

How should china establish the privilege of silence system in criminal proceeding...

[Countries](#), [China](#)



1. The origin and the connotations of the Privilege of Silence. " Miranda warning" originated from a case heard by the U. S. Supreme Court in 1966: an 18-year-old girl was kidnapped and raped, she identified that it was Miranda who did that. The police interrogated Miranda and used his confession as the hearing testimony. After Miranda was convicted he appealed to the Supreme Court on the grounds that the police did not inform him of the right to remain silent, and his confession was concocted under pressure.

He said that if he had been told to have a privilege of silence, he would have not made up that confession. After considering all the arguments, the United States Supreme Court ruled the Miranda confession invalid. Because of this jurisprudence, when arresting or interrogating suspects, the police need to say the " Miranda warning" first. This is how the privilege of silence was born in the judicial system.

The Privilege of Silence contains the following connotations: First, the suspect has no obligation to say words which might be detrimental to his/her own, the prosecution agencies or the courts can not use inhuman or degrading methods to force him to say; Second, the suspect has the right to always keep silent during the interrogation, and the judge can not make the adjudication against him/her because his/her silence; Third, before the suspect says the favorable or unfavorable word to him/her, he/she has the right to know the consequences of these words.

And he/she must be voluntary to say. If the suspect was forced to speak, the court cannot use these words as the evidence. 2. The Privilege of Silence in

<https://assignbuster.com/how-should-china-establish-the-privilege-of-silence-system-in-criminal-proceedings/>

China In China, the Privilege of Silence has not yet been established. This is inseparable with China's actual situation. In China's judicial practice, on one hand, due to the comparatively poorly developed investigation technology, the testimony of the suspect plays an important part in guiding the police to find out the truth. On the other hand, paying attention to the testimony of the suspect can indeed enhance case handling efficiency.

However, the neglect of the right of silence begins to constantly expose some problems. For example, some significant wronged cases reported by the media these years show that the problem of " Confession by Torture" is so severe in China. Although the confession by torture is strictly prohibited by Criminal Law, yet in the investigation, prosecution or trial activity, the phenomenon of torture generally exists. It is not uncommon that the judiciary staff frequently uses threat, enticement, deceit or other illegal methods to collect evidence, which seriously violates the basic human rights guaranteed in the Constitution.

Among the various causes of the torture phenomenon, the most important reasons are the ideology of the presumption of guilt and the practice of relying heavily on confessions. Thus the establishment of the privilege of silence plays an important role in effectively combating with this phenomenon. 3. Pros and cons Whether China shall establish a right to silence system? This has long been the hot topic in the legal circles in recent years. The mainly supporting ideas are as following: (1) The establishment of right to silence can help to curb the long-standing phenomenon of confessions by torture.

Extracting confessions by torture is a spurned and forbidden behavior in the civilized society. Its typical characteristic is to impose violence or disguised violence on the suspect, severely devastating both the suspect's physical and psychological health, violating the natural rights of human. (2) It is required by the full implementation of the presumption of innocence.

Although the presumption of guilt is prohibited by law, yet in China's judicial practice, this harmful ideology is not even close to be banned.

Under the impact of this ideology, the alleged offender is considered as a criminal and he/she shall be treated as a criminal. So the penalties, the long-term or even indefinite detention, the torture and other inhuman ways can all be imposed on him/her. 3 (3) China has recognized the right of silent advocated by some international rules or meeting, therefore, China needs to make the corresponding provisions in the Code of Criminal Procedure. With the development of international economic and trade, the cultural exchanges between China and foreign countries continue to deepen.

You can read also *King v Cogdon*

The technological media makes China's judicial activities began to be transparent to the world. Thus, to safeguard the image of the country, a high demand of the legality in investigative activities must be assured. (4) The confirmation of the privilege of silence was considered to be one of the most important milestones in human's fight to the civilization. It ensures the humanity and justice in the criminal proceedings. It reflects the degree of

judicial civilization of a country, and is an inevitable requirement of the country according to law.

Opponents argue that the country should not create a right of silence system, the right of silence does not meet the conditions of our country, at least for now China does not yet have the conditions to introduce this system, their views mainly include the following: (1) The privilege of silence reduces the effectiveness of the proceedings, and influences the effectiveness of punishing crimes. The confession of the suspect is the shortcut for investigators to identify the facts of the case, but the silent right blocks this shortcut. This right of the suspect would make the investigators' interrogation right exist in name only.

As a result, the search of various potential evidences relies solely on the existing investigation techniques and the professional competence of the investigators, thereby greatly slow down the investigation process, and even stagnating investigative work. There are irreconcilable contradictions between the privilege of silence and the principle of economic proceedings. And if the investigators failed to find relevant evidences other than the confession, the truth of the case would not be identified and the defendant must be released.

If the released defendant were the real criminal, then it would undoubtedly indulgent the evil, and would obstruct upholding the social justice. (2) The privilege of silence is bound to increase the cost of litigation. Once the suspect decides to keep silent, investigators then have to spend time and

energy, make use of manpower, material and financial resources to search for clues and evidence for the case. Therefore, the establishment of the silent right system will inevitably lead to the increase in the cost of litigation.

(3) The privilege of silence cannot fundamentally exclude the confession by torture. The right of silence can help to curb the torture to some degree, but due to a variety of objectively presenting reasons, investigators can always come up with various means or reasons to circumvent the legal responsibility. Therefore, the privilege of silence itself is not the cure of torture. To make the privilege truly serve to inhibit the confession by torture, there must be corresponding establishment of mechanisms to ensure the enforcement of this privilege. (4) In some major crimes of terrorism and organized crimes, the privilege of silence might be used by these "career criminals", making them escape from the punishment of law.

This is contrary to the original purpose. Despite there are certain flaws exist in the privilege of silence system, However, even criminals should also have their own personal rights, not to mention the suspects, any suspect can not be identified as guilty before the court makes a final judgment, so their right to remain silent should not be illegally infringed. If such a close judicial procedure could not be ensured, then the remote "eternal justice" would be doomed to remain as utopia.

The reason that the Americans has accepted the "Miranda warning" and would tolerate the side effects of the Miranda rule is that they believe that the law's first function is to suppress the public authority, secondary is to suppress the dangerous social criminals. 1 If the public authority were out of

control, its harms to the society would be far more than those of personal crimes. Letting go the murderers may make the justice come late, but letting loose the public power may ultimately distort and devalue justice.

If the authority were abused to protect the so-called justice, it would be extremely possible that some legal-abiding citizens might be pushed into the abyss of evil. By then, even if it punished crimes a hundred times, it would not offset the pains that a kind person had gone through from one injustice. Even though the build of the privilege of silence system is the trend, it is important for us to realize that there are objective flaws exist in this system, efforts should be made to prevent its negative effects.

According to the current conditions of the country, my suggestion is to confirm a limited right of silence. 4. Recommendations: Build a limited privilege of silence system. The right of Silence System is an integrated system that contains many aspects of deep-seated factors in the litigation. Thus the establishment of the right of silence system is not a simple task, but a systematic project, including the legislators' decision-making, the public's recognition and support, the corresponding operational mechanism and the appropriate protection mechanism.

Therefore, under current conditions, the country needs to establish a minimum mechanism of protection of the right to silence. (1)

Comprehensively establish the principle of the presumption of innocence.

The principle of the presumption of innocence is one of the basic principles in the criminal proceedings and is a generally recognized criminal procedure

principle for modern countries under the rule of law. And the right of silence system is the necessary logic requirement of the principle of the presumption of innocence.

The Article 12 of the Code of Criminal Procedure in China stipulates: " No person shall be found guilty without being judged as such by a People's Court according to law. " It has absorbed the spirit of the presumption of innocence. Therefore, the Code of Criminal Procedure should further clarify the principle of the presumption of innocence. This is the theoretical basis for and the guarantee of implementation of the privilege of silence system. Accordingly, the Article 12 can be modified to:" Every person should be regarded as innocent before the Court's effective verdict.

Every suspect has the privilege of silence, unless his/her privilege of silence is excluded by law. " (2) Expressly exclude the rule of self-incrimination and clearly confirm the privilege of silence. Prohibit making any adverse inference because of the suspect's silence. Cancel the obligation stipulated in the Criminal Procedure Law that requires the suspects to answer questions truthfully. There is a close connection between the exclusion of self-incrimination and the privilege of silence.

And the exclusion of self-incrimination should be a basic principle for the criminal proceedings. Therefore this principle could be added in the first chapter of the Code of Criminal Procedure----the tasks and basic principles, namely: " any person can not be compelled to testify against himself/herself, suspects and defendants in criminal proceedings have the right to remain

silent, unless his/her right of silence is excluded by law. Prohibit regarding the suspects' and the defendants' silence as aggravating circumstances. There is a contradiction between the right of silence and the obligation to honestly state. Therefore, to ensure the exercise of the privilege of silence, the 93 Article of the Code of Criminal Procedure stipulates that the suspect must answer the investigators' questions truthfully should be removed. 7 (3) Establish Illegal Oral Evidence exclusionary rule and arbitrary confession rule. These are two important rules in the rules of evidence and are institutional guarantees for the privilege of silence and can help curb the phenomenon of confession by torture.

Illegal evidence exclusion rules require all illegal or improper obtained evidences (rather than confession out of free will) should be absolutely ruled out, and confessions cannot be proven beyond reasonable doubt should also be excluded. Arbitrary confession rule puts that, unless the law explicitly limits, the confessions are effective only under the circumstances that the suspects voluntarily, intentionally and rationally give up their rights of silence. In China, the Criminal Procedure Law of the People's Republic of China clearly stipulates that Judges, prosecutors and investigators must, in accordance with legal procedures, collect various evidence that can confirm the suspect's and the defendant's guilt or innocence, or the gravity of his/her crime; extorting confessions by torture, threatening, enticing, tricking or other illegal methods are strictly forbidden in collecting evidence; and any person shall not be compelled to prove his own guilt.

Therefore, based on the existing spirit of law, we can further confirm the evidence exclusion rules. In the Article 46 of the Code of Criminal Procedure, after the existing "... credence shall not be readily given to oral statements", we can further add " where extorting confessions by torture or threat, inducement, fraud, extended detention or other illegal methods that are used to obtain the testimony of witnesses, statements of victims and the confessions of the suspect can be verified, then these confessions shall not be used to accuse a crime or make a judgment. (4) Establish systems to encourage the defendant to testify, including the testimony immunity system and leniency programs. The right to silence does not mean that suspects cannot speak, nor that to encourage suspects to not confess, but to give him/her the right to choose whether to remain silent or to make a statement, this is to protect his/ her basic human rights. The law does not prohibit self-incrimination, but prohibits forced self-incrimination. In America, for example, through the Plea Bargaining, the offender's guilty plea rate is up to 90%.

To minimize the side effects of the right to silence system, we shall establish some relevant systems to ensure that the defendant actively cooperates with the judicial authorities in a timely manner to investigate the facts. First, through legalizing the leniency policies to encourage the defendant to admit guilt initiatively, making the confession the legal circumstances of leniency, rather than just discretionary circumstances. The second is to establish testimony immunity system. Prohibit using some of the defendant's

statements to testify against herself/himself, and exempt the according criminal responsibilities.

But note the testimony immunity system should only be applied to some significant and complex cases, for example, organized crime, triad societies, smart crime, corruption and bribery crime, transnational crime or other major crimes. (5) Improve the witness system. The testimony of witnesses is an important means to expose and prove the criminal. The establishment of right to silence system will make the Criminal proceedings mainly rely on evidences other than confessions. Consequently, the role of the witness testimony will be more prominent and more important.

Therefore, the Code of Criminal Procedure should stipulate that witnesses must appear in court, and construct supporting measures to improve the attendance of witnesses and to ensure the witnesses provide testimony objectively and sufficiently. First, we must establish system to force witness to court and clear the legal consequences of the illegal testimony. The second is to establish a material compensation system and the security guarantee system for the witness, eliminating their worries. 6) Establish the Notification of Procedural Rights and the Lawyer Presence Right mechanisms, protect the suspect's meeting right and communication right. These are the important procedural safeguards for the full implementation of the right to silence, without which, the right of silence would merely be a meaningless rule. It is impossible for people to exercise their rights if they don't know them. And the judicial officers may use the misleading and unclear circumstances to lure confessions. To make the suspects be clearly

informed of their rights prior to the interrogation is a common practice and consensus in most countries.

Therefore, the law must stipulate detailed requirements to the notification system, including the time and specific issues of the notification, statutory interpretation obligations and the consequences of having failed to perform the duties and responsibilities. Due to the suspects are not necessarily familiar with the law, without the assistance of counsel, the right to silence is difficult to be well implemented. The lawyer presence right is an effective way to avoid confession by torture and to ensure the exercise of the right of silence.

In China's criminal proceedings, the lawyer's involvement degree is very low, especially compared to the developed countries. Therefore, according to the country's conditions, except some major cases, such as cases involves national security, complex organized crime cases, the Code of Criminal Procedure should endow the presence right to the lawyer. Through protecting the meeting rights and communication rights of the suspects, the law can prevent or reduce the coercion to the suspects in custody.

Therefore, the law should reduce the limits to the suspect's meet and communication.

Of course, in some special cases, to protect some significant social interests, the law can set up necessary exceptions, review or control the suspect's meeting and communication rights. (7) Establish some exceptions to the right of silence. To decide whether or not a suspect will be endowed the right

of silence in a case, the specific issues need to be analyzed first. In some special cases, the suspects' right of silence should be restricted. These restrictions are to seek the unification between individual rights and the social interest.

According to this principle, at least it seems to me, the following crimes should be excluded: A. Crimes of endangering national security, financial fraud crime and computer crime. The country's interests are above everything else, to effectively safeguard national security and fight against both domestic and foreign hostile forces, the chapter one of the Criminal Law--crimes of endangering national security—could be excluded. The intelligent crimes have become increasingly prominent and due to the limits of the country's investigative techniques, the high-tech crimes are too difficult to detect.

Thus, at least for now it is not appropriate to give such criminals the privilege of silence. B. Smuggling, narcotics, moneylaundering, robbery and other severe joint crime, criminal syndicate and underworld crime and other organized crime. In crimes such as smuggling, narcotics and money laundering, criminals usually use one-way communication. Thus the confessions of the suspects play a crucial role in revealing the cases' causes, backgrounds and processes, and the relationships between the accomplices. If they were given the right to silence, the real culprits behind the scene would not likely to be captured.

Organized crime has the following characteristics: numerous people, strict organization, huge hazards or potential harms and hard to track down. Such cases are very difficult to catch, of accomplices, confessions plays the pivotal role. Therefore the confessions of the captured suspects tend to play a decisive role in such cases. C. Corruption, bribery and huge unidentified property cases. At present, China is in a period of high incidence of corruption cases, the fight against corruption is a long-term and arduous task.

In order to effectively combat corruption and bribery, to curb and reduce the incidence of job-related crimes, it is recommended that those crimes are being excluded. Besides, most criminal subjects in these crimes hold an important authority; have a certain degree of education background and social status. Which means they have wide social relations and strong social activities ability, and often have both preparations before and countermeasures after the crime. Such strong anti-investigative capacities often interfere the detection processes.

The investigation of these crimes would be harder if they were endowed with the privilege of silence, which would damage the interests of the country. D. Cases relate to public safety and emergency situations. For crimes involving public safety, if not got confessions in time, significant public safety hazard would happen. For life threatening cases, if the suspect did not immediately provide the place of where the victims were hidden, the personal safety of the victims would be endangered. Thus the privilege of silence should be excluded in these cases.

For example, kidnapping, illegal detention, unaccounted dangerous goods crimes such as poisons, firearms, ammunitions and explosives. To these cases, at the trial stage, the privilege of silence is undoubtedly applied, but at the interrogation stage, whether or not the privilege of silence should be given need to be identified by the judges. E. The defendant should not keep silent on some crimes unrelated basic personal information. Such information includes name, identity, age, occupation, address and so on.

This is in order to combat crime effectively and accurately, and to avoid unnecessary losses. (8) Improve the construction of the judicial organs. The establishment of the privilege of silence system is the trend, which put forward higher requirements for the construction of the judicial organs. The judicial offices should actively respond to this trend and try to improve themselves in the following two ways: First, update the judicial notions of the staff and weaken the confession's role in evidence system.

In current criminal proceedings, the confession is known as the "king of the evidence", the value and importance of the confession is extremely exaggerated. This notion is still deeply rooted in the minds of many judicial officers, which is contrary to the requirements of the right of silence system. Therefore, the judicial organs should change their concepts, and establish the concept of human rights protection, and resolutely put an end to the behavior of extracting confessions. Second, use high-tech to equip judicial organs, and to improve their investigation abilities.

The establishment of the privilege of silence system will makes the judicial officers pay more attention to obtaining external evidence rather than confessions. Which requires the country to increase investment in technology and equipment of the investigative organs, to improve the standards of the investigators, and to actualize scientific investigation. With the development of the litigation civilization and the improvement of the detection capability, the number of the unpunished criminals will be gradually reducing, and the side effects of the privilege of silence system will be minimized.