilege was replaced by the limited form of immunity from use in Article 5, paragraph 1, of the 1985 Canadian evidence act, which provides that, "No witness shall be excused from answering any question on the ground that answering any question may make him guilty". However, in practice, many precedents in the country have come to the conclusion that it is inconsistent with this provision.
[25]In fact, the compulsory testimony of witnesses has long been stipulated in common law countries, but our academic circles rarely study and pay attention to this point. The immunity studied in this part of this paper belongs to the formal immunity in common law system, excluding informal immunity. Informal immunity is discussed in detail below, so it is not discussed here.
[26]Section 2 of the Criminal Justice Act 1987 provides that, "In the course of investigation, the director has the right to request any suspect or witness to be investigated to answer any questions or information and documents relating to the investigation, and the statements obtained therefrom shall not be used as evidence against the presenter." except when the accused is accused of being false in the investigation, he is prosecuted for perjury.

forced to answer a question, his answer shall not be applied or accepted as evidence against him in any subsequent criminal trial or other form of proceedings, unless he is charged with perjury in giving testimony;Australia's National Crime Bureau Act 1984 and the Australian Securities Commission Act 1989 respectively stipulate that in the investigation procedures conducted by the two institutions, if a witness refuses to answer a question without justified reasons, it will constitute a crime, but the witness's answer shall not be used as evidence against him thereafter;Section 128 of Australia's Evidence Act 1995 provides that if the court finds that a witness has violated Australian law or constituted a crime under Australian law or based on the needs of judicial interests, it may require the witness to testify, but its testimony and any information, documentary evidence or material evidence obtained directly or indirectly due to the provision of the testimony, shall not be used against the witness in any proceedings before an Australian court, except for perjury;In Hong Kong, in the criminal prosecution of organized crime and triad crime, the organized and serious crimes ordinance provides that "the Secretary for justice may make an ex parte application to the court of first instance","Require a person to answer questions or provide information on anything that the authorized person reasonably appears to be relevant to the investigation. The Secretary for justice may, by notice in writing served on the person, require the person to appear before an authorized person at a designated time and place to answer questions or provide information on anything that the authorized person reasonably appears to be relevant to the investigation."Among them, a person ordered to answer a question or provide information shall not refuse to answer a question or provide information because the answer or the information provided will incriminate him, unless the information or material evidence is legally privileged. Even lawyers and barristers can be asked to disclose the name, name and address of the client. [27]

In other words, in the logical setting of common law countries, the exercise of immunity takes the witness's compulsory testimony as the "price", and the two are equal compensation. At this time, on the one hand, they can be understood as the immunity protection of the witness by the immunity and the compulsory testimony of the government's investigation power to the witness. In the immunity reward theory of common law system, on the other hand, they can also be understood as the protection of witnesses by immunity and the protection of witnesses by the privilege againstself-incrimination. In the view of, immunity and the privilege againstself-incrimination are a kind of "exchange and substitution" in legal protection, and the two are equivalent in effect.[28]Therefore, we can sort out the logical setting of the operation of the tainted witness immunity system in the common law system: the exercise of immunity is equivalent to the privilege of not forcing self-incrimination in the effect of right protection; in balancing the relationship between individuals and the government, it is compensated with the investigation right of the government forcing witnesses to testify.

IV. An analysis of the nature of immunity in the common law system

Since there is an equal and opposite relationship between immunity, the privilege againstself-incrimination and the right of government investigation, how to determine the nature of this immunity?

First of all, from the purpose and significance of the establishment of immunity, although there is a corresponding equivalent relationship between immunity and the other two rights (forces), this does not mean that the nature of immunity can be simply attributed to one of them. On the contrary, immunity and the other two rights (forces) are primary and secondary relations, or differences in means and purposes. Among them, providing protection equivalent to the privilege of not forcing self-incrimination is the means, and obtaining the corresponding right to compel witnesses to testify is the purpose. As judge Frankfurt said,"Responsibility, not privilege, is the core of

[27]See the delegation to Hong Kong and Macao: legislation and prosecution strategies against organized crime in Hong Kong and Macao, Journal of the state prosecutor's college, No. 2, 2002.
[28]See 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting).

this problem - the responsibility to testify, not the privilege to exempt such responsibility".[29] At the beginning, the immunity of tainted witness was created to reduce the negative impact in the process of combating crime and finding out the truth brought by the application of the privilege of not forcing self-incrimination, rather than on the contrary, as the privilege of not forcing self-incrimination"Substitutes" appear.

Secondly, from the perspective of institutional logic, due to the objective need of forcing witnesses to testify in litigation, it will trigger the conflict with the privilege of not forcing witnesses to testify themselves, and then take the witness immunity system as a "substitute" of privilege to achieve the effect of protecting witnesses.[30]Although the privilege of not forcing self-incrimination and the right of immunity coexist in the history of the common law system, there is no doubt that the objective requirement of forcing witnesses to testify is the premise and basis of the existence of the right of immunity.

Finally, from the perspective of the procedure setting in common law countries, immunity has more power attributes. On the one hand, the decision-making power of immunity lies with the prosecution (including the police and judges in some countries), the defense, including the parties, has no right to claim or give up, and the granting of witness immunity is mandatory. If the parties give up testifying or perjury, they should bear the corresponding criminal consequences.[31]On the other hand, taking the American procedure as an example, in most states, the prosecution organ must apply to the court for an exemption order for the commencement of the American tainted witness. The court examines it from two aspects: first, whether the tainted witness advocates opposing forced self-incrimination; second, whether the exemption is contrary to the public interest.[32]From the perspective of jurisprudence, only when considering the exercise of administrative power, will we refer to whether it violates the public interest[33]. If it is an individual citizen's right, whether it should be exercised should be freely chosen by the individual citizen.

V. The immunity of tainted witness in civil law[34]: Specific right of non- prosecution

The immunity system of tainted witness in civil law and its characteristics

Germany is a good model for the study of the immunity of tainted witnesses in civil law. As early as the mid-20th century, in order to prevent organized criminal activities, especially terrorist organized criminal activities, Germany encouraged criminals to cooperate with law enforcement authorities as a necessary supplement to the means of criminal investigation.[35] After that, in 1981, German Narcotics Law(BtMG) established the provision of "mitigation or exemption from punishment" for tainted witnesses of cooperation.[36]In addition, in 1989, Germany also adopted the relevant witness regulations aimed at combating political terrorism

[29]See Heike v. United States, 227 U.S. 131, 142 (1913).
[30]The extent to which this "substitution" can match the privilege will not break the "delicate balance between the individual and the government", which is what judges in common law countries need to think about in the process of making decisions; this is also the reason why many countries, including the United States, have repeatedly modified the way of immunity when establishing immunity.
[31]In the formal exemption, if the Party waives to testify, he will be punished for contempt of court; if the party perjures, he will be punished for perjury.
[32]See Wang Zhao-peng: American Criminal Procedure Law (Second Edition), Peking University Press, 2014 edition, P. 249, note 27.
[33]This is the embodiment of the public welfare of administrative power. The public welfare of administrative power requires that the ownership and exercise of administrative functions and powers are aimed at seeking and protecting the public interests of the state, the collective and the society, and protecting the legitimate rights and interests of the administrative counterpart, which must comply with the statutory public purpose and scope.
[34]In fact, the immunity of tainted witness with prosecution discretion as the power attribute exists not only in civil law, but also in the United States, Hong Kong and other regions of common law system. Its representative form is informal immunity in the immunity model. In order to facilitate the mutual distinction between formal immunity and common law system, the author here abbreviates it as taking civil law as an example.
[35]See BGBI I 1951/43; BGBI I 1976/2181.
[36]See BGBI I 1981 / 30681.

and organized crime, which were amended at the end of 1999.[37] subsequently, in 2009, German legislators added paragraph 2 of Article 46 of the criminal code (§ 46b STGB), the scope of cooperation related to tainted witnesses has been extended to the general field of "serious criminal crimes"[38], which marks the comprehensive establishment of Germany's cooperation oriented "national witness" system in the criminal field.

The construction of German national witness system (Kronzeugenregelung)can be said to come from its practical needs to deal with new types and complex crimes. Like common law countries, the national witness system is essentially an investigation model to find out the facts of cases. From the perspective of legal scope, this model is composed of several special laws and general laws in Germany; from the perspective of legal types, this model not only includes relevant entities, but also contains part of the procedural law. In this investigation model, the person accused of a crime can testify about the criminal acts of others by cooperating with the prosecution authorities, so as to help clarify the relevant criminal facts or prevent corresponding serious crimes. For this reason, the national witness system is also known as the educational assistance system (Aufklärungsgehilfe) in Germany, or the preventive assistance system (Prä- ventionsgehilfe). The word "assistance" vividly indicates the national witness of Germany[39](Kronzeuge)rolling in criminal proceedings: that is, state witnesses should stand on the side of the state, support prosecution in the fight against serious crimes in some specific fields, and contribute to the fight against crime and the realization of litigation entities. In return for their assistance in investigation, state witnesses may be reduced or even exempted from punishment (or not prosecuted) in the sentencing process.

In fact, Germany is not the only country to design the tainted witness system as a cooperation oriented investigation model. Austria, which belongs to civil law, also adopts the same tainted witness design model.[40]Moreover, in the common law system, there is also such a tainted witness model of cooperative investigation. Taking the United States as an example, in addition to the immunity from crime and the use of evidence, there is also a way of immunity: informal immunity, also known as immunity from prosecution, means that when the accused voluntarily provides evidence to obtain immunity, the prosecution organ can decide the commitment of immunity from prosecution according to its discretion. It avoids the cumbersome procedure of the prosecutor applying for immunity from the court and improves the litigation efficiency. However, its disadvantages are also obvious: it leaves the review of the judge and informal immunityexemption often lacks necessary supervision, and the legitimate rights and interests of witnesses are sometimes difficult to protect. Similarly, Hong Kong also has an investigation mode to encourage tainted witnesses to cooperate with the authorities: to the major crimes that pose a serious threat to Hong Kong's order or public security (such as drug crimes, underworld crimes, etc.) and meet certain conditions,[41]the Hong Kong authorities will encourage their cooperation by means of full or partial exemption.In order to encourage the defendant to disclose the crimes

[37]See BGBI I 1989 / 261059.

[38]See BGBI I 2009 / 48, 2288.

[39]It is also known as "crown witness" or "Royal witness". According to the investigation, it originates from the British name of the witness in the indictment, that is, the evidence of the so-called king or queen. Because the prosecutor represents the head of state, that is, the so-called royal family, it is called Royal witness. Now it is mainly used to describe tainted witness or accomplice witness. Germany put the national witness (Kronzeuge) in 1989The name was incorporated into the legal provisions, and the term was subsequently cited in the Austrian criminal code.

[40]In 1998, the first paragraph of Article 41 of the Austrian criminal code allows the court to give a lighter punishment to witnesses cooperating with law enforcement authorities. In recent years, the Austrian criminal procedure law has been amended and added the first paragraph of article 209 to allow qualified cooperative witnesses to enjoy immunity from withdrawal of prosecution. In addition, the second paragraph of article 209 of the Austrian criminal procedure law also provides for a special witness system.

[41]The conditions are as follows: first, the evidence provided by the accomplice is the evidence for the conviction of another defendant and cannot be obtained from other sources; second, there is reason to believe that the criminal responsibility of the accomplice is less than that of the other defendant; third, the accomplice voluntarily pleads guilty and is willing to testify truthfully. At this time, the police can apply to the attorney general for a letter of exemption from prosecution. The attorney general considers this application from two aspects: whether it can effectively combat crime and whether it will harm the public interest.

related to money laundering, the organized and serious crimes ordinance of Hong Kong also stipulates the defense grounds that can be exempted. Similarly, when Japan revised the criminal procedure law in 2016, it added the "agreement system of investigation and trial assistance": if the accused can "provide assistance to the investigation and trial, the prosecutor may give one or more lenient sanctions. These assistance include: (1) true statements made by the prosecutor, prosecutor or judicial police staff during interrogation; (2) true statements made during interrogation as a witness; (3) for the collection of evidence collected by the prosecutor, prosecutor or judicial police officer, the criminal organization may provide lenient punishment for the evidence or other necessary assistance: (1) no prosecution; (2) withdrawal of public prosecution "[42]. In Macao, the Stain Witness System is mainly applicable to crimes of corruption and bribery and organized crimes committed by underworld organizations." MacaoArticle 7 of the organic law of the Independent Commission against corruption stipulates that "if the perpetrator of a corruption crime cooperates with the prosecution authority to provide important evidence that can solve the case, especially if he testifies against his accomplice, the tainted witness shall be exempted from punishment or prosecution." in addition, Article 5 of Macao's organized crime law stipulates that,"In the underworld organized crime, if the perpetrator provides the police with the information of the underworld to prevent the occurrence of the crime, points out the important members and shields of the underworld, and exposes the criminal plan of the underworld, he can reduce the penalty or impose a penalty other than deprivation, or even exempt from the penalty." for the convicted persons who have been sentenced, the Macao organized crime lawArticle 38 stipulates that "the original crime can be retried and the penalty for tainted witnesses can be reduced."[43]In Taiwan, tainted witnesses are also known as "nest-anti-witnesses". Paragraph 1 of Article 14 of the witness protection law adopted in Taiwan in 2000stipulates that "Members of organized crimes listed in Article 2 of this law, such as smuggling, drug trafficking, corruption, bribery and money laundering, who provide key criminal information related to the case or the criminal facts of other accomplices, cooperate with the prosecutor to successfully prosecute other accomplices, can be exempted only with the consent of the prosecutor"; paragraph 2 of Article 14 stipulates that,"If the offender or defendant does not belong to accomplices in a joint crime, the suspect and defendant shall testify against the offender who committed the crime mentioned above in the second part of this law, so that the prosecution organ can prosecute the offender, and the circumstances of the crime of the tainted witness are lighter than that of the offender, and the prosecutor agrees to make a non-prosecution of the tainted witness". [44]

After careful study, it is not difficult to find that the establishment of the stain witness exemption system in the above countries and regions adopts a completely different cooperation mode from that in common law countries.The first mock exam has the following characteristics:

First, the way in which tainted witnesses provide testimony or criminal clues and information to the prosecution (sometimes including the police and the court) is not "forced", but a voluntary cooperative attitude.In other words, the first mock exam exemption system does not violate the premise of "no self-incrimination".In fact, in the context of civil law system, the practice of forcing the defendant to testify is not tenable.The defendant cannot testify under oath like a witness in attendance, so he cannot make an affidavit in his own case;the defendant also has no obligation to answer questions from the prosecution or the judge. On the contrary, he has the right to refuse to answer any questions from the beginning of the lawsuit.For example, in Germany, because German law clearly stipulates the defendant's qualification as a witness, unless he gives evidence voluntarily(at this time, the

[42]Dong Kun: special non-prosecution in leniency of confession and punishment, published in legal research, issue 6, 2019.
[43]Delegation to Hong Kong and Macao: legislation and prosecution strategies against organized crime in Hong Kong and Macao, Journal of the state prosecutor's college, No. 4, 2002.
[44]Xu Du-qing: Research on organized crime and Countermeasures in Taiwan, Doctoral Dissertation of China University of political science and law, 2005.

defendant shall not make an oath statement in his own case. The German criminal procedure law does not stipulate the means to force the defendant to tell the truth or change the untrue statement. At any time, the defendant can revoke his preparation for the statement and refuse the previous statement, especially the confession). Otherwise, the practice of forcing the defendant to testify like common law countries cannot be realized in Germany.[45]In France, the witness testimony in France includes sworn testimony and non-sworn testimony, and the testimony of accomplices and prisoners' close relatives does not need to be sworn. In addition, the criminal investigation law of Francealso provided for the close relatives of relevant accomplices and suspects. Even in the face of some questions from the judge, the defendant can still make unsworn testimony, and the authenticity of his testimony is not investigated for the crime of perjury, thus eliminating the possibility that the prosecution, including the judge, forces the witness to testify and provide information.[46]

Secondly, the immunity of tainted witnesses can be procedural. The formal immunity system of tainted witnesses in common law countries either exempts the criminal responsibility of tainted witnesses by means of crime immunity, or prohibits the statements made by witnesses in court from becoming evidence against them in the future. However, no matter which form of immunity, both are immunity in the sense of substantive law or evidence law. The cooperation oriented immunity model of tainted witnesses in the civil law system shows that procedural immunity can also be granted to tainted witnesses. For example, in Germany, article 153E of its code of criminal procedure stipulates that "(members of terrorist organizations) if the perpetrator contributes to eliminating the danger to the existence, security or legal order of Federal Germany after the act and before he knows that the act is discovered, with the consent of the state Supreme Court with jurisdiction, the Federal Supreme prosecutor may not prosecute the act. If the perpetrator reports to the relevant departments after the act, this provision also applies when making such a contribution to the situation of endangering democratic constitutionalism, treason or attempts to endanger external security; when it has been prosecuted, with the consent of the Federal Supreme prosecutor... The state Supreme Court with jurisdiction can stop the procedure. "This shows that the immunity of tainted witnesses can also adopt" no prosecution "or" stop the procedure ". In addition to Germany, the above-mentioned informal immunity system in the United States, the agreement system of investigation and trial assistance in Japan, and the immunity system of nest-anti-witness in Taiwan also adopt the procedural immunity mode of "no prosecution" or "withdrawal of prosecution".

VI. Analysis on the attribute of stain witness immunity in civil law system

From the above discussion, it is not difficult to see that the stain witness exemption system represented by Germany is a brand-new exemption model for the purpose of finding out the facts of the case and seeking the cooperation of stain witnesses. This model does not take the violation of the prohibition of forced self-incrimination as the premise, and takes non-prosecution or lenient sentencing as the main way to exempt stain witnesses. In a sense, it is alsocan be said that this model is a "witness negotiation" system in which the prosecution's non-prosecution or lenient sentencing exchanges important testimony of tainted witnesses. Indeed, can this exemption model be characterized as a "negotiated transaction" as summarized in the "transaction theory" above?

Although "negotiated transaction" can indeed represent some characteristics of this exemption model, it cannot represent the essential attributes of this exemption model. The reasons are as follows:

First, from the perspective of litigation mode, the exemption mode should belong to consensual litigation, and negotiation and transaction is only its performance rather than essence. Consensual litigation refers to the general

[45]See Article 136 of the German Code of criminal procedure.
[46]See Article 63 of the French Code of criminal procedure.

name of litigation activities to solve the criminal responsibility of the accused in a consensual way in criminal litigation. It is different from traditional adversarial litigation in judicial competition For different theoretical presuppositions, in the consensual litigation, the contradictions between the prosecution and the defense can not only be reconciled, but also achieve a win-win situation in fairness and efficiency: the two sides can deal with the defendant's criminal responsibility through consultation, communication and other cooperative ways, and reach an agreement on this issue, so as to save litigation time and litigation cost. Therefore, the cooperation oriented tainted witness. The exemption mode has a distinct core of consensual litigation, which belongs to consensual litigation like restorative justice, criminal reconciliation system, plea system and China's leniency system of confession and punishment. They are only the means and ways to reach agreement, not the natural content of consensual litigation. Even in some consensual litigation, the way to reach negotiated transactions can be omitted. Therefore, in essence, negotiation is only the means and way to reach agreement and agreement is the purpose and value of this emerging litigation model.

Second, the discretionary power represented by specific non-prosecution or leniency in sentencing is the premise of consensus. Consensus can-not be achieved without concessions and compromises. Such concessions and compromises are manifested in the exemption or preferential treatment of tainted witnesses in criminal proceedings.[47]On the one hand, according to the theory of legal prosecution in civil law, as long as the defendant's behavior meets the legal prosecution conditions, the public prosecution organ must prosecute and does not enjoy the power of discretion in the absence of clear legal provisions. Therefore, the public prosecution organ does not enjoy the power of discretion in the process of exemption of tainted witness; the independent discretion is based on the explicit provisions of the law on the tainted witness system.This shows that the immunity of tainted witness is specific power. On the other hand, on the premise that the law clearly authorizes the public prosecution, the public prosecution can decide whether to exempt the tainted witness according to the value and importance of the confession and information clues provided by the tainted witness. This shows that the immunity of tainted witness also has certain autonomy. Therefore, it can be said that this kind of immunity represented by Germany, the cooperation oriented immunity model of tainted witness is dominated by the immunity with specificity and autonomy, which is essentially an organic part of the discretion of the public prosecution organ.

VII. Summary

In general, the immunity of tainted witness is to mitigate or exempt the suspect[48] from providing testimony (or related crime information or clue), because of the testimony (or related crime information, clue).The value of this system is to seek and encourage the search for the truth of the facts. This system is similar to "no one shall be forced to testify against himself", the causality of privilege is contingent, and the latter is not a necessary condition for the existence of the witness immunity system. The core of the tainted witness immunity system is the tainted witness immunity. The tainted witness immunity is not a personal right, but essentially a state act. In the field of criminal procedure, the complaint department exempts the parties according to certain functions and powers in order to obtain testimony or information. In the context of Anglo American law, the immunity of tainted witness is a kind of power of investigation for the direct purpose of forcing witnesses to testify controlled by the

[47]In practice, tainted witnesses report to the prosecution (police). The motives for providing confessions or information and clues are multifaceted, which may be out of a kind and fair heart, hatred for suspects, desire for money or expectation of commutation of sentence. Therefore, the immunity and preferential treatment of tainted witnesses are also multi-level in practice in various countries, including bonus payment, exemption from prosecution, commutation of sentence and personal protection, etc.

[48]The object of immunity of tainted witness includes not only suspect but also witness. But because the witness is not the third person in the traditional sense, it is related to the case, and the witness has not found the suspect's identity for the time being. Therefore, in order to discuss this problem, the author also included it in the criminal suspect.

prosecutor (government)[49]; in the context of civil law and some informal immunity systems in Anglo American law, the immunity of tainted witnesses is a prosecutorial discretion mainly held by prosecutors to seek or encourage the consent of suspects to find the truth.

VIII. Deconstruction of the immunity of tainted witnesses in China

（1） Broad immunity and narrow immunity

As for the immunity of tainted witness, there are two kinds of immunity bounded by the different degrees of immunity from criminal responsibility: one is immunity in the full sense; the other is immunity in the incomplete sense. The former refers to the complete exemption from the criminal responsibility of all or part of the names of tainted witness in the act of substantive incrimination, unless special matters exist.[50]Otherwise, the criminal responsibility of tainted witnesses will no longer be investigated within the scope of immunity. Therefore, the system of immunity from crime and use in the common law system and the system of immunity from procedural non-prosecution in the civil law belong to this kind of immunity. Because this kind of immunity has the characteristics of high degree of immunity from criminal responsibility, wide popularization and great influence of the system, it being widely used in our country. So generally speaking, the immunity system and immunity discussed by the academic circles are also discussed in this sense, which is called immunity in a narrow sense.

The other kind of immunity, in the incomplete sense, refers to the partial reduction of the criminal responsibility of the substantively incriminating behavior of the tainted witness. In theory, this kind of immunity can only appear in the cooperation oriented tainted witness exemption mode; otherwise it will lead to forcing the suspect to prove his crime.[51]For example, in Hong Kong, China, although Hong Kong adopts the method of crime exemption, it can be divided into two cases: full exemption and partial exemption. The organized crime law of Hong Kong stipulates that for tainted witnesses, the punishment can be partially reduced or completely exempted, or the original punishment can be replaced by a penalty of non-deprivation of liberty. Similarly, such incomplete immunity also exists in a few civil law countries such as Germany and Austria,"The court may reduce the penalty in accordance with Article 49, paragraph 1... If the offender participates in the act, his contribution to the investigation must exceed his contribution to the crime... According to paragraph 1, the court may be exempted from the penalty." In addition, article 209, paragraph 1 (209A), item 6, of the Austrian code of criminal procedure stipulates that "the group responsibility law shall apply.“... The amount of fine that should be paid can deviate from the provisions of item 1, paragraph 1, Article 19 of the group liability law and be reduced to 75 daily fines”. This kind of exemption includes the exemption in the sense of exemption from partial criminal responsibility, which the author calls the broad tainted witness exemption. This way of discussing the tainted witness exemption system in a broad sense is in Germany and Austria.It is not uncommon in academic circles.

On the one hand, this theoretical distinction on the immunity of tainted witnesses not only helps to deepen our understanding of the differences between the immunity systems of tainted witnesses in different legal systems,

[49]In practice, the exercise subject of immunity is not entirely the government. Taking the United States as an example, the United States Congress also applies the tainted witness system in some investigation procedures, which has also attracted some criticism from American scholars that Congress, as a legislature, cannot have the government’s investigation power.

[50]In order to avoid the abuse of witness immunity system, many countries have provided for some exceptions to the exemption system. Taking the United States as an example, the federal court stipulates that the liability of perjury of tainted witnesses shall not be exempted; and the crimes involved in the testimony of tainted witnesses irrelevant to questioning in court are not exempted. In addition, the use of immunity is re charged for the evidence from independent sources of the prosecution. The court also supported the accusation of tainting the witness.

[51]This incomplete immunity model, as well as the tainted witness immunity and its system in the broad sense mentioned below, only exist in the cooperation oriented tainted witness immunity model in practice. The tainted witness immunity system in the common law system and its establishment background are difficult to support this kind of immunity from partial criminal responsibility. The discussion and discussion are also carried out under the cooperation oriented tainted witness exemption mode, which is hereby explained.

broaden our observation perspective and research style of the tainted witness system in the civil law system, but also lays a foundation and space for our academic circles to study the immunity system of tainted witnesses from the scope of criminal law. As far as Germany is concerned, its national witness system is not only reflected in the code of criminal procedure, but also in many substantive and procedural laws such as the German criminal code and the German Narcotics Law. Historically, in addition to paragraph 5 (153E) of Article 153 of the German criminal procedure law, its stain witness exemption system (National witness system) also includes Article 129 of the 1951 German criminal code[52], Article 31[53] of German Narcotics Law in 1982, Article 5[54] of German witness protection law in 1989, German money laundering witness system in 1990[55]and Article 46, paragraph 2[56] of German criminal code in 2009.

On the other hand, distinguishing the immunity degree of tainted witness is helpful to integrate the system content of tainted witness immunity at the broad level in China. This paper once defined the tainted witness immunity system as follows in the summary of the first part: "the tainted witness immunity system is to provide testimony (or relevant criminal information and clues)The criminal suspect shall reduce or exempt his criminal liability from his testimony (or related crime information or clues), and the system that protects his personal safety situation. ", such a definition is a generalization of the tainted witness system in the broad sense of immunity. If the definition is compared with China's existing criminal laws, some provisions on voluntary surrender and meritorious service in articles 67 and 68 of China's criminal code, and some provisions on bribers and introductions in paragraph 3 of article 390 and paragraph 2 of article 392 contain tainted witnesses in the broad sense of China the main content of immunity; and the provisions on special non-prosecution in the first paragraph of Article 182 of China's criminal procedure law and the provisions on discretionary non-prosecution in the second paragraph of article 177 of the criminal procedure law applicable with the above criminal provisions cover the main content of China's narrow immunity.

（2） Voluntary surrender, meritorious service and other systems[57] and the broad immunity of tainted witnesses

As for the relationship between voluntary surrender and meritorious service system and tainted witness exemption system, many domestic scholars have conducted in-depth discussion, and most scholars believe that although the two systems have certain similarities, in practice, the former also reflects the "spirit of tainted witness system" and can achieve "similar application effect". However, there are still great differences between voluntary surrender, meritorious service system and stain witness exemption system.[58]Start with a clean slate; the two systems are mainly embodied in two aspects: first, the system of voluntary surrender and meritorious service stipulated in the criminal code of China is considered to be a chance for a criminal suspect to turn over a new leaf in judicial interpretation or in practice.The opinions on handling several specific issues of voluntary surrender and meritorious service stipulates that "under similar circumstances, the leniency for defendants with voluntary surrender circumstances shall be appropriately wider than those with meritorious service circumstances". The reason for this provision is that "the voluntary surrender circumstances have equal opportunities for every criminal,

[52]See BGBI I 1951/43.
[53]See BGBI I 1981/53.
[54]See BGBI I 1989/26, 1059.
[55]See BGBI I 1992 / 34.
[56]See BGBI I 2009 / 482288.
[57]The meritorious service system in a broad sense includes articles 50, 68, 78 and 449 of the criminal code. Here, the author only refers to the meritorious service system in a narrow sense, that is, the content of Article 68 of the criminal code.
[58]Generally speaking, scholars believe that the great differences between the two systems are reflected in the following aspects: first, the theoretical basis and institutional logic are different; second, there are differences in the content and applicable conditions of the system; third, the legal effect is different.

and not everyone has opportunities for meritorious service"[59].In practice, the defendant takes the system of voluntary surrender and meritorious service as the individual right to reduce sentencing. It is also common for the court to appeal against the judgment because the court does not recognize the circumstances of his voluntary surrender or meritorious service. The judicial cognition, whichbelieves that taking voluntary surrender and meritorious service as the criminal part to reduce sentencing to some extend a kind of "right",is far from the power attribute of the Stain Witness's immunity, and the latter is the core content of the immunity system of the tainted witness. Secondly, the application body of the stain witness exemption system is "tainted witness". It should have the dual status of the suspect and the witness at the same time, and there is a certain implicative relationship between the dual identities On the contrary, it is not difficult to find that the two systems have obvious intersection in the subject and scope of application.

The author agrees with the above conclusions. At present, the difference between the tainted witness system and the system of voluntary surrender and meritorious service is obvious. However, previous studies are often carried out at the system level. If viewed from the perspective of broad immunity, different conclusions will be drawn. As mentioned above, the essence of the tainted witness immunity system is immunity. In a broad sense, this immunity can be in an incomplete sense. Article 67 of China's Criminal Code stipulates that "those who voluntarily surrender after committing a crime and truthfully confess their crime are voluntary surrender. Criminals who surrender themselves can be given a lighter or mitigated punishment"; "Although a criminal suspect does not have the circumstances of confession of surrender in the first two paragraphs, he may be given a lighter punishment if he truthfully confesses his crimes; he may be given a mitigated punishment for truthfully confessing his crimes and avoiding serious consequences." the sixty-eighth provision of the Criminal Code stipulates that a criminal suspect may not be guilty of a crime."Criminals who perform meritorious deeds such as exposing other people's criminal acts, verifying the truth, or providing important clues to solve other cases may be given a lighter or mitigated punishment; those who perform major meritorious deeds may be mitigated or exempted from punishment." in combination with the interpretation on Several Issues concerning the specific application of law in handling voluntary surrender and meritorious deeds promulgated by the Supreme People's court. The first rule is that "truthfully confessing the crime is to suspect the suspect's crime after he has voluntarily surrendered the case. In a joint crime case, a criminal suspect should confess his known accomplice in addition to truthfully confessing his crime. The principal offender should confess his own crime when he confesses the facts of the joint crime which he knows of other cases." it is not difficult to see that some provisions of articles 67 and 68 of China's criminal code actually give judges[60] the power to reduce or exempt them from punishment, which means that judges are given immunity in a broad sense; moreover, such immunity has been applied many times in practice. In other words, although there are many differences between voluntary surrender, meritorious service and stain witness exemption from the institutional level, there is no doubt that some provisions on voluntary surrender and meritorious service in the criminal code contain some contents of China's broad immunity.

Similarly, due to the strong concealment in the practice of bribery cases and the difficulty of obtaining evidence, the testimony of bribers is often very important in the investigation of bribery cases. In order to crack down on bribery crimes and encourage and attract bribers to testify, China's criminal law has made special provisions for bribers who actively explain the facts of bribery crimes actively cooperate with the prosecution and introduce bribers. The third paragraph of article 390 of China's Criminal Code stipulates that "if a briber voluntarily confesses his bribery before being prosecuted, he may be given a lighter or mitigated punishment.

[59]Zhou Feng, XueShu-lan, Meng Wei: understanding and application of the opinions on handling specific issues of voluntary surrender and meritorious service, published in people's Justice (application), No. 3, 2011.

[60]If combined with the provisions of article 177 of the criminal procedure law, the subject of immunity may also include prosecutors.

Among them, if the crime is relatively minor, plays a key role in the detection of major cases, or has made significant meritorious contributions, he may be given a lighter or exempted punishment"; the second paragraph of article 392 stipulates that,"If a person who introduces a bribe voluntarily confesses the act of introducing a bribe before being prosecuted, the punishment may be mitigated or exempted."These Provisions endow judges with the power to exempt qualified tainted witnesses in bribery crimes, lay a legal foundation for the application of tainted witness exemption system in bribery crimes, and are also an organic part of China's broad tainted witness immunity.

（3） Discretionary and special non-prosecution system and immunity of tainted witness in a narrow sense

The first paragraph of article 182nd of the criminal procedure law of the year 2018stipulates that "if a criminal suspect voluntarily confesses the facts of a suspected crime, or has a major meritorious service or a case involving the state's major interests, the public security organ may cancel the case after the approval of the Supreme People's Procuratorate, and the people's Procuratorate may make a decision not to prosecute or to prosecute one or more of the suspected crimes." This is considered by the academic circles to have created a new type of special non-prosecution system, which is also the end result of the system of stain witness immunity with Chinese characteristics.[61] In fact, the special non-prosecution established by legislation is the most representative non-prosecution system in China, which can best reflect the characteristics of the immunity of tainted witnesses. It is a typical power form of the immunity of tainted witnesses in the narrow sense. It has the distinctive characteristics of the immunity of tainted witnesses in the narrow sense of civil law: the cooperation of investigation, the involvement of roles, the procedural nature of immunity and immunity. However, from the perspective of China's legislation and judicial practice, the special non-prosecution system is not the only content of China's narrow stain witness immunity.

1996In, China's criminal procedure law was amended to abolish the exemption from prosecution system and add a discretionary non-prosecution system, that is, "if the circumstances of the crime are minor and there is no need to sentence or exempt from punishment according to the provisions of the criminal law, the people's procuratorate can make a decision on non-prosecution"[62], which endows the procuratorial organ with the discretion of non-prosecution at the legislative level.Combined with the relevant provisions of articles 67, 68, 390 and 392 of China's criminal code, it can be said that the application of discretionary non-prosecution system constitutes part of China's narrow tainted witness immunity in practice.This conclusion is mainly based on the following reasons: first, there is a natural fit between discretionary non-prosecution and the immunity of tainted witnesses.The essence of immunity of tainted witness is a specific non-prosecution system, and the non-prosecution system should meet the characteristics of cooperation and involvement of tainted witness system.On the contrary, the discretionary non-prosecution system in China is not directly reflected in discretionary non-prosecution. However, in combination with the relevant provisions of articles sixty-seventh, sixty-eighth, 390th and 392 of the criminal code, it is not difficult to find that the above provisions in the criminal code require the criminal suspect to "truthfully confess" (sixty-seventh), "provide important clues" (sixty-eighth) and "the initiative to confess bribery before being prosecuted".(articles 390 and 392), its cooperative characteristics are obvious. There is a cross in the scope of application between the system of voluntary surrender and meritorious service in the criminal law and the exemption of tainted witnesses: some of the identification of voluntary surrender is the confession of the suspect to his own crime and does not involve the crime of accusing others; some meritorious service is the testimony and information provided by the suspect entirely as an outsider, which is not related to his own crime. However, it also does not hinder the application of the system of voluntary

[61]See Dong Kun: special non-prosecution in leniency of confession and punishment, published in legal research, No. 6, 2019.
[62]Chen Wei-dong: Research on the problems and Countermeasures of the application of the right of non-prosecution by procuratorial organs, published in China Journal of criminal law, issue 4, 2019.

surrender and meritorious service to the cases involving tainted witnesses in practice, and such cases are not rare in practice. Second, as an organic part of China's narrow immunity of tainted witnesses, the narrow immunity contained in the discretionary non-prosecution system cannot be replaced by special non-prosecution at present. With the continuous improvement and promotion of construction and practical application of the leniency system for guilty plea and punishment, the criminal procedure law of 2018 not only stipulates the principle of leniency for guilty plea and Punishment[63], but also adds provisions on special non-prosecution by procuratorial organs. Therefore, some scholars believe that,"The application of the power of selective non-prosecution of procuratorial organs has gone beyond the scope of misdemeanors, extended to felony cases, expanded the application field of the doctrine of prosecution cheapness, and provided a broader space for the implementation of the criminal policy of tempering justice with mercy".[64]In fact, reviewing the amendments to the non-prosecution system in China's previous criminal procedure laws, China established the legal non-prosecution system since 1979(paragraph 1 of article 177), and then in 1996, a discretionary non-prosecution system (paragraph 2 of article 177) and a non-prosecution system with insufficient evidence (paragraph 4 of Article 175) were added, then in 2012, a conditional non-prosecution system for juvenile criminal cases was added in the Criminal Procedure Law (article 282), and now a special non-prosecution system (Article 182) was added in 2018, the discretionary power reform of China's prosecution authorities has shown a prudent expansion trend, and the scope of application has gradually transitioned from misdemeanor cases to felony cases. Therefore, from the perspective of tainted witness immunity, special non-prosecution undoubtedly expands the application space of tainted witness immunity. However, due to a prudent legislative attitude, the criminal procedure law of 2018 haslimited the power of non-prosecution, and its strict application conditions and approval procedures also determine that special non-prosecution can-not be used to solve a large number of tainted witness immunity cases in practice, especially the immunity of tainted witnesses with minor crimes, which can only be completed by the discretionary non-prosecution system in the current legislative and judicial practice.

IX. Application of immunity of tainted witness in China

1I. subject of immunity

In China, the subject of exercising the immunity of tainted witnesses in a broad sense refers to the public security organ, the people's Procuratorate and the court. Among them, the ways of exercising the immunity of public security organ, the people's Procuratorate and the people's court are different: the public security organ cancels the case of qualified tainted witnesses; the procuratorial organ makes a decision not to prosecute qualified tainted witnesses. According to China's criminal procedureArticle 182 of the procedural law stipulates that the public security organ and the procuratorial organ shall obtain the approval of the Supreme People's Procuratorate for the exemption from felony except for the application of discretionary immunity from prosecution. Its purpose is to unify the standards for the exercise of immunity and prevent the abuse of immunity from felony in practice. The way to exercise the court's immunity of tainted witnesses is to reduce, lighten or exempt the tainted witnesses from punishment in sentencing. The inclusion of the court into the natural subject of China's tainted witness exemption system is out of the dual needs of the exemption system in legislation and practice: from the perspective of legislation, some Provisions on voluntary surrender and meritorious service in articles 67 and 68 of China's criminal law do give the court the right to tainted witnesses. From the practical point of view, before the legislation explicitly gives the public security organs and the procuratorial organs immunity, there are mainly several ways to deal with tainted witnesses in China's judicial practice: first, the investigative organs are

[63]See article 15 of China's criminal procedure law in 2018.

[64]Zhou Chang-jun: selective non-prosecution in the implementation of the leniency system of guilty plea and punishment, published in the treatise on politics and law, No. 5, 2019.

committed to confess crimes in the process of investigating organized crimes, smuggling crimes, underworld organized crimes and drug crimes.. the tainted witness who has provided criminal evidence for a minor crime shall be dismissed; secondly, the procuratorial organ shall deal with the qualified tainted witness in another case and decide not to prosecute or return it to the investigation organ for dismissal; thirdly, the court shall deal with the tainted witness who has a serious crime and cannot be dismissed or not prosecuted according to law in terms of sentencing in accordance with the criminal law."In reality, a considerable number of tainted witnesses are subject to criminal prosecution and enter the trial stage. Most exemption transactions are carried out by the people's court to ensure the implementation of the exemption transaction commitment."[65]It can be seen that in judicial practice, the lighter and mitigated punishment of tainted witnesses with serious crimes by the court has constituted the essence of China's tainted witness exemption system, and this essence can-not be replaced by the narrow immunity stipulated in Article 182 of China's criminal procedure law in 2018.[66]It can be said that the court is not only an important place in the application of tainted witness immunity system in China, but also the natural subject of tainted witness immunity.

2Applicable standards of narrow immunity[67]

"Although discretion is essential to the judicial process, the use of discretion will still lead to various criticisms. One of the criticisms is based on the consistency of judgment: even if the judgment is discretionary at the beginning, the future discretion will be limited once it is made. This is because if the two cases have similar key characteristics, in order to ensure the consistency, the latter judgment cannot materially deviate from the previous judgment."[68]For this reason, as discretion, the exercise of immunity should follow certain principles and standards. In Australia, the court should comply with" judicial justice "when granting immunity to require witnesses to testify,according to the Article 128 of the Australian criminal procedure law in 1995. although Australia does not give a clear legislative definition of "judicial justice", in practice, Judge Smith believes that the considerations of "judicial justice" mainly include the following points: (1) the importance of evidence in the proceedings; (2) the degree of demand for the invocation of the evidence by the prosecutor and the defendant; (3) the nature and seriousness of the crime charged by the evidence;(4) The nature of the crime committed by the witness and the possible penalty; (5) the way to obtain evidence.[69]In the United States, the initiation of the tainted witness system in most states requires the prosecution organ to apply to the court for an exemption order, and the court generally examines the necessity of exemption from two aspects: first, whether the tainted witness advocates opposing forced self-incrimination; second, whether the exemption is contrary to the public interest.[70]

Theoretically speaking, the purpose of the stain witness exemption system is to obtain information or clues about the facts of the case by exempting the witness from criminal responsibility, so as to achieve the purpose of combating and preventing crime". It should be applied to areas of crime where law enforcement authorities are unable to play their information and prevention role due to lack of investigation and insufficient evidence, and on this basis, assess the need for the application of the system".[71] This necessity is an embodiment of the principle of

[65]GuoFeng-li: on China's tainted witness exemption system and its construction, in quest Press, Issue 9, 2011.
[66]For the special non-prosecution stipulated in Article 182 of China's criminal procedure law in 2018, the applicable standards and approval procedures can be seen below.
[67]For the applicable standards of broad immunity, please refer to the relevant sentencing guidance issued by the Supreme People's court.
[68]Song Ying-hui:Principles of criminal procedure, Law Press, 2003 edition, page 52.
[69]See Attorney-General's Department, Commonwealth Evidence Law: Evidence Act 1995, (AGPS, Canberra, 1995), p.128.
[70]For the test of public interest, the following factors should be comprehensively considered: the specific situation of the defendant; the specific situation of the victim; the seriousness of the circumstances of the crime; Public opinion; Crime situation and national criminal policy in a specific period; Litigation efficiency; National security, politics, diplomacy and other public interests.
[71]See 378 U.S. 52, 56 (1964).

balance: that is, the value of the information disclosed by the tainted witness should be weighed against and proportional to the crime of the witness. On the one hand, the information disclosed by the tainted witness should have considerable value. This value is usually reflected in the provision of assistance of the key information and evidence for the suspect's convictionto the prosecution authorities to solve cases and deal with important crimes in the field where conventional investigation measures can-not play a role. If the information and evidence provided by the tainted witness fail to reach the above level, or the prosecution organ can obtain the corresponding information and evidence through other channels, there is no need to apply the immunity of the tainted witness. On the other hand, the value of the information disclosed by the tainted witness should be proportional to his crime and not exceed the necessary limit. The exemption of criminal responsibility for tainted witnesses is the result of the balance between the values of discovering the truth of the facts and punishing the crime. If the crime committed by tainted witnesses exceeds the necessary limit, resulting in the value of punishing the crime is greater than the fact value provided by them, the application of the exemption system for tainted witnesses is no longer necessary. Only the value of the information disclosed is greater than its crime, the subjective malignancy and social harm, and did not exceed the necessary limit, the exemption of tainted witnesses meets the objective requirements of the principle of balance.

In terms of judicial practice, the key to the determination of the exercise standard of China's narrow immunity lies in the interpretation of "major meritorious service" and "major national interest" in Article 182 of the criminal procedure law. According to Article 7 of the interpretation on the specific application of law to deal with voluntary surrender and meritorious service issued by the Supreme People's court in 1998,"Criminals have reported and exposed major criminal acts committed by others, verified and verified; important clues providing other major cases are verified; they are suspect in other major criminal activities; they assist the judicial authorities in arresting other major criminal suspects (including accomplices).The performance of other important contributions to the state and society should be recognized as a major meritorious service. The standard of "serious crimes", "major cases" and "major suspects" in the preceding paragraph generally refers to situations where the suspects or defendants may be sentenced to more than life imprisonment or have a greater impact on the province, autonomous region, municipality directly under the central government or the whole country.Since the criminal procedure rules of the people's Procuratorate (hereinafter referred to as the rules of the Supreme People's Procuratorate) promulgated by the Supreme People's Procuratorate in 2019 continues the previous practice of transferring the decision-making power of non-prosecution to the chief procurator of each court.[72] In addition, all eligible cases need to be approved by the Supreme People's Procuratorate. From the perspective of practical operation, the workload is huge. Therefore, some scholars believe that it is necessary to narrow the interpretation of "significant meritorious service" and understand it as "particularly significant meritorious service".[73] This view should be said to be in line with China's current judicial practice.

3Revocation of immunity

In different countries, due to the different nature and functional positioning of immunity, the revocation of immunity often has different treatment ideas and procedural patterns. In the United States, because the tainted witness immunity system is regarded as a substitute for the existence of the fifth amendment to the constitution, the United States Court held that on the revocation of tainted witness immunity"When the tainted witness lies or fails to cooperate fully, the general remedy of the government is to sue for perjury or contempt of court rather than abolish the exemption agreement". [74]In Germany, in addition to revoking the decision of non-prosecution for the unqualified tainted witness, Germany has successively added the crime of false suspicion (§ 164 STGB) and the

[72]See article 279 of the rules of criminal procedure of the people's Procuratorate (2019).
[73]See Dong Kun: special non-prosecution in leniency of confession and punishment, published in legal research, No. 6, 2019.
[74]See 534F.2d 518 (2d Cir. 1976).

crime of forgery (§ 145d STGB)[75] to the criminal code, in order to avoid the abuse of the national witness system and reduce the possibility of tainting the false testimony of witnesses in practice.

There are two forms of immunity in China: broad immunity (lighter sentencing of tainted witnesses under the guidance of judges) and narrow immunity (revocation of cases and non-prosecution of tainted witnesses under the guidance of public security organs and procuratorial organs). The author only discusses the revocation of immunity at the narrow level."The punishment of non-prosecution made according to the doctrine of prosecution cheapness is essentially an administrative punishment, not a judicial punishment, so it does not have the res judicata like the judgment and will not lead to the elimination of the right of public prosecution. Once new facts or evidence are found... Public prosecution can still be initiated."[76]This means that, on the one hand, China's narrow immunity is the disposition of non-prosecution and withdrawal based on the theory of prosecution cheapness, which is essentially the power of administrative disposition and can be revoked; on the other hand, the decision of non-prosecution and withdrawal will not lead to the elimination of the power of public prosecution. When the power of administrative disposition is revoked, the public prosecution can still be instituted. Therefore, when the exempted person is due to when some factors change so that it is no longer suitable to be exempted, the procuratorial organ may revoke the decision of non-prosecution in accordance with Article 388[77]of the rules of Supreme People's Procuratorate and initiate public prosecution against the exempted person in accordance with the law; the public security organ may, in accordance with article 190 of the provisions on the procedures of public security organs for handling criminal casesrefilling the case for investigation. The changes of this factor include the following situations: first, the exempted person deliberately makes false testimony or deliberately makes false statements in order to defraud immunity. For the exempted person in this situation, in addition to initiating public prosecution according to law, the prosecution organ (public security organ) can also be investigated for criminal responsibility on suspicion of perjury. Second, the exempted person refuses to provide testimony without justified reasons. It is worth noting that if the prosecution of the exempted person has been resumed at this time, the exempted person can no longer be forced to appear in court or admonished and detained in accordance with Article 193 of the criminal procedure law, because the exempted person has changed his identity at this time. Thirdly, it is involuntary to find out the confession and testimony of the exempt person. If the cooperation between the exempt and the suspect is not based on voluntary, the immunity to the exempt person is not only in line with the general provisions of the criminal procedure law of China, but also may lead to the application of the exclusionary rule of illegal evidence because of the violation of the principle of no self-incrimination.Therefore, when it is found that the exempted person confesses and testifies involuntarily, it shall not only cancel the exemption qualification of the exempted person in time, but also conduct a comprehensive investigation of the obtained confession and testimony of the exempted person: if there is evidence that should be excluded in the investigation, review and prosecution stage, it shall be excluded according to law and shall not be used as the basis for prosecution opinions and prosecution decisions. Fourth, other circumstances in which immunity should be revoked, such as other circumstances in which it is inappropriate to exempt suspects based on national security, political, diplomatic and other public interests, social influence and public opinion.

4、 Conclusion

The study of a power helps to clarify the content logic and operation structure of the system based on the power, and helps to clarify the internal attributes of relevant systems, so as to lay a solid theoretical foundation for

[75]See Article 145, paragraph 4, of the German criminal code.

[76]See Hao Yin-zhong: principles of criminal public prosecution power, people's court press, 2004 edition, pp. 92-93.

[77]Article 388 of the Supreme People's Procuratorate rules stipulates that "if the people's procuratorate finds that the decision of non-prosecution is indeed wrong and meets the conditions for prosecution, it shall revoke the decision of non-prosecution and initiate public prosecution."

its procedure construction, supporting improvement and even system reform. This is the case with the study of tainted witness immunity. It should be noted that the current research on tainted witness immunity. In addition, while encouraging the subjects of immunity power to reasonably apply the immunity system of tainted witnesses, we should also actively explore the supervision and restriction mechanism of immunity. Drawing lessons from China's traditional non-prosecution system, the public security organs' right of reconsideration and review, the victims' right of appeal, self-appeal and on the basis of relevant supervision and restriction mechanisms such as the right of non-prosecuteddefendant, we should strengthen the review, hearing and interpretation of exemption cases, so as to ensure the rationality and legitimacy of the exercise of immunity.